Kāpiti Coast DISTRICT COUNCIL
Me Huri Whakamuri, Ka Titiro Whakamua

APPENDICES

Strategy, Operations and Finance Committee Meeting

Under Separate Cover

Thursday, 12 September 2024

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Proposed Plan Change 3

Kārewarewa Urupā

How to read this document

The following formatting conventions are used to identify proposed changes to the District Plan:

1. Text that is underlined (example) is to be inserted into the District Plan.
2. Text that is shown in red (example) is text that is required by s86E of the RMA (which requires that rules that have immediate legal effect are identified in a proposed plan). This text will be removed when the plan change becomes operative.

This plan change has immediate legal effect

Plan Change 3 has immediate legal effect from the date that this plan change is publicly notified by the Council. This is because sites of significance to Māori in Schedule 9 are “historic heritage features” under the District Plan. Section 86B of the RMA provides that rules that protect historic heritage have immediate legal effect when a plan change is publicly notified.

1.0 Proposed amendments to the District Plan

1.1 Amend Schedule 9 – Sites and Areas of Significance to Māori to add the following items to the schedule:

[s86E note: this amendment has immediate legal effect pursuant to section 86B(3)(d) of the RMA]

District Plan ID	Name	Type	Iwi	Key access and view points	Wāhanga
WTSx1	Kārewarewa Urupā	Urupā	Āti Awa		Tahi
WTSx2	Kārewarewa Urupā	Urupā	Āti Awa		Rua

1.2 Amend the "Historical, Cultural, Infrastructure and Districtwide" map series to add the sites identified in amendment 1.1 to the "waahi tapu" layer of the District Plan maps, as set out in the map contained in Appendix A.

[s86E note: this amendment has immediate legal effect pursuant to section 86B(3)(d) of the RMA]

Appendix A Amendments to District Plan maps

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Data Sources: Eagle Technology, Land Information New Zealand, GEBCO, Community maps contributors

Projection: NZGD 2000 New Zealand Transverse Mercator

LEGEND

Proposed Wāhi Tapu Site
- WTSx1 (Kārewarewa Urupā, Wāhanga Tahi)
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Abbreviations and acronyms

The following is a list of abbreviations and acronyms used throughout this document, and their meanings.

Abbreviation/acronym	Meaning
Council	Kāpiti Coast District Council
District Plan or **Plan**	Operative Kapiti Coast District Plan 2021
HNZPTA	Heritage New Zealand Pouhere Taonga Act 2014
IPI	Intensification Planning Instrument
ISPP	Intensification Streamlined Planning Process
Iwi / Hapū	Ngāti Toa Rangatira / Te Ātiawa ki Whakarongotai / Ngā Hapū o Ōtaki (Ngāti Raukawa ki te Tonga)
LTP	Kāpiti Coast District Council Long-Term Plan 2021-2041
MDRS	Medium Density Residential Standards
Minister	Unless otherwise noted, means the Minister for the Environment
NES	National Environmental Standards
NPS	National Policy Statement
NPSET	National Policy Statement for Electricity Transmission 2008
NPS-FM	National Policy Statement for Freshwater Management 2020
NPS-HPL	National Policy Statement for Highly Productive Land 2022
NPS-IB	National Policy Statement for Indigenous Biodiversity 2023
NPS-REG	National Policy Statement for Renewable Electricity Generation 2011
NPS-UD	National Policy Statement on Urban Development 2020 (published May 2022)
NRP	Natural Resources Plan for the Wellington Region 2023
NZCPS	New Zealand Coastal Policy Statement 2010
Panel	Independent Hearings Panel for Plan Change 2
PC2	Plan Change 2
PC3 or **Plan Change**	Plan Change 3 (this plan change)
RMA or **Act**	Resource Management Act 1991
RPS	Regional Policy Statement for the Wellington Region 2013
SASM	Site or area of significance to Māori

Glossary

The following is a list of Te Reo Māori terms used throughout this document, and their meanings.

Word	Meaning
Kaitiaki	A person or agent who cares for taonga; may be spiritual or physical. Guardian, steward, but the meaning of kaitiaki in practical application may vary between different hapū and iwi. [District Plan definition]
Kaitiakitanga	The exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship. [RMA definition]
Kōiwi	Human remains.
Mana whenua	Customary authority exercised by an iwi or hapū in an identified area. [RMA definition]
Pā	Fortified village. [NRP definition]
Tangata whenua	In relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area. [RMA definition]
Tikanga Māori	Māori customary values and practices. [District Plan definition]
Tino rangatiratanga	Self-determination, sovereignty, self-government, Māori governance by Māori over Māori affairs. [District Plan definition]
Tipuna/Tupuna	Ancestors. [District Plan definition]
Urupā	(Māori) burial ground. [District Plan definition]
Wāhi mahara	Memorial place. [NRP definition]
Wāhi tapu	A site or an area which is sacred or spiritually meaningful to tangata whenua. Wāhi tapu may be associated with creation stories of tangata whenua, a particular event (such as a battle or ceremony); it may be where the whenua (placenta) was returned to the earth, or where a certain type of valued resource was found. [District Plan definition]

1.0 Purpose and overview

The Kāpiti Coast District Council (the **Council**) has prepared proposed Plan Change 3 (**PC3** or the **Plan Change**) to the Operative Kapiti Coast District Plan (the **District Plan** or the **Plan**) in accordance with Part 1 of Schedule 1 to the Resource Management Act 1991 (**RMA** or the **Act**).

1.1 Purpose of the Plan Change

The purpose of PC3 is to recognise and provide for Kārewarewa urupā as a site of significance to Māori.

1.2 Summary of the Plan Change

The Council is undertaking this plan change following the High Court's recent judicial review decision to quash (or cancel) the incorporation of Kārewarewa urupā into the District Plan as part of Plan Change 2 (**PC2**)[1]. This decision was not about the merits of scheduling the urupā in the District Plan, rather it was about whether the Council had the legal power to this as part of PC2. An outcome of the Court's decision is that protection of the urupā in the District Plan requires a separate 'ordinary' plan change under Part 1 of Schedule 1 to the RMA. PC3 is that plan change.

The following sections briefly describe the background to the urupā, its inclusion as part of PC2, and the of the Court's judicial review decision. This section concludes by summarising the effects of incorporating Kārewarewa urupā into Schedule 9 of the District Plan.

Kārewarewa urupā

Figure 1: extent of Kārewarewa urupā shown outlined in white.

Kārewarewa urupā is located to the east of the confluence of the Waikanae River and the Waimeha Stream (see Figure 1). It is a place of significant spiritual, cultural, and historic heritage value to

[1] *Kāpiti Coast District Council v Waikanae Land Company Ltd* [2024] NZHC 1654. See: https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZHC-1654.pdf

tangata whenua. The history of the urupā and its significance are described in a report by the Waitangi Tribunal. This report is contained in Appendix A.

Kārewarewa urupā is a place of significant spiritual and cultural value to tangata whenua. In 1839, the historically important battle of Kuititanga occurred in the Waikanae district, and many of those who died in this battle were buried at the urupā. Te Ātiawa have described Kārewarewa urupā in the following terms:

> *The area was then no longer appropriate for occupation or food cultivation and was thus abandoned and deemed waahi tapu. From the mid-19th century the site has been used as an urupā. Several very significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pākehā that had some connection to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu.*[2]

In 1919, the block of land containing the urupā was partitioned off from a larger block of Māori freehold land. The block of land was sold to the Waikanae Land Company in 1969, who successfully applied to the then Horowhenua County Council to have the Māori cemetery designation that covered the urupā removed from the District Scheme. Since this time approximately half of the land has been subject to residential urban development, around Te Ropata Place, Barrett Drive and Marewa Place. 45 residential properties have been subdivided and developed in this area, alongside the road network comprising Barrett Drive, Marewa Place, Te Ropata Place, and Tamati Place. The remainder of the land (a large block of land located on Tamati Drive, a portion of the reserve accessed from the corner of Barret Drive and Marewa Place, and a smaller block of land at 6 Barrett Drive) has remained largely undeveloped. There is a history of kōiwi/human remains being discovered during prior development works at the urupā.

Plan Change 2

Plan Change 2 was publicly notified by the Council in August 2022. PC2 was the Council's 'Intensification Planning Instrument'[3], which incorporated the Medium Density Residential Standards into the District Plan. As part of this, it also proposed to recognise and provide for Kārewarewa urupā by incorporating it into Schedule 9 of the District Plan as a 'qualifying matter'. The effect of doing this would be to introduce restrictions on further development at the urupā, including by introducing a requirement to obtain a resource consent prior to undertaking any of a range of activities at the urupā (including land disturbance, additions and alterations to existing buildings, new buildings, and subdivision). The Council's reasons for incorporating the urupā into the District Plan as part of PC2 are described in the Council's Section 32 Evaluation Report for PC2[4].

In March and April 2023, an Independent Hearings Panel (the Panel) conducted a hearing of submissions on PC2. This included hearing submissions on Kārewarewa urupā. On 20 June 2023, the Panel provided a report to the Council setting out its recommendations on PC2[5]. The Panel's findings on the values of the urupā are summarised at paragraph [159](a) and (b) of their report:

> (a) *The Kārewarewa Urupā Block values are historical, spiritual and cultural associated with the occupation of Te Ātiawa and events associated with that land. These are not solely burial values as an urupā but importantly include those values. That includes the remains of esteemed ancestors that engage the highest obligations for protection and care following Te Ātiawa's tikanga.*
>
> (b) *The Kārewarewa Urupā Block was demarcated and deemed sacred by Te Ātiawa elders since at least 1839 onwards as wāhi tapu.*

The Panel recommended that the Council incorporate Kārewarewa urupā into Schedule 9 of the District Plan, with adjustments to the south-western boundary in response to submissions made by Te

[2] Waitangi Tribunal. (2020). *The Kārewarewa Urupā Report*, p.5.
[3] The definition of 'Intensification Planning Instrument' is set out in section 80E of the RMA.
[4] Refer in particular to sections 6.1.4 and 8.3.3 of the Section 32 Evaluation Report for PC2. See: https://www.kapiticoast.govt.nz/media/xmzfukmb/pc2_s32.pdf
[5] Independent Hearings Panel on PC2. (2023). *Report of the Independent Hearings Panel on PC2.* See Appendix C.

Ātiawa ki Whakarongotai[6]. At its meeting on 10 August 2023, the Council accepted the Panel's recommendations on Kārewarewa urupā, and on 1 September 2023, the incorporation of Kārewarewa urupā into the District Plan became operative.

Judicial review of Plan Change 2

In 2024, the Council's decision to incorporate Kārewarewa urupā into the District Plan as part of PC2 was judicially reviewed by the High Court. The judicial review was brought against the Council by the Waikanae Land Company, a landowner within the urupā area.

The judicial review was not about the merits of incorporating Kārewarewa urupā into Schedule 9 of the District Plan. Rather, the Court was asked to determine whether the Council had the legal power to do so as part of PC2. This is because PC2 was a unique 'one-off' plan change required by the government as part of its direction to councils across New Zealand to incorporate the Medium Density Residential Standards into their district plans. As an Intensification Planning Instrument, PC2 was subject to limitations on its scope set out in the Resource Management Act 1991 (RMA)[7]. The Court was asked to determine whether incorporating Kārewarewa urupā into Schedule 9 breached these limits.

The Court delivered its decision on 21 June 2024[8]. The Court found that the Council did not have the power to incorporate Kārewarewa urupā into the District Plan as part of PC2 in the manner that it did, because it was outside the scope of what could be included in an Intensification Planning Instrument under the RMA. As a result, the Court quashed (or cancelled) the scheduling of the urupā[9]. However, the Court also recognised that the Council could incorporate Kārewarewa urupā into the District Plan through an 'ordinary' plan change under Part 1 of Schedule 1 to the RMA[10]. PC3 achieves that purpose.

Effect of incorporating Kārewarewa urupā into the District Plan

The spatial extent of the urupā, and the District Plan provisions associated with it, are the same as those recommended by the Independent Hearings Panel for PC2.

PC3 proposes to incorporate Kārewarewa urupā into Schedule 9 the District Plan (Sites and Areas of Significance to Māori)[11]. This means that land use activities and subdivision at the urupā would be subject to the objectives, policies, and rules set out in the District Plan's Sites and Areas of Significance to Māori (**SASM**) chapter[12].

PC3 proposes that parts of the urupā that have not yet been developed will be subject to the 'wāhanga tahi' provisions of the SASM chapter, while parts that have already been developed will be subject to the 'wāhanga rua' provisions. The following table summarises the effect of these provisions on various activities:

Activity	Wāhanga tahi	Wāhanga rua
Land disturbance/ earthworks	Rule SASM-R2 (permitted): Permitted land disturbance is limited to fencing of the perimeter of the site, subject to an accidental discovery protocol. Rule SASM-R10 (restricted discretionary): Other land disturbance	Rule SASM-R3 (permitted): Up to 10m^3 of land disturbance or earthworks is permitted per year, subject to an accidental discovery protocol. Rule SASM-R11 (restricted discretionary): Other land disturbance

[6] The Panel's consideration of and recommendations on Kārewarewa Urupā are discussed at section 6 of the Independent Hearing Panel's Report on Plan Change 2. See: https://www.kapiticoast.govt.nz/media/jrmofuz1/ihp-report-to-kapiti-coast-district-council-on-pc2.pdf
[7] Under section 80E of the RMA.
[8] *Kāpiti Coast District Council v Waikanae Land Company Ltd* [2024] NZHC 1654. See: https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZHC-1654.pdf
[9] *Kāpiti Coast District Council v Waikanae Land Company Ltd* at para [68].
[10] *Kāpiti Coast District Council v Waikanae Land Company Ltd* at para [64](b).
[11] See: https://eplan.kapiticoast.govt.nz/eplan/rules/0/246/0/0/0/217
[12] See: https://eplan.kapiticoast.govt.nz/eplan/rules/0/188/0/8863/0/217

Activity	Wāhanga tahi	Wāhanga rua
	and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.	and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.
Additions/ alterations of existing lawfully established buildings	Rule SASM-R10 (restricted discretionary): Additions and alterations are not a permitted activity. They require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.	Rule SASM-R3 (permitted): Additions and alterations are permitted, subject to not including a basement or in-ground swimming pool. Rule SASM-R11 (restricted discretionary): Other additions and alterations require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.
Construction of new buildings	SASM-R18 (non-complying): New buildings are not a permitted activity. They require resource consent as a 'non-complying activity'.	Rule SASM-R3 (permitted): New ancillary buildings are permitted, subject to not including a basement or in-ground swimming pool. Rule SASM-R11 (restricted discretionary): Other new buildings require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.
Subdivision	SUB-DW-R10 (restricted discretionary): Subdivision of land that does not increase the number of allotments within which the site of significance is located requires resource consent as a 'restricted discretionary' activity. SUB-DW-R15 (discretionary): Subdivision of land that increases the number of allotments within which the site of significance is located requires resource consent as a 'discretionary' activity.	SUB-DW-R10 (restricted discretionary): Subdivision of land that does not increase the number of allotments within which the site of significance is located requires resource consent as a 'restricted discretionary' activity. SUB-DW-R15 (discretionary): Subdivision of land that increases the number of allotments within which the site of significance is located requires resource consent as a 'discretionary' activity.

These provisions provide for the effects of land use and subdivision on the values associated with the urupā to be managed by the District Plan.

1.3 Status of the District Plan

The District Plan became operative on 30 June 2021. Since this time, the following changes to the District Plan have been made, or are in the process of being made:

Plan Change	Description	Status
1A	Accessible car parking provisions	Operative (1 August 2024)
1B	Managing liquefaction risk for new buildings	Operative (31 October 2022)

Plan Change	Description	Status
1C	Cycle parking provisions	Operative (1 August 2024)
1D	Reclassification of Arawhata Road, Tutanekai Street and Ventnor Drive	Council decision publicly notified (10 July 2024)
1E	Rural indigenous biodiversity incentives	Draft consultation closed (31 October 2022)
1F	Modification of indigenous vegetation and update to key indigenous tree species list	Council decision publicly notified (10 July 2024)
1K	Electoral signage	Council decision publicly notified (10 July 2024)
1L	Council site rezoning	Council decision publicly notified (10 July 2024)
2	Intensification	Operative (1 September 2023 and 1 November 2023)

1.4 Structure of this Section 32 Evaluation Report

This Section 32 Evaluation Report has been prepared in accordance with the requirements of section 32 of the RMA.

The overarching purpose of section 32 is to ensure that any proposed district plan provisions are robust, evidence-based and the most appropriate means to achieve the purpose of the Act. The Council is required to undertake an evaluation of any proposed district plan provisions before notifying those provisions and to publicly notify the section 32 evaluation report (this report) alongside the proposed provisions. The section 32 evaluation report provides the reasoning and rationale for the proposed provisions and should be read in conjunction with those provisions.

To achieve this purpose, the report is structured as follows:

- **Section 2.0 Statutory and policy direction** provides an analysis of the statutory and policy context relevant to the proposed Plan Change.
- **Section 3.0 Resource Management Issue Analysis** provides an analysis of the resource management issues relevant to the proposed Plan Change.
- **Section 0**

- **Scale and Significance & Quantification of Benefits and** Costs provides an assessment of the scale and significance of the anticipated environmental, economic, social and cultural effects associated with the proposed Plan Change, and identifies whether it is reasonable to quantify the costs and benefits of the proposed provisions.
- **Section 5.0 Description of Proposal** provides a description of the proposed amendments to the District Plan proposed by this Plan Change.
- **Section 6.0As a result** of PC3, subdivision, use, and development within Kārewarewa urupā will be subject to the provisions of the SASM chapter. This includes one policy, which is as follows:

SASM-P1	*Waahi Tapu*
Waahi tapu and other places and areas significant to Māori and their surroundings will be protected from inappropriate *subdivision*, *development*, *land disturbance*, *earthworks* or change in *land* use, which may affect the physical features and non-physical values of the place or area. The *Council* will work in partnership with the relevant *iwi authority* for the ongoing and long term management and protection of *waahi tapu*. Relevant *iwi authorities* will be consulted on all *resource consent* applications affecting *waahi tapu and other places and areas significant to Māori* identified in the Schedule of Sites and Areas of Significance to Māori (Schedule 9).	

Sites within Kārewarewa urupā will also be subject to the rules of the SASM chapter, which vary depending on whether the site is within the wāhanga tahi overlay, or the wāhanga rua overlay. The following table summarises the rules for various activities within these areas:

Activity	**Wāhanga tahi overlay**	**Wāhanga rua overlay**
Land disturbance/ earthworks	Rule SASM-R2 (permitted): Permitted land disturbance is limited to fencing of the perimeter of the site, subject to an accidental discovery protocol.	Rule SASM-R3 (permitted): Up to 10m^3 of land disturbance or earthworks is permitted per year, subject to an accidental discovery protocol.
	Rule SASM-R10 (restricted discretionary): Other land disturbance and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.	Rule SASM-R11 (restricted discretionary): Other land disturbance and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.
Additions/ alterations of existing lawfully established buildings	Rule SASM-R10 (restricted discretionary): Additions and alterations require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.	Rule SASM-R3 (permitted): Additions and alterations are permitted, subject to not including a basement or in-ground swimming pool.
		Rule SASM-R11 (restricted discretionary): Other additions and alterations require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.
Construction of new buildings	SASM-R18 (non-complying): New buildings require resource consent as a 'non-complying activity'.	Rule SASM-R3 (permitted): New ancillary buildings are permitted, subject to not including a basement or in-ground swimming pool.

Activity	Wāhanga tahi overlay	Wāhanga rua overlay
		Rule SASM-R11 (restricted discretionary): Other new buildings require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.
Subdivision	SUB-DW-R10 (restricted discretionary): Subdivision of land that does not increase the number of allotments within which the site of significance is located requires resource consent as a 'restricted discretionary' activity.	
	SUB-DW-R15 (discretionary): Subdivision of land that increases the number of allotments within which the site of significance is located requires resource consent as a 'discretionary' activity.	

These rules will provide for the consideration of the actual or potential effects of subdivision, land use, and development on the values associated with Kārewarewa urupā when considering notification or substantive decisions on any resource consent application within the urupā. With respect to notification of consent applications, the Council will be required to consider whether the adverse effects of the activity on tangata whenua are minor or more than minor, and if so, notify tangata whenua (through the relevant iwi authority) of the consent application.

Section 86B(3) provides that rules that protect historic heritage have immediate legal effect. This means that the rules that apply to Kārewarewa urupā as set out in PC3 will have immediate legal effect from the date that PC3 is publicly notified.

- Examination of Objectives includes an examination of the objective of the Plan Change it identify whether it is appropriate for achieving the purpose of the RMA.
- **Section 7.0 Evaluation of Provisions** evaluates the proposed provisions, and reasonable alternatives to achieve the proposed objectives, including the costs, benefits, effectiveness and efficiency of the proposed provisions, and the risk of acting or not acting.
- **Section 8.0 Additional information for qualifying matters** sets out the additional information for qualifying matters required by section 77J(3) of the RMA.

2.0 Statutory and policy direction

Section 74 of the RMA sets out the matters to be considered by the Council in preparing and changing the District Plan, section 75 of the RMA sets out the contents of district plans, including the higher-order planning documents that must be given effect to, and section 77G sets out the Council's ongoing duty to incorporate the Medium Density Residential Standards into the District Plan.

This section of the report sets out the statutory and policy direction that is relevant to the Plan Change, in accordance with sections 74, 75 and 77G of the RMA.

2.1 Functions of the Council

Under s74(1)(a) of the RMA, the Council must prepare and change the District Plan in accordance with its functions under section 31 of the RMA.

The functions of the Council under section 31 of the RMA that are relevant to this Plan Change include:

Section	Relevant function
31(1)(a)	*the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district*
31(1)(b)	*the control of any actual or potential effects of the use, development, or protection of land*

2.2 Part 2 of the RMA

Under s74(1)(b) of the RMA, the Council must prepare and change the District Plan in accordance with the provisions of Part 2 of the RMA. A section 32 evaluation must include an evaluation of how the proposal achieves the purpose and principles contained in Part 2 of the RMA.

Section 5 sets out the purpose of the RMA, as follows:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

*(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources to enable people and communities to provide for their social, economic and cultural wellbeing and for their health and safety, while -*

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In achieving this purpose, all persons exercising functions and powers under the RMA also need to:

- Recognise and provide for the matters of national importance identified in section 6;
- Have particular regard to the range of other matters referred to in section 7; and
- Take into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi in section 8.

2.2.1 Section 6 of the RMA (matters of national importance)

The section 6 matters that are relevant to this Plan Change include:

Section	Relevant matters
6(e)	*the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga* Recognising and providing for Kārewarewa urupā as a site of significance to Māori improves the extent to which the District Plan recognises and provides for the relationship between tangata whenua, their ancestral lands, and their wāhi tapu.
6(f)	*the protection of historic heritage from inappropriate subdivision, use, and development* Sites and areas of significance to Māori (including wāhi tapu) are identified as historic heritage features in the District Plan. Recognising and providing for Kārewarewa urupā as a site of significance to Māori improves the extent to which the District Plan recognises and provides for the protection of historic heritage from inappropriate subdivision, use, and development.

2.2.2 Section 7 of the RMA (other matters)

The section 7 matters that are relevant to this Plan Change include:

Section	Relevant matters
7(a)	*kaitiakitanga* Providing for Kārewarewa urupā as a site of significance to Māori recognises that tangata whenua are kaitiaki and supports tangata whenua to exercise kaitiakitanga in relation to the urupā.
7(aa)	*the ethic of stewardship* Providing for Kārewarewa urupā as a site of significance to Māori supports current and future landowners to exercise stewardship in relation to the urupā by: • enabling current and future landowners to be aware of the urupā and its significance to tangata whenua; and • controlling land use and subdivision at the urupā, so that the effects of these activities on the tangible and intangible values associated with the urupā can be appropriately managed.
7(g)	*any finite characteristics of natural and physical resources* Recognising and providing for Kārewarewa urupā as a site of significance to Māori recognises that the site, and its tangible and intangible values, are a finite and irreplaceable resource of significance to tangata whenua.

2.2.3 Section 8 of the RMA (the principles of the Treaty of Waitangi)

The principles of the Treaty of Waitangi (Te Tiriti o Waitangi) that are particularly relevant to this plan change include:

Principle	Relevant matters
Tino rangatiratanga	While this Plan Change does not, on its own, provide for tino rangatiratanga in relation to the urupā, it supports tino rangatiratanga by recognising that the urupā is a site of spiritual and cultural significance to tangata whenua.
Active protection	This Plan Change supports the active protection of the interests of tangata whenua by controlling land use and subdivision at the urupā, so that the

Principle	Relevant matters
	effects of these activities on the tangible and intangible values associated with the urupā can be appropriately managed.
Participation and partnership	Tangata whenua have sought, over an extended period of time and with significant effort, the recognition and protection of Kārewarewa urupā as a wāhi tapu site in the District Plan, most recently through PC2. This Plan Change recognises the desire expressed by tangata whenua to see Kārewarewa urupā recognised and provided for as a site of significance to them in the District Plan. In addition to the consultation undertaken with tangata whenua as part of the preparation of PC2, the Council also sought feedback from tangata whenua on a draft version of this Plan Change, as part of preparing the plan change.

2.3 National Direction and the National Planning Standards

Section 74(ea) of the RMA requires the Council to prepare and change the District Plan in accordance with any National Policy Statement, the New Zealand Coastal Policy Statement, and the National Planning Standards. Section 75(3) of the RMA requires that the District Plan give effect to any National Policy Statement, the New Zealand Coastal Policy Statement and the National Planning Standards. In addition, section 74(f) of the RMA requires the Council to prepare and change the District Plan in accordance with any regulation (including National Environmental Standards).

The following sections outline the parts of National Direction that are relevant to the Plan Change.

2.3.1 National Policy Statements and the New Zealand Coastal Policy Statement

The following operative National Policy Statements and New Zealand Coastal Policy Statement apply to the Council's overall functions under section 31 of the RMA:

- National Policy Statement on Electricity Transmission 2008 (**NPSET**)[13];
- New Zealand Coastal Policy Statement 2010 (**NZCPS**)[14];
- National Policy Statement for Renewable Electricity Generation 2011 (**NPS-REG**)[15];
- National Policy Statement for Freshwater Management 2020 (**NPS-FM**)[16];
- National Policy Statement on Urban Development 2020 (**NPS-UD**)[17];
- National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**)[18];
- National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**)[19].

The following National Policy Statements are relevant to the plan change:

- The NZCPS;
- The NPS-UD.

2.3.2 NZCPS

Kārewarewa urupā is located within the coastal environment identified in the operative District Plan[20]. The following provisions of the NZCPS are relevant to the Plan Change:

[13] See: https://environment.govt.nz/assets/Publications/Files/nps-electricity-transmission-mar08.pdf
[14] See: https://www.doc.govt.nz/globalassets/documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement-2010.pdf
[15] See: https://environment.govt.nz/assets/Publications/Files/nps-reg-2011.pdf
[16] See: https://environment.govt.nz/assets/publications/National-Policy-Statement-for-Freshwater-Management-2020.pdf
[17] See: https://environment.govt.nz/assets/publications/National-Policy-Statement-Urban-Development-2020-11May2022-v2.pdf
[18] See: https://environment.govt.nz/assets/publications/National-policy-statement-highly-productive-land-sept-22-dated.pdf
[19] See: https://environment.govt.nz/assets/publications/biodiversity/National-Policy-Statement-for-Indigenous-Biodiversity.pdf
[20] The Council may consider the appropriateness of the mapping and extent of the coastal environment in the operative District Plan as part of an upcoming coastal environment plan change.

NZCPS provision	Relevant matters
Objective 3	*To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:* • *recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;* • *promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;* • *incorporating mātauranga Māori into sustainable management practices; and* • *recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.* Recognising and providing for Kārewarewa urupā as a site of significance to Māori gives effect to Objective 3 of the NZCPS.
Objective 6	*To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:* • *the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;* *…* • *historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.* The use of the wāhanga tahi and wāhanga rua provisions to recognise and provide for Kārewarewa urupā enables people and communities to provide for their social, economic, and cultural wellbeing by appropriately recognising the need to protect the values of the urupā, while also providing for a reasonable level of further development to occur where existing uses have been lawfully established.
Policy 2	***The Treaty of Waitangi, tangata whenua and Māori heritage*** *In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:* *(a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;* *(b) involve iwi authorities or hapu on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;* *(c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;* *(d) …* *(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapu*

NZCPS provision	Relevant matters
	and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and *(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and* *(ii) consider providing practical assistance to iwi or hapu who have indicated a wish to develop iwi resource management plans;* *(f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:* *(i) bringing cultural understanding to monitoring of natural resources;* *(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;* *(iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiapure, mahinga mataitai or other non-commercial Māori customary fishing; and* *(g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:* *(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and* *(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pa or fishing villages.* Recognising and providing for Kārewarewa urupā as a site of significance to Māori gives effect to Policy 2 of the NZCPS because: • It recognises the cultural and traditional relationship of tangata whenua with the urupā; • Iwi authorities have been involved in the preparation of this Plan Change, both through their input into PC2, and though the provision of feedback on a draft version of this Plan Change; • The identification and protection of Kārewarewa urupā is consistent with iwi management plans, in particular *Whakarongotai o te moana, Whakarongotai o te wā*, the Kaitiakitanga Plan for Te Ātiawa ki Whakarongotai; • Providing for the management of the effects of land use and subdivision in relation to the urupā, through the District Plan, supports tangata whenua to exercise kaitiakitanga in relation to the urupā;

NZCPS provision	Relevant matters
	• It provides for the identification, assessment, protection, and management of areas or sites of significance or special value to Māori, including the urupā.

2.3.3 NPS-UD

Kārewarewa urupā is located within an urban environment, as defined in the NPS-UD. The following provisions of the NPS-UD are relevant to the plan change:

NPS-UD provision	Relevant matters
Objective 1	*New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.* Recognising and providing for Kārewarewa urupā as a site of significance to Māori supports the development of a well-functioning urban environment, by recognising that the protection of the values associated with the urupā from inappropriate land use and development provides for the cultural wellbeing of tangata whenua, both now and into the future.
Objective 5	*Planning decisions relating to urban environments, and FDSs, take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).* Refer to section 2.2.3 (Section 8 of the RMA) for a description of how this Plan Change gives effect to Objective 5 of the NPS-UD.
Policy 9	*Local authorities, in taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to urban environments, must:* *(a) involve hapu and iwi in the preparation of RMA planning documents and any FDSs by undertaking effective consultation that is early, meaningful and, as far as practicable, in accordance with tikanga Māori; and* *(b) when preparing RMA planning documents and FDSs, take into account the values and aspirations of hapu and iwi for urban development; …* Tangata whenua, through iwi authorities, have been involved in the preparation of this Plan Change, both through their input into PC2, and though the provision of feedback on a draft version of this Plan Change.

2.3.4 National Environmental Standards

In addition to the NPSs there are nine National Environmental Standards (**NES**) currently in force:

- NES for Air Quality 2004;
- NES for Sources of Human Drinking Water 2007;
- NES for Electricity Transmission Activities 2009;
- NES for Assessing and Managing Contaminants in Soil to Protect Human Health 2011;
- NES for Telecommunication Facilities 2016;
- NES for Freshwater 2020;
- NES for Marine Aquaculture 2020;
- NES for Storing Tyres Outdoors 2021;
- NES for Commercial Forestry 2023.

There are no NES relevant to the Plan Change.

2.3.5 National Planning Standards

Section 75(3)(ba) requires that the District Plan give effect to a national planning standard. The Operative District Plan implements the National Planning Standards 2019[21].

The method for incorporating Kārewarewa Urupā into the District Plan as part of this Plan Change is consistent with the National Planning Standards.

2.4 Regional Policy Statements and Plans

2.4.1 Regional Policy Statement

Section 75(3)(c) of the RMA requires that the District Plan give effect to any regional policy statement. The relevant regional policy statement that applies to the district is the Regional Policy Statement for the Wellington Region 2013 (the **RPS**)[22].

The following provisions of the RPS are relevant to the plan change:

RPS provision	Relevant matters
Objective 15	***Historic heritage is identified and protected from inappropriate modification, use and development.*** Recognising and providing for Kārewarewa urupā as a site of significance to Māori provides for the identification and protection of the urupā from inappropriate modification, use, and development.
Policy 21	*Identifying places, sites and areas with significant historic heritage values– district and regional plans* Identifying Kārewarewa urupā as a site of significance to Māori in the District Plan is consistent with the direction in Policy 21(d) of the RPS to identify places with significant tangata whenua values, being that the place is cared or important to Māori for spiritual, cultural, or historical reasons.
Policy 22	*Protecting historic heritage values – district and regional plans* Recognising Kārewarewa urupā as a site of significance to Māori, and providing for the wāhanga tahi and wāhanga rua provisions of the SASM chapter of the District Plan to apply to land use and subdivision in relation to the urupā, is consistent with giving effect to the direction in Policy 22(a) of the RPS to protect the significant values of the urupā from inappropriate subdivision, use, and development.
Objective 28	***The cultural relationship of Māori with their ancestral lands, water, sites, wāhi tapu and other taonga is maintained.*** Recognising and providing for Kārewarewa urupā as a site of significance to Māori provides for the maintenance of the cultural relationship of Māori with their wāhi tapu.
Policy 49	*Recognising and providing for matters of significance to tangata whenua – consideration* Recognising and providing for Kārewarewa urupā as a site of significance to Māori is consistent with the direction in Policy 49(a) and (d) of the RPS, that the

[21] See: https://environment.govt.nz/assets/publications/national-planning-standards-november-2019-updated-2022.pdf
[22] See: https://www.gw.govt.nz/assets/Documents/2023/02/RPS-Full-Document-Edited-December-2022-Updated.pdf

RPS provision	Relevant matters
	Council recognise and provide for the exercise of kaitiakitanga and places with significant spiritual or cultural historic heritage value to tangata whenua.

2.4.2 Proposed Regional Policy Statement

Section 74(2)(a)(i) of the RMA requires that the Council have regard to any proposed regional policy statement when preparing or changing the District Plan. Proposed Change 1 to the RPS[23], which was notified in August 2022, is a proposed regional policy statement.

The following provisions of the proposed RPS are relevant to the plan change:

Proposed RPS provision	Relevant matters
Objective 22	***Urban development, including housing and infrastructure, is enabled where it demonstrates the characteristics and qualities of well-functioning urban environments, which:*** ***…*** ***(h) enable Māori to express their cultural and traditional norms by providing for mana whenua / tangata whenua and their relationship with their culture, land, water, sites, wāhi tapu and other taonga; …*** Recognising and providing for Kārewarewa urupā as a site of significance to Māori supports the development of a well-functioning urban environment, by recognising that the protection of the values associated with the urupā from inappropriate land use and development provides for the cultural wellbeing of tangata whenua, both now and into the future.
Policy UD.2	*Enable Māori cultural and traditional norms – consideration* *When considering an application for a resource consent, notice of requirement, or a plan change of a district plan for use or development, particular regard shall be given the ability to enable Māori to express their culture and traditions in land use and development, by as a minimum providing for mana whenua / tangata whenua and their relationship with their culture, land, water, sites, wāhi tapu and other taonga.* Recognising and providing for Kārewarewa urupā as a site of significance to Māori is consistent with the direction set out in this policy because managing the effects of urban development on the values associated with the urupā provides for, as a minimum, the relationship between tangata whenua and wāhi tapu.

2.4.3 Regional Plans

Section 75(4)(b) of the RMA requires that the District Plan must not be inconsistent with a regional plan. The relevant regional plan that applies to the district is the Natural Resources Plan for the Wellington Region 2023 (**NRP**)[24].

The NRP manages the effects of activities in relation to coastal and freshwater bodies. The NRP identifies the 'Kārewarewa Lagoon', located immediately to the north-west of Kārewarewa urupā, as a site of significance to Te Ātiawa ki Whakarongotai in schedule C2 (see Figure 2). Schedule C2

[23] See: https://www.gw.govt.nz/assets/Documents/2022/08/Proposed-RPS-Change-1-for-the-Wellington-Region.pdf
[24] See: https://www.gw.govt.nz/assets/Documents/2023/07/Natural-Resource-Plan-Operative-Version-2023-incl-maps-compressed.pdf

identifies the following significant values associated with Kārewarewa Lagoon: wāhi tapu, urupā, pā, and wāhi mahara.

This Plan Change is consistent with the NRP.

Figure 2: Map from the NRP showing the location of 'Kārewarewa Lagoon', immediately to the north-west of Kārewarewa urupā.

2.4.4 Proposed Regional Plans

Section 74(2)(a)(ii) of the RMA requires that the Council have regard to any proposed regional plan when preparing or changing the District Plan. Proposed Change 1 to the NRP was notified in October 2023[25], and is a proposed regional plan.

Proposed Change 1 to the NRP is principally concerned with the implementation of the NPS-FM in the Te Whanganui-a-Tara and Te Awarua-o-Porirua whaitua. This Plan Change is not inconsistent with the Proposed Change 1 to the NRP.

2.5 Plans or proposed plans of adjacent territorial authorities

Section 74(2)(c) of the RMA requires that the Council have regard to the extent to which the District Plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.

The Plan Change is not inconsistent with any operative or proposed district plan in the Wellington Region or Horowhenua District.

2.6 Relevant plans or strategies prepared under other Acts

Section 74(2)(a)(i) of the RMA requires that the Council have regard to management plans and strategies prepared under other Acts. There are no plans or strategies prepared under other Acts that are relevant to this Plan Change.

2.7 Iwi Management Plans

Section 74(2A) of the RMA requires that the Council take into account any relevant planning document that is recognised by an iwi authority and lodged with the Council (otherwise referred to as

[25] See: https://www.gw.govt.nz/assets/Documents/2023/10/Full-Plan-Provisions-including-Clause-16-changes-made-on-6-December-2023.pdf

iwi management plans). There are four iwi management plans that have been lodged with the Council:

- Proposed Ngāti Raukawa te au ki te Tonga Ōtaki River and Catchment Iwi Management Plan (2000);
- Nga Korero Kaupapa mo Te Taiao: Policy Statement Manual for Kapakapanui: Te Runanga O Ati Awa ki Whakarongotai Inc (2001);
- Te Haerenga Whakamua – A Review of the District Plan Provisions for Māori: A Vision to the Future for the Kāpiti Coast District Council District Plan Review 2009-12 (2012);
- Whakarongotai o te moana o te wai Kaitiakitanga Plan for Te Ātiawa ki Whakarongotai (2019).

The following iwi management plans are particularly relevant to this Plan Change:

Iwi Management Plan	**Relevant Provisions**
Te Haerenga Whakamua – A Review of the District Plan Provisions for Māori: A Vision to the Future for the Kāpiti Coast District Council District Plan Review 2009-12 (2012)	Input from tangata whenua was an important part of developing the District Plan. Te Haerenga Whakamua is a representation of this input and provides a series of suggested kaupapa and tikanga that was taken into account as part of preparing the District Plan. The following tikanga set out in Te Haerenga Whakamua[26] are particularly relevant to this Plan Change: • **Adverse effects to wāhi tapu must be avoided.** Wāhi tapu must be identified on the heritage register before they can be protected in the District Plan. • **Wāhi tapu identified on the heritage register must be afforded a level protection of protection (in consultation with tangata whenua) in the District Plan.** The modification or disturbance of an archaeological site or wāhi tapu will not be approved unless sufficient evidence is provided as to the benefit to both tangata whenua and the wider community. Regard has been given to these tikanga as part of the preparation of this Plan Change.
Whakarongotai o te moana o te wai Kaitiakitanga Plan for Te Ātiawa ki Whakarongotai (2019)	This document identifies the key kaupapa, huanga and tikanga values, objectives and policies of Te Ātiawa ki Whakarongotai to guide kaitiakitanga. The document is internally focused in order to support the kaitiaki practice of the iwi, but also to inform other agencies. The huanga (objectives) and tikanga set out in the Kaitiakitanga Plan that are particularly relevant to this Plan Change include[27]:

[26] Moore, P., Royal, C., & Barnes, A. (2012). *Te Haerenga Whakamua*, p.65.
[27] Ātiawa ki Whakarongotai. (2019). *Whakarongotai o te moana o te wai Kaitiakitanga Plan for Te Ātiawa ki Whakarongotai,* pp.22-23.

Iwi Management Plan	Relevant Provisions
	• Wāhi tapu, tikanga, and kōrero tuku iho are respected and protected. • The role of mana whenua as kaitiaki is recognised and upheld in any management of cultural heritage issues. • Wahi tapu sites are mapped so that kaitiaki can ensure any potential effects of development on them are avoided. • Kaitiaki determine measures for providing necessary protection for wāhi tapu, wāhi tupuna and archaeological sites. Regard has been given to these huanga and tikanga as part of the preparation of this Plan Change.

2.8 Medium Density Residential Standards (MDRS)

Section 77G of the RMA sets out the ongoing obligation for the District Plan to incorporate the Medium Density Residential Standards (**MDRS**) into every relevant residential zone in the district. The MDRS are the requirements, conditions, and permissions set out in Schedule 3A to the RMA. The relevant residential zones in the Kāpiti Coast district are the General Residential Zone and the High Density Residential Zone.

Kārewarewa urupā is located within the General Residential Zone, which must otherwise incorporate the MDRS. However, section 77G(6) provides that the Council may make the requirements, conditions, and permissions set out in Schedule 3A less enabling of development, if authorised to do so under section 77I of the RMA.

Section 77I similarly provides that the Council may make the requirements, conditions, and permissions set out in Schedule 3A less enabling of development only to the extent necessary to accommodate a 'qualifying matter'. Sites and areas of significance to Māori are a qualifying matter under section 77I(a), on the basis that recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance under section 6(e). In addition to this, recognising and providing for the protection of historic heritage from inappropriate subdivision, use, and development is a matter of national importance under section 6(f) of the RMA.

The following elements of this Plan Change are less enabling of development than the requirements, conditions, and permissions set out under Schedule 3A of the RMA:

Requirement, condition, or permission under Schedule 3A of the RMA	Element of this plan change that is less enabling of development
Clause 2(1): It is a permitted activity to construct or use a building if it complies with the density standards in the district plan (once incorporated as required by section 77G).	The construction and use of buildings will be a: • Non-complying activity in wāhanga tahi areas (SASM-R18); • A restricted discretionary activity un wāhanga rua areas (SASM-R11).
Clause 3: Subdivision requirements must (subject to section 106) provide for as a controlled activity the subdivision of land for the purpose of the construction and use of	The subdivision of land that increases the number of allotments will be a discretionary activity (SUB-DW-R15).

Requirement, condition, or permission under Schedule 3A of the RMA	Element of this plan change that is less enabling of development
residential units in accordance with clauses 2 and 4.	

Because sites and areas of significance to Māori in the General Residential Zone are a qualifying matter, this evaluation report is required to include additional information relating to qualifying matters set out under section 77J(3) of the RMA. This information is contained in section 8.0 of this report.

2.9 Other Acts

The Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPTA**) is relevant to this Plan Change.

The purpose of the HNZPTA is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.

Part 3 of the HNZPTA provides for the protection of archaeological sites . Under section 6 of the HNZPTA, archaeological site means:

> *subject to section 42(3),-*
>
> *(a) any place in New Zealand, including any building or structure (or part of a building or structure), that—*
>
> > *(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and*
> >
> > *(ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and*
>
> *(b) includes a site for which a declaration is made under section 43(1)*

Section 42 of the HNZPTA requires that archaeological sites must not be modified or destroyed without an archaeological authority granted by Heritage New Zealand Pouhere Taonga.

Regardless of whether it is identified as a site of significance to Māori in the District Plan, Kārewarewa urupā is an archaeological site under the HNZPTA, which means that any works that may modify or destroy the site cannot occur without an archaeological authority. This process is administered by Heritage New Zealand and does not involve the Council.

2.10 Other matters

For the avoidance of doubt, the following matters that the Council must have regard to under sections 74 and 75 of the RMA are not considered to be relevant to this Plan Change:

- Entries on the New Zealand Heritage List/Rārangi Kōrero (section 74(2)(b)(iia));
- Regulations relating to ensuring sustainability, of the conservation, management, or sustainability of fisheries resources (section 74(2)(b)(iii))
- Section 98 of the Urban Development Act 2020 (section 74(2)(b)(iv));
- Any emissions reduction plan (section 74(2)(d));
- Any national adaptation plan (section 74(2)(e));
- Water conservation orders (section 75(4)(a)).

3.0 Resource Management Issue Analysis

3.1 Resource management issue

The resource management issue that this Plan Change responds to is the need to recognise and provide for Kārewarewa urupā as a site of significance to Māori.

Figure 3: extent of Kārewarewa urupā shown outlined in white.

Figure 4: extent of Kārewarewa urupā shown outlined in white. The General Residential Zone is shown in yellow, and the Natural Open Space Zone is shown in green.

3.1.1 Kārewarewa urupā

Kārewarewa urupā is located to the east of the confluence of the Waikanae River and the Waimeha Stream to the south-west of the suburb of Waikanae Beach (see Figure 3). It is set within a residential setting generally comprising single storey (or in some cases two-storey) detached residential buildings on moderately sized sites. The underlying landscape is characterised by gently undulating topography typical of the dune landscape of which Waikanae Beach is a part.

Kārewarewa urupā is a place of significant spiritual and cultural value to tangata whenua. In 1839, the historically important battle of Kuititanga occurred in the Waikanae district, and many of those who died in this battle were buried at the urupā. Te Ātiawa have described Kārewarewa urupā in the following terms:

> *The area was then no longer appropriate for occupation or food cultivation and was thus abandoned and deemed waahi tapu. From the mid-19th century the site has been used as an urupā. Several very significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pākehā that had some connection to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu.*[28]

In 1919, the block of land containing the urupā was partitioned off from a larger block of Māori freehold land. The block of land was sold to the Waikanae Land Company in 1969, who successfully applied to the then Horowhenua County Council to have the Māori cemetery designation that covered the urupā removed from the District Scheme (see Figure 5). Since this time approximately half of the land has been subject to residential urban development, around Te Ropata Place, Barrett Drive and Marewa Place. 45 residential properties have been subdivided and developed in this area, alongside the road network comprising Barrett Drive, Marewa Place, Te Ropata Place, and Tamati Place. The remainder of the land (a large block of land located on Tamati Drive, a portion of the reserve accessed from the corner of Barret Drive and Marewa Place, and a smaller block of land at 6 Barrett Drive) has remained largely undeveloped. There is a history of kōiwi/human remains being discovered during prior development works at the urupā.

The history of the urupā and its significance are described in detail in a report by the Waitangi Tribunal. This report is discussed further in section 3.2.1, and the report is contained in full in Appendix A.

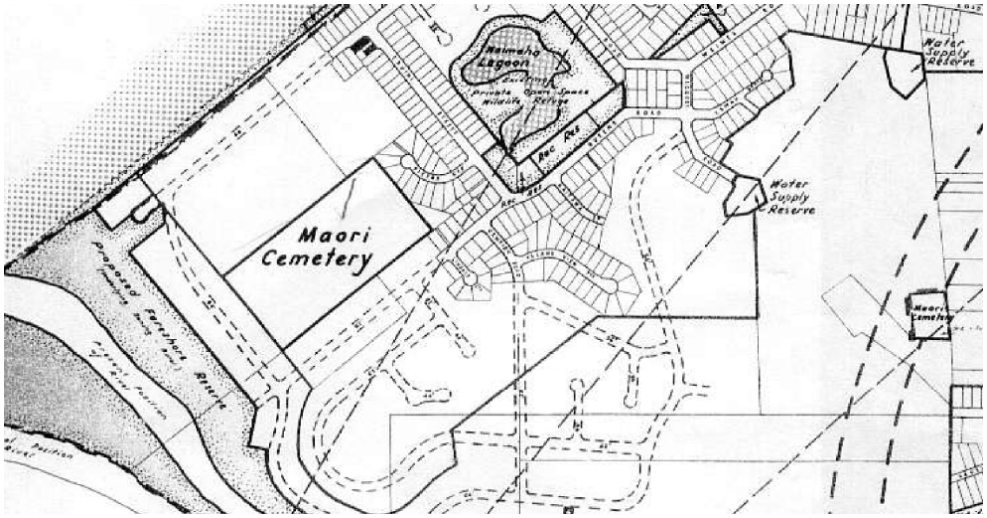

Figure 5: Horowhenua County District Scheme map. Source: Waitangi Tribunal (2020), p.26.

[28] Waitangi Tribunal. (2020). *The Kārewarewa Urupā Report*, p.5.

3.1.2 Operative District Plan provisions

The urupā is principally located within the General Residential Zone, with the northern corner being located in the Natural Open Space Zone.

The area is not identified as a site of significance to Māori in the operative District Plan. As such, the following activities are generally permitted to occur within the area:

Activity	General Residential Zone	Natural Open Space Zone
General permitted activities (subject to standards)	• Rule GRZ-R2: Residential activities • Rule GRZ-R4: Shared and group accommodation and supported living accommodation • Rule GRZ-R8: Arable farming and the keeping of animals • Rule GRZ-R10: Home businesses and home craft occupations • Rule GRZ-R35: Papakāinga on land held under Te Ture Whenua Māori Act 1993	• Rule NOSZ-R3: Recreation, community, and cultural activities. • Rule NOSZ-R9: Species protection and conservation management works. • Rule NOSZ-R10: Landscaping.
Fences and walls	• Rule GRZ-R3: Fences and walls up to 2 metres tall (or 1.8 metres tall adjacent to the Natural Open Space Zone) are permitted.	• Rule NOSZ-R1: Fences and walls between 1.2 metres and 1.8 metres (depending on permeability) are permitted.
Permeable surfaces	• Rule GRZ-R1: At least 30% of the site must be permeable.	• N/A.
New buildings and structures, and alterations to existing buildings and structures	• Rule GRZ-R33: New buildings and structures, and alterations to existing buildings and structures, are permitted subject to the following standards: ○ No more than 3 residential units or retirement units per site. ○ Must be generally no more than 11 metres in height. ○ Must not project beyond a 60° recession place measured from a point 4 metres vertically above the ground level. ○ Set back between 1 metres and 1.5 metres from the boundary. ○ Maximum building coverage of 50% of the net site area.	• Rule NOSZ-R6: New buildings and structures, and alterations to existing buildings and structures, are permitted subject to the following standards: ○ Maximum building coverage of 2% ○ Maximum gross floor area of any building of 350m^2 ○ Maximum height of 6 metres ○ Minimum yard setback of 5 metres from the General Residential Zone ○ Buildings and structures must not project beyond a 45° recession place measured from a point 2.1 metres vertically above the ground level.

Activity	General Residential Zone	Natural Open Space Zone
	○ Outdoor living space of at least 20m^2. ○ Outlook space from each habitable room. ○ 20% of the street-facing building façade is glazing. ○ Minimum landscaped area of 20% of the developed site.	
Earthworks	• Rule EW-R2: Earthworks (excluding for approved building platforms) subject to the following standards: ○ Earthworks must not be undertaken on slopes greater than 28°. ○ Earthworks must not be undertaken within 20 metres of a waterbody. ○ Earthworks must not disturb more than 50m^3 of land per subject site within a 5 year period and must not alter the original ground level by more than 1 metre vertically. ○ General standards for surface runoff, and management of silt, sediment, and erosion. ○ An accidental discovery protocol being followed. • Rule EW-R3: Earthworks for approved building platforms that do not extend more than 2 metres beyond the foundation line of the building, subject to: ○ General standards for surface runoff, and management of silt, sediment and erosion. ○ An accidental discovery protocol being followed.	
Subdivision	• Rules SUB-DW-R25 and SUB-RES-R33: subdivision to create new allotments is a controlled activity, subject to standards.	• SUB-OS-R60: subdivision to create new allotments is a discretionary activity.

3.1.3 Plan Change 2

At its meeting on 21 October 2021, the Strategy and Operations Committee of the Council endorsed the preparation of a plan change for a "new waahi tapu listing for Kārewarewa Urupā in Waikanae Beach, to align with the findings of the Waitangi Tribunal report: Kārewarewa Urupā Report"[29].

Subsequent to this, in December 2021 the government passed the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021, which required the Council to prepare and publicly notify by 20 August 2022 an Intensification Planning Instrument (IPI) that, amongst other matters, incorporated the Medium Density Residential Standards (MDRS) into the District Plan. This plan change became known as PC2. Kārewarewa Urupā as a site of significance to Māori was incorporated into the preparation of PC2 on the basis that the urupā was predominantly located in the General Residential Zone, which would otherwise be subject to the MDRS. The Council included the proposal to incorporate Kārewarewa urupā into Schedule 9 of the District Plan (Sites and Areas of Significance to Māori) when it consulted with the community on a draft version of PC2 in April and May 2022. After considering feedback received on draft PC2, the Council decided to incorporate

[29] Refer to committee resolution SAOCC2021/51. See: https://kapiticoast.infocouncil.biz/Open/2021/10/SAOCC_20211021_MIN_2321.PDF

Kārewarewa urupā into proposed PC2. The Council's reasons for incorporating the urupā into the District Plan as part of PC2 are described in the Council's Section 32 Evaluation Report for PC2[30].

PC2 was publicly notified by the Council on 19 August 2022. The Government's amendments to the RMA required the Council to use the Intensification Streamlined Planning Process (**ISPP**), the purpose of which was to provide for an expeditious planning process[31]. The principal differences between the ISPP and an 'ordinary' plan change under Part 1 of Schedule 1 are:

- The process must be completed no later than the date directed by the Minister for the Environment. For PC2, the Council was directed to publicly notify its decisions no later than 20 August 2023 (one year after it was notified)[32].
- The Council was required to appoint an independent hearing panel to conduct a hearing and make recommendations back to the Council on the plan change and submissions.
- The Council could accept or reject the recommendations of the Independent Hearings Panel, but if it rejected any recommendations, these would be referred to the Minister for the Environment for a decision.
- The decisions of the Council or the Minister could not be appealed to the Environment Court.

The Council received 219 primary submissions on PC2 (containing 1,295 decisions requested by submitters), and 99 further submissions (containing 1,099 further decisions requested). Of these, 7 primary submissions (containing 9 decisions requested) and 4 further submissions (containing 19 decisions requested) were related to Kārewarewa urupā.[33] The final day of the hearing on PC2 (3 April 2023) was dedicated to hearing submissions on Kārewarewa urupā.

Submissions were heard by an Independent Hearings Panel in March and April 2023, who provided its recommendations on submissions and the provisions of PC2 in a report to the Council on 20 June 2023.[34] Section 6 of the Panel's report sets out its consideration of Kārewarewa urupā. The Panel recommended that Kārewarewa urupā be incorporated into Schedule 9 of the District Plan, with amendments to the location of the south-western boundary in response to the submission of Ātiawa ki Whakarongotai.

The Council accepted the Panel's recommendation on Kārewarewa urupā when it made its decisions on PC2 on 10 August 2023. The Council publicly notified its decisions on PC2 on 19 August 2023. PC2, including the incorporation of Kārewarewa into Schedule 9 of the District Plan, became operative in part on 1 September 2023[35], although the rules in PC2 had legal effect from the date on which the Council publicly notified its decisions[36].

3.1.4 Judicial review of PC2

In 2024, the Council's decision to incorporate Kārewarewa urupā into the District Plan as part of PC2 was judicially reviewed by the High Court. The judicial review was brought against the Council by the Waikanae Land Company, a landowner within the urupā area.

The judicial review was not about the merits of incorporating Kārewarewa urupā into Schedule 9 of the District Plan. Rather, the Court was asked to determine whether the Council had the legal power to do so as part of PC2. This is because PC2 was a unique 'one-off' plan change required by the government as part of its direction to councils across New Zealand to incorporate the Medium Density

[30] Refer in particular to sections 6.1.4 and 8.3.3 of the Section 32 Evaluation Report for PC2. See: https://www.kapiticoast.govt.nz/media/xmzfukmb/pc2_s32.pdf
[31] The ISPP is described in Part 6 of Schedule 1 to the RMA.
[32] For context, the timeframe for publicly notifying a decision on 'ordinary' plan changes under Part 1 of Schedule 1 is 2 years from public notification of the plan change.
[33] Submissions and further submissions relevant to Kārewarewa urupā are set out in Appendix B.
[34] The Panel's report is contained in Appendix C.
[35] With the exception of the Panel's recommendation [13](b)(1), which the Council rejected. This related to the rezoning of an area of land requested by a submitter. The Minister decided on this matter on 4 October 2023. This matter is unrelated to this Plan Change.
[36] Section 86B(1) of the RMA.

Residential Standards into their district plans. As an Intensification Planning Instrument, PC2 was subject to limitations on its scope set out in the Resource Management Act 1991 (RMA)[37], and the Court was asked to determine whether incorporating Kārewarewa urupā into Schedule 9 breached these limits.

The Court delivered its decision on 21 June 2024[38]. The Court found that the Council did not have the power to incorporate Kārewarewa urupā into the District Plan in the manner that it did, because it was outside the scope of what could be included in an Intensification Planning Instrument under the RMA. As a result, the Court quashed (or cancelled) the scheduling of the urupā[39]. However, the Court also recognised that the Council could incorporate Kārewarewa urupā into the District Plan through an 'ordinary' plan change under Part 1 of Schedule 1 to the RMA[40]. PC3 achieves that purpose.

3.2 Sources of information

Several sources of information have been considered as part of the preparation of PC3. These include:

- The Waitangi Tribunal Report: "The Kārewarewa Urupā Report".
- Information from PC2 relevant to Kārewarewa urupā.
- The Independent Hearings Panel's report on PC2.

Each of these sources of information are briefly described in the following sections.

3.2.1 The Waitangi Tribunal Report

The Kārewarewa Urupā Report, published by the Waitangi Tribunal in 2020, is contained in Appendix A.

The Kārewarewa Urupā Report was prepared by the Waitangi Tribunal in response to a claim lodged by Te Ātiawa / Ngā Ātiawa ki Kāpiti as part of the Tribunal's Porirua ki Manawatu inquiry. The report is a "pre-publication" report released in advance of the Tribunal's main iwi report, however the Tribunal notes that its findings and recommendations will not change in the final publication.

The Tribunal found that the traditional, historical, and archaeological evidence is clear that the block of land is an urupā, and that the urupā has "great significance in cultural and spiritual terms" for Ātiawa ki Whakarongotai.[41]

The report traverses several issues and topics related to the urupā, including:

- The history of the site as an urupā, and its significance as a wāhi tapu to Ātiawa ki Whakarongotai;
- The history of the land as Māori land in the late 19th and early 20th century, including its award to Ātiawa, its partitioning from the main block of land as a 'cemetery', including a court order that the land be made 'absolutely inalienable';
- The circumstances (including the statutory framework for Māori land) that led to the sale of the urupā to the Waikanae Land Company in 1968-1969;
- The decision by the Horowhenua County Council on the application of the Waikanae Land Company to remove the 'Maori Cemetery' designation that applied to the site in the Horowhenua District Scheme in 1970;

[37] Under section 80E of the RMA.
[38] *Kāpiti Coast District Council v Waikanae Land Company Ltd* [2024] NZHC 1654. See: https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZHC-1654.pdf
[39] *Kāpiti Coast District Council v Waikanae Land Company Ltd* at para [68].
[40] *Kāpiti Coast District Council v Waikanae Land Company Ltd* at para [64](b).
[41] Waitangi Tribunal. (2020). *The Kārewarewa Urupā Report,* p. 7.

- Initial development of the land in the 1970's;
- Resumption of development works in 1990 to 2000, including the discovery of kōiwi, the application of the Historic Places Act 1993 to the site, and subsequent attempts by Ātiawa to protect the urupā from further development.

The spatial extent of Kārewarewa Urupā proposed by PC3 is consistent with that set out in the Kārewarewa Urupā report.

3.2.2 Information from PC2 relevant to Kārewarewa urupā

The Council received a wide range of information relevant to Kārewarewa urupā as part of the preparation and development of PC2. This information is set out in Appendix B and includes:

- Feedback received from the public on incorporating Kārewarewa urupā into the District Plan as part of draft PC2;
- Written feedback received from iwi authorities on draft PC2;
- The Section 32 Evaluation Report for PC2, as it relates to Kārewarewa urupā;
- Submissions and further submissions on proposed PC2, as they relate to Kārewarewa urupā;
- The Council officer's planning evidence for PC2, as it relates to Kārewarewa urupā;
- Written and oral statements and evidence relevant to Kārewarewa urupā presented by submitters at the hearing on PC2;
- The Council officer's written reply to matters raised in the hearing on PC2.

This information has been considered as part of the preparation of PC3.

3.2.3 The report of the Independent Hearings Panel on PC2

In March and April 2023, an Independent Hearings Panel (the Panel) conducted a hearing of submissions on PC2. This included hearing submissions on Kārewarewa urupā. On 20 June 2023, the Panel provided a report to the Council setting out its recommendations on PC2. The Panel's report is contained in Appendix C.

Section 6 of the report sets out the Panel's consideration of the Council's proposal to incorporate Kārewarewa urupā into Schedule 9 of the District Plan as part of PC2. The report discusses a range of matters relating to the urupā, including (but not limited to):

- The range of submissions on the proposal to incorporate Kārewarewa urupā into Schedule 9 of the District Plan.
- The Waitangi Tribunal Report.
- The evidence about the values associated with the urupā presented at the hearing.
- The level of restriction proposed by the Council, and whether this was proportional to the values.
- The significance of the 'Maori Cemetery' designation included in the Horowhenua County Council District Scheme, and the significance of its removal in 1970 (including the process by which it was removed).
- Whether or not including Kārewarewa urupā as part of PC2 was *ultra vires*.

The Panel's findings on the values of the urupā are set out at paragraph [159] of their report, and include the following:

(a) The Kārewarewa Urupā Block values are historical, spiritual and cultural associated with the occupation of Te Ātiawa and events associated with that land. These are not solely burial values as an urupā but importantly include those values. That includes the remains of esteemed ancestors that engage the highest obligations for protection and care following Te Ātiawa's tikanga.

(b) The Kārewarewa Urupā Block was demarcated and deemed sacred by Te Ātiawa elders since at least 1839 onwards as wāhi tapu.

The Panel summarised its overall consideration of Kārewarewa urupā at paragraph [9] of its report:

> *There is no doubt that the cultural values of the Kārewarewa Urupā Block are, for Te Ātiawa, significant and have endured irrespective of legal and development processes and changes following the acquisition of the land by the Waikanae Land Company in 1968. These values warrant recognition, and we have carefully evaluated the competing equities of the situation as part of our overall evaluation of the proportionality of the Council's recommended planning measures.*

The Panel subsequently recommended that the Council incorporate Kārewarewa urupā into Schedule 9 of the District Plan, with a modification to the south-western boundary in response to the submission of Te Ātiawa ki Whakarongotai. The extent and provisions for Kārewarewa urupā proposed to be incorporated into the District Plan through PC3 are the same as those recommended by the Panel for PC2.

The information contained in the Panel's report is relevant to PC3.

3.3 Consultation

3.3.1 Pre-notification consultation with Ministers

Clauses 3(1)(a) and (b) of Schedule 1 to the RMA requires the Council to consult with the Minister for the Environment and any other Ministers of the Crown who may be affected by the proposed plan change, during the preparation of the proposed plan change.

The Council sought feedback from the Minister for the Environment, the Minister for Housing, and the Minister for Māori Crown Relations: Te Arawhiti by providing them with a draft of the proposed plan change on 7 August 2023.

The Council received no feedback from the Ministers.

3.3.2 Pre-notification consultation with iwi authorities

Clause 3(1)(d) of Schedule 1 to the RMA requires the Council to consult with tangata whenua, through iwi authorities, during the preparation of the proposed plan change. In addition to this, clause 4A of Schedule 1 requires that the Council provide iwi authorities with a draft of the proposed plan change before notifying it and have particular regard to any advice received from those iwi authorities.

The Council sought feedback from Te Rūnanga o Toa Rangatira (on behalf of Ngāti Toa Rangatira), Te Ātiawa ki Whakarongotai Charitable Trust, and Ngā Hapū o Ōtaki by providing them with a draft of the proposed plan change on 7 August 2023.

The Council has received written feedback in support of PC3 from all iwi authorities. This feedback is contained in Appendix D.

3.3.3 Pre-notification consultation with the public

The Council has sought to prepare and notify PC3 in a timely manner, because of the vulnerability of Kārewarewa urupā to inappropriate subdivision, land use, or development. Because of this, no pre-notification consultation has been undertaken with the public prior to the notification of PC3.

Notwithstanding this, the Council engaged with the public on the proposal to incorporate Kārewarewa urupā into Schedule 9 of the District Plan as part of PC2, and the feedback received from the public on PC2 continues to be relevant to PC3. This includes:

- The Council directly contacted landowners within the area proposed to be identified as Kārewarewa urupā and sought their feedback on the proposal as part of the Council consulting on a draft version PC2. Feedback was on the draft proposal to incorporate Kārewarewa urupā into the District Plan was received from 10 parties.
- When PC2 was publicly notified, the Council directly notified landowners within the area. Several parties submitted on the proposal to incorporate Kārewarewa urupā into Schedule 9 of the District Plan, including 7 primary submissions and 4 further submissions. 5 submitters spoke to their submissions at the hearing for PC2.

References to this information are included in Appendix B. The information received from the public as part of PC2 is relevant to PC3 and has been considered as part of its preparation. The public will have the opportunity to submit on PC3 once it has been publicly notified.

4.0 Scale and Significance & Quantification of Benefits and Costs

This section of the report assesses the level of detail required for the purposes of this evaluation, including the nature and extent to which the benefits and costs of the proposal have been quantified.

4.1 Scale and Significance

Section 32(1)(c) of the RMA requires that this report contain a level of detail that corresponds with the scale and significance of the environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal.

The level of detail undertaken for this evaluation has been determined by assessing the scale and significance of the environmental, economic, social and cultural effects anticipated through introducing and implementing the proposed provisions (i.e. objectives, policies and rules) relative to a series of criteria. These criteria provide a framework for determining the scale and significance of the Plan Change.

Based on this the scale and significance of anticipated effects associated with this proposal are identified below:

Criteria	Scale/Significance			Comment
	Low	Moderate	High	
Basis for change			✓	The purpose of PC3 is to recognise and provide for the significant values associated with Kārewarewa urupā. The proposal is based on sound evidence, including the report by the Waitangi Tribunal, and feedback and submissions received from tangata whenua and landowners. After hearing submissions and evidence on Kārewarewa urupā, the Independent Hearings Panel for PC2 made factual findings on the merits of incorporating Kārewarewa urupā into the District Plan and recommended that the Council do so.
Addresses a resource management issue			✓	Kārewarewa urupā is a place of cultural and spiritual importance to tangata whenua that is not currently recognised in the District Plan and is at risk from inappropriate subdivision, use, and development. PC3 recognises and provides for the relationship between the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, which is a matter of national importance under section 6(e) of the RMA. It also recognises and provides for the protection of historic heritage from inappropriate subdivision, use, and development, which is a matter of national importance under section 6(f) of the RMA.
Degree of shift from the status quo			✓	PC3 provides for a notable shift in the status quo as it relates to the level of development enabled on the site. The District Plan currently enables the MDRS on the part of the site that

Criteria	Scale/Significance			Comment
	Low	Moderate	High	
				is within the General Residential Zone. PC3 would substantially restrict further development on the part of the site that has not yet been developed (identified as wāhanga tahi) and would generally only enable alterations to existing uses on sites that have already been developed (identified as wāhanga rua).
Who and how many will be affected/ geographical scale of effect/s	✓			Parties affected by PC3 are generally limited to the owners and occupiers of land within the spatial extent of the urupā. Tangata whenua with ancestral connections to the urupā will also be affected by the change.
Degree of impact on or interest from tangata whenua			✓	There is a high degree of interest from tangata whenua. Iwi authorities support the plan change.
Timing and duration of effect/s			✓	PC3 will have immediate legal effect when it is publicly notified, and ongoing effects once it becomes operative.
Type of effect/s		✓		PC3 is restrictive, rather than enabling. As such, the effects of PC3 are likely to be intangible, rather than tangible. PC places restrictions on land disturbance and development within the spatial extent of Kārewarewa urupā. These restrictions vary depending on the location. Within the area identified as wāhanga tahi, the restrictions are greater, and include restrictions on new buildings, earthworks, land disturbance, and subdivision. Within the area identified as wāhanga rua, the restrictions are lesser. While earthworks, land disturbance, and subdivision are restricted, alterations to existing buildings are provided for.
Degree of risk and uncertainty	✓			There is a low degree of risk and uncertainty associated with PC3. There is certain and sufficient information about Kārewarewa urupā, and its values to tangata whenua, to justify acting.

Overall, the scale and significance of the proposed provisions is considered to be moderate to high for the reasons outlined above.

Consequently, this evaluation report should contain a moderate to high level of detail and analysis related to the evaluation of the proposed provisions.

4.2 Quantification of Benefits and Costs

Section 32(2)(b) of the RMA requires that, where practicable, the benefits and costs of a proposal are to be quantified.

Due to the nature of the resource management issue being addressed by PC3, which includes both tangible and intangible values and effects, it is not practicable to quantify all benefits or costs associated with the plan change. As such, the identification of benefits and costs associated with this plan change is principally qualitative.

Notwithstanding this, some potential non-monetary costs associated with the plan change have been estimated as part of providing the additional information required under the RMA to justify qualifying matters. This information is set out in section 8.0 of this report.

5.0 Description of Proposal

PC3 proposed to incorporate Kārewarewa urupā into the District Plan, as recommended by the Independent Hearings Panel for PC2. This requires amendments to Schedule 9 of the District Plan (Sites and Areas of Significance to Māori), as well as amendments to the District Plan maps.

Sites within Schedule 9 are subject to the provisions of the Sites and Areas of Significance to Māori (SASM) chapter in Part 2 – Districtwide Matters of the District Plan. The SASM chapter is a district-wide overlay in accordance with the National Planning Standards. This means that, where a site is identified in Schedule 9, the provisions of the SASM chapter apply to it in addition to the provisions of the underlying zone.

PC3 proposes to amend Schedule 9 of the District Plan is as follows (with additions to the schedule shown underlined):

District Plan ID	Name	Type	Iwi	Key access and view points	Wāhanga
WTSx1	Kārewarewa Urupā	Urupā	Āti Awa		Tahi
WTSx2	Kārewarewa Urupā	Urupā	Āti Awa		Rua

PC3 also proposes to amend the "Historical, Cultural, Infrastructure and Districtwide" District Plan map series to add Kārewarewa urupā to the District Plan maps, as show in Figure 6:

Figure 6: the extent of Kārewarewa urupā proposed to be incorporated into Schedule 9 of the District Plan. The area shown in red is proposed to be subject to the District Plan's 'wāhanga tahi' provisions. The area shown in grey is proposed to be subject to the District Plan's 'wāhanga rua' provisions.

As a result of PC3, subdivision, use, and development within Kārewarewa urupā will be subject to the provisions of the SASM chapter. This includes one policy, which is as follows:

SASM-P1	*Waahi Tapu*
Waahi tapu and other places and areas significant to Māori and their surroundings will be protected from inappropriate *subdivision*, *development*, *land disturbance*, *earthworks* or change in *land* use, which may affect the physical features and non-physical values of the place or area. The *Council* will work in partnership with the relevant *iwi authority* for the ongoing and long term management and protection of *waahi tapu*. Relevant *iwi authorities* will be consulted on all *resource consent* applications affecting *waahi tapu and other places and areas significant to Māori* identified in the Schedule of Sites and Areas of Significance to Māori (Schedule 9).	

Sites within Kārewarewa urupā will also be subject to the rules of the SASM chapter, which vary depending on whether the site is within the wāhanga tahi overlay, or the wāhanga rua overlay. The following table summarises the rules for various activities within these areas:

Activity	**Wāhanga tahi overlay**	**Wāhanga rua overlay**
Land disturbance/ earthworks	Rule SASM-R2 (permitted): Permitted land disturbance is limited to fencing of the perimeter of the site, subject to an accidental discovery protocol.	Rule SASM-R3 (permitted): Up to 10m^3 of land disturbance or earthworks is permitted per year, subject to an accidental discovery protocol.
	Rule SASM-R10 (restricted discretionary): Other land disturbance and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.	Rule SASM-R11 (restricted discretionary): Other land disturbance and earthworks require resource consent as a 'restricted discretionary activity', subject to an accidental discovery protocol.
Additions/ alterations of existing lawfully established buildings	Rule SASM-R10 (restricted discretionary): Additions and alterations require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.	Rule SASM-R3 (permitted): Additions and alterations are permitted, subject to not including a basement or in-ground swimming pool.
		Rule SASM-R11 (restricted discretionary): Other additions and alterations require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.
Construction of new buildings	SASM-R18 (non-complying): New buildings require resource consent as a 'non-complying activity'.	Rule SASM-R3 (permitted): New ancillary buildings are permitted, subject to not including a basement or in-ground swimming pool.
		Rule SASM-R11 (restricted discretionary): Other new buildings require resource consent as a 'restricted-discretionary activity', subject to an accidental discovery protocol.

Activity	Wāhanga tahi overlay	Wāhanga rua overlay
Subdivision	SUB-DW-R10 (restricted discretionary): Subdivision of land that does not increase the number of allotments within which the site of significance is located requires resource consent as a 'restricted discretionary' activity.	
	SUB-DW-R15 (discretionary): Subdivision of land that increases the number of allotments within which the site of significance is located requires resource consent as a 'discretionary' activity.	

These rules will provide for the consideration of the actual or potential effects of subdivision, land use, and development on the values associated with Kārewarewa urupā when considering notification or substantive decisions on any resource consent application within the urupā. With respect to notification of consent applications, the Council will be required to consider whether the adverse effects of the activity on tangata whenua are minor or more than minor, and if so, notify tangata whenua (through the relevant iwi authority) of the consent application.

Section 86B(3) provides that rules that protect historic heritage have immediate legal effect. This means that the rules that apply to Kārewarewa urupā as set out in PC3 will have immediate legal effect from the date that PC3 is publicly notified.

6.0 Examination of Objectives

Section 32(1)(a) of the RMA requires that the evaluation report examine the extent to which the objectives of the proposal (proposed District Plan Change) are the most appropriate way to achieve the purpose of the RMA, which is to promote the sustainable management of natural and physical resources.

An examination of the proposed objective along with a reasonable alternative is set out below. The following set of criteria is used as a framework for examining the appropriateness of the objective:

1. Relevance (i.e. Is the objective related to addressing resource management issues and will it achieve one or more aspects of the purpose and principles of the RMA?)
2. Usefulness (i.e. Will the objective guide decision-making? Does it meet sound principles for writing objectives (i.e. does it clearly state the anticipated outcome?)
3. Reasonableness (i.e. What is the extent of the regulatory impact imposed on individuals, businesses or the wider community? Is it consistent with identified tangata whenua and community outcomes?)
4. Achievability (i.e. Can the objective be achieved with tools and resources available, or likely to be available, to the Council?)

While not specifically required by section 32 of the RMA, in some instances alternative objectives are also considered to ensure that the proposed objective(s) are the most appropriate to achieve the purpose of the RMA.

6.1 Objective for PC3

This Plan Change does not propose to change any existing objectives or add any new objectives to the District Plan. Rather, the objective of this Plan Change is the purpose of the Plan Change[42].

The proposed objective, along with an alternative objective, are set out below:

Objective of the plan change	To recognise and provide for Kārewarewa urupā as a site of significance to Māori.
Alternative objective	Do not recognise and provide for Kārewarewa urupā as a site of significance to Māori.

The following table examines both objectives using the framework set out above:

	Objective of the plan change (recognise and provide for Kārewarewa urupā)	**Alternative objective (do not recognise and provide for Kārewarewa urupā)**
Relevance		
Addresses a relevant resource management issue	**Yes.** The objective recognises and provides for the values associated with Kārewarewa urupā by managing subdivision, use, and development of land as it relates to those values.	**No.** The alternative objective does not have regard to the values associated with Kārewarewa urupā, and does not provide for the management of subdivision, use, and development in relation to those values.
Assists the Council to undertake its	**Yes.** The objective is consistent with the Council's functions under	**No.** The alternative objective is not consistent with the Council's functions under section 31(1)(a) of

[42] See the definition of 'objectives' under section 32(6) of the RMA.

	Objective of the plan change (recognise and provide for Kārewarewa urupā)	Alternative objective (do not recognise and provide for Kārewarewa urupā)
functions under s31 RMA	sections 31(1)(a) and (b) of the RMA.	the RMA, because it does not achieve integrated management of the effects of the use, development, or protection of land as it relates to Kārewarewa urupā.
Gives effect to higher-order planning documents	**Yes.** The objective gives effect to: • Objectives 15 and 28, and Policies 21, 22, and 49 of the RPS; • Objectives 1 and 5, and Policy 9 of the NPS-UD; • Objectives 3 and 6, and Policy 2 of the NZCPS; • Sections 6(e), 6(f), 7(a), 7(aa), 7(g), and 8 of the RMA.	**No.** The alternative does not recognise or provide for the values associated with Kārewarewa urupā, and does not give effect to the direction set by higher order planning documents in relation to these values.
Usefulness		
Guides decision-making	**Yes.** The objective recognises the existence of Kārewarewa urupā and provides a clear policy and rule framework for activities in relation to the urupā.	**Uncertain.** The alternative objective does not require the Council to make resource consent decisions in relation to Kārewarewa urupā. However, it may lead to confusion in the overall decision-making framework, as the site will continue to be subject to permitted activity accidental discovery protocol standards under the District Plan, and any future land disturbance would still require an archaeological authority under the HNZPTA.
Reasonableness		
Will not impose unjustifiably high costs on the community / parts of the community	**Yes.** While the objective imposes costs on parts of the community, these are not unjustifiably high in light of the significance of the values associated with Kārewarewa urupā.	**No.** Not recognising and providing for Kārewarewa urupā will continue to expose the urupā to potentially significant adverse effects as a result of inappropriate subdivision, use, or development. This is likely to lead to unjustifiably high costs to tangata whenua that have ancestral connection to the urupā.
Acceptable level of uncertainty and risk	**Yes.** There is certain and sufficient information about the extent and values associated with Kārewarewa urupā to recognise and provide for it in the District Plan.	**Uncertain.** Not recognising and providing for Kārewarewa urupā in the District Plan despite the information available to the Council creates uncertainty as it may give the impression that the urupā is not

	Objective of the plan change (recognise and provide for Kārewarewa urupā)	Alternative objective (do not recognise and provide for Kārewarewa urupā)
		there, or that it does not have significant value.
Achievability		
Consistent with identified tangata whenua and community outcomes	**Yes.** Recognising and providing for Kārewarewa urupā in the District Plan is supported by iwi authorities and is consistent with relevant iwi planning documents.	**No.** Not recognising and providing for Kārewarewa urupā would be contrary to the desired outcomes expressed by tangata whenua.
Realistically able to be achieved within the Council's powers, skills and resources	**Yes.** The Council already administers policies and rules in relation to sites and areas of significance to Māori.	**Yes.** To the extent that not recognising and providing for Kārewarewa urupā would create no additional obligations on Council in relation to resource consents.

Based on the examination set out above, the objective for the Plan Change is considered to be the most appropriate way to achieve the purpose of the RMA, which is to promote the sustainable management of natural and physical resources.

6.2 Operative District Plan objectives that are relevant to the Plan Change

In addition to the objective of the Plan Change as set out in the previous section, the following operative District Plan objectives are also relevant to the Plan Change:

Objective	Relevance
DO-O1 Tangata whenua	This objective seeks that the Council work in partnership with the tangata whenua of the District in order to maintain kaitiakitanga of the District's resources. PC3 is consistent with this objective because it recognises and provides for Kārewarewa urupā and the values associated with the urupā. It provides for the relationship between tangata whenua and the urupā and recognises the role of tangata whenua as kaitiaki of sites of significance within the District.
DO-O3 Development Management	This objective seeks enable more people to live in the District's urban environments, while accommodating identified qualifying matters that constrain development. PC3 is consistent with this objective. While the area subject to PC3 is part of the District's urban environment, wāhi tapu and sites of significance to Māori are also a qualifying matter under the RMA and the NPS-UD. PC3 accommodates a qualifying matter by managing subdivision, use, and development in a manner that recognises and protects the values associated with the urupā.
DO-O7 Historic Heritage	This objective seeks to protect historic heritage in the District, including by: • Recognising and protecting tangata whenua historic heritage including wāhi tapu and other places and areas of significance to Māori; and

Objective	Relevance
	• Providing for the appropriate use and development of natural and physical resources with historic heritage values, while ensuring any adverse effects are avoided, remedied, or mitigated. PC3 is consistent with this objective because it recognises and protects Kārewarewa urupā and the values associated with it from inappropriate subdivision, use, and development. PC3 protects the part of the urupā that has not yet been developed by placing restrictions on the further development of those parts of the urupā. PC3 continues to provide for appropriate use of the parts of the urupā that have already been developed, by continuing to provide for a modest amount of development associated with existing residential uses.

7.0 Evaluation of Provisions

Under s32(1)(b) of the RMA, reasonably practicable options to achieve the objective of the Plan Change need to be identified and examined. This section of the report evaluates the proposed provisions, as they relate to the objective. The analysis used to inform this process is outlined in section 3.0 of this report.

For each potential approach an evaluation has been undertaken relating to the costs, benefits, and the certainty and sufficiency of information (as informed by section 3.0 of this report) in order to determine the effectiveness and efficiency of the approach, and whether it is the most appropriate way to achieve the relevant objective(s).

The Council has considered the following potential options to achieve the objective of the Plan Change:

- **Option 1: Proposed approach.** Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.
- **Option 2: Status quo.** Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).
- **Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site).** Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include:
  - Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage;
  - Limiting subdivision within the area by introducing minimum allotment size and shape requirements.

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.		
Costs	**Benefits**	**Risk of Acting / Not Acting if there is uncertain or insufficient information**
Environmental • **Impacts on character and amenity values associated with undeveloped land proposed to be scheduled as *wāhanga tahi*.** The restrictions on development associated with the *wāhanga tahi* provisions creates a risk that the land may be left unmaintained, which may have adverse impacts on the character and amenity values of the area and surrounding sites. • **Opportunity costs – ability to undertake environmental improvements on land proposed to be scheduled as *wāhanga tahi*.** The restrictions on land disturbance associated with the *wāhanga tahi* provisions may restrict or prevent natural environment improvements, such as the planting of trees or other vegetation, from occurring on the site. ***Economic*** • **Opportunity costs – lost development potential on *wāhanga tahi* land.** The *wāhanga tahi* provisions	***Environmental*** • **Reducing risk of inappropriate disturbance of kōiwi/human remains.** The proposed provisions reduce the risk of further inappropriate disturbance of physical kōiwi/human remains that may be present in the area, that may otherwise occur as a result of the level of development provided for by the provisions of the underlying General Residential Zone. Any physical disturbance that may occur is appropriately managed through permitted activity standards, or through a resource consent process. ***Economic*** • **Increase certainty and reduced risk of unexpected costs.** The proposed provisions provide certainty and transparency that the area is likely to be considered an archaeological site that requires an archaeological authority under the Heritage New Zealand Pouhere Taonga Act. This reduces the risk of unexpected costs (including time and	It is considered that there is certain and sufficient information on which to base the evaluation of proposed provisions because: • Engagement with iwi has identified that the proposed provisions are supported by iwi; • There is sufficient information to support the evaluation (as outlined in section 3.2 of this report) including the Waitangi Tribunal's report on Kārewarewa Urupā, information gathered (including feedback from the community) as part of the preparation of PC2, and the recommendations of the Independent Hearings Panel on PC2.

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.		
are sufficiently restrictive that they would be likely to prevent the development of land for housing. This would result in economic opportunity costs in the form of forgone potential development returns to the landowner(s). It is noted that opportunity costs would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). • **Opportunity costs – reduced development potential on *wāhanga rua* land.** The *wāhanga rua* provisions will restrict the ability to construct additional residential units as a permitted activity within the *wāhanga rua* area. This would result in economic opportunity costs to landowners in the form of forgone development potential. However, landowners would still be able to undertake alterations to existing buildings in *wāhanga rua* areas to the extent provided for by the density standards in the underlying General Residential Zone. For example,	compliance costs) associated with obtaining an archaeological authority in an unplanned manner, or costs associated with enforcement action for undertaking land disturbance without an archaeological authority. • **Reduced costs to iwi.** Recognising and providing for Kārewarewa urupā in the District Plan is likely to reduce time and resourcing costs imposed on Te Ātiawa ki Whakarongotai, who have had to provide advice in an ad-hoc manner over a number of years on the location, extent and values associated with Kārewarewa Urupā. • **Other economic growth/employment related benefits (RMA s32(2)(a)(i)-(ii)).** No direct or indirect economic growth or employment related benefits have been identified in relation to the proposed provisions. ***Social*** • **Certainty as to the status of the land for current and future landowners.** Scheduling Kārewarewa Urupā in the District Plan provides certainty for current and future landowners as to the status of the land, and its history as an urupā. This	

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.		
existing buildings within *wāhanga rua* areas would be able to add additional storeys, or undertake horizontal extensions, so long as they comply with the permitted activity standards for development in *wāhanga rua* areas outlined in the rules of the SASM chapter. It is noted that opportunity costs would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). • **Consenting and compliance costs.** The proposed provisions impose a range of consenting compliance costs on landowners or developers for land disturbance or development in the scheduled area. Costs may also be imposed on Council and iwi in terms of advising on and processing applications. These costs include costs for obtaining resource consents, and additional costs associated with complying with accidental discovery protocols (although costs associated with accidental discovery protocols are	is particularly beneficial for future landowners, who, in the absence of any recognition in the District Plan, may not otherwise be aware that the area is an urupā. ***Cultural*** • **Protection of cultural values.** Recognising and providing for Kārewarewa Urupā in the District Plan provides a significant benefit to current and future generations of tangata whenua, including Te Ātiawa ki Whakarongotai, by protecting the cultural values associated with the site (including its significance as an urupā, significance as a resting place for tupuna, and its significance in relation to historic battles that occurred within the area) from further adverse effects associated with land disturbance and development. • **Recognition of the relationship of Te Ātiawa ki Whakarongotai with ancestral land and wāhi tapu.** Recognising and providing for Kārewarewa Urupā in the District Plan provides a significant benefit to past, present and future generations of Te Ātiawa ki Whakarongotai, as it recognises the relationship between Te	

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.		
likely to be imposed under the Heritage New Zealand Pouhere Taonga Act regardless of whether the land is scheduled as a wāhi tapu in the District Plan). • **Other economic growth/employment related costs (RMA s32(2)(a)(i)-(ii)).** There is likely to be economic growth and employment related opportunity costs as a result of housing development that does not occur as a result of the proposed provisions. ***Social*** • **Reduction in housing development capacity.** The proposed provisions are likely to lead to a reduction in theoretical plan-enabled residential development capacity (estimated at 318 residential units), although this will not have a material impact on the ability for the District Plan to provide for sufficient residential development capacity (see section 8.0 for analysis). However, impacts on housing development capacity would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an	Ātiawa ki Whakarongotai and their ancestral land and wāhi tapu sites and recognises their role as kaitiaki. • **Protection of heritage values.** Recognising and providing for Kārewarewa Urupā in the District Plan benefits current and future generations by protecting the heritage and archaeological values of the site from further adverse effects associated with land disturbance and development. • **Supporting stewardship of cultural and historic resources.** By raising awareness of the history of the site and its status as an urupā, the provisions support current and future owners of the land to exercise care and stewardship over a valuable cultural and historic resource. In particular, the provisions provide for landowners to engage with Te Ātiawa ki Whakarongotai, as kaitiaki, in the event of the accidental discovery of kōiwi/human remains.	

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.		
archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). ***Cultural*** • **Land disturbance on *wāhanga rua* sites.** The proposed provisions still enable a modest amount of land disturbance, subject to standards, on sites proposed to be scheduled as *wāhanga rua*. Land disturbance risks disturbing the tangible and intangible cultural and heritage values associated with the site (including the potential disturbance of kōiwi) and may have further adverse impacts on the relationship between Te Ātiawa ki Whakarongotai and the site.		
Effectiveness	**Efficiency**	
The proposed provisions are the most effective method of achieving the objectives of the plan and the purpose of the RMA because: • They protect Kārewarewa Urupā, including its cultural and heritage values, and physical kōiwi/human remain that may be present in the area, from further inappropriate land disturbance and development; • They provide current and future landowners with an awareness of the historical use and values associated with the site;	The proposed provisions are the most efficient method of achieving the objectives of the plan and the purpose of the RMA because: • While the provisions impose costs on landowners, they will provide for significant benefits to current and future generations by protecting the cultural and heritage values associated with the site from inappropriate land disturbance and development, and by recognising the relationship between Te Ātiawa ki Whakarongotai and their ancestral land and wāhi tapu;	

Option 1: Proposed approach. Recognise and provide for Kārewarewa Urupā as a wāhi tapu site by adding the site to Schedule 9 of the District Plan, as outlined in section 5.0 of this report.	
• The provisions recognise the relationship between Te Ātiawa ki Whakarongotai and their ancestral land and wāhi tapu sites, and their role as kaitiaki; • Appropriate levels of land disturbance or development can be managed through permitted activity standards or resource consent processes.	• The provisions provide certainty for current and future landowners as to the status of the land as a wāhi tapu site; • The provisions provide for an appropriate level of development to occur on sites that have already been developed; • The provisions support efficient regulation by improving the alignment between the District Plan and regulation of the area as an archaeological site that is already occurring under the Heritage New Zealand Pouhere Taonga Act.
Overall evaluation	
The proposed provisions are the most appropriate method of achieving the objectives of the plan and the purpose of the RMA because: • The provisions are the most effective and efficient method of protecting the cultural and heritage values associated with Kārewarewa urupā from further inappropriate land disturbance and urban development that is otherwise enabled by the provisions of the underlying General Residential Zone; • The provisions recognise and provide for the relationship between Te Ātiawa ki Whakarongotai and their ancestral land and wāhi tapu, and recognise their role as kaitiaki; • The provisions provide certainty for current and future landowners as to the status of the area as a wāhi tapu site, and enable current and future landowners to be aware of the historical use of the site, the cultural and heritage values of the site, and the significance of the site to tangata whenua; • The provisions provide for appropriate levels of land disturbance and development to be managed through permitted activity standards or resource consent processes; • It is consistent with District Objectives DO-O1, DO-O3, and DO-O7; • Recognising and providing for Kārewarewa Urupā gives effect to Objectives 15 and 28, and Policies 21, 22, and 49 of the RPS. • Recognising and providing for Kārewarewa Urupā gives effect to Objectives 3 and 6, and Policy 2 of the NZCPS, and Objectives 1 and 5 and Policy 9 of the NPS-UD; • The provisions enable Council to fulfil its obligations under sections 6(e), 6(f), 7(a), 7(aa), 7(g), and 8 of the RMA.	

Option 2: Status quo. Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).		
Costs	**Benefits**	**Risk of Acting / Not Acting if there is uncertain or insufficient information**
Environmental • **Further disturbance of kōiwi/human remains.** Under the level of development enabled by the provisions of the operative District Plan, there is an increased risk of disturbing or uncovering physical kōiwi/human remains that may be present in the area. ***Economic*** • **Compliance costs.** Regardless of whether the area is recognised as a wāhi tapu site under the District Plan, the area is already recognised as an archaeological site under the Heritage New Zealand Pouhere Taonga Act. Because of this, any land disturbance or development in the area is likely to require an archaeological authority from Heritage New Zealand. • **Costs associated with accidental discovery.** Under the level of development enabled by the provisions of the operative District Plan, there is a risk of increased levels of land	***Environmental*** • **Environmental improvements on undeveloped land.** Development of the undeveloped part of the area may enable environment improvements and may avoid, remedy, or mitigate adverse impacts on character and amenity values that could occur if the land is kept in an undeveloped and unmaintained state. ***Economic*** • **Land development.** Development of the land could provide economic benefits to current landowners, by enabling landowners to develop their land in an economically efficient manner. However, economic benefits would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). • **Other economic growth/employment related benefits (RMA s32(2)(a)(i)-(ii)).** Development of the land, where it is authorised to occur, could provide for local	It is considered that there is certain and sufficient information on which to base the evaluation of proposed provisions because: • Engagement with iwi has identified that the proposed provisions are supported by iwi; • There is sufficient information to support the evaluation (as outlined in section 3.2 of this report) including the Waitangi Tribunal's report on Kārewarewa Urupā, information gathered (including feedback from the community) as part of the preparation of PC2, and the recommendations of the Independent Hearings Panel on PC2.

Option 2: Status quo. Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).		
disturbance or development occurring without an archaeological authority, and increased risk of accidental discovery during construction. Costs associated with this include delays to construction, costs associated with obtaining an archaeological authority, and potential enforcement action costs. • **Other economic growth/employment related costs (RMA s32(2)(a)(i)-(ii)).** No direct or indirect economic growth or employment related costs have been identified in addition to those noted above. ***Social*** • **Uncertainty for current and future landowners.** Providing for the level of development enabled by the operative District Plan, while continuing to not recognise or provide for Kārewarewa Urupā, is likely to increase the number of people who may come to live within and own land within the urupā. Without recognition in the District Plan, people may be unaware of the historical use of the site, and the cultural and heritage values associated with it. This would also increase the number of people	economic growth and employment as a result of the construction associated with development. ***Social*** • **Enabling housing development capacity.** Development of the land to the level of development provided for by the operative District Plan would support the district to provide a sufficient supply of housing to meet the needs of current and future generations. However, due to the size of the site, its contribution to housing development capacity is likely to be modest in the context of the total development capacity of the District's urban environments (see section 8.0 for analysis). It is noted that housing development capacity would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). ***Cultural*** • No direct or indirect cultural benefits have been identified for this option.	

Option 2: Status quo. Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).		
and landowners affected by any future restrictions placed on the use and development of the land, where it is recognised as wāhi tapu site in the future. ***Cultural*** • **Adverse impacts on cultural values.** Maintaining the level of development enabled by the operative District Plan is likely to result in costs to current and future generations of tangata whenua (including Te Ātiawa ki Whakarongotai) as a result of the irreversible damage, loss or destruction of cultural values associated with the site (including its significance as an urupā, its significance as a resting place for tupuna, and its significance as a site in relation to historic battles that occurred in the area). • **Adverse impacts on the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu.** Te Ātiawa ki Whakarongotai have indicated that the threat that further development might occur on Kārewarewa Urupā is an ongoing matter of concern for the iwi.		

Option 2: Status quo. Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).		
Continuing to enable the level of development provided for by the operative District Plan is likely to result in significant adverse impacts on the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu. It also does not recognise the role of Te Ātiawa ki Whakarongotai as kaitiaki. • **Adverse impacts on heritage values.** Continuing to enable the level of development provided for by the operative District Plan is likely to result in costs to current and future generations through the irreversible damage, loss or destruction of heritage and archaeological values associated with the site.		
Effectiveness	**Efficiency**	
This option is not an effective method of achieving the objectives of the plan and the purpose of the RMA because: • It does not recognise the significance of Kārewarewa Urupā to tangata whenua or provide for the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu. It also does not recognise the role of Te Ātiawa ki Whakarongotai as kaitiaki.	This option is not an efficient method of achieving the objectives of the plan and the purpose of the RMA because: • While benefits to current landowners by enabling development, it is likely to impose significant costs on current and future generations of tangata whenua; • While it enables residential development capacity, the quantum of capacity enabled is not significant in the context of the District;	

Option 2: Status quo. Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).	
• It does not recognise the information about the location and significance of the urupā, as outlined in the Waitangi Tribunal Report and the Independent Hearings Panel's report on PC2. • It enables development without providing measures to protect the cultural or heritage values associated with Kārewarewa Urupā from inappropriate subdivision, use and development.	• It is also likely to impose costs and uncertainty on future landowners and residents who may not be aware that the area is an urupā, who may not wish to live on an urupā, and who may have to bear the increased costs associated with future restrictions (should the area be recognised as an urupā in Schedule 9 of the District Plan in the future).
Overall evaluation	
This option is not an appropriate method of achieving the objectives of the plan and the purpose of the RMA because: • It does not protect the cultural and heritage values associated with Kārewarewa Urupā from inappropriate subdivision, use and development; • It does not take into account the views of tangata whenua, does not recognise or provide for the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu, and does not recognise the role of Te Ātiawa ki Whakarongotai as kaitiaki; • It does not recognise the information about the location and significance of the urupā, as outlined in the Waitangi Tribunal Report and the Independent Hearings Panel's report on PC2. • It maintains uncertainty about the status of the site, and this uncertainty is likely to adversely impact current and future landowners and residents; • It is not consistent with District Objectives DO-O1, DO-O3, and DO-O7; • It does not give effect to Objectives 15 and 28, and Policies 21, 22, and 49 of the RPS; • It does not give effect to Objectives 3 and 6, and Policy 2 of the NZCPS, and Objectives 1 and 5 and Policy 9 of the NPS-UD; • It does not enable the Council to fulfil its obligations under sections 6(e), 6(f), 7(a), 7(aa), 7(g), and 8 of the RMA.	

Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site). Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include: • Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage; • Limiting subdivision within the area by introducing minimum allotment size and shape requirements.		
Costs	**Benefits**	**Risk of Acting / Not Acting if there is uncertain or insufficient information**
Environmental • The environmental costs associated with this option are similar to Option 2, except the scale or likelihood of the costs are reduced as a result of the reduced level of development provided for by this option. ***Economic*** • The economic costs associated with this option are similar to Option 2, except the scale or likelihood of the costs are reduced as a result of the reduced level of development provided for by this option. • **Opportunity costs – foregone development potential.** Reducing the level of development enabled within the area, this option would result in economic opportunity costs to landowners in the form of forgone development potential, although the	***Environmental*** • The environmental benefits associated with this option are similar to Option 2. ***Economic*** • The economic benefits associated with this option are similar to Option 2, except the scale or likelihood of the benefits are reduced as a result of the reduced level of development provided for by this option. ***Social*** • The social benefits associated with this option are similar to Option 2, except the scale or likelihood of the benefits are reduced as a result of the reduced level of development provided for by this option. ***Cultural*** • No direct or indirect cultural benefits have been identified for this option.	It is considered that there is certain and sufficient information on which to base the evaluation of proposed provisions because: • Engagement with iwi has identified that the proposed provisions are supported by iwi; • There is sufficient information to support the evaluation (as outlined in section 3.2 of this report) including the Waitangi Tribunal's report on Kārewarewa Urupā, information gathered (including feedback from the community) as part of the preparation of PC2, and the recommendations of the Independent Hearings Panel on PC2.

Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site). Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include: • Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage; • Limiting subdivision within the area by introducing minimum allotment size and shape requirements.		
impact of this would be less than the impact associated with Option 1. However, opportunity costs would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). ***Social*** • The social costs associated with this option are similar to Option 2, except the scale or likelihood of the costs are reduced as a result of the reduced level of development provided for by this option. • **Reduction in housing development capacity.** Reducing the level of development enabled within the area, this option would result in foregone housing development capacity for the district, although the impact on housing development capacity would be less than the impact associated with Option		

Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site). Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include: • Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage; • Limiting subdivision within the area by introducing minimum allotment size and shape requirements.		
1. However, impacts on housing development capacity would only be realised to the extent that development is able to obtain necessary approvals under other Acts (particularly an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014). ***Cultural*** • The economic costs associated with this option are similar to Option 2. The cultural costs are unlikely to be notably reduced as a result of providing for lower density development, as Te Ātiawa ki Whakarongotai have indicated that any further development at the site is a matter of concern for iwi.		
Effectiveness	**Efficiency**	
This option is not an effective method of achieving the objectives of the plan and the purpose of the RMA because: • While this option takes into account the existence of Kārewarewa Urupā, it does not recognise the significance of Kārewarewa Urupā	This option is not an efficient method of achieving the objectives of the plan and the purpose of the RMA because: • While there are benefits to current landowners by enabling development (albeit reduced compared to Option 2), it is likely to	

Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site). Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include: • Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage; • Limiting subdivision within the area by introducing minimum allotment size and shape requirements.	
to tangata whenua or provide for the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu. It also does not recognise the role of Te Ātiawa ki Whakarongotai as kaitiaki. • This option does not effectively protect the cultural or heritage values associated with the site, because it enables land disturbance and development to occur without regard to the irreversible impacts on those values, or the impacts on tangata whenua.	impose significant costs on current and future generations of tangata whenua; • While it enables residential development capacity, the quantum of capacity enabled is not significant in the context of the district (and in any case less than compared to Option 2); • This option is likely to result in a confusing regulatory framework that lacks transparency and does not guide appropriate decision making. Reducing development density in the area without recognising Kārewarewa urupā means that it will not be clear to District Plan users why development density has been reduced. This option also does not provide clear policy direction to decision-makers on resource consents for development within the area. • It also imposes costs and uncertainty on future landowners and residents who may not be aware that the area is an urupā, who may not wish to live on an urupā, and who may have to bear the increased costs associated with future restrictions (should the area be recognised as an urupā in Schedule 9 of the District Plan in the future).
Overall evaluation	
This option is not an appropriate method of achieving the objectives of the plan and the purpose of the RMA because: • It does not protect the cultural and heritage values associated with Kārewarewa Urupā from inappropriate subdivision, use and development; • While it does take into account the existence of Kārewarewa Urupā, it does not recognise or provide for the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu, and does not recognise the role of Te Ātiawa ki Whakarongotai as kaitiaki;	

Option 3: Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site). Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include: • Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage; • Limiting subdivision within the area by introducing minimum allotment size and shape requirements.
• It maintains uncertainty about the status of the site, and this uncertainty is likely to adversely impact current and future landowners and residents; • It is likely to lead to a confusion and inefficient regulatory and policy framework that does not guide appropriate decision-making; • It is not consistent with District Objectives DO-O1, DO-O3, and DO-O7; • It does not give effect to Objectives 15 and 28, and Policies 21, 22, and 49 of the RPS; • It does not give effect to Objectives 3 and 6, and Policy 2 of the NZCPS, and Objectives 1 and 5 and Policy 9 of the NPS-UD; • It does not enable the Council to fulfil its obligations under sections 6(e), 6(f), 7(a), 7(aa), 7(g), and 8 of the RMA.

8.0 Additional information for qualifying matters

Under section 77G(6) of the RMA, the Council may provide for District Plan provisions to be less enabling of development than the requirements of the MDRS, where a qualifying matter exists.

Section 77I of the RMA provides for the following matters as qualifying matters:

> *(a) a matter of national importance that decision makers are required to recognise and provide for under section 6:*
>
> *(b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:*
>
> *(c) a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:*
>
> *(d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:*
>
> *(e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:*
>
> *(f) open space provided for public use, but only in relation to land that is open space:*
>
> *(g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:*
>
> *(h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:*
>
> *(i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:*
>
> *(j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.*

Where a plan change proposes to accommodate a qualifying matter, section 77J(3) of the RMA requires that this evaluation report do the following:

> *(a) demonstrate why the territorial authority considers—*
>
> > *(i) that the area is subject to a qualifying matter; and*
> >
> > *(ii) that the qualifying matter is incompatible with the level of development permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 for that area; and*
>
> *(b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and*
>
> *(c) assess the costs and broader impacts of imposing those limits.*

This information is set out in the following sections of this report.

8.1 Section 77J(3)(a): justification for the qualifying matter

The Waitangi Tribunal report states that the traditional, historical, and archaeological evidence is clear that the block of land is an urupā, and that the urupā has “great significance in cultural and spiritual terms” for Ātiawa ki Whakarongotai. In addition to this, the Independent Hearings Panel for PC2 found that:

> *The Kārewarewa Urupā Block values are historical, spiritual and cultural associated with the occupation of Te Ātiawa and events associated with that land. These are not solely burial values as an urupā but importantly include those values. That includes the remains of esteemed ancestors that engage the highest obligations for protection and care following Te Ātiawa's tikanga.*[43]

Based on the information available to the Council, the existence of the urupā and the values associated with it are a matter that the Council must recognise and provide for under section 6(e) of the RMA (which provides for the relationship between Māori and their culture and traditions with their ancestral land, sites, and wāhi tapu).

In addition to this, wāhi tapu are historic heritage features under the provisions of the District Plan, as well as the definition of 'historic heritage' outlined in section 2 of the RMA. On this basis, wāhi tapu are also a matter that Council must recognise and provide for under section 6(f) of the Act (which provides for the protection of historic heritage from inappropriate subdivision, use, and development).

On this basis, incorporating Kārewarewa urupā into Schedule 9 of the District Plan is a qualifying matter under the following provisions of the Act:

- S77I(a): *a matter of national importance that decision makers are required to recognise and provide for under section 6*.

The spatial extent of the proposed additions to Schedule 9 of the District Plan are the same as the area identified as the urupā block in the Waitangi Tribunal Report, and as recommended by the Independent Hearings Panel on PC2 (see).

Kārewarewa Urupā is predominantly located within the General Residential Zone (which is required to incorporate the MDRS). As an urupā, the site is sensitive to development that involves the disturbance of land or the construction of buildings. This is because land disturbance and building construction may have significant adverse effects on the tangible and intangible cultural and heritage values associated with the site (including the potential to encounter or otherwise disturb kōiwi). The prospect that further development might occur at the urupā is a cause of deep concern for Te Ātiawa ki Whakarongotai, and this concern is described most clearly by Te Ātiawa themselves, in section 1.1.1 of the Waitangi Tribunal Report.

On this basis, the level of development permitted by the MDRS is considered to be inappropriate to occur at the urupā. It is therefore appropriate to provide restrictions on development in order to provide for the Kārewarewa Urupā as a qualifying matter. Schedule 9 of the District Plan describes appropriate levels of development in relation to various types of wāhi tapu site. The descriptions associated with *wāhanga tahi* and *wāhanga rua* categories are most relevant to the types of land located at Kārewarewa Urupā. These categories are described in the following table (from Schedule 9):

Wāhanga	Type	Key development threats	Sensitivity to development	Desired level of protection
Wāhanga tahi	Urupā (Māori burial grounds) and parekura (battlefield)	Land disturbance, earthworks	High – sites are largely unoccupied/ undeveloped.	High – rules intended to provide a high level of protection as there is a high risk land disturbance will encounter kōiwi.

[43] Independent Hearings Panel on PC2. (2023). *The Report of the Independent Hearings Panel on PC2,* at para. [159](a). See Appendix C.

Wāhanga	Type	Key development threats	Sensitivity to development	Desired level of protection
Wāhanga rua	Urupā (Māori burial grounds), pā (village), papakāinga (place of settlement)	Land disturbance, earthworks, construction of new buildings and alterations, additions and relocations of existing building, and network utilities	Moderate – land is modified and currently occupied by residents and/or businesses	Moderate – rules intended to allow for a reasonable level of development to occur provided land disturbance volumes are reasonably low and discovery protocols are followed

As set out in section 7.0 of this report, the levels of development evaluated as being appropriate in relation to the urupā are:

- For undeveloped land, the level of development provided for by the *wāhanga tahi* provisions;
- For land that has already been developed, the level of development provided for by the *wāhanga rua* provisions.

8.2 Section 77J(3)(b): impact on the provision of development capacity

Under PC3, the construction of new residential units in a *wāhanga tahi* area is a non-complying activity, and the construction of new residential units in a *wāhanga rua* area is a restricted discretionary activity (see section 5.0). While additional dwellings could be developed in the *wāhanga rua* area as a restricted discretionary activity, for the purposes of identifying the potential impact of the qualifying matter on the provision of development capacity, it is assumed that both *wāhanga tahi* and *wāhanga rua* areas would not contribute to residential development capacity.

The total area of General Residential Zone proposed to be added to Schedule 9 measures approximately 7.1 hectares. This includes:

- 3.2 hectares located in *wāhanga tahi*;
- 3.9 hectares located in *wāhanga rua*.

The following table identifies the impact of adding Kārewarewa Urupā to Schedule 9 of the District Plan on plan-enabled residential development capacity:

	Additional theoretical plan-enabled residential development capacity (additional residential units)		**Difference (forgone additional residential development capacity as a result of accommodating the qualifying matter)**
	Level of additional development otherwise enabled by the General Residential Zone provisions (residential units)	Level of additional development provided for by the wāhanga tahi and wāhanga rua provisions (residential units)	
Within the *wāhanga tahi* area	228 residential units (note 1)	0 residential units	318 residential units
Within the *wāhanga rua* area	90 residential units (note 2)		
Notes: Note 1: To calculate a theoretical yield for the purposes of identifying the impact of the qualifying matter on the provision of development capacity, the number outlined above is derived by applying a notional density of one residential unit per 140m^2 site area. This is based on the Ministry for the Environment's fact sheet on the MDRS[44]. This is likely to be a high estimate, as it does not account for legal roads and public reserves that may be required to enable development of the area. Note 2: This number is based on an assumption that 2 additional residential units could be developed on each allotment (for a total of 3 per allotment) as a permitted activity under the General Residential Zone provisions. There are 45 developed allotments that are located wholly or partially within the *wāhanga rua* area.			

For context, the area extent of General Residential Zone proposed to be covered by either the wāhanga tahi or wāhanga rua provisions (approximately 7.1 hectares) equates to approximately 0.3% of the total area of the General Residential Zone.

The District Plan enables a surplus housing supply of 18,785 residential units, according to the Council's latest Housing and Business Development Capacity Assessment[45]. Because of this, providing for Kārewarewa urupā will not have a material impact on the ability for the District Plan to provide for sufficient residential development capacity.

8.3 Section 77J(3)(c): Assessment of the costs and broader impacts of the qualifying matter

Evaluation of the costs and broader impacts of the qualifying matter are set out in the evaluation of Option 1 in section 7.0 of this report. The identified costs include (in no particular order):

- Reduction in housing development capacity (although this will not have a material impact on the ability for the District Plan to provide for sufficient residential development capacity).
- Opportunity costs associated with reduced development potential on the sites subject to the provisions (noting that further development within the area is already subject to obtaining an archaeological authority under the Heritage New Zealand Pouhere Taonga Act).
- Opportunity costs associated with reduced ability to undertake amenity or other environmental improvements on undeveloped land.

[44] See Ministry for the Environment (2021). *Intensification Options – Factsheet*. See https://environment.govt.nz/assets/what-government-is-doing/factsheet-mdrs-graphic.pdf
[45] See: https://wrlc.org.nz/wp-content/uploads/2023/10/HBA3-CHAPTER-5-Kapiti.pdf

- Consenting, compliance, and enforcement costs.

The broader impacts of the qualifying matter include:

- Contributing to restoring the relationship between Te Ātiawa ki Whakarongotai and their ancestral land, sites, and wāhi tapu.
- Protection of tangible and intangible cultural, spiritual, and heritage values for past, present and future generations.
- Providing certainty for present and future generations of landowners and occupiers about the status of the land as a wāhi tapu, and a site of significance to Te Ātiawa ki Whakarongotai.

The costs of the qualifying matter are reasonable in light of the broader impacts, and in light of the sustainable management purpose of the RMA and the obligation to recognise matters of national importance under sections 6(e) and 6(f) of the RMA.

9.0 Conclusion

The purpose of PC3 is to recognise and provide for Kārewarewa urupā as a site of significance to Māori.

Kārewarewa urupā is a place of significant spiritual, cultural, and historic heritage value to tangata whenua. Te Ātiawa have described Kārewarewa urupā as being used as an urupā from the mid-19th century, with several significant tūpuna being buried there. The urupā was retained in Māori ownership until it was sold in 1969 to the Waikanae Land Company. At the time it was sold, the land was covered by a 'Maori Cemetery' designation in the Horowhenua County Council District Scheme. This designation was removed by the Horowhenua County Council in 1970 on the application of the Waikanae Land Company, who subsequently developed the land for housing. Kōiwi/human remains were discovered during development works in 2000. No further development has occurred since this time. Today, approximately half of the urupā has been developed for housing, with the remaining half being undeveloped.

The history of the urupā, and the values associated with it, are recorded in a report by the Waitangi Tribunal's report on Kārewarewa urupā, published in 2020. The Independent Hearings Panel for Plan Change 2 also examined the evidence of the existence and values associated with the urupā, and concluded that:

> *There is no doubt that the cultural values of the Kārewarewa Urupā Block are, for Te Ātiawa, significant and have endured irrespective of legal and development processes and changes following the acquisition of the land by the Waikanae Land Company in 1968. These values warrant recognition.*

The Independent Hearings Panel for PC2 recommended that the Council incorporate Kārewarewa urupā into Schedule 9 of the District Plan as a site of significance to Māori. PC3 gives effect to that recommendation. PC3 is supported by Te Rūnanga o Toa Rangatira (on behalf of Ngāti Toa Rangatira), Te Ātiawa ki Whakarongotai Charitable Trust, and Ngā Hapū o Ōtaki.

The Council has evaluated three options for achieving the purpose of PC3. The evaluation demonstrates that incorporating Kārewarewa urupā into Schedule 9 of the District Plan is the most appropriate approach out of the options considered because:

- The provisions are the most effective and efficient method of protecting the cultural and heritage values associated with Kārewarewa urupā from further inappropriate land disturbance and urban development that is otherwise enabled by the provisions of the underlying General Residential Zone;
- The provisions recognise and provide for the relationship between Te Ātiawa ki Whakarongotai and their ancestral land and wāhi tapu, and recognise their role as kaitiaki;
- The provisions provide certainty for current and future landowners as to the status of the area as a wāhi tapu site, and enable current and future landowners to be aware of the historical use of the site, the cultural and heritage values of the site, and the significance of the site to tangata whenua;
- The provisions provide for appropriate levels of land disturbance and development to be managed through permitted activity standards or resource consent processes.

Recognising and providing for Kārewarewa urupā as a site of significance to Māori, as proposed by PC3, provides for the effects of subdivision, land use, and development on Kārewarewa urupā to be managed through the District Plan. This is consistent with the objectives of the District Plan, including objectives DO-O1, DO-O3, and DO-O7. It gives effect to the relevant policies set out in higher order planning documents, including the RPS, NZCPS, and NPS-UD. The provisions also enable Council to fulfil its obligations under sections 6(e), 6(f), 7(a), 7(aa), 7(g), and 8 of the RMA. On this basis, PC3 provides for the District Plan to achieve the sustainable management purpose of the RMA in relation to Kārewarewa urupā.

Appendix A. Kārewarewa Urupā Report (Waitangi Tribunal, 2020)

Appendix B. Information from PC2 relevant to Kārewarewa urupā

Appendix C. Independent Hearings Panel's Report on PC2

Appendix D. Iwi authority feedback on PC3

THE KĀREWAREWA URUPĀ REPORT

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THE KĀREWAREWA URUPĀ REPORT

PRE-PUBLICATION VERSION

WAI 2200

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Minister for Arts, Culture and Heritage

The Honourable Kelvin Davis
Minister for Crown–Māori Relations

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

25 May 2020

E ngā Minita,

Tēnā koutou i roto i ēnei rā taumaha. He maha ngā whenua e pāngia ana e te mate Korona, a tini noa iho ngā kaumātua me ngā tamariki e riro ana i te mate i roto i ngā marama e hia ake nei. Tēnei te tangi atu ki a rātou katoa te hunga kua kapohia e te ringa kaha o aitua.

Tēnā anō hoki koutou i tā koutou mahi e hoehoe haere nā ki tēna wāhi, ki tēna wāhi, ki te kawe i ia utanga, i ia utanga, ki te iti, ki te rahi. Tēnei tā mātou kete nei, e hiahiatia ana e mātou o te Rōpū Whakamana i te Tiriti o Waitangi kia utaina ki tō

Ministers,

We extend our sincere greetings to you in these challenging times. Many countries continue to be in the grip of the Covid-19 pandemic, which has taken incredible numbers of both young and old over these past few months. We respectfully acknowledge all of those who have succumbed to this tragic illness.

You have steered our nation's waka throughout this difficult period and ensured that assistance has been provided to those most in need. The Waitangi Tribunal now has a small contribution to make in support of

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MINISTRY OF JUSTICE
Tāhū o te Ture

koutou waka. Mā koutou e pai kia kawea atu ki te tauihu, ki te taurapa rānei, nā te mea, he pai kia pūkai atu ngā taonga matarahi ki te taurapa. Kāti ēnā, me hori pū tā mātou kupu.

Tērā tētahi whenua ko te Kārewarewa te ingoa, kua oti kē atu anō e mātou te pūrongo atu hei titiro mā koutou ngā Minita me te ao whānui. Kāore rawa te whenua i rohea atu hei urupā, ēngari he urupā rongonui ki Waikanae i ngā tau maha kua hori nei. E hia kē ngā tau ka nui kē te mahi takeo i ngā mahi ake a Te Ātiawa/Ngāti Awa ki te whakapai ngātahi i tēnei kaupapa, e rahua haere tonutia ana hoki e te ture whenua me ngā kaupapa here. Tērā pea he rite tonu rātou ki te pūngawerewere i piki noa kia eke ia ki te patu o te whare, a kāore ia i eke; heoi, tohe pūnoke tonu ana, kātahi ka eketia tana wāhi i tohe ai.

Kei roto i te pūrongo nei ngā hua o ngā hui i whakahaeretia, ngā take i āta wānangahia, ā ko tōna whakatutukitanga ko ngā tohutohu me ngā tūmanako hei whiriwhiri mā koutou, hei whakatinana hoki mā te Kāwanatanga.

Kia tau ki a koutou katoa te rangimarie, me te aroha noa, me te rongomau.

your efforts to improve outcomes for our nation. You can determine if it has a place in the bow or the stern of your waka, because we recognise that the most important cargo should take precedence in the stern. Let us now turn to the purpose of this report.

This report now presented to you and the general public concerns a parcel of land named Kārewarewa. Despite being a historically significant burial site in Waikanae for many years, it has not been formally set aside as a cemetery. Over many years, Te Ātiawa/Ngāti Awa have made efforts to have this matter addressed but were continually thwarted by contemporary land laws and policies. Hopefully now they will, like the spider that tried many times to scale the wall of a house, eventually succeed by perseverance.

The report reflects the outcomes of our hearings, the matters that were raised, the aspirations presented, and guidance for you and the Government to consider in your deliberations on how to deal with this matter.

May harmony, love, and peace be upon you all.

Claims about Kārewarewa urupā were lodged by Te Ātiawa/Ngāti Awa ki Kapiti and heard in 2018–19 as part of our Porirua ki Manawatū inquiry. We agreed to prepare an early report on the urupā, in advance of our iwi volume for Te Ātiawa/Ngāti Awa, because the urupā requires urgent protection from further residential development. The report is presented now in pre-publication form but our findings and recommendations will not change in the final publication.

In 1839, the historically important battle of Kuititanga occurred in the Waikanae district, ending a period of conflict between Te Ātiawa/Ngāti Awa and Ngāti Raukawa. Many of those who died were buried on land at the eastern confluence of the Waikanae and Waimeha Rivers. Other prominent ancestors were also buried there. These included Metapere Te Waipunahau (a senior rangatira and the mother of Wi Parata and Hemi Matenga) and the famed Kahe Te Rauoterangi. This urupā is known as Kārewarewa. After the introduction of the native land laws, the people tried repeatedly to set about 20-acres aside as an urupā between 1896 and 1919. The Kārewarewa urupā block was finally granted its own separate title as Ngārara West A14B1 in 1919 but was not formally set apart as a native (later Māori) reservation.

In 1968, a meeting of assembled owners was called under the Māori Affairs Act 1953 to vote on a resolution to sell this block to a development company, the Waikanae Land Company. Having been advised that this was not the urupā block at the meeting, the owners voted to vest the land in the Māori Trustee for sale. Only 13 of the 77 owners were present (in person or by proxy). We found that the statutory regime allowed small minorities of owners (as in this case) to sell the land of the majority without their knowledge or consent. The Māori Affairs legislation authorised a very low quorum for such meetings, and then provided for the Māori Trustee to act as agent to execute the deed (circumventing the non-consent of the majority of owners). There were no checks and balances in this system because the Māori Land Court's confirmation of a sale was confined by statute to matters of price.

We found that this statutory regime deprived owner groups of their tino rangatiratanga over their land and breached the Treaty principles of partnership and active protection. The prejudice in this case was the loss of ownership and control of this significant urupā, leaving it protected only by its cemetery designation in the district plan.

In 1969, the Waikanae Land Company purchased the urupā block from the Māori Trustee. It then applied to the Horowhenua County Council for a district plan change under the Town and Country Planning Act 1953, in order to remove the 'Māori Cemetery' designation and develop the land for housing. In our inquiry, the Crown conceded that it failed to 'adequately investigate' whether the block was an urupā when it became aware of this application. The Crown also conceded that it failed to file an objection with the council or intervene to protect the urupā, which 'led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'. We agreed that this concession was apt.

The Horowhenua County Council decided to revoke the cemetery designation in 1970, despite objections from tribal leaders. The council reached this decision partly because the information provided at the committee hearing was incorrect or ill-informed. This included the failure to uncover

historical evidence about the urupā, which resulted in a belief that the land had been set aside in 1919 to be used in the future as a new 'cemetery'. There was also a mistaken belief that the owners had unanimously sold the block (when only a small minority had voted to do so). But the council was also influenced by the good town planning principles in the Town and Country Planning Act 1953. We found that this Act was inconsistent with Treaty principles. It was a monocultural piece of legislation which took no account of Māori values or interests, and which accorded iwi and hapū no statutory role – in either consultation or decision-making – in district plan processes.

Further, we found that the Burial and Cremation Act 1964 gave little or no protection to Māori burial grounds, and did not protect Kārewarewa in this instance.

The former owners and the wider iwi were prejudiced by the desecration of the urupā in the 1970s. About 350,000 cubic metres of dredged material from the adjacent wetland was dumped on top of it, followed by further modification and the construction of streets and houses on more than half of the urupā block. This was very serious for the kaitiaki, especially for those whose ancestors were buried there.

The remaining part of Kārewarewa was spared development because the company went into receivership in the late 1970s. In 1990–2000, however, work resumed in the company's name on behalf of unpaid security holders. During preparatory work for further development, kōiwi were exposed on two occasions, which resulted in an unsuccessful Historic Places Trust prosecution. The protection given the urupā by the Historic Places Act 1993 – once kōiwi were uncovered – does seem to have deterred the company's developers from further action at the time. In 2014–18, the developers resumed their attempts. They began with an archaeological investigation aimed at delineating the exact location and limits of burials on the undeveloped part of Kārewarewa. In 2016, Heritage New Zealand Pouhere Taonga granted an application for an exploratory authority to dig a test pit. The application process under section 56 of the Heritage New Zealand Pouhere Taonga Act 2014, and the degree of protection provided for Kārewarewa by this Act, were strongly debated between the Crown and claimants.

We found that there are systemic Treaty breaches in the processes for exploratory authorities and the requirements of section 56, especially as compared to the requirements for other kinds of archaeological authorities under the Act. The statutory timeframe for processing and deciding section 56 applications is inadequate. There is no requirement for applicants to provide an assessment of Māori values or the impact of an invasive exploratory investigation on those values, even though wāhi tapu (in this case an urupā) may be involved. Further, section 56 does not require decision-makers to consider Māori values or the impact on those values, again despite the use of

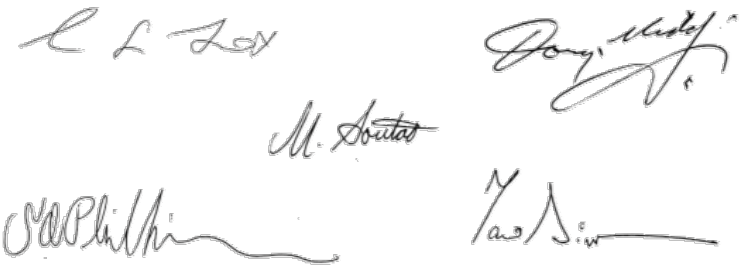
'invasive' techniques on an urupā. These flaws reflect an imbalance in section 56. Although invasive investigations may have little or no archaeological effects, they may still have profound spiritual and cultural effects in the case of wāhi tapu. Also, the appeal rights in the Act are (and will remain) inadequate so long as iwi organisations are inadequately resourced. We found that the claimants were prejudiced by the granting of the application under section 56 of the Act.

At the end of our report, we made a number of recommendations to prevent the recurrence of such prejudice if future applications are made relating to Kārewarewa or other urupā. We recommended that the Māori Heritage Council lead a review of the statutory timeframes for section 56 applications, following which Heritage New Zealand would recommend any necessary changes to the Minister. We also recommended the amendment of section 56 to require an assessment of Māori values in the case of wāhi tapu (including urupā), and an assessment of the impact of the invasive exploratory investigation on those values. Also, section 56 should be amended so that the decision-makers must take Māori values (and impacts on those values) into account for wāhi tapu.

Under section 4A of the Treaty of Waitangi Act 1975, the Tribunal may not make any recommendations about 'the return to Māori ownership of any private land' or 'the acquisition by the Crown of any private land'.

We hope that this matter may be resolved by both statutory amendment (to prevent future prejudice) and dialogue between parties, so that the Crown's Treaty obligation to protect Kārewarewa urupā will be given proper effect.

Nāku noa, nā



Deputy Chief Judge Caren Fox, the Honourable Sir Douglas Lorimer Kidd KNZM, Dr Grant Phillipson, Tania Te Rangingangana Simpson, Dr Monty Soutar

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PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Kārewarewa Urupā Report – Pre-publication Version*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted and typographical errors rectified. Additional maps, photographs, and illustrative material may be inserted. A select record of inquiry may be appended. However, the Tribunal's findings and recommendations will not change.

ABBREVIATIONS

app	appendix
CA	Court of Appeal
CE	chief engineer
ch	chapter
cl	clause
doc	document
ed	edition, editor
ltd	limited
m	metre
MCB	Manawatū Catchment Board
memo	memorandum
n	note
no	number
NZ	New Zealand
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZTA	New Zealand Transport Agency
p, pp	page, pages
para	paragraph
PC	Privy Council
pt	part
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
TAKW	Te Ātiawa ki Whakarongotai
v	and
vol	volume
Wai	Waitangi Tribunal claim
WLC	Waikanae Land Company

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2200 record of inquiry. A full copy of the index to the record is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION

1.1 Introduction

1.1.1 What this report is about

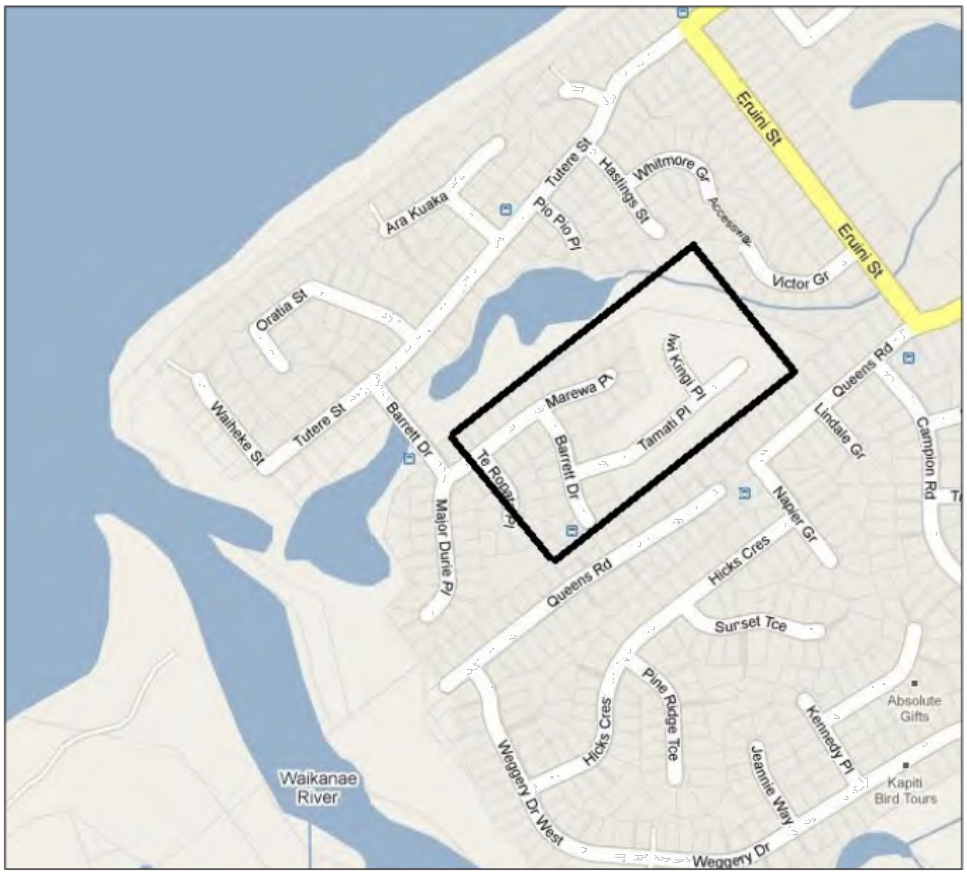
This report is an exception to the series of volumes being prepared for the iwi phases of the Porirua ki Manawatū inquiry. One volume has been released so far on Muaūpoko claims.[1] The present report addresses claims about Kārewarewa urupā, which was raised with us as an urgent matter during the Te Ātiawa / Ngāti Awa hearings in 2018–19. Closing and reply submissions were filed in late 2019 and early 2020. The release of the report has been delayed slightly by the Covid-19 outbreak and lockdown. We are releasing it early in pre-publication format in order to assist the parties to resolve this important matter as soon as possible.

Our first introduction to this urupā was during a site visit at Waikanae Beach on 20 August 2018, the first day of hearings for Te Ātiawa / Ngāti Awa. To us, it looked the same as any other suburban neighbourhood, with houses and a grassed area next to them, which the claimants referred to as the urupā at Tamati Place (see figure 2). This piece of land is owned by the Waikanae Land Company. Claimant Ben Ngaia explained: 'Kārewarewa today contains housing development but also an area of open space which has not been developed. We continue to have no meaningful way to express our kaitiakitanga to that whenua.'[2] Manu Parata told the Tribunal that the alienation and inappropriate development of Kārewarewa urupā was a major grievance for the iwi. He wanted the land protected from further development.[3]

The late Paora Ropata filed the Wai 1945 claim about the urupā in 2008.[4] Mr Ropata provided evidence on behalf of the Kaunihera Kaumātua (Kaumātua Council) at our second hearing. He explained that the urupā was located on a 20-acre block at Waikanae Beach, Ngārara West A14B1, which the Native Land Court had made inalienable in 1896. At a meeting of assembled owners in 1968, those present voted to vest the land in the Māori Trustee for sale. According to Mr Ropata, they did so because of incorrect 'legal advice' that the piece of land being sold was not the urupā block. The Māori Trustee sold the land to the Waikanae Land Company in 1969. The company applied to the county council to have the

1. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report: Pre-Publication version* (Wellington: Waitangi Tribunal, 2017)
2. Benjamin Ngaia, answers to written questions, 11 October 2018 (doc E3(d)), p 3
3. Manu Parata, brief of evidence, 30 July 2018 (doc E6), pp 2, 4–5
4. Wai 1945 statement of claim, 25 August 2008 (paper 1.1.60)

1.1.1



Map 1: The Kārewarewa urupā block in relation to current streets, Waikanae Beach

Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 19 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 21).

cemetery designation removed so that the land could be developed. Despite opposition from kaumātua and kuia, the council agreed to lift the cemetery designation.[5] Streets and residential housing were then constructed on the urupā block in the 1970s.

Mahina-a-rangi Baker, Pou Takawaenga Taiao for Te Ātiawa ki Whakarongotai Charitable Trust, explained that the Waikanae Land Company still owned the land on which the urupā is located. The company attempted to develop the remaining grassed land for housing in 1999–2000. This attempt was stymied by the unearthing of kōiwi (human remains). In 2014–18, however, the company resumed its efforts, starting with a geomagnetic survey and test pit aimed – according to Ms Baker – at showing that kōiwi are limited to a particular part of the site, allowing

5. Paora Tuhari Ropata, brief of evidence, 17 January 2019 (doc F1), pp 14–21. The late Mr Ropata was unwell at the time of the hearing and his evidence was presented by Te Kahu Ropata on 9 February 2019.

the remainder to be developed.[6] She told us the claimants' perspective on that work:

> The analogy I've used to describe the offence that this rationale presents, is if someone was to propose entering into an old battle ground where people have fallen, such as Gallipoli, or to enter into any of the cemeteries in Aotearoa, and dig around in an attempt to find a 0.5 metre squared area that doesn't appear to contain human remains, as a basis for proceeding to develop houses on those sites.[7]

Although no further development work ensued after the archaeological investigation carried out in 2016–17, the claimants are deeply concerned at the prospect of further disturbance to the burial ground. Ms Baker explained that new archaeological testing or development proposals could come at any time:

> And this is not 100 years ago, it's not 50 years ago, it's today. In 2018, it can still be acceptable for developers to suggest that they might exhume the kōiwi of our ancestors. And we have to sit with the knowledge that there is no guarantee that the Crown will prevent this from happening. This is the reality of what we live with as Māori every day. It's honestly quite exhausting to have to be hyper vigilant that at any time, the attempts to exhume could be initiated again. For all I know I could have an email sitting in my inbox right now that relates to this *take*.[8]

In response to the deep concern expressed by Paora Ropata, Manu Parata, Mahina-a-rangi Baker, and other claimants, the Tribunal decided that this matter should be reported upon early, in advance of our reporting on the Te Ātiawa / Ngāti Awa phase.[9]

1.1.2 What this chapter is about

In this introductory chapter, we begin by setting out the evidence that the Ngārara West A14B1 block contained a nineteenth-century urupā. The Crown did not question this point in the present inquiry but the existence of the urupā was denied in the proceedings to lift the cemetery designation in 1969–70 (discussed in chapter 3). The issue has also been debated more recently in attempts to complete the Tamati Place housing development (see chapter 4). For those reasons, it is important to explore the evidence about the urupā. We then summarise the parties' arguments and the issues for consideration in this report. After that, we provide a brief explanation of the relevant Treaty principles for the report. The chapter concludes with a short outline of the structure and contents of the remaining chapters.

6. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), pp 51–54
7. Mahina-a-rangi Baker, brief of evidence (doc F11), p 52
8. Transcript 4.1.18, p 129
9. Waitangi Tribunal, memorandum, 18 April 2019 (paper 2.6.52), p [4]

1.2 Kārewarewa Urupā

We received claimant traditional evidence about the urupā in two forms: tangata whenua witnesses provided oral evidence and research at our hearings; and technical witnesses provided some traditional evidence that had been recorded in writing at various times since 1840. We have drawn upon both forms of evidence for our discussion of the urupā here.

Mahina-a-rangi Baker stated:

> Te Kārewarewa Urupā is located within an old dune belt at the confluence of the Waikanae River and the old course of the Waimeha Stream (or Waimea depending on dialect), north of the Waikanae River and estuary, and east of the Waimeha Stream, in the coastal settlement of current day Waikanae Beach.[10]

Kuititanga pā, Waimeha pā, and Kārewarewa kainga were located close together in this area, within a large cultivation ground stretching from the present El Rancho Christian park to the mouth of the Waikanae River. Waimeha pā was a 'small outpost of the main Āti Awa pa at Kenakena'. According to some sources, there was only one pā – Waimeha and Kuititanga being the same pā.[11] In an 1890 Native Land Court hearing, Wi Parata described Kārewarewa as having been a 'village'. According to W Carkeek in his 1966 book, the exact location of Kārewarewa is unknown, but Mere Pomare stated that it was on the north side of the Waikanae River. Mere Pomare's evidence to the court (also in 1890) was that Kārewarewa was a 'burial ground' where her mother, 'the famous chieftainess Te Rauoterangi', was buried. Others were buried there, she said, including 'some of Wi Parata's ancestors', and the place was 'very tapu'. There were 'restrictions on the taking of flax or other plants from the area'.[12] W Carkeek also identified Waimeha pā as located at the junction of the Waimeha stream and Waikanae River, and as a burial ground following its abandonment after the battle of Kuititanga. Metapere Te Waipunahau, Wi Parata's mother, was buried there, as was the mother of Eruini Te Marau. The latter described it as a burial ground in the 1890 hearings, as did Hira Maika.[13]

Mahina-a-rangi Baker's cultural impact assessment report, prepared in 2015, views the Waimeha and Kārewarewa burial grounds referred to in 1890 as essentially in the same place. She explained that 'the name Te Kārewarewa is that which is used by the descendants of Te Ātiawa today to refer to the site at the eastern

10. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015, p 5 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 580)

11. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Te Kārewarewa Urupā', pp 5–8 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580–583); W C Carkeek, *The Kapiti Coast: Maori History and Place Names* (Wellington: A H and A W Reed, 1966) (doc A114), p 58; Hemi Sundgren, brief of evidence, 29 January 2019 (doc F19) pp 14–17; Lou Chase, 'Ngātiawa / Te Āti Awa Oral and Traditional History Report', February 2018 (doc A195), p 57

12. Carkeek, *The Kapiti Coast* (doc A114), p 116

13. Carkeek, *The Kapiti Coast* (doc A114), p 152

confluence of the Waikanae and Waimeha.'[14] There does seem to have been uncertainty at times about the name of the urupā located at Tamati Place. But there has always been certainty within the iwi of the existence of an urupā at the confluence of the rivers. The 20-acre block we are concerned with in this report has been consistently identified as a 'Māori cemetery' or 'urupā' in records since 1896.

The battle of Kuititanga will be described more fully in the Te Ātiawa / Ngāti Awa volume of our report. In brief, this 1839 battle marked the culmination of a period of uneasy relations between Te Ātiawa / Ngāti Awa and Ngāti Raukawa in the Waikanae and Otaki districts. The historical evidence is that the first people buried at the site known as Kārewarewa were some of those who fell at Kuititanga. The custom of Christian burial was followed but grave sites were not marked.[15] Ms Baker explained:

> The area was then no longer appropriate for occupation or food cultivation and was thus abandoned and deemed waahi tapu. From the mid 19th century the site has been used as an urupā. Several very significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pākehā that had some connection to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu.[16]

The urupā block was partitioned out of Ngārara West A14 in 1919. The owners persistently tried to set this land aside over a quarter decade (in 1896, 1905, and 1919). The 20-acre Ngārara West A14B1 was located on the northern side of the Waikanae River and adjacent to the Waimeha stream. It was recorded variously by the court minute-takers at these sittings as a 'cemetery', an 'urupā', and a 'graveyard' (this is discussed further in chapter 2). Unfortunately, the extremely brief court minutes do not include any details about the urupā or its name.

In 1970, when the Waikanae Land Company sought to lift the cemetery designation from this land, Te Aputa Kauri objected. Mrs Kauri was the daughter of Tohuroa Parata and great-granddaughter of Wi Parata. She stated that she had ancestors buried in the block, which she described as 'tapu land'. It was, she said, 'the resting place of many persons connected with the early history of Waikanae'.[17] Sylvia Tamati also objected, stating that this land was the 'burial ground of my Tribal ancestors of "Te Atiawa"'.[18] Johnson Te Puni Tamati Thomas, a descendant of Unaiki Parata, filed an objection stating: 'My ancestors fought, died and

14. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 9 (Baker, papers in support of brief of evidence (doc F11(a)), p 584)
15. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', pp 5, 8 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580, 583); Hemi Sundgren, brief of evidence (doc F19), p 17
16. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 13 (Baker, papers in support of brief of evidence (doc F11(a)), p 588). See also Hemi Sundgren, brief of evidence (doc F19), p 17.
17. Te Aputa Kauri, statement of objections, 2 April 1970 (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 98)
18. Sylvia Tamati, statement of objections, 2 April 1970 (Woodley, 'Local Government Issues' (doc A193(c)(viii), p 94)

are buried in this cemetery and Tapu ground'.[19] Finally, Jillian Simmonds also objected, stating that the land was tapu and she had 'ancestors and relatives buried in [this] Maori Cemetery'.[20]

In 2015, Mahina-a-rangi Baker consulted kaumātua about what they had known about the site when growing up:

> Some recalled the path they would take as children and adults to reach the river mouth, which would cross Te Kārewarewa. They had been told as children that it had been a battleground, that there were people buried there, and that it was waahi tapu and they knew to not take anything from that site. Several iwi members gave accounts of kōiwi being occasionally exposed and visible in the area of interest in their youth. They were instructed to leave them where they found them. One kaumatua however, recalled that her brother had the responsibility of occasionally collect[ing] any kōiwi that were highly exposed to take back to another urupā, Takamore, for interment.[21]

At our hearings, Manu Parata explained his understanding that Kārewarewa was a burial place for 'many of the chiefs, kuia and sick children who never returned to Taranaki in the 1848 heke'.[22]

Kaumātua Paora Ropata, who filed the Wai 1945 claim about this urupā, was born at Waikanae in 1938. He told us:

> I cannot recall this urupa being used during my childhood. What I do remember was our elders stressing the need for us children not to go anywhere near the area. Whenever we got injured or sick our parents would ask where we had been, what we had touched. We didn't ask why we couldn't go there, we just knew it was out of bounds and we honoured the word.
>
> It transpires the area identified above had been declared wāhi tapu long before our time and this tikanga had been passed down to those elders who declared their Te Āti Awa iwi and whānau should continue to respect the area as wāhi tapu.
>
> . . . . .
>
> I did not know of this urupa being used when I was a child. I recall the Ngārara Road Public Cemetery, the Ruakohatu and Takamore Cemeteries being the main Urupa in use in the days of my youth. However, the illegal exhumation of eleven bodies from the Kārewarewa urupa is clear evidence this urupa was in use during the mid-1800's and not intended for future use as postulated by the Waikanae Land Company and Horowhenua County Council.[23]

19. Johnson Te Puni Tamati Thomas, statement of objections, 3 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 92)
20. Jillian Simmons, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 93)
21. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 13 (Baker, papers in support of brief of evidence (doc F11(a)), p 588)
22. Manu Parata, 'Wai Claims 2006–2018 – Te Ati Awa no Runga i te Rangi, Te Ati Awa ki Kapiti: Manuscript of Facts', no date (doc E13(a)), p 38
23. Paora Ropata, brief of evidence (doc F1), pp 15, 20

In our view, the traditional, historical, and archaeological evidence is clear that this block was an urupā. We have no doubts on that point. Although we have only provided a brief summary here, further historical and archaeological evidence is discussed in the following chapters. For the claimants, this urupā has great significance in cultural and spiritual terms.

Te Kenehi Teira of Heritage New Zealand Pouhere Taonga, in his evidence for the Crown, noted the Historic Places Trust's view in 2001 that 'the area then proposed for development "is part of a known Maori cemetery" and that "invasive testing of this area is inappropriate"'. 'I can confirm', he said, 'that Heritage New Zealand maintains this view.'[24]

1.3 The Parties' Arguments

1.3.1 The claimants' case

The claimants filed two closing submissions which referred to Kārewarewa urupā. They argued that, according to the historical evidence, the Native Land Court and the county council 'recognised Ngārara West A14B1 as a cemetery or urupā through at least the first half of the twentieth century'.[25] In 1968, however, the Crown's Māori land laws allowed a 'meeting of less then 20% of the owners' to vest the land in the Māori Trustee for sale. This resolution was passed by owners 'who only represented 11.5%' of the total shares in the block. According to the claimants, the Māori Trustee then sold the land to the Waikanae Land Company despite objections 'by Te Ātiawa who made it clear that the land was an urupā and was to be inalienable'.[26] Further, the Cemeteries Act 1908 and its successor, the Burial and Cremation Act 1964, ought to have protected the urupā regardless of its underlying ownership.[27] In the claimants' view, the Crown has not in fact provided 'equal levels of protections' to Māori and non-Māori cemeteries.[28]

The Waikanae Land Company applied to the county council for removal of the cemetery designation in 1969. The company argued that there were no proven burials on the site and that the court had set the land aside for a future cemetery in 1919, a position which the Native Land Court had confirmed. The claimants argued that this was clearly incorrect. There was 'indisputable evidence', they said, that the burial ground had been in use long before then, and 'there should therefore have been more attention paid' by officials to 'investigating the nineteenth-century situation'.[29] Despite objections from tribal leaders, the council removed the designation in 1970, thus permitting the desecration of the urupā. The claimants submitted that the Crown did not carry out its Treaty obligations to actively

24. Te Kenehi Teira, brief of evidence, 5 July 2019 (doc G4), p14
25. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p10
26. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p10
27. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p10
28. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p17
29. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p11

protect either the urupā or the claimants' tino rangatiratanga in respect of this wāhi tapu.[30]

Further, the claimants argued that the Crown failed to protect the urupā after kōiwi were uncovered in 2000. In their view, Heritage New Zealand failed in its role as 'the main defence of sacred tangata whenua sites'.[31] This was because of 'the inability of Heritage NZ to identify and ensure the implementation of clear and appropriate processes in relation to consultation, and the provision of information to inform the determination of archaeological authority processes'. In the claimants' view, this constituted a 'breach of Heritage's obligation to provide active protection to Māori, their sacred sites and their taonga'.[32] The claimants did not accept the Crown's argument that there were still a number of protection mechanisms available to safeguard the urupā, such as heritage protection orders. In their view, all of the proposed mechanisms would be difficult and costly to seek.[33] Their approach to remedies is discussed further in chapter 4.

1.3.2 The Crown's case

The Crown conceded that three Government departments were made aware of the proposal to change the 'Māori cemetery' designation in 1970, and that 'a reasonable Crown' should have investigated 'whether or not there was a burial site' in 'compliance with its Treaty duties'. The Crown should then have 'used its power to halt the development process', since 'evidence to support the existence of a burial site would have been relatively easy to come by'. The Crown further conceded that its failure to investigate and lodge an objection 'led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles'.[34]

In respect of the sale of the block in 1969, the Crown submitted that there was no evidence of any opposition to the Māori Trustee's sale. Crown counsel agreed that only 13 owners voted on the resolution to vest the land for sale, but submitted that there is no evidence that there were some 'owners who did not know about the proposed sale and may have objected to its sale had they known about it'.[35]

Most of the Crown's closing submissions related to the period of recent activity (2014–18), the actions of Heritage New Zealand, and the sufficiency of protections for the urupā in the Heritage New Zealand Pouhere Taonga Act 2014. Crown counsel observed that the Historic Places Trust prosecuted the developers after the unearthing of kōiwi in 2000. The Crown also submitted that the digging of a small test pit in 2017 is the only work that Heritage New Zealand has permitted since 2000. The purpose of the test pit was to show whether the 'anomalies' identified by a geomagnetic survey were within the original soil, and therefore supported the

30. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 12–13
31. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 13–16
32. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 16
33. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 16–17
34. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), pp 16–17
35. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 12–13

hypothesis that there were more burials on the site and that no further development should take place.[36]

In terms of consultation about the application to dig the pit, the Crown submitted that there was genuine confusion about the roles of various individuals and institutions within the iwi, and denied that the only consultation that occurred was with the Takamore trustees. Nonetheless, the Crown argued that a good faith process may have resulted in a mistake as to the consultees' iwi organisation, and that the legislation provided an appeal process which was an appropriate and sufficient remedy. The Crown further submitted that no authority from Heritage New Zealand was legally required in any case, since the test pit was located well away from any 'anomalies' (possible burial pits), and therefore did not fit within the definitions of an archaeological site in the Act.[37] After a detailed assessment of the relevant facts, the Crown submitted that the granting of permission for the test pit was not done in bad faith and was 'not a breach of its duties under the Treaty of Waitangi'.[38]

In terms of current protections, the Crown submitted that the provisions for granting archaeological authorities, including the role and functions of the Māori Heritage Council (Te Kaunihera Māori o te Pouhere Taonga), protect Kārewarewa urupā from further development. In addition, the Crown pointed to a number of specific protection mechanisms (which are discussed later in the report). In its submission, the Heritage New Zealand Pouhere Taonga Act is consistent with Treaty principles.[39]

1.4 Issues for Determination

The parties' arguments and the evidence before us indicates the following key issues for determination:

- What protection did the Crown's native/Māori land laws provide for the urupā block? (Addressed in chapter 2.)
- What was the legislative scheme under which the urupā block was alienated in 1968–69, and how and why was the block sold? (Addressed in chapter 2.)
- What protections did the Town and Country Planning Act 1953 and the Burial and Cremation Act 1964 provide for the urupā after it was sold? What opportunity did this legislation give the Crown to protect the urupā, and did the Crown act upon that opportunity? (Addressed in chapter 3.)
- What protection have the Historic Places Act 1993 and the Heritage New Zealand Pouhere Taonga Act 2014 afforded the urupā? (Addressed in chapter 4.)

These are the key issues that underlie our discussion and analysis in this report.

36. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 20–21, 24–28
37. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 28–36, 41–44, 46, 50–52, 54–56
38. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 55, 56
39. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 56–64

1.5 Treaty Principles

In this report, the relevant principles of the Treaty of Waitangi are partnership and active protection. We provide a fuller analysis of the signing of the Treaty in the Waikanae area and of the principles of the Treaty in the forthcoming Te Ātiawa/Ngāti Awa volume. Here we give a brief explanation of the partnership and active protection guaranteed to Māori by the Treaty of Waitangi

1.5.1 Partnership

The Treaty forged a partnership between Māori and the Crown. This is one of the fundamental principles of the Treaty. The nature and characteristics of the partnership principle have been described in many Tribunal reports and court decisions. The Treaty partners are required to act towards each other in the utmost good faith. This entails reasonableness, cooperation, trust, and respect for each partner's sphere of operation and authority: the kāwanatanga of the Crown and the tino rangatiratanga of Māori.[40] This arises from articles 1 and 2 of the Treaty, which 'guaranteed Māori their tino rangatiratanga over their land, resources, and people, in return for Māori recognition of the Crown's right to govern and its right of pre-emption'.[41] The Wai 262 Tribunal defined kāwanatanga as 'the right to enact laws and make policies'. The same Tribunal defined tino rangatiratanga as the 'greatest or highest chieftainship', in which 'the rights of authority and control then exercised by the tribal leaders will be protected'. In 'the Treaty context', this meant 'a right to autonomy or self-government'.[42]

Māori autonomy must therefore be respected and protected by the Crown. As the Tribunal has said, 'the Crown does not have an unqualified right to govern' or to determine matters of core interest to the Māori Treaty partner. Rather, overlaps between the respective spheres of kāwantanga and tino rangatiratanta should be resolved by 'negotiation and agreement', which may require collaboration and even consent depending on the matter at issue and its centrality to the Māori interest.[43] In particular, partnership obligations required the Crown to ensure the 'full, free, prior, and informed consent' of Māori 'to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2'.[44] More generally, the Crown must be properly informed of its Treaty partner's views when its makes a decision within its own sphere that affects Māori interests. This often (but not always) requires consultation.[45]

40. Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct, 2015), pp 28–29
41. Waitangi Tribunal, *Whaia Te Mana Motuhake*, p 26
42. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 14, 15, 79, 91
43. Waitangi Tribunal, *Whaia Te Mana Motuhake*, pp 29, 41–42
44. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 173
45. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003) pp 26–27

1.5.2 Active protection

The Te Tau Ihu Tribunal defined the principle of active protection in this way:

> The Crown's duty to protect Māori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.[46]

A number of Tribunal reports have quoted the Privy Council decision in *Broadcasting Assets* in respect of active protection, which stated:

> It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.[47]

Urupā and other wāhi tapu are among the taonga which the Crown must actively protect.[48] The Māori Heritage Council, a leadership body within Heritage

46. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4
47. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517 (Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication* (Wellington: Waitangi Tribunal, 2019), p 19)
48. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 629, 677

New Zealand Pouhere Taonga, stated in a recent policy paper that 'Māori heritage places', including wāhi tapu, are '"taonga" as expressed in Te Tiriti o Waitangi'.[49]

1.6 The Structure of this Report

In chapter 2 of this report, we address issues relating to the degree of protection given Kārewarewa urupā by the Crown's native/Māori land laws. This includes an examination of the Māori owners' attempts to cut out and protect the urupā block from sale in 1896–1919. We also consider the form of title available to protect urupā in the decades prior to its sale in 1969, which ranged from restrictions on alienation in the 1890s to the ability to set urupā aside as Māori Reservations in the 1960s. Chapter 2 then considers the statutory regime for meetings of assembled owners in the 1960s, by which a minority of owners voted to appoint the Māori Trustee as agent to sell the urupā block in 1968. We conclude with our Treaty findings on the matters addressed in chapter 2.

In chapter 3, we address issues relating to the degree of protection given Kārewarewa urupā by the Town and Country Planning Act 1953 and the Burial and Cremation Act 1964, once title to the block had passed out of Māori ownership in 1969. This includes an examination of how and why the designation of 'Māori cemetery' was revoked by the Horowhenua County Council in 1970 and the Crown's role in that process. Following the lifting of the designation, the urupā block was partially developed for residential housing. This chapter ends with a section on Treaty findings and a brief examination of the prejudice caused by the development of the block in the 1970s.

Chapter 4 addresses the degree of protection given Kārewarewa urupā by the modern heritage regime. This includes an examination of how the Historic Places Act 1993 prevented further development in the early 2000s, once kōiwi were exposed by new development work in 2000. We then examine the relevant features of the Heritage New Zealand Pouhere Taonga Act 2014, and the role of Heritage New Zealand in the archaeological investigations which took place in 2015–16. We conclude this chapter with our findings and recommendations.

49. Heritage New Zealand Pouhere Taonga, *Tapuwae: Nā Te Kaunihera Māori Mō Te Pouhere Taonga Māori: The Māori Heritage Council Statement on Māori Heritage* (Wellington: Heritage New Zealand Pouhere Taonga, 2017), p 9

CHAPTER 2

PROTECTING THE URUPĀ UNDER THE CROWN'S NATIVE / MĀORI LAND LAWS

2.1 Introduction

In 1919, Ngārara West A14B1 was partitioned out of the A14 block. It was awarded to all the owners of A14 as Māori freehold land. It remained under this form of title until 1969. A meeting of assembled owners was called in December 1968, which voted to appoint the Māori Trustee as their agent to sell the land. The Māori Trustee duly sold the urupā block to the Waikanae Land Company in 1969. These events raise issues about what forms of protection the Crown's native / Māori land laws[1] gave to urupā in the nineteenth and early twentieth centuries, and why and how the owners agreed to sell the urupā block in 1968. In particular, the statutory scheme for the sale of Māori land in the 1960s is a crucial matter. We address these issues in this chapter.

2.2 Making the Urupā Inalienable, 1896–1909

The Ngārara block consisted of about 45,000 acres in the Waikanae district. After the award of title to Te Ātiawa / Ngāti Awa in 1873, Ngārara was partitioned in the late 1880s and early 1890s during a bitter internal contest between various elements within the iwi.[2] Those matters will be covered in the iwi volume of our main report. The Ngārara West A14 block was partitioned out in 1891 and awarded to 13 individual owners. It consisted of 260 acres.[3] The surveyor's field book in 1891 noted that there were 'graves' on this block.[4] Ngārara West A14 was then subject to contradictory and overlapping partitions as follows:

- 1896: A14A partitioned out for 'cemetery'; residue is A14.
- 1896: one owner's interest awarded to C B Morrison. (But not partitioned?)
- 1905: owners again try to partition out 'urupā' – application dismissed because 1896 orders already made but not complete (due to lack of survey).
- 1906: 75 acres partitioned in satisfaction of survey lien as A14C.

1. In 1947 the Māori Purposes Act changed the term 'native' in all legislation to 'Māori': Māori Purposes Act 1947, s 2(2)
2. See Tony Walzl, 'Ngatiawa: land and political engagement issues, c 1819–1900', December 2017 (doc A194).
3. Suzanne Woodley, 'Porirua ki Manawatū Inquiry District: Local Government Issues Report', June 2017 (doc A193), p 623
4. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), p 9

2.2

- 1915: application to partition C B Morrison's purchase – partitioned as A14A; residue is A14B.
- 1919: application to partition 'cemetery' – partitioned as A14B1; residue is A14B2.

In November 1896, Raniera Erihana and others applied to partition Ngārara A14 so as to 'set apart a portion of it for a Cemetery to include the part to the westward of [Ngārara West A15] between that boundary and the River Waimea'. At that point, Judge Alexander Mackay understood the piece of land to contain about 10 acres but the area had not been surveyed. The judge therefore made orders cutting out an area named Ngārara West A14A, to consist of 'such quantity as may be found there whether more or less [than 10 acres]'.[5] We note that no particular weight need be put on the use of the term 'cemetery' instead of 'urupā' by the court's minute taker. The minutes were recorded in English, not Māori.

As at 1896, the native land laws included two options for the protection of the urupā. The Native Trusts and Claims Definition and Registration Act 1893 allowed the court to order a piece of land to be inalienable and vested in trustees for 'religious, educational, or other purposes of general or public utility as shall be specified'.[6] As we discussed in our report on Muaūpoko claims, this section of the 1893 Act was used to vest Lake Horowhenua in trustees in 1897.[7] The other option was for the judge to make the land inalienable under section 14(6) of the Native Land Court Act 1894. The 1893 provision required the agreement of a majority of owners in writing before it could be exercised – it is possible that this condition of the Act could not be met. In any case, the court imposed a restriction under the 1894 Act, ordering that the land should be 'absolutely inalienable'.[8] The 1894 legislation allowed judges to vary or lift these kinds of restrictions, but no attempt was made to do so prior to new legislation in 1909.

We note, however, that there was no provision for this burial ground, which was of significance to the whole tribe, to be put into some form of tribal title. Ownership of this Te Ātiawa/Ngāti Awa urupā was vested in 13 individuals. According to Mahina-a-rangi Baker, kaumātua had identified the owners of A14 as 'descendants of those that were buried at Te Kārewarewa'.[9]

In 1905, the Māori owners were concerned that the title to the urupā might not be protected and again applied to have it partitioned. The application was made on their behalf by Raniera Erihana (who had also filed the application back in 1896). The court minutes stated that 'what is desired by the owners is a part[ition]

5. Otaki Native Land Court, minute book 31, 10 November 1896, fols 147–148 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 6–7)
6. Native Trusts and Claims Definition and Registration Act 1893, s 7
7. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report* (Wellington: Waitangi Tribunal, 2017), pp 346, 348
8. Otaki Native Land Court, minute book 31, 10 November 1896, fol 148 (Ropata, papers in support of brief of evidence (doc F1(a)), p 7)
9. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 588–589)

to cut off a certain "urupa"'. The court's response was 'that Judge Mackay made part[ition] cutting out "urupa"', and that 'what is wanted is a survey to enable those Orders to be completed'. The judge therefore dismissed the application as unnecessary.[10] Claimant counsel submitted that the use of the word 'urupā' in this minute book confirmed that the purpose of the applications in 1896 and 1905 was to 'cut out an existing urupā'.[11]

We have no evidence as to why the partition had not been surveyed between 1896 and 1905. Despite the court's dismissal of the new application, the urupā block (A14A) had still not been surveyed when Ngārara A14 came back before the court in 1915. Evald Subasic, who wrote a brief report on historical matters for Mary O'Keeffe, suggested:

> The probable reason for the lack of survey was the fact that at the time there was an outstanding survey lien on the Ngārara West A14 block dating back from the original partition of the block out of Ngārara West [in 1891]. Either the owners themselves were unwilling to incur a further survey lien by surveying the cemetery section, or the surveyors were unwilling to survey the section until the outstanding debt to them was paid. The evidence consulted is silent on this matter . . .[12]

The 1905 application may have been driven by pressure from the surveyors, who wanted to have a piece of land cut out in satisfaction of the survey lien. The following year, the court partitioned out Ngārara West A14C in payment to the surveyor. This block consisted of 75 acres, located at the northern end of A14.

2.3 The Urupā becomes Vulnerable to Alienation, 1909–69

Ngārara West A14 came back before the court in 1915. This time, the applicants were ED and H Barber, who wanted to partition the interest purchased by CB Morison. As noted above, this purchase had been confirmed by the court back in 1896. The court now awarded 13½ acres with the name 'A14A', which was the appellation that Judge Mackay had given the urupā block in 1896. It appears that the court was unaware of the details of Mackay's original order, which had still not been surveyed and completed. Following the 1915 partition, the residue of the block became A14B and was vested in 35 individual owners (the number having grown through successions). It was then realised that the survey lien had reduced the size of the original A14, which reduced A14A to about nine acres in area. Suzanne Woodley noted that '[n]o owners appeared to be at the hearing (or are not recorded as such)'.[13]

10. Wellington Native Land Court, minute book 7, 6 February 1905, fol 286 (Ropata, papers in support of brief of evidence (doc F1(a)), p 9); Woodley, 'Local Government Issues' (doc A193), p 624
11. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 8
12. Evald Subasic, 'Research Notes on Ngarara West A14 – Urupa/Cemetery', June 2001 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(a)), pp 10–11)
13. Woodley, 'Local Government Issues' (doc A193), p 625

2.3

In 1919, the Māori owners attempted to partition out the urupā block for a third time. This time, the purpose was described in the minutes as cutting out a 'grave yard' (first mention) and 'cemetery' (second mention). Natanahira Parata gave evidence that 'all the people' had agreed to the application, and that the land had originally been set aside by Judge Mackay but not surveyed. In June 1919, the court ordered this partition of 20 acres as Ngārara West A14B1, with boundaries to be pointed out (on the ground) by Hira Parata.[14] Ms Baker observed that the survey for this partition had been completed by 1920, and that A14B1 was located in the original site described in 1896 as 'between the Western boundary for block [Ngārara West A] 15 and the Waimeha.'[15] Evald Subasic's report agreed on this point.[16]

In the meantime, the Native Land Act 1909 had cancelled all existing restrictions on alienation. This meant that, even if Judge Mackay's original orders had been completed before 1915, his requirement that the land be 'absolutely inalienable' would no longer have had any 'force or effect' from 1909 onwards.[17]

The 1919 partition treated the urupā block as native freehold land owned by 34 individuals. The Native Land Act 1909 did enable the court or a land board to recommend reserving it as a burial ground. The Governor in Council would make the final decision. Native Reservations were inalienable. This provision (and its equivalent in successive Acts) applied to native freehold land with more than 10 owners.[18] It is important in this inquiry for two reasons: first, because it would have protected the block from sale and provided trustees to take care of the urupā; and, secondly, because the failure to reserve the land in this way was later taken as evidence that the block had been cut out for a *future* cemetery, not an existing one. This in turn facilitated the removal of the official cemetery designation in the district plan (see chapter 3).

The Māori owners of Ngārara A14B1 were probably unaware of the provision for Native Reservations in 1919, but the 1909 Act would have allowed the court to take the initiative on this matter. Section 15 stated:

> In the course of the proceedings on any application the Court may, subject to Rules of Court, without further application, and upon such terms as to notice to parties and otherwise as the Court thinks fit, proceed to exercise any other part of its jurisdiction the exercise of which in that proceeding the Court deems necessary or advisable.

The Native Land Act 1909 was repealed in 1931. The new Native Land Act of that year continued the provision for Native Reservations, as did the Māori Affairs Act

14. Wellington Native Land Court, minute book 21, 18 June 1919, fol 386 (Ropata, papers in support of brief of evidence (doc F1(a)), p 22); Woodley, 'Local Government Issues' (doc A193), pp 625–626
15. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 16 (Baker, papers in support of brief of evidence (doc F11(a)), pp 591)
16. Evald Subasic, 'Research Notes on Ngarara West A14 – Urupa / Cemetery' (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 12)
17. Native Land Act 1909, s 207(1)
18. Native Land Act 1909, s 232

1953 when it in turn replaced the Native Land Act of 1931.[19] The new provisions in 1953 allowed the court to recommend that any Māori freehold land be set aside as a Māori Reservation for a number of purposes, including burial grounds, and that the reservation could be made for the benefit not just of the owners but for 'Maoris of the class or classes specified'.[20]

It appears that the Te Ātiawa / Ngāti Awa owners were still unaware of the necessity to protect their urupā under this new legislation. In 1970, Sylvia Rangiauahi Tamati Thomas explained that none of the tribal urupā had been made reservations with trustees. Once the urgent need to do so became clear due to the alienation of Kārewarewa in 1968–69, tribal leaders hastened to establish a trust and get trustees appointed for Takamore Urupā in late 1969. Takamore was then made a Māori Reservation in 1973.[21]

Apart from the native land legislation (and the Māori Affairs Acts that succeeded it in 1953 and 1967), there was supposed to be protection from general legislation dealing with cemeteries and burial grounds. We consider that point further in the next chapter.

2.4 The Legislative Framework for Alienations in the 1960s

In the Te Ātiawa / Ngāti Awa phase of our inquiry, the Crown made an early concession of Treaty breach that is relevant to the alienation of Ngārara West A14B1:

> The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa / Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa / Ngāti Awa ki Kāpiti. The Crown concedes that its failure to protect these structures was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles[.][22]

By the late 1960s, individualisation of title and generations of succession had produced fragmented land blocks and 'crowded' titles. Many blocks had numerous owners, some of whom had no idea about their small, fractionated interests in various pieces of land. Some owners' interests had not been succeeded to, others owned extremely small and scattered interests, and migration for work had scattered owners all around the country. The whole situation made it very difficult for Māori to keep their remaining land or to use it effectively. The Central North Island Tribunal explained how this situation arose from the native land laws established

19. Native Land Act 1931, s 298; Māori Affairs Act 1953, s 439
20. Māori Affairs Act 1953, s 439
21. Woodley, 'Local Government Issues' (doc A193), pp 636–637; Sylvia Tamati, statement of objections, 3 April 1970 (Woodley, 'Local Government Issues' (doc A193(c)(viii), p 94); Benjamin Ngaia, brief of evidence, 30 July 2018 (doc E3), p 5
22. Crown counsel, 'Te Tauāki Karauna: Crown Statement of Position and Concessions', August 2018 (paper 1.3.1), pp 6–7. This concession was repeated in the Crown's general closing submissions: Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), pp 21, 29.

by the Crown in the nineteenth century, and the various measures taken to try to ameliorate the situation. These included consolidation schemes, the compulsory acquisition of small shares, and the belated establishment of trust mechanisms to restore a form of communal land management. Following the well-known Hunn report of 1960, the Māori Affairs Amendment Act 1967 was aimed at the 'integration' of an increasingly urbanised Māori population and the simplification of titles in the countryside so that Māori land could more easily be farmed or sold.[23] This is the context in which the alienation of Ngārara A14B1 should be understood.

For Māori land with more than 10 owners, part 23 of the Māori Affairs Act 1953 prescribed a three-step process for alienations.

The first step was for the court registrar to call a 'meeting of assembled owners', which was designed to prevent the piecemeal acquisition of individual interests (as had been common in the nineteenth century). Back in 1909, when the meeting of owners system was introduced, Native Minister James Carroll described it as 'practically a resuscitation of the old runanga system, under which from time immemorial the Māori communities transacted their business'.[24] The meetings of assembled owners were intended to allow the majority of owners to make decisions about their lands collectively.[25] The legislative provisions, however, fell well short of enabling this intention to be achieved. Under the 1909 Act, the quorum was set at just five owners (regardless of the number in a block), and a resolution could be carried at such a meeting 'if owners voting in favour owned a larger aggregate share of the land than those voting against'. Successors could not vote unless they had gone through the process of obtaining succession orders from the court.[26]

The Māori Affairs Act 1953 continued the meeting of assembled owners' system. It set the quorum for a meeting of assembled owners even lower than in 1909. Only three owners had to be present, no matter how many owners there were in a block. Owners could also be represented by proxy so long as a minimum of three were present in person. As under previous legislation, this very small minority of owners could resolve to alienate land if the owners who voted in favour 'own[ed] a larger aggregate share of the land' than the owners who voted against the resolution.[27]

In 1967, the Māori Purposes Act amended the quorum requirements so that the court could set a quorum. If the court did not set a quorum, then meetings would now have to have either 10 owners or one-quarter of the owners (whichever was lower) either in person or by proxy. Regardless of whether the quorum was 10 owners or a quarter of owners, those present or represented at the meeting had to hold at least one-quarter of the 'beneficial freehold interest' (the shares) in the

23. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), chapter 11.
24. J Carroll, 15 Dec 1909, NZPD, vol 148, p 1102 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 426)
25. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 426
26. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686
27. Māori Affairs Act 1953, ss 309(1)–(2), 311(1)

block.[28] This significant reform took effect on 1 April 1968, eight months before the meeting of assembled owners for Ngārara West A14B1.[29] It was certainly an improvement but still allowed those representing only a quarter of the ownership to sell the land. Six years later, the Māori Affairs Act 1974 raised the quorum for sales much higher to owners holding at least 75 per cent of the 'beneficial freehold interest' in the land, but this was too late for the urupā block.[30]

Owners' rights to object after a meeting of assembled owners were very limited, even if they were in the majority. Only those who were present at the meeting could sign a memorial of dissent.[31] This might lead to their interests being cut out of the land before the sale or lease was approved.[32]

The second step in the alienation process required the Māori Land Court to confirm the resolution passed at a meeting of owners. Evidently, this was intended as a safeguard in a system which allowed tiny minorities to alienate the interests of other owners. Under the Māori Affairs Act 1953:

> No alienation could be confirmed unless the court was satisfied (among other things) that the alienation was not 'contrary to equity or good faith, or to the interests of the Maori alienating', that the alienation was not in breach of any trust, and that the 'consideration (if any) for the alienation is adequate' (section 227). . . . On hearing the application for confirmation, the court could make any modification whatsoever to any aspect of the alienation, if it seemed that 'some modification in favour of the Maori owners should in justice be made'.[33]

These protections could have been significant for the Kārewarewa urupā block but the Māori Affairs Amendment Act 1967 removed almost all of the court's power to vet resolutions; court confirmation was automatic unless the price was considered too low or the alienation might lead to 'undue aggregation of farmland' in the hands of a purchaser.[34] As a result, there were no real checks or balances in the system.

The third step of the process transferred responsibility for executing the transaction to the Māori Trustee. Once the court had confirmed a resolution to sell or lease, the the Māori Trustee became the statutory agent for the owners.[35] Again, this was necessary to get around the fact that not all owners had necessarily agreed, and therefore a deed of sale or contract could not be completed by the owners themselves. Instead, the Māori Affairs Act 1953 stated that '[e]very instrument

28. Māori Purposes Act 1967, s 4(4), inserting a new s 309(6A), (6B), and (6C) into the Māori Affairs Act 1953.
29. Māori Purposes Act 1967, s 4(5)
30. Māori Affairs Amendment Act 1974, s 36, inserting a new s 309(6B) into the Māori Affairs Act 1953.
31. Māori Affairs Act 1953, s 313(2)
32. Māori Affairs Act 1953, s 320
33. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 6, p 2998
34. Waitangi Tribunal, *Te Urewera*, vol 6, pp 2998–2999
35. Māori Affairs Act 1953, s 323(1)

of alienation executed by the Māori Trustee', acting as statutory agent for a block owned by more than 10 owners, would have 'the same force and effect, and may be registered in like manner, as if it had been lawfully executed by all of the owners.'[36]

As an alternative to a resolution to sell or lease, the 1953 Act empowered the meeting of owners to appoint the Māori Trustee directly as their agent to negotiate a sale or lease on their behalf, subject to any restrictions in the resolution passed at the meeting.[37] A resolution of this kind still had to be confirmed by the court, but the Māori Trustee had to agree first to undertake the responsibility.[38] Following the court's confirmation, the owners would have no further say in the alienation of their land by the Māori Trustee, except that a duly convened meeting of assembled owners could revoke the original resolution appointing him as their agent.[39]

This was the statutory scheme under which Ngārara West A14B1 was sold to the Waikanae Land Company in 1969.

2.5 The Sale of Ngārara West A14B1 in 1968–69

2.5.1 The meeting of assembled owners, December 1968

In the late 1960s, the Waikanae Land Company proposed to develop the Waikanae beach area. It wanted to 'create a marina and residential subdivision in the area that Te Kārewarewa was located; their intention was to cut through [and] excavate the area around the lagoon and open it right up to tidal inundation, so that it became a marina, and subdivide surrounding properties.'[40] The company purchased about 96 acres of Māori land at the mouth of the Waikanae River in 1967. This was a subdivision of the original Ngārara West A14 block (Ngārara West A14B2B3).[41] Following this purchase, the company applied to the court in 1968 to call a meeting of assembled owners for the purchase of Ngārara West A14B1. In November 1968, the court ordered the registrar to convene a meeting and fixed a quorum of six owners who had to be present in person (rather than by proxy).[42] In doing so, the court acted under the recent provisions introduced by the Māori Purposes Act 1967, which allowed the court to fix a quorum upon application.[43]

The court set a very low quorum of just six owners. At the time, there were 77 owners in the urupā block. Many of them were deceased, which meant that the number of owners would have been larger if successions had occurred, or their addresses were unknown. This situation was quite common for the Māori land titles system at the time. Suzanne Woodley commented that the advertisement of the meeting gave only three weeks' notice, which was likely insufficient time for

36. Māori Affairs Act 1953, s 323(2)
37. Māori Affairs Act 1953, s 315(1)(e)
38. Māori Affairs Act 1953, s 315(3)
39. Māori Affairs Act 1953, s 324
40. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 48
41. Ross Webb, 'Te Atiawa/Ngāti Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205), p 60
42. Woodley, 'Local Government Issues' (doc A193), p 627
43. Māori Purposes Act 1967, s 4(4)

'any of these succession orders to have been made'. A form letter was sent to the 39 owners whose addresses were known, informing them of the proposed meeting, the resolution to sell, and the possibility of appointing the Māori Trustee as agent to sell or lease the land if the resolution failed.[44] A notice would have been inserted in the court pānui as well, although that had a limited circulation.

Crown counsel submitted: 'Whilst it may be that there were owners of the land who did not know about the proposed sale and may have objected to its sale had they known about it, there is no evidence on the record of the inquiry that this was the case.'[45] We do not accept this submission, given the lack of successions and the fact that only 39 of 77 addresses were known. It is not certain, of course, that all of those addresses were correct.

Three owners appointed proxies to attend on their behalf. An owner living in Greymouth, Te Aupiki Gould, could not appoint a proxy and stated: 'As we are scattered all over NZ & Australia, I cannot see how we can hold a meeting to decide anything.' In those circumstances, voting for a sale seemed to him to be the only solution, but he may not have been aware of the 1953 provisions to establish a trust or a Māori Reservation.[46] Of the remaining owners, 10 attended the meeting in person. These owners represented 17 per cent of the interests in the block. Together with the three proxies, the owners represented at the meeting held about 20 per cent of the total shares in Ngārara West A14B1.[47] If the court did not set a quorum, then the new 1967 provisions required that those present or represented at the meeting hold at least a quarter of the shares – a minimum that would not have been reached at this meeting.[48]

The meeting of assembled owners was held at the Waikanae Memorial Hall on 18 December 1968. One of the key features of this meeting was that the owners present did not appear to be aware that 'A14B1' was the urupā block. The minutes of the meeting are obviously very abbreviated. From what was recorded, the urupā was not mentioned by anyone until after the purchasers had retired from the meeting to allow the owners free discussion of the proposal. One of the proxies was held by N Simpson, a solicitor of Morison, Taylor and Company. He is recorded in the minutes as follows:

> Mr Simpson said that it was very important for these people to buy this piece of land, which would assist greatly in the subdivision of the area already bought. The valuations quoted meant nothing, the land was worth $30,000. At first it was thought that the cemetery was in this block but he had since learnt that it was not.[49]

44. Woodley, 'Local Government Issues' (doc A193), pp 627–629
45. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), p 13
46. T Gould to Māori Land Court, 13 December 1968 (Woodley, 'Local Government Issues' (doc A193), p 629)
47. Woodley, 'Local Government Issues' (doc A193), p 629
48. Māori Purposes Act 1967, s 4(4), inserting s 309(6B) into the Māori Affairs Act 1953.
49. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), p 25)

Kaumātua Paora Ropata considered that this would have had the weight of 'legal advice', but noted: 'I don't know how they arrived at that conclusion.'[50] In any case, it appears that Mr Simpson's advice to the meeting was accepted. The resolution to sell the 20-acre block was considered solely on the merits of the price offered by the company, which was $20,000. The majority of those present or represented (by both number and shares) voted against the resolution to sell the land to the company. They considered the price to be too low. Mr Simpson then proposed that the Māori Trustee be appointed the owners' agent to 'sell the land by public tender to the highest bidder'. This resolution was passed by a majority of 88.125 shares, with eight owners voting for and five against it.[51]

Claimant counsel submitted that a meeting of less than 20% of the owners' resulted in this resolution, and that it was 'passed with support of owners who represented only 11.5% of the total shares voting in favour.'[52] A system which allowed such a minority of owners to sell the land was of great concern to the claimants in our inquiry.

2.5.2 The sale of Ngārara West A14B1 in 1969

Following the meeting, the Māori Land Court confirmed the resolution. This occurred in February 1969. Ms Woodley noted that Mr Simpson attended this hearing, and he advised the court that the Māori Trustee had agreed to accept appointment as agent for the owners. Mr Simpson also told the court that the owners wanted a higher price and so had decided that the land should be put up for tender.[53]

Following a tender process, the Māori Trustee sold Ngārara West A14B1 to the Waikanae Land Company on 15 October 1969 for $31,555.[54] Some claimants have criticised the Māori Trustee for selling this land but, in our view, the real problem lay with the assembled owners' system. The Māori Trustee was obligated by law to carry out the resolution passed at a duly convened meeting of owners and confirmed by the court, no matter how small the minority of owners present at the meeting. We address this point further below when we make our findings of Treaty breach.

In the next chapter, we consider the legal protections afforded the urupā after its purchase by the company in 1969, but first we make our Treaty findings in respect of the matters covered in this chapter.

2.6 Treaty Findings

By the 1960s, the cancellation of all restrictions on alienation in 1909 was no longer relevant to the urupā block because an alternative mechanism – the Native /

50. Paora Ropata, brief of evidence (doc F1), pp 18–19
51. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), pp 25–26)
52. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
53. Woodley, 'Local Government Issues' (doc A193), p 632
54. Woodley, 'Local Government Issues' (doc A193), p 633

Māori Reservation – allowed for the protection of urupā under successive Acts. The court did not take the initiative and propose a reservation at the 1919 hearing, which it could have done under section 15 of the Native Land Act 1909, and which we think would have been an appropriate solution. Te Ātiawa/Ngāti Awa tribal leaders were unaware of the need to protect the urupā in their district by establishing Reservations. They only became aware of the need for this in 1969 as a result of what happened to Kārewarewa (as explained in section 2.3). We do not find any breach of Treaty principles here since an adequate protection mechanism had existed since the urupā was partitioned out in 1919.

By the time the urupā block was sold in 1968–69, the individualisation of title imposed on Māori in the nineteenth century had resulted in fractionated titles, with multiple owners scattered around the country. Many were unable to form a trust or incorporation to manage their land and some were unaware that they had interests in particular blocks or that they ought to have succeeded to a deceased relative's interests. It was in this context that the 1953 statutory scheme for alienations, described in section 2.4, operated to allow the sale of Māori land by tiny minorities of owners. Despite the higher quorum introduced in the Māori Purposes Act 1967, the quorum requirements for meetings of assembled owners remained low and were particulary unjust. It was not until 1974 that a fairer quorum level was set by the Māori Affairs Amendment Act of that year.

In the case of Ngārara West A14B1, addresses could only be found for 39 of the 77 owners. Also, some owners had died but the timeframe for the meeting did not allow for successions to be arranged. Partly as a result, only 13 owners were involved in the meeting (three of them by proxy). This small minority owned about one-fifth of the shares in the block, yet the law allowed them to pass a resolution authorising the Māori Trustee to sell the land to the highest bidder. They thereby alienated not only their own interests in the land but also those of the 63 other owners. There were no checks and balances in the system as the court's confirmation process was pro forma (concerned only with price). The result was deeply unfair and prejudicial not just to the owners of Ngārara West A14B1 but also to the wider iwi members whose tūpuna were buried in the urupā.

We find that the meeting of assembled owners' system deprived owner groups of their tino rangatiratanga over their land and breached the Treaty principles of partnership and active protection (which were explained in chapter 1).

The prejudice in this case was the loss of ownership and control of this significant urupā, leaving it protected only by its cemetery designation in the district plan. We turn to that issue in the next chapter.

Summary of Findings

In this chapter, our findings may be summarised as follows:

- The incomplete title for Ngārara West A14B1 was restricted from alienation in 1896. Although all such restrictions were cancelled by statute in 1909, there were alternative forms of protection for urupā by that time. In the 1960s, this included the possibility to set the land aside as a Māori Reservation. But tribal leaders were not aware of the necessity to do so for any of the Te Ātiawa / Ngāti Awa urupā until too late and the block had been sold. No finding of Treaty breach was made on this issue.
- The statutory framework for the sale or lease of Māori land in the 1960s was designed to facilitate alienation. In particular, the meeting of assembled owners system allowed tiny minorities to sell the land interests of all owners in a block, using the Māori Trustee as a statutory agent to circumvent the lack of consent. Although the quorum requirements were improved in 1967, they were still too low. A minority of the urupā block owners, possessing only one-fifth of the shares in the land, were present and voted at the meeting of assembled owners for Ngārara West A14B1. There were no checks or balances in the system to prevent this minority selling the whole block. The meeting of assembled owners' system and its use to alienate Kārewarewa urupā was a breach of the Treaty principles of partnership and active protection. The owners (and the wider iwi) were prejudiced by this breach, which rendered their taonga vulnerable to inappropriate development.
- We note also that those owners present at the meeting were advised that this piece of land was *not* the urupā block.

CHAPTER 3

LEGAL PROTECTIONS FOR THE URUPĀ AFTER SALE

3.1 Introduction

In this chapter, we address the legal protections for the urupā after its sale to the Waikanae Land Company. It is important to note that the company was not the Crown nor an agent of the Crown. Its actions are discussed only so far as necessary to examine the statutory protections for Māori burial grounds and the acts or inaction of the Crown in protecting Kārewarewa urupā. In terms of statutory protections, Ngārara West A14B1 had been exempt from rating in the decades before its sale, listed as an 'urupā' in the valuation roll. It had also been designated a 'Māori cemetery' in the district scheme, which had been promulgated by the Horowhenua County Council under the Town and Country Planning Act 1953 (see figure 1). More general protection was available for cemeteries under the Burial and Cremation Act 1964. These two statutes – and the extent to which they protected Kārewarewa in 1970 – are the primary issue for consideration in this chapter.

In respect of Crown actions or inaction, the main opportunity for Crown intervention after the sale of the block arose when the company applied to lift the cemetery designation in 1969–70. This was an essential step before the land could be developed for residential housing. The Crown had an opportunity to lodge an objection and could have 'used its power to halt the development process' but declined to do so. Crown officials failed to identify the existence of the urupā, even though 'evidence to support the existence of a burial site would have been relatively easy to come by'.[1] Crown counsel conceded that the Crown's failure led to the desecration of Kārewarewa urupā and was a breach of Treaty principles. We explore this concession further below.

The application to lift the cemetery designation was heard by a committee of the Horowhenua County Council in 1970. Tribal leaders objected but only one was heard due to the late filing of the other objections. One of the late objections was filed on behalf of the marae trustees. During the committee hearing, some of the issues explored in the previous chapter were raised. These included the fact that the block had not been made a Māori reservation and the supposed 'unanimous' sale of the land by a meeting of its Māori owners. Further, the Māori Affairs Department district officer and Māori Land Court registrar failed to identify the minutes of the 1896 and 1905 hearings. These three points allowed the company to put forward a scenario that the owners of Ngārara West A14B1 had cut the block

1. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), p17

3.1

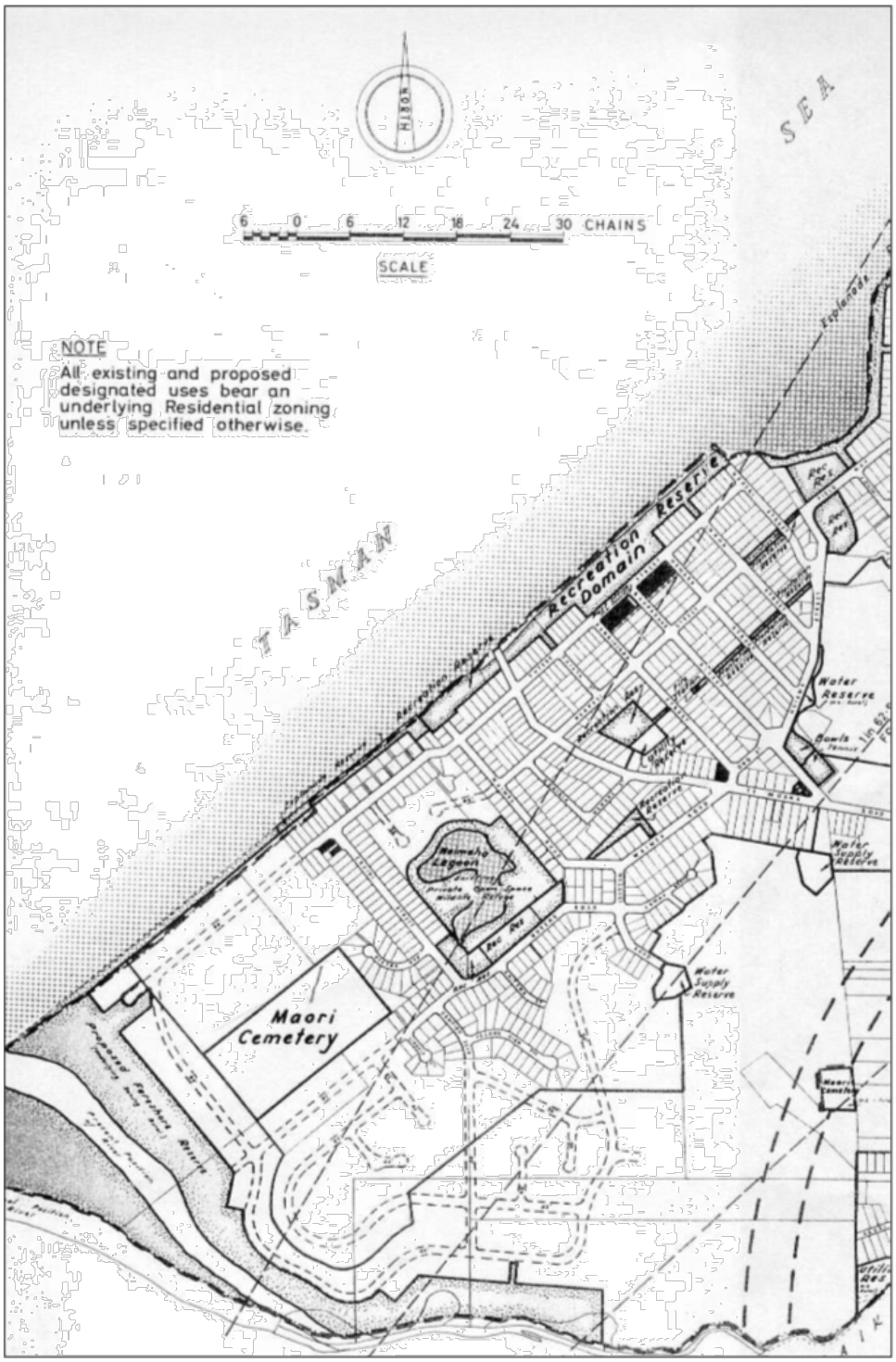


Figure 1: Horowhenua County district scheme map showing the 'Maori Cemetery' block

Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 18 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 20).

out for a future cemetery (not an existing one), a crucial argument in the committee hearing. Another crucial argument was the question of what constituted good town planning under the 1953 Act, and whether the existence of a possible urupā should prevent commercial development. Ultimately, the council agreed to cancel the cemetery designation in 1970.

After exploring these issues, we make our findings and identify the prejudice suffered by the claimants.

3.2 Official Recognition of Ngārara West A14B1 as a 'Māori Cemetery' or 'Urupā'

In their evidence to the Tribunal, Ms Woodley and Ms Baker noted various records that acknowledged the status of Ngārara West A14B1 as a 'cemetery', 'urupā', or 'burial ground'. Ms Woodley observed that the Horowhenua County Council valuation roll from 1939 described the owner and occupier as 'Natives (cemetery)'. In the 1950s, the valuation roll specified that this block was an 'urupā' and therefore non-rateable. Ngārara West A14B1 was still described in the valuation roll as an 'urupā' in 1968.[2] This was clearly related to the block's designation as a 'Māori cemetery' in the Horowhenua county district scheme.[3] The district scheme had been prepared under the Town and Country Planning Act 1953. The block had an 'underlying' zoning as 'residential'.[4] Ms Woodley was unable to say exactly when the cemetery designation had been inserted in the district scheme.[5]

Mahina-a-rangi Baker also noted an exchange between the Crown and the Manawatū Catchment Board in 1957 over proposals to lower the Waimeha Lagoon for drainage purposes. The lagoon was on the western boundary of the urupā block.[6] Ms Baker quoted the following summary of a file entry in the Waikanae River Archive, dated 23 December 1957:

> Letter explaining proposal and seeking objections from affected residents and from 'Maoris' through the Dept of Maori Affairs. Dept advised M[anwatu] C[atchment] B[oard] that the Maori owners would probably wish to object as part of the land was a cemetery and provided the addresses of the principal owners. File note from MCB CE to Area Engineer 'doubtful if you need do much more'. No record of the individual Maori owners being contacted.[7]

2. Suzanne Woodley, 'Porirua ki Manawatū Inquiry District: Local Government Issues Report', June 2017 (doc A193), pp 626–627
3. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015, pp 17–18 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 592–593)
4. Public notice of plan change 3, February 1970 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 34)
5. Woodley, 'Local Government Issues' (doc A193), p 634
6. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), pp 47–48
7. Waikanae River Archive, Archive 14: Waimeha and Waimanu Lagoons, summary of file entry, 23 December 1957 (Mahina-a-rangi Baker, brief of evidence (doc F11), p 48)

Ultimately, no action was taken to lower the lagoon but, as Mahina-a-rangi Baker stated, this shows that 'the Crown was aware and made the Manawatū Catchment Board aware in 1957 that there was a cemetery at Kārewarewa, adjacent to the "Waimeha Lagoon"'.[8]

3.3 Amending the District Scheme to Remove the Designation of 'Māori Cemetery'

3.3.1 The company applies for a change to the district scheme

It appears that the Waikanae Land Company was fully aware of the cemetery designation at the time it purchased the land from the Māori Trustee on 15 October 1969. The company applied for the designation to be removed on 26 August, almost two months before the purchase was completed. The company's solicitors informed the council on 26 August 1969 that their clients were 'negotiating for the purchase of this block'. They said that their enquiries 'indicated that the land had never been used as a burial ground', and so they asked the council to remove the designation and allow the land to be developed.[9]

On 17 October 1969, the application was discussed at the Waikanae County Town Committee, just two days after the sale. This committee was a standing committee of the county council, formed to give Waikanae 'more say in its own affairs'.[10] At the meeting, the county clerk explained that the company had supplied information from the Māori Land Court to the effect that the land had 'not been set apart as a Maori burial ground'. The county council had therefore agreed to propose a change to the district scheme, lifting the cemetery designation from the block. Te Aputa Kauri and Sylvia Tamati had already sent written objections, stating that 'several of their ancestors were buried at Ngārara West A14B1'.[11] The committee recommended to the council that the change process should go ahead, with opportunity for Mrs Kauri, Mrs Tamati, and anyone else to file objections.[12]

Mary O'Keeffe's evidence referred to an *Evening Post* article of 28 October 1969, published about a fortnight after the company's purchase of Kārewarewa from the Māori Trustee.[13] It stated:

> **Development Plan For Maori Cemetery Causes Uneasy Problem**
> An uneasy problem faces the local authorities for Waikanae. It is whether or not to change the District Scheme zoning of an old-time Maori burial ground to subdivisional residential land. The solution is likely to cause either sentimental or economic grievances.

8. Mahina-a-rangi Baker, brief of evidence (doc F11), p 48
9. County engineer, report, 25 May 1970 (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 91); Woodley, 'Local Government Issues' (doc A193), p 639
10. Woodley, 'Local Government Issues' (doc A193), pp 453, 634
11. Woodley, 'Local Government Issues' (doc A193), p 634
12. Woodley, 'Local Government Issues' (doc A193), p 634
13. Mary O'Keeffe, 'Tamati Drive Subdivision: Archaeological Assessment', May 2001 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 57)

> The Waikanae Land Company some time ago purchased 96 acres [Ngārara West A14B2B3] of coastal land at Waikanae, most of this lying northward from the Waikanae River. . . . The company now wishes to purchase an additional 20 acres designated 'Maori Cemetery' on the district scheme. The figure of $31,000 is available for this purpose in an agreement with the Maori Trustee acting for numerous shareholders of the cemetery land, many of whom are apparently willing to sell. . . . Through its Palmerston North solicitors [the company] has applied for a rezoning of the cemetery block . . .
>
> Supporting its application, the company states that 'from inquiries made the land "cemetery" has never been used as a Maori burial ground'. Indeed, it is said only two sailors of old are buried there.
>
> However, in the Waikanae area rich in Maori history there are three recognised Maori burial grounds excluding the Parata family private cemetery near the Memorial Hall.
>
> Oldest of these is Karewarewa, the 20-acre land in question. Two are considered filled, the burial ground in present use being Takamore, inland from Puriri Street.
>
> On learning of the proposals for Karewarewa cemetery some though not all of the Maori people took umbrage. At least two of them, highly respected and influential with genealogies running back at least 10 generations, are lodging objections.
>
> These claim that the 'searched records' referred to are mere Pakeha ones of recent origin. They cite their family knowledge and ancestral lore and, authoritatively, the late Mr W C Carkeek who had access to national archives and the records of the Maori Land Courts of early times for his now standard work to prove otherwise regarding Karewarewa interments.[14]

After describing Carkeek's information about the ancestors buried at Kārewarewa and those who had fallen at Kuititanga, the article concluded:

> Such, then, are the factors around which a decision will have to be made following advertising of the proposed re-designation of what is said to be the Karewarewa burial ground. The land is doubtless ideal for the purpose of the company concerned and its loss to them could be a district loss but, on the other hand, a hahunga or disinterment would be virtually impossible.
>
> And, says a local descendant of the interred, 'We don't want the bones of our ancestors wrapped up in bank notes.'[15]

3.3.2 The Crown's decision not to object to the proposed change

After receipt of the town committee's approval, the Horowhenua County Council decided to proceed with public notification of the proposed district scheme change.[16] In addition to public notification in the *Evening Post*, the council also

14. *Evening Post*, 28 October 1969
15. *Evening Post*, 28 October 1969
16. Woodley, 'Local Government Issues' (doc A193), p 634

notified the Ikaroa Māori Land Court[17] and the Ministry of Works. A ministry official contacted the Māori Affairs Department to confirm whether the department was 'agreeable to the rezoning of the Māori cemetery'.[18] The Internal Affairs Department also contacted the Māori Affairs Department about 'excavating near the Waikanae River which may be encroaching on a Māori burial ground'.[19]

The Māori Affairs Department district officer at Palmerston North, M G McKellar, advised head office of the proposed change to the district scheme, and of the deadline for objections (6 April 1970). McKellar also advised that the land had been sold after a meeting of assembled owners, and enclosed a copy of the Māori Land Court registrar's letter of 23 September (discussed below). His view was that the owners had not set up a Māori Reservation and had chosen to sell the land, and had therefore given up their rights to its use:

> We enclose a copy of a letter written on 23 September 1969 [to the company's solicitors] on the status of this land. It was never set aside as a Maori Reservation, and at the meeting of owners it was stated by Mr Simpson, of Morison, Taylor & Co., Wellington, that the cemetery was not situated on this block. The land is now European Land, and the former Maori owners have, by virtue of their own meeting of owners, given up their rights to use the land.[20]

Presumably this advice was passed on to the Ministry of Works. Following the ministry's approach to the Māori Affairs Department, a ministry official noted that a meeting of the owners had agreed to sell the land, and that this sale had occurred in October 1969 before the proposal to change the land's designation.[21] As Crown counsel submitted, the Minister of Works had the right to file an objection to the proposed change under the provisions of the Town and Country Planning Act 1953 but did not do so.[22] Once advised that the land was no longer in Māori ownership, the Ministry of Works took no further action.[23]

3.3.3 The Crown's concession of Treaty breach

In response to the evidence discussed in the preceding sections, Crown counsel made the following concession of Treaty breach:

17. County clerk to the registrar, Ikaroa Māori Land Court, 17 February 1970 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 33)
18. Minute, no date, on county clerk to district commissioner of Works, 17 February 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 177)
19. District officer to head office, Māori Affairs Department, 9 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 180)
20. District officer to head office, Māori Affairs Department, 9 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 180)
21. Second minute, no date, on the reverse of county clerk to district commissioner of Works, 17 February 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 178)
22. Crown counsel, closing submissions: Kārewarewa urupā, 16 December 2019 (paper 3.3.59), p 17
23. Woodley, 'Local Government Issues' (doc A193), p 635

The evidence confirms that Crown officials in three departments were made aware in February and early March 1970 of the proposed change to the designation of the land. All were aware that the land was (then) currently designated as a 'Māori cemetery' by the council, and one had had the issue brought to his attention as 'encroach[ment] on a Māori burial ground'. This official knew that the 1919 partition in the Native Land Court had been for 'cutting out a graveyard', and knew that the graveyard had nevertheless never been reserved.

At the point when the Crown was made aware of the proposal to remove the designation, two people had already protested that their tūpuna were buried on the site and objected to its development, and more came forward shortly afterward. It was known locally that the site contained gravestones, and the mere fact that the land was designated a cemetery by the council suggested that it could contain burials. Records of the two attempted partitions of the land for a cemetery which pre-dated 1919 were also available at the Māori Land Court.

The Crown considers that a reasonable Crown, in compliance with its Treaty duties and faced with this situation, should have made further enquiries into whether or not there was a burial site on the land in question and, if so convinced, should have used its power to halt the development process. The evidence presented to the Tribunal indicates that if Crown officials had made these enquiries, evidence to support the existence of a burial site would have been relatively easy to come by.

As such, the Crown makes the following concession of Treaty breach:

The Crown concedes that in 1970 it failed to adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1 after being informed that this land was to be developed. The Crown further concedes its failure to object to the removal of the cemetery designation over Kārewarewa urupā led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.[24]

In our view, this Crown concession is entirely apt but it falls short of acknowledging the flaws in the meeting of assembled owners' system, which empowered 13 of the 77 owners to sell Ngārara West A14B1. We have already made a finding of Treaty breach on that point (see chapter 2).

3.3.4 The company tries to clarify the status of the land, 1969

As noted in chapter 2, Mr Simpson had raised the issue of the 'Māori cemetery' at the meeting of assembled owners in December 1968: 'At first it was thought that the cemetery was in this block but he had since learnt that it was not.'[25] From the evidence available to us, the Waikanae Land Company became concerned about this issue in August 1969, prior to purchasing the land from the Māori Trustee. The

24. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp16–17

25. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), p25)

company's solicitors wrote to the Māori Land Court on 26 August 1969, inquiring about whether the block had been used as a 'Māori burial ground'.[26]

The deputy registrar responded on 11 September 1969, enclosing the court minutes from the 1919 partition hearing. He noted that the minutes described the purpose of the partition as 'cutting out a graveyard'. The land had not, however, been 'set apart as a Māori reservation for the purposes of a cemetery, nor have trustees been appointed at any time'. As a result, the block remained 'ordinary Māori freehold land'. The deputy registrar also referred to Mr Simpson's statement at the meeting of assembled owners (quoted in section 2.5.1). The company's solicitors were referred to Mr Simpson in case he might be able to 'enlarge on this statement'. The deputy registrar advised that the court's records 'do not disclose anything further about the actual use of this block as a Māori burial ground'.[27]

At the company's request, the deputy registrar sent an abbreviated letter on 23 September 1969. This second letter stated only that the minutes had referred to a 'graveyard' but that no action had been taken to set it aside as a Māori reservation. The land was simply 'ordinary Māori freehold land'.[28] This more limited statement was later used in support of the company's case to change the Horowhenua district scheme (discussed later below).

Suzanne Woodley commented that the court officials failed to refer to the earlier minutes from 1896 and 1905. Nor did they 'suggest speaking to local Māori about the matter' or engage themselves with the owners or with Waikanae kaumātua and kuia.[29] We agree that these were very important points.

In February 1970, however, the court deputy registrar responded to further requests for information and did inform the company of the 1896 partition request to cut off a 'cemetery', to be named A14A. The deputy registrar explained that this partition order was never completed because there was no survey. He did not mention the proceedings in 1905 to cut out the same land as an 'urupa', which the court had dismissed because the original orders simply needed to be completed.[30] It appears that the company did not pass the information about the 1896 partition on, and there was no mention of it in the proceedings to change the district scheme (see below).

Ms Woodley added: 'There was also no record of any attempt to check valuation rolls or district planning maps which as noted above, recorded that the block was a

26. Deputy Registrar to Rowe and O'Sullivan, 11 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p181)
27. Deputy Registrar to Rowe and O'Sullivan, 11 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p181)
28. Deputy Registrar to Rowe and O'Sullivan, 23 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p182)
29. Woodley, 'Local Government Issues' (doc A193), pp 632–633, 657
30. Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), pp 10–11). The letter was from the deputy registrar to Rowe and O'Sullivan, dated 19 February 1970. This letter is held by Fitzherbert Rowe Lawyers and was made available to Ms O'Keeffe in 2014 but the Tribunal has not had the opportunity to see it.

cemetery'.[31] This brings us to a crucial point: the company's attempt to remove the protection offered to the urupā block by its designation as 'Māori cemetery' in the district scheme.

3.3.5 Te Ātiawa / Ngāti Awa objections to removing the cemetery designation

The council received four written objections from Te Ātiawa / Ngāti Awa:

- Te Aputa Kauri, the great-granddaughter of Wi Parata, stated in her objection form that the land was tapu, that she had ancestors buried in the 'cemetery', and that it was 'the resting place of many persons connected with the early history of Waikanae'. Mrs Kauri said that her objection would only be met by the land remaining a 'Māori Cemetery'.[32]
- Sylvia Tamati lodged her objection on behalf of the marae trustees, stating that the block was the 'burial ground of my Tribal ancestors of "Te Ātiawa", Taranaki'. Mrs Tamati also said that her objection was lodged on behalf of her mother, Ngawati Morehu, the 'beneficiaries' (that is, the former owners), and others who had relations buried in the 'cemetery'. She asked that a block of land be set aside for the 'interment of human remains unearthed on this block' in a casket. Further, Mrs Tamati noted that none of the other tribal burial grounds had been made reservations either or had had trustees appointed, and that action had only just been taken (in November 1969) to appoint trustees for Takamore.[33]
- Jillian Simmonds objected that the block was 'tapu land' and that she had ancestors and relations buried there. She asked that the 'Burial Ground' be left as it was.[34]
- Johnson Te Puni Tamati Thomas objected, stating: 'My ancestors fought, died and are buried in this cemetery and Tapu ground'. He added: 'Although this block of land was never registered as a cemetery reserve [meaning a Māori reservation], it was connected with the early history of Waikanae and the resting place of my ancestors'. Mr Thomas asked for land to be set aside for reburial. He also wanted to be notified of all arrangements so that a special church service could take place.[35] Paora Ropata told us that Mr Thomas and other objectors were 'descendants of Unaiki Parata (my Great Great Grandmother)'.[36]

31. Woodley, 'Local Government Issues' (doc A193), pp 632–633
32. Te Aputa Kauri, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 98)
33. Sylvia Tamati, statement of objections, 2 April 1970; Sylvia Tamaki to county clerk, 5 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii), pp 94–95); (Woodley, 'Local Government Issues' (doc A193), pp 636–637)
34. Jillian Simmons, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 93)
35. Johnson Te Puni Tamati Thomas, statement of objections, 3 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 92)
36. Paora Ropata, brief of evidence, 17 January 2019 (doc F1), p 20

3.3.5

Although all of these objections were signed before the cut-off date of 6 April 1970, only Te Aputa Kauri's objection was received by the council in time. Because one valid objection had been received, the council then had to advertise for the filing of statements in support or opposition to the objection, and set a date to hear the objection. The objectors who filed too late were advised that they could support Mrs Kauri's objection if they chose.[37]

The objection form included a category for how the objection could be met, and this had revealed a significant difference of views: two had sought for the urupā to retain its designation as a Māori cemetery; and the other two had said that their objection could be met by the council setting aside a new piece of land for the reinterment of any human remains disturbed by the developers. Mrs Tamati felt strongly enough about that to file a statement in opposition to Te Aputa Kauri. In that statement, she argued that the development of the land represented progress and would benefit the whole of Waikanae. At present, however, the land was covered with gorse and other 'noxious weeds', and it had proven impossible to obtain funding or the cooperation of all the (former) owners to deal with that problem.[38]

The Waikanae Land Company also registered its opposition to Mrs Kauri's objection. The company's position included three possible grounds:

- the land could not be *shown* to be 'the burial place of any of the ancestors of the objector or of Maoris connected with the early history of Waikanae'; and / or
- the land *was not* a 'traditional Maori burial ground'; and / or
- it was in 'the public interest and the interests of good town planning that the designation be removed'.[39]

Following the receipt of these statements in opposition, Te Aputa Kauri's objection was heard by a special committee of three councillors on 25 May 1970. Mrs Kauri appeared in person at the hearing but was not represented by counsel. The company had the benefit of legal submissions on its behalf, in addition to which one of the directors gave evidence opposing Mrs Kauri's objection. Sylvia Tamati did not appear in person but her objection was read out (noting that this was confined to what should be done with the land now and was not an objection to the rest of Mrs Kauri's evidence).[40]

Te Aputa Kauri told the committee that her opposition was driven by 'the deep feelings of emotion and sentiment which I have concerning our Maori heritage – feelings of respect and veneration which were first instilled in me as a child' by

37. Woodley, 'Local Government Issues' (doc A193), pp 636–638; Horowhenua County Council, minute, 7 April 1970 (and note on that minute) (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 96–97)

38. Sylvia Tamati, statement in opposition to objection, 12 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 100)

39. Waikanae Land Company, statement of opposition to objection, 1 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 101)

40. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970; S Tamati, statement of opposition, 12 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 105–108, 111)

her parents and elders. She was not, however, optimistic that her objection would be successful, being aware that 'sentiment for the past will not stop progress', and that the committee was obliged to consider the public interest and 'good town planning'. Nonetheless, Mrs Kauri stated that her objection stood. If the council disallowed it then at 'the very least' she sought the reinterment of any human remains in 'a common grave on an adjacent piece of reserve land', and for a commemorative plaque to be erected.[41]

William Lawrence, director of the Waikanae Land Company, gave evidence stating that:

- he had inspected the ground and found two headstones as the only evidence that any burials had ever occurred;
- the Māori Land Court had advised that there was 'no Court record nor any knowledge on the part of the Court which would indicate that this block was a traditional Māori burial ground';
- the 1919 minutes indicated that the partition was to set aside land for a new graveyard, not an existing one, and the 23 September 1969 letter from the registrar confirmed this point and indicated that no attempt had been made to appoint trustees or establish a Māori reservation;
- the objector's belief that the block was the Kārewarewa burial ground was wrong, because Carkeek's book stated that the location of this burial ground was unknown;
- a meeting of assembled owners had unanimously resolved to have the land sold by the Māori Trustee; and
- there was nothing visible that suggested the land had any historic significance or should be left in its current state for that reason.[42]

The company's solicitors repeated all of these points but accepted that, if the land was a traditional burial ground, it could only be Kārewarewa. Nonetheless, the solicitors argued that the company's case did not turn on whether the land had been used for burials or not. Rather, even if it could be proven that there was a cemetery on the land, the key issue was whether leaving the block in its present state was an appropriate way of dealing with the land. In the company's submissions, its plans for development of the land were 'in the public interest' and in 'the interest of good town planning'.[43] The company did give an assurance that it would 'honour and respect any remains which may be uncovered and arrange for them to be dealt with in the manner suggested by Mrs Kauri'. The company would not object if the council chose to make this a formal condition on their development of the land.[44]

41. Te Aputa Wairau Kauri, statement of evidence to the special committee, no date (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 109)
42. Woodley, 'Local Government Issues' (doc A193), pp 640–641
43. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 106–107)
44. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 106)

3.3.5

It is clear that a number of important matters were either not presented to the committee or not given sufficient weight:

- No weight whatsoever was accorded to the traditional knowledge of local Māori.
- No reference was made to the minutes of 1896 or 1905, which made it clear that the owners had been trying to set the urupā block apart for a number of years, and had not decided in 1919 to cut out land for a *new* cemetery.
- The company director's search of the overgrown land for headstones was not a valid method for determining the site of a traditional urupā, although it demonstrated that some burials had occurred.
- Significant weight was placed on the point that the urupā had not been made a Māori Reservation since the 1919 partition. The Māori land titles system, however, made it difficult for a large number of owners, with many absent or owning tiny fractions, to deal with their land collectively (such as by agreeing to appoint trustees, establish a Māori Reservation, or clear a 20-acre block of 'noxious weeds').
- Significant weight was placed on the point that the owners had 'unanimously' voted to sell their land at a meeting of assembled owners. This was correct as far as it went – the 13 owners had voted either to sell directly or to appoint the Māori Trustee as agent to sell – and it is obvious why the owners' sale of the land for development was a crucial aspect of the case. But this argument took no account of the fact that, as the law allowed, only a small minority of owners had actually attended the meeting in 1969. Owners representing about 11 per cent of interests in the land had voted in favour of the resolution to vest it for sale. All other owners were disenfranchised and lost their land. Over and above the 77 legal owners, there were more tribal members who had interests under custom, as their tūpuna were buried in that land. We have already found that the statutory scheme that allowed the land to be sold in this way was in breach of the Treaty (see chapter 2).

The committee reported back to the council in July 1970, recommending that the cemetery designation be lifted. Two reasons were given. First, the Māori owners had sold the land to a development company. Secondly, there was 'no certain evidence that it is an historical Maori Burial Ground', or that any burials had taken place since it was 'set apart for a future Maori Cemetery in 1919'. Undermining this reasoning, the committee added that there was nevertheless 'the possibility that human remains may be uncovered as development of the land proceeds'.[45] This indicates that the committee accepted the company's main argument: even if the urupā existed, it was not in the public interest or the interests of good town planning to leave the land in its present state if it could be developed and turned into residential sections.

45. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 107–108)

The committee's decision reflects the monocultural nature of the Town and Country Planning Act 1953. Suzanne Woodley commented in respect of the committee's decision:

> It is of note that the legislation at the time did not provide for a role for tangata whenua in respect to the decision-making process concerning the change of designation. There was also no requirement at the time for local authorities to recognise, when preparing their district plans, 'the relationship of the Maori people and their culture and traditions with their ancestral land'. This was not introduced until 1977 as per section 3 of the Town and Country Planning Act.[46]

Claimant counsel submitted:

> The failure to protect the Urupā from desecration is a number of errors documented by Suzanne Woodley. However, those errors have a single underlying cause: the failure of public bodies established by the Crown to respect the tino rangatiratanga of Te Ātiawa. This is the thread that runs through the failure of Māori Land Court officials to properly advise on the designation of Ngārara West A14 as an urupā, the failure of the Horowhenua County Council or Kāpiti District Council to give weight to the evidence of Te Aputa Kauri, to the failure to consider the objections of other Māori.[47]

The claimants accepted that the Crown was not directly responsible for the committee's decision to prioritise residential development. But claimant counsel submitted that the Crown's legislative framework had not provided for partnerships in local government. As a result, iwi lacked 'real power in relation to decisions affecting their land'.[48]

3.4 The Application of the Burial and Cremation Act 1964

At the time of the sale of the urupā block in 1969, a new law in respect of cemeteries and burial grounds had only recently replaced the Cemeteries Act 1908. After multiple amendments over the years, the Cemeteries Act 1908 was repealed by the Burial and Cremation Act 1964. The parties disagreed as to whether this Act provided Ngārara West A14B1 with any legal protection.

Claimant counsel submitted in respect of the Cemeteries Act 1908:

> The evidence clearly shows that the tangata whenua land owners, the Native Land Court, and the Horowhenua County Council recognised Ngārara West A14B1 as a cemetery or urupa through at least the first half of the twentieth century. Further to

46. Suzanne Woodley, 'Local Government Issues' (doc A193), p 644
47. Claimant counsel (Wai 88 & 89), closing submissions, 24 October 2019 (paper 3.3.49), p 23
48. Claimant counsel (Wai 88 & 89), closing submissions (paper 3.3.49), pp 23–24

> that, the enactment of the New Zealand Cemeteries Act 1908 defined, 'every place of burial not being a cemetery' as a burial-ground and a cemetery as 'any place set apart for the burial of the dead'. The Act made all such burial-grounds subject to all regulations and protections available under the Act.[49]

According to claimant counsel, the same protections still applied to Kārewarewa under the new 1964 Act:

> The Burial and Cremation Act 1964 was in effect upon the sale of the land and kept the same definitions as the 1908 Act. Section 21 of the 1964 Act restricted the alienation of land defined as a cemetery or burial ground to specific circumstances, none of which in our submission were applicable.[50]

The Crown submitted that the 1964 Act did not apply because it 'specifically excluded Māori burial sites'. For that reason, the only relevant legislation was the Māori Affairs Act 1953 and its provision to set aside burial grounds as Māori Reservations.[51]

On the face of it, the Crown is correct. Section 3 of the Burial and Cremation Act 1964 stated: '*Except as is expressly provided in this Act*, this Act shall not apply to Māori burial grounds or to the burial of bodies therein' (emphasis added). In section 2, the Act defined Māori burial grounds as land set apart for that purpose as a Māori Reservation under section 439 of the Māori Affairs Act or a 'corresponding former provision' (which would have covered native reservations prior to the 1953 Act). On our reading of the 1964 Act, urupā that had not been set aside as section 439 reservations do not appear to have been included at all because, in addition to being *expressly excluded*, they did not appear to come under the Act's definitions of 'cemeteries', 'private burial grounds', or 'Māori burial grounds'. The *express provision* referred to in section 3 of the Burial and Cremation Act 1964 included matters in the Act which applied to every cemetery and burial ground (including Māori Reservations), such as the removal of bodies and animal trespass.

In our view, the terms of the 1964 Act meant that the Crown provided minimal or no protection for Māori burial grounds outside any reservations made under section 439 of the Māori Affairs Act 1953.

Nonetheless, Kārewarewa urupā had been designated a 'Māori cemetery' (a term that does not appear in the Burial and Cremation Act) in the local authority's district scheme. This *did* restrict development of the land no matter whether it was still in Māori ownership or not. In our view, the crucial point is not the application of the 1964 Act but the removal of the cemetery designation, which has been discussed in the preceding section.

49. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 10
50. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
51. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 17, n 63

Urupā and the Burial and Cremation Act 1964

Under section 2 of the Burial and Cremation Act 1964:

- 'burial ground' means a denominational or private burial ground 'but does not include a Māori burial ground';
- 'cemetery' means land 'held, taken, purchased, acquired, set apart, dedicated, or reserved' under any Act or before the 1964 Act for the 'burial of the dead generally';
- 'denominational burial ground' means any land outside of a cemetery that has been 'held, purchased, acquired, set apart, or dedicated' under any Act or before the 1964 Act for burials belonging to a religious denomination;
- 'Māori burial ground' means 'any land set apart for the purposes of a burial ground' under section 439 of the Māori Affairs Act 1953 or 'any corresponding former provision'; and
- 'private burial ground' means any land declared a private burial ground under the Cemeteries Amendment Act 1912.

Section 3 of the Burial and Cremation Act 1964 states: 'Except as is expressly provided in this Act, this Act shall not apply to Māori burial grounds or to the burial of bodies therein'. Under section 6, 'cemeteries' were further defined as places that shall be 'open for the interment of all deceased persons'. Cemeteries or burial grounds (but not Māori burial grounds) that were no longer in use could be 'closed' by order of the Governor-General, and could not then be sold or alienated in any way. Cumulatively, it is clear that urupā which had not been set aside as Māori reservations did not come under the definitions of 'cemeteries', 'private burial grounds', 'Māori burial grounds', or 'denominational burial grounds'. They were either not protected or provided very minimal protection by the provisions of the Burial and Cremation Act 1964.

3.5 Treaty Findings

As set out in section 3.3.3, the Crown has conceded that its acts or omissions have breached Treaty principles:

> The Crown concedes that in 1970 it failed to adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1 after being informed that this land was to be developed. The Crown further concedes its failure to object to the removal of the cemetery designation over Kārewarewa urupā led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.[52]

52. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p17

Based on our analysis in section 3.3, the Crown's concession is entirely apt and we agree that the Crown's omissions were in breach of the principles of the Treaty. Specifically, it failed to investigate whether or not Ngārara A14B1 was an urupā, including by failing to consult tribal leaders on this point, which was a breach of the principles of partnership and active protection. Further, the Crown failed to lodge an objection or to intervene in some other way, which was a breach of its active protection obligations. The prejudice was, as the Crown stated, that these Crown omissions 'led to the desecration of the urupā', as we set out below in section 3.6.

In our view, there were additional Treaty breaches in the legislative scheme for local government and town planning at that time. First, as we noted in section 3.3.5, the Town and Country Planning Act 1953 was monocultural legislation. It took no account whatsoever of Māori interests and values. The county council committee's decision was based on the fundamental concept that commercial development was in the best interests of the public and of good town planning, even though it accepted the 'possibility that human remains may be uncovered as development of the land proceeds'.[53] The requirement for decision-makers to take account of the 'relationship of the Māori people and their culture and traditions with their ancestral land' in amending district plans was not introduced until 1977.[54] Secondly, hapū and iwi had no statutory role in the planning process. There was no requirement in the Town and Country Planning Act 1953 for local Māori to be consulted or involved in decision-making processes on matters of importance to them. For these two reasons, we find the Town and Country Planning Act 1953, as it applied to the amendment of the Horowhenua county district scheme to remove the 'Māori Cemetery' designation, was inconsistent with the principles of partnership and active protection. The prejudicial effects will be set out in the next section.

Finally, we observe that, on the face of it, the Burial and Cremation Act 1964 excluded all urupā that were not Māori Reservations from the protections given to cemeteries and private burial grounds. This left the Kārewarewa urupā outside the protections of that Act. But we make no finding of breach on this point as further research would be needed into how the Act worked and was interpreted in practice.

3.6 Prejudice: Desecration of the Urupā

The prejudicial effects of the Treaty breaches set out in section 3.5 were soon evident. After the cemetery designation was removed in 1970, the Waikanae Land Company proceeded with the development of the urupā block and the surrounding area. The development generated a lot of protest and controversy, mostly due to the company's plans for the Waikanae River mouth and estuary. The Wildlife

53. Special committee report, 'Horowhenua District County Scheme: Change No3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp107–108)
54. Town and Country Planning Act 1977, s3(1)(g)

Map 2: The Waikanae Land Company's original lands, including the urupā block
Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 3 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 5).

Division of Internal Affairs was among those concerned about the proposed commercial development of the estuary, and the effect it would have on the native bird population.[55] The company owned about 100 acres on the northern side of the river (see map 2), where it bulldozed the sandhills for residential sections and also began dredging the Waimeha wetlands (the old stream bed). By the end of 1971, a special dredge had 'moved 350,000 cubic metres of sand and created the new Waimanu Lagoon.'[56] This dredged material was compacted and re-deposited on top of the urupā.[57]

55. Ross Webb, 'Te Atiawa / Ngāti Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205), pp 60–67
56. Chris Maclean and Joan Maclean, *Waikanae*, second ed (Waikanae: Whitcome Press, 2010), p 194
57. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), p 13

3.6

Map 3: Residential and undeveloped areas of the urupā block

Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 4 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 6).

Several headstones were uncovered during the company's work.[58] Three have survived, two of which (dated 1848 and 1852) were moved nearby during the development work. The date on the third is illegible; this stone was for a child of George Ashdown, an early whaler, and Maata Pekamu of Ngāti Mutunga and Ngāti Kura, and was 'relocated to the urupā currently used by Te Ātiawa ki Whakarongotai, Te Ruakōhatu.'[59] Rawhiti Higgott advised that this headstone 'dated back to the 1860s.'[60]

Mahina-a-rangi Baker explained that the flattening of the sandhills and the removal of such a large quantity of the sand also affected kōiwi. She cited an earlier 'Kārewarewa Urupā Waahi Tapu' report, prepared by Pataka Moore, stating:

58. Maclean and Maclean, *Waikanae*, p 221; Mary O'Keeffe, brief of evidence (doc G6), p 7
59. Mahina-a-rangi Baker, 'Cultural Impact Assessment', pp 9–13 (Baker, papers in support of brief of evidence (doc F11(a)), pp 584–588); Mary O'Keeffe, brief of evidence (doc G6), p 14. Ruakōhatu Urupā is located across from Whakarongotai Marae, separated by the main road.
60. Rawhiti Higgott, brief of evidence, no date (doc A129), p [4]

> Author of Te Kārewarewa Urupā Waahi Tapu report interviewed various members of Te Ātiawa in his research, who also gave accounts of bulldozers and dredges finding koiwi at this time. They describe this work as 'abhorrent' and having great effect on certain people. Kaumatua Tony Thomas explained that whilst he seldom speaks of the events, it is something that needs to be remembered by the community. These local accounts recalled that many koiwi remained buried, and others were moved within the slurry by trucks to other areas where fill was needed. It is not possible to ascertain specifically which parts of the urupā were affected by the changes as the natural dune system was highly modified during this initial dredging period. . . . Much of Te Kārewarewa urupā has now had residential properties built on it. This is a substantive grievance for Te Ātiawa.[61]

Residential sections were created on the block around part of Barrett Drive, Te Ropata Place, and Marewa Place (see map 3).[62] The company, however, got into financial difficulties and went into receivership in 1979.[63] Ms Baker commented: 'This seems to have a put a hold on development works, however by this time over half of Te Kārewarewa urupā had been developed with housing put on top of the burial sites of our tupuna.'[64] This was the prejudicial effect of the Treaty breaches outlined in sections 2.6 and 3.5.

The desecration of the urupā did not end with the company going into receivership in the 1970s. Development efforts were later revived in 1999–2000 and in 2014–18. They resulted in the exposure of kōiwi in 2000, which led to a temporary halt to the development of Tamati Place, followed by various archaeological works to investigate the nature and extent of burials. These issues are addressed in the next chapter.

61. Mahina-a-rangi Baker, 'Cultural Impact Assessment', p 20 (Baker, papers in support of brief of evidence (doc F11(a)), p 595)
62. Mary O'Keeffe, 'Tamati Place – Archaeological Issues', p 19 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 21). Figure 11 shows current streets laid out on Ngarara West A14B1.
63. Ross Webb, 'Te Atiawa / Ngāti Awa ki Kapiti – Inland Waterways' (doc A205), p 64
64. Mahina-a-rangi Baker, brief of evidence (doc F11), p 50

Summary of Findings

In this chapter, we summarise our findings as follows:

- The Crown conceded that it failed to 'adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1, after being informed that this land was to be developed'. The Crown also conceded that its 'failure to object to the removal of the cemetery designation' led to the 'desecration of the urupā' and was a breach of Treaty principles. We consider that this was an appropriate concession and that the Crown's omissions, including its failure to consult tribal leaders, breached the principle of active protection of taonga.
- In addition, the Town and Country Planning Act 1953 was monocultural legislation, which did not provide for consultation with Māori or any input for tangata whenua in decision-making on matters that affected them. The Act also did not provide for Māori values and interests to be taken into account in local government decision-making. These aspects of the Act, particularly as they applied to the removal of the 'Māori cemetery' designation in 1970, were inconsistent with the principles of partnership and active protection.
- On our reading of it, the Burial and Cremation Act 1964 provided little or no protection to Māori burial grounds (limited in the Act to those that had been set aside as Māori Reservations), but we made no finding of breach because further research is needed on how the Act worked in practice.
- The former Māori owners and the wider iwi were prejudiced by these breaches when the urupā was desecrated by the dumping of 350,000 cubic metres of dredged material on top of it and the development of over half of it for residential housing.

CHAPTER 4

PROTECTION OF THE URUPĀ UNDER MODERN HERITAGE LAWS

4.1 Introduction

4.1.1 What this chapter is about

In this chapter, the primary issue is the extent to which the modern heritage regime has protected Kārewarewa urupā. There are two main statutes: the Historic Places Act 1993 and the Heritage New Zealand Pouhere Taonga Act 2014.

The Historic Places Act 1993 overhauled heritage management and protection in New Zealand. It established the Māori Heritage Council within the Historic Places Trust structure. The council had many functions and powers. These included a leadership role in Māori heritage preservation, determining whether wāhi tapu should be registered, recommending (or deciding upon delegation) the granting of archaeological authorities to modify or destroy a site, and consulting Māori about such applications.[1] The 1993 Act also placed a much greater weight on Māori heritage in general, and on Māori values in respect of sites of interest to tangata whenua, than the previous statutory regime. It required applicants for an archaeological authority to consult tangata whenua on sites of interest to them or explain why the applicant had not done so. It also required applicants to provide an assessment of how the proposed modification or destruction of a site would affect Māori values.[2]

Alongside the emphasis on consultation (by the applicant) and assessment of Māori values in decision-making, the Act retained some of the dominance of archaeological protection that had marked earlier legislation. Te Kenehi Teira, a Crown witness in our inquiry, explained that the 'non-tangible . . . quite often gets relegated to a seconday consideration'. He pointed to the Australian Northern Territories legislation for an alternative approach.[3]

In 2000, the status of the Historic Places Trust was changed from that of an NGO (non-governmental organisation) to a Crown entity. Responsibility for the Act also shifted from the Conservation Department to the Ministry for Culture and Heritage.[4]

In 1999–2000, the Waikanae Land Company resumed attempts to development the remaining parts of Ngārara West A14B1 for the Tamati Place housing development (see figure 2, showing the undeveloped area, including Tamati Place and Wi

1. Historic Places Act 1993, ss14(3), 84–86
2. Historic Places Act 1993, ss11–12
3. Transcript 4.1.21, p165; Northern Territory of Australia Heritage Act 2011
4. Archives, Culture, and Heritage Reform Act 2000

4.1.1

Figure 2: The undeveloped part of Kārewarewa urupā
Source: Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 72

Kingi Place). At the time, given the removal of the 'Māori cemetery' designation and the decision that the block had been set aside for a *new* cemetery, work to prepare the site was carried out without any application for an authority from the trust. In 2000, however, preliminary work exposed kōiwi on the site This brought in the Historic Places Trust and the need for an archaeological authority to continue any further development of the site. The degree of protection which this afforded is the first issue examined in this chapter.

The heritage management regime was reformed in 2014 but not in such a ground-breaking way as in 1993. Under the Heritage New Zealand Pouhere Taonga Act 2014, the trust was renamed Heritage New Zealand Pouhere Taonga. It remained a Crown entity but the trust's branch committees were abolished. The 2014 Act continued the Māori Heritage Council and its various powers and functions. The Act was designed to streamline processes and align them with the RMA, partly with the intention of giving greater weight to landowners' views and interests in heritage decision-making.[5] Importantly for this report, the 2014 Act introduced a new form of archaeological authority called an 'exploratory authority', which provided for an invasive investigation of a site. These authorities were treated in a different manner than those to modify or destroy a site.[6]

5. Ministry for Culture and Heritage, 'Heritage New Zealand Pouhere Taonga Bill: Departmental Report', May 2013, pp 5, 12: www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws
6. Heritage New Zealand Pouhere Taonga Act 2014, s 56

In 2014, the Waikanae Land Company resumed efforts towards developing Tamati Place but now with the clear proof that the site was an urupā. The question then became for the developers: was the whole site an urupā and could development continue if there were parts of the site with no evidence of burials? The result was the use of the new exploratory authorities established in 2014. The legislative regime for these authorities, and the processes used by Heritage New Zealand Pouhere Taonga to grant an authority to dig a test pit in 2016, comprise the second set of issues addressed in this chapter. The Crown's submissions were focused mostly on these issues, and we received evidence from three Heritage New Zealand witnesses: Te Kenehi Teira, Dean Whiting, and Kathryn Hurren. We have therefore considered the evidence and analysis at some length in the section dealing with these matters. The archaeologist concerned, Mary O'Keeffe, also presented evidence as a Crown witness, but Crown counsel noted that Ms O'Keeffe was an independent witness and her views were 'hers alone and not the Crown's'.[7]

Following our discussion and analysis of these issues, we make our Treaty findings. We then proceed to discuss the potential remedies raised by claimant and Crown witnesses before making our recommendations. As our recommendations all relate to the issues discussed in this chapter, the recommendations are included at the end of this chapter rather than made the subject of a new chapter.

4.1.2 The Tribunal's jurisdiction

Under section 6 of the Treaty of Waitangi Act 1975, the Waitangi Tribunal has jurisdiction to consider (among other things) acts or omissions 'by or on behalf of the Crown'. Heritage New Zealand Pouhere Taonga is a Crown entity. The question as to whether or not the Tribunal has jurisdiction to make findings about the acts or omissions of Heritage New Zealand was not considered by the parties' submissions in this inquiry. All parties assumed that the Tribunal does have such jurisdiction.

The Crown Entities Act 2004 classifies Heritage New Zealand as an 'autonomous Crown entity', which 'must have regard to government policy when directed by the responsible Minister'. Autonomous Crown entities are distinguished in that statute from Crown entities that are classified as 'Crown agents'.[8] The Historic Places Trust was also an autonomous Crown entity but subject to a Treaty clause inserted in 2000 into the Historic Places Act 1993, which stated:

> (2) This Act must continue to be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires, even though this Act is no longer—
>
> (a) administered by the Department of Conservation; or
>
> (b) included in Schedule 1 of the Conservation Act 1987.[9]

7. Crown counsel, closing submissions: Kārewarewa urupā, 16 December 2019 (paper 3.3.59), pp 21–22
8. Crown Entities Act 2004, s 7; sch 1, pt 2
9. Historic Places Act 1993, s 115(2); Archives, Culture, and Heritage Reform Act 2000, s 12

4.1.2

The Heritage New Zealand Pouhere Taonga Bill was introduced in 2013. The Ministry of Culture and Heritage advised the select committee that the Historic Places Act's 'general requirement "to give effect to the principles of the Treaty"' was 'unclear'. Therefore, the Ministry advised, 'consistent with modern drafting practice, the Bill identifies specifically which provisions of the Bill give effect to the Treaty'.[10]

Section 7 of the Heritage New Zealand Pouhere Taonga Act 2014 states that, '[i]n order to recognise and respect the Crown's responsibility to give effect to the Treaty of Waitangi', the Act contains specific provisions. These provisions relate to the 'functions, powers and delegations of the Māori Heritage Council and processes relating to the archaeological authority process'.[11] Section 7 specifies the various provisions of the Act as:

- Section 10 provides for the appointment of three board members with knowledge of 'te ao Māori and tikanga Māori'.
- Under sections 13–14, Heritage New Zealand has functions relating to wāhi tūpuna, wāhi tapu, and 'wāhi tapu areas', and can be a Heritage Protection Authority for these under the RMA.
- In sections 22 and 26, the Heritage New Zealand board has the power to delegate functions and powers to the Māori Heritage Council.
- In sections 27–28, the Māori Heritage Council has functions and powers to 'ensure the appropriate protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, historic places, and historic areas of interest to Māori'.
- In section 39, Heritage New Zealand has power to enter into heritage covenants for 'wāhi tūpuna, wāhi tapu, and wāhi tapu areas'.
- In sections 46, 49, 51, 56, 57, 62, and 64 (all relating to archaeological authorities) and section 67 (applications to go on the New Zealand Heritage List), there are 'measures that are appropriate to support processes and decisions relating to sites that are of interest to Māori or to places on Māori land'.
- In sections 66, 68, 69, 70, 72, and 78 (all relating to the New Zealand Heritage List), the Māori Heritage Council has power to enter, or to determine applications to enter, various sites on the New Zealand Heritage List. These powers relate to registering 'wāhi tūpuna, wāhi tapu, and wāhi tapu areas' on the list.
- In section 74, the Māori Heritage Council has power to make recommendations to local authorities about wāhi tapu areas entered on the list, to which local authorities must have particular regard.
- In sections 75 and 82, there are requirements to consult the Māori Heritage Council 'in certain circumstances' relating to the New Zealand Heritage List and the National Historic Landmarks list. In section 82, the Minister for

10. Ministry for Culture and Heritage, 'Heritage New Zealand Pouhere Taonga Bill: Departmental Report', p 11

11. Heritage New Zealand Pouhere Taonga, *Statement of General Policy: The administration of the archaeological provisions under the Heritage New Zealand Pouhere Taonga Act 2014*, 29 October 2015, p 4 (Crown counsel, documents filed in response to Tribunal questions (doc G1(d)), p 5)

> Māori Development must be consulted in certain cirumstances about the National Historic Landmarks list.[12]

Section 7 thus means that the Crown's responsibility to give effect to the Treaty is 'recognised and respected' in these 25 provisions of the Act. Our understanding is that, when Heritage New Zealand exercises or carries out these functions, powers, and processes, the Crown's Treaty 'responsibility' must be met. Crown counsel certainly considered that Heritage New Zealand has Treaty obligations and that its actions were matters for which we have jurisdiction. She submitted, for example, that Heritage New Zealand's decision to grant the authority for a test pit in 2016 was 'not in breach of its duties under the Treaty of Waitangi'.[13]

Te Kenehi Teira, deputy chief executive at Heritage New Zealand, told us that the organisation's 'philosophy and practice' approached and complied with Treaty obligations 'in additional ways' to those specified in section 7 of the Act. He also referred us to the Māori Heritage Council's policy statement.[14] Entitled *Tapuwae*, it stated that 'Heritage New Zealand Pouhere Taonga has a responsibility to give effect to the Treaty of Waitangi'.[15] The council's policy statement added:

> The Treaty of Waitangi provides the foundation for Heritage New Zealand engagement with Māori communities in respect of their heritage places. As a Crown entity, Heritage New Zealand exercises its functions and powers on the basis of Treaty-based relationships with whānau, hapū and iwi. Heritage New Zealand, through the presence of the Council and the standing and involvement of Council members amongst Māori communities, has successfully forged strong relationships with whānau, hapū and iwi. This permits the activities and statutory functions of Heritage New Zealand relating to Māori heritage places to be undertaken within a relationship that is essentially a Treaty partnership.
>
> Relationships between Heritage New Zealand and whānau, hapū and iwi are underpinned by the principles of partnership – incorporating a duty to act reasonably, honourably and in good faith, and a duty to make informed decisions – active protection, and where applicable, redress.[16]

We conclude, therefore, that section 7 of the 2014 Act delegates 'the Crown's responsibility to give effect to the Treaty' to Heritage New Zealand for the provisions referred to in that section. The Māori Heritage Council has instituted a policy, which states that Heritage New Zealand's activities and functions in respect of Māori heritage must be carried out within a Treaty relationship underpinned

12. Heritage New Zealand Pouhere Taonga Act 2014, s 7
13. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 4, 56
14. Te Kenehi Teira, answers to written questions, not dated (30 September 2019) (doc G4(d)), pp [4]-[5]
15. Heritage New Zealand Pouhere Taonga, *Tapuwae: Nā Te Kaunihera Māori Mō Te Pouhere Taonga Māori: The Māori Heritage Council Statement on Māori Heritage* (Wellington: Heritage New Zealand Pouhere Taonga, 2017), p 7
16. Heritage New Zealand Pouhere Taonga, *Tapuwae*, p 8

by the principles of partnership, active protection, and (where applicable) redress. In this chapter, our analysis in respect of Heritage New Zealand is focused on the processes and powers exercised under section 56 of the Act, which is a provision included in the Treaty clause (section 7). We therefore have jurisdiction to consider the acts or omissions of Heritage New Zealand for the purpose of this report. Our findings and recommendations are mostly focused on section 56 itself (see sections 4.3.9 and 4.5 below).

4.2 Kārewarewa and the Historic Places Act 1993

4.2.1 Resumption of development work, 1990–2000

According to Chris and Joan Maclean, who wrote a history of Waikanae, the main focus of residential development turned to the south of the Waikanae River in the 1980s and 1990s.[17] In the 1990s, however, the Waikanae Land Company resumed work on the urupā block. Although the company was in receivership, 'further stages of subdivision of the Company's land were undertaken in the name of the Company on behalf of unpaid security holders'.[18] Archaeologist Mary O'Keeffe explained:

> In 1990 and 1999 the ground surface of the [Tamati Place] subdivision was re-contoured. In 1990 the ground to the west of Wi Kingi Place was cut to a maximum depth of slightly more than 3 m on the dune ridge, and slightly more than 0.5m west of the intersection between Tamati Place and Wi Kingi Place. Fill was deposited on the eastern part of the subdivision to a maximum depth of 4 m. In addition, small pockets in the western part were filled to a depth of less than 1m.[19]

By the time of the work done in 1999–2000, the Resource Management Act 1991 (RMA) and the Historic Places Act 1993 were in place. This was a significant change in the legislative framework for town planning. According to Paora Ropata's evidence, resource consents were granted in 1997–99 'to build 29 houses on the site'.[20] We have no further evidence about these consents or the processes followed to grant them, so we are unable to determine how or why further development was permitted. The High Court noted in 2002 that no 'archaeological conditions or restrictions were attached to the consent which had been granted to the developer for the [Tamati Place] subdivision'. Nor was there any 'notation on the District Plan indicating that the site had any archaeological significance'.[21] Section 99 of

17. Chris Maclean and Joan Maclean, *Waikanae*, second ed (Waikanae: Whitcome Press, 2010), p 196
18. Mary O'Keeffe, 'Tamati Place – Archaeological Issues', p 2 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 4)
19. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), pp 14–15
20. Paora Ropata, brief of evidence, 17 January 2019 (doc F1), p 21
21. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [6] (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 97–98)

the Historic Places Act, however, made it an offence to destroy, damage or modify an archaeological site without an authorisation from the Historic Places Trust. Archaeological sites were defined in the Act as places associated with pre-1900 human activity which might – through archaeological methods – provide evidence about New Zealand history.[22]

Work began in 2000 to 'prepare the site and construct service trenches'.[23] The trenches were dug along the centre of the two proposed roads, which were named Tamati Place and Wi Kingi Place (a short offshoot from Tamati Place).[24] During the course of this work, kōiwi were exposed on two separate occasions. The remains of at least nine individuals were found (some evidence says 11).[25]

In brief, based on the accounts in the District Court and High Court cases about this incident, kōiwi were uncovered on 5 July 2000 as a result of the earthworks. Historic Places Trust staff decided that the situation should be dealt with on an emergency basis. This meant that the site would not be treated as an 'archaeological site' for the purposes of the Historic Places Act, so that the kōiwi could be disturbed further by removing them for reinterment. Those working at the site were advised, however, that further work would need an authority from the trust and would also need to be monitored. A contentious point, however, was that some limited work was allowed to be completed but without enough specificity as to *where*. Susan Forbes, the archaeologist called to the site on 5 July 2000, advised contractors at that time of the existence of what appeared to be middens, which she said indicated the whole area was potentially an archaeological site. On 19 July 2000, a driver contacted Ms Forbes because further kōiwi had been found, at least 10 metres away from the original site of exposure. According to the contractors, the work underway at the time was necessary because pipe testing had showed leaks, and so – for safety purposes and to protect their materials – they had to complete some of the drainage work.[26]

Paora Ropata told us that the people only found out what was going on from Susan Forbes through 'word of mouth', not from the developers, and 'there was a sense of anger and betrayal once the Iwi learned of the continuation of diggings'.[27] In 2001, the Historic Places Trust prosecuted Payne Sewell Ltd and Higgins

22. Historic Places Act 1993, s 2. There was also a second definition relating to shipwrecks which is not relevant here.

23. Mary O'Keeffe, 'Tamati Drive Subdivision, Waikanae: Archaeological Assessment', May 2001 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 50)

24. Mary O'Keeffe, 'Tamati Place – Archaeological Issues' (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 6)

25. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 595); Paora Ropata, brief of evidence (doc F1), p 21; *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [15] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 99)

26. *Historic Places Trust v Higgings Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001; *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 80–109)

27. Paora Ropata, brief of evidence (doc F1), pp 21–22

Contractors Ltd for a breach of section 99 of the Historic Places Act 1993. The Kaunihera Kaumātua, a council of tribal elders, 'actively supported' the prosecution.[28] The District Court convicted the defendants for continuing to work on the site after 5 July 2000 because they had been 'put on notice by archaeologist Susan Forbes'.[29] Higgins Contractors were fined $15,000 and Payne Sewell Ltd were fined $20,000.[30]

The High Court overturned this conviction on appeal, however, on the basis that the information laid against the contractors had failed to specify the correct date and place. The information laid against Payne Sewell and Higgins Contractors had specified Tamati Place, whereas the kōiwi had been exposed on Wi Kingi Place. The Historic Places Trust had argued that 'Tamati Place' was a single archaeological site but the court did not accept that argument. Also, the work which uncovered the kōiwi had occurred on 17–19 July, whereas the information charged that the offence occurred on 20 July (the day Ms Forbes was contacted and work was carried out with her to complete uncovering the kōiwi so that they could be removed). Further, the trust had allowed some work to continue without the need for an authority. The judge therefore found that the District Court had been mistaken in finding that the 'lack of authority from the Trust was made out'. For these two reasons, the High Court overturned the conviction.[31]

4.2.2 The Waikanae Land Company seeks authority from the Historic Places Trust, 2000–04

Claimant counsel submitted that the appeal succeeded on 'what was understood to be a technicality'.[32] There was no doubt, however, that an authority would now be needed from the Historic Places Trust to continue with any further development work on the Tamati Place subdivision. In November 2000, the Waikanae Land Company applied for an authority from the Historic Places Trust under section 11 of the Historic Places Act.[33] This section of the Act enabled applicants to seek an authority to destroy, damage, or modify an archaeological site. Applicants were required to file an assessment of any 'archaeological, Māori, or other relevant values and the effect of the proposal on those values'. They also had to state whether

28. Paora Ropata, brief of evidence (doc F1), p 22

29. *Historic Places Trust v Higgings Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001 at [55] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 95)

30. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [2] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 96)

31. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [35]-[48] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 104–108)

32. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 14

33. 'Application to Destroy, Damage or Modify Archaeological Site(s)', not dated (November 2000); Manager Māori Heritage to Manahi Baker, Kapakapanui, 23 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 73, 82). The application form cites section 12 (an application for a general authority) but the Historic Places Trust treated it as an application under section 11 of the Act.

they had consulted with tangata whenua, and to relay any views expressed by tangata whenua. If they had not consulted with Māori, then the applicants had to provide an explanation as to why they had not done so.[34]

The company sought authority to complete the residential subdivision by removing excess sand, building roads, re-levelling part of the site, and connecting the water supply. The eventual building of houses, however, was 'unlikely to penetrate original ground levels'. The company also offered to avoid construction 'over the find of koiwi', but this would require modifying the subdivision plan and obtaining the council's approval for a consent variation.[35]

Local Māori leaders found out about the application in early 2001. At that point, they were supporting the prosecution (which was still underway), and were deeply concerned about the prospect of further damage to the urupā. They were adamant that no further work be done.[36] Manahi Baker of Kapakapanui, the iwi's environment and heritage unit, wrote to the Historic Places Trust in January 2001, pointing out that no consultation had occurred with tangata whenua. There was also concern that archaeological investigations might further disturb the site. It was their preference that any further work await the outcome of the prosecution, after which the iwi would 'be happy to assist the landowner with plans to isolate and protect the cemetery from development'.[37]

The manager of the Māori Heritage Unit responded that the company believed there was no 'intact archaeological evidence' on the site. This was apparently because of the amount of material that had been deposited on the site as a result of the dredging. Hence, the company now wanted to carry out an archaeological investigation to determine whether an authority was in fact needed. The trust, however, had already told the company that an authority *was* required. He reassured Mr Baker that consultation was also required and the application could not proceed further until 'the views and comments of Te Runanga o Te Ati Awa Ki Whakarongotai are received'.[38] In May 2001, the Historic Places Trust advised Mary O'Keeffe that no investigative digging would be allowed because the 'area where you wish to excavate is part of a known Maori cemetery'.[39]

The Waikanae Land Company had engaged Ms O'Keeffe to carry out an archaeological assessement (a requirement of section 11 of the Historic Places Act 1993). She explained: 'An assessment investigates the nature, location, context, significance and value of known and potential archaeology that could be adversely

34. Historic Places Act 1993, s 11(2)(c)-(d)

35. 'Application to Destroy, Damage or Modify Archaeological Site(s)', not dated (November 2000) (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 78–79)

36. Paora Ropata, brief of evidence (doc F1), pp 23–24

37. Manahi Baker, Kapakapanui, to Māori Heritage Unit, Historic Places Trust, 16 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 81)

38. Manager Māori Heritage to Manahi Baker, Kapakapanui, 23 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 82–83)

39. Regional Archaeologist to Mary O'Keeffe, 3 May 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 87)

impacted by proposed work, so as to determine whether granting an authority is appropriate.'[40] In brief, Ms O'Keeffe's report in 2001 found that the shell material (initially supposed by Susan Forbes to be evidence of middens and ovens on the site) originated from the material dredged from the Waimeha wetlands in the 1970s. But she recommended against the company continuing with its application:

> It is inferred from traditional and contemporary sources that the area including the proposed subdivision is a Maori burial ground, probably in use from 1839.
>
> Burials recorded on an 1898 plan makes the area an archaeological site in terms of the definition in the Historic Places Act.
>
> Archaeological values are considered to be such that further development is considered inappropriate.
>
> *It is recommended* that the client does not apply for an authority under the Historic Places Act, as the archaeological values are considered sufficiently high to preclude further work. It is considered very unlikely that Historic Places Trust would grant an authority with strong evidence of the presence of a burial ground. [Emphasis in original.][41]

The Waikanae Land Company did not accept this recommendation. Instead, it proceeded with a ground penetrating radar survey in March 2002, hoping to find proof of whether or not there were further burials in the undeveloped area. With the technology available at that time, the radar found nine 'anomalies' near to where the kōiwi were exposed in July 2000. There were another three at the northern end of the site. Ms O'Keeffe explained that, in archaeological terms, the 12 'anomalies' located in 2002 could conceivably be evidence of further burials. She also noted that technology has 'improved markedly' since then, and a later geomagnetic survey in 2016 found many more such 'anomalies'.[42] An 'anomaly' is 'where a hole has been dug and has been filled in because that filled in soil gives back a different magnetic signature'.[43]

Following the archaeological assessment and the results of the radar survey, the company reported to the Historic Places Trust in January 2003 'stating that information is still being collated for the archaeological authority application submitted to the Trust in November 2000'.[44] By February 2004, when the company had still not filed the information necessary for its application to proceed, the trust decided that the application had lapsed. The trust advised the company that their

40. Mary O'Keeffe, brief of evidence (doc G6), p 6
41. Mary O'Keeffe, 'Tamati Drive Subdivision, Waikanae: Archaeological Assessment', May 2001, p 2 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 49)
42. Mary O'Keeffe, brief of evidence (doc G6), pp 19–20
43. Transcript 4.1.21, p 188
44. Senior Archaeologist to Waikanae Land Company, 4 February 2004 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 88)

application was considered withdrawn and a fresh application would be required 'at a later date if / when plans are finalised for the property'.[45]

The Historic Places Act 1993 thus protected Kārewarewa urupā from further desecration at this point. Although the trust's prosecution ultimately failed on appeal in the High Court, the company could not proceed to further damage or modify the urupā without an authorisation from the Historic Places Trust. The company clearly struggled to find archaeological evidence that would support its application. The archaeological assessment recommended against proceeding because the area was a burial ground, and the ground penetrating radar survey suggested the presence of further burials over and above those already disturbed in 2000 (and back in the 1970s). As far as we are aware, the Waikanae Land Company let the matter lie for a decade or so. It was not until 2014 that the company tried again to seek authorisation to carry out archaeological investigation so that development could resume. We address this latest development below in section 4.3.

4.2.3 Reburial of the kōiwi

In the meantime, while the company's application was still extant, Te Ātiawa / Ngāti Awa leaders also needed to apply to the Historic Places Trust for authorisation to disturb the site so that the kōiwi could be reburied in the urupā.[46] The trust granted the authority in mid-2001, on two conditions:

> That prior to the re-interment, the location of the area to be re-excavated is accurately determined by survey so as to ensure no further disturbance to the remaining burials occurs.
>
> That any excavations are monitored by an approved archaeologist so as to ensure that any further disturbance to the site is kept to a minimum.[47]

Paora Ropata told us: 'We then took the kōiwi back to Kārewarewa and reinterred in accordance with our tikanga at Tamati Place – the name which had been applied to the Kārewarewa Urupā.'[48] The burial took place close to the site where the kōiwi had been found in July 2000.[49] By choosing to reinter the kōiwi at Kārewarewa, the Kaunihera Kaumātua sent a clear signal that the undeveloped part of the urupā must continue to be protected from further development.[50]

45. Senior Archaeologist to Waikanae Land Company, 4 February 2004 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 88)
46. Paora Ropata, brief of evidence (doc F1), p 23
47. Te Kenehi Teira, Kaihautu Māori, to Kaumātua Council, Te Ati Awa ki Whakarongotai Inc, 19 July 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 70)
48. Paora Ropata, brief of evidence (doc F1), p 23
49. See 'Kārewarewa Urupa Site', photograph, not dated (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 72); Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place, Waikanae, Kapiti Coast', April 2018 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 16)
50. Manu Parata, brief of evidence, 30 July 2018 (doc E6), p 5

4.3 Heritage New Zealand Pouhere Taonga Act 2014

4.3.1 The Takamore trustees attempt to protect Kārewarewa urupā

Following the lapse of its application to the Historic Places Trust in 2004, the company's representatives did not try to proceed with development work for a decade. By the time the company resumed its efforts in 2014, a new heritage statute had been passed and the Takamore trustees had attempted to get the Crown to buy back the land for the iwi.

The Takamore urupā was the subject of evidence from Ben Ngaia and others during our hearings. This urupā was made a Māori Reservation in 1973 (as discussed in chapter 2). We will address the claims in respect of Takamore in the volume of our report dealing with the Te Ātiawa / Ngāti Awa phase. Here, we note simply that Takamore was the subject of a long struggle between the trustees, the New Zealand Transport Agency (NZTA), and the Kapiti Coast District Council over the route of the Kapiti expressway. At the end of that struggle, the Takamore trustees reached a reluctant accommodation with the NZTA in 2013. Ben Ngaia explained that, as part of the mitigation, there was to be a monetary component which the trustees 'stipulated we wanted used to purchase land in Waikanae Beach held in private ownership, but which was an Urupā [Kārewarewa]'.[51]

Mr Ngaia further explained:

> During our negotiations with Kapiti Coast District Council and then later with New Zealand Transport Agency, the Takamore Trustees took the position that one way to try and mitigate the adverse impacts on our kaitiakitanga in relation to the Takamore waahi tapu would be to provide us an opportunity to manage and exercise kaitiakitanga to the Tamati Place urupa (an area we regard as part of our wider responsibilities, but with which we have been unable to have a meaningful relationship). NZTA made an effort in good faith to try and purchase the Tamati Place undeveloped land from the private owner, but this has not been successful.[52]

This attempt to protect Kārewarewa reflected the Takamore trust's wider role in caring for wāhi tapu. As Ms Baker noted, her cultural impact assessment report for Kārewarewa in 2015 was 'peer reviewed and approved by the [Te Ātiawa ki Whakarongotai] Trust Board, Paora Ropata as lead Claimant for Wai 1945 and Ben Ngaia as Chair of Takamore Trustees, responsible for waahi tapu in our rohe'.[53] This was later to cause some confusion for archaeologist Mary O'Keeffe and Heritage New Zealand, as we discuss below.

51. Benjamin Ngaia, brief of evidence, 30 July 2018 (doc E3), p 17
52. Benjamin Ngaia, answers to written questions, 11 October 2018 (doc E3(d)), p 3
53. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 51

4.3.2 The Waikanae Land Company resumes attempts to develop Kārewarewa

After the NZTA tried to purchase the remaining undeveloped land, the Waikanae Land Company renewed its attempts to proceed with the Tamati Place housing project. Mary O'Keeffe suggested that 'the developer was determined to continue with the development, and the presence of koiwi was not seen by him as a problem or an obstruction to development'.[54] The company approached Te Ātiawa ki Whakarongotai Charitable Trust in August 2014, asking the iwi for a cultural impact assessment report, which could be used for either a Resource Management Act process or a new application for an archaeological authority. The cultural impact assessment was prepared by Mahina-a-rangi Baker in 2015.[55] This was the first step in the company's plan to complete the stalled housing subdivision.

Following the completion of the cultural impact assessment in November 2015, the company re-engaged Mary O'Keeffe as an archaeologist. This time, Ms O'Keeffe was not prepared to make the kind of recommendations against development that she had made back in 2001 (see above):

> Initially in 2000–2001, when I thought this situation may have an immediate resolution, I wrote an archaeological assessment which contained recommendations, as required by Historic Places Trust's authority application process. As it became apparent over ensuing years that this situation would not be resolved quickly or easily, and as the developer's determination became more apparent, I changed the scope of my written reports to serve the purpose of informing a discussion between the developer and iwi, by setting out verified facts, hypotheses based on known data, and not setting out any recommendations.[56]

A key factor for the company was that the 'extent and intensity of burials has yet to be confirmed'.[57] The 'landowner would like to confirm whether the site was used for extensive burials other than the remains currently known' – hence, in the company's view, the need for further archaeological investigation.[58] Also, the company wanted to 'verify' the information in the iwi cultural impact assessment that the site was an urupā.[59]

54. Mary O'Keeffe, brief of evidence (doc G6), p 2
55. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 5 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580)
56. Mary O'Keeffe, brief of evidence (doc G6), p 2
57. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Kathryn Hurren, papers in support of brief of evidence (doc G3(a)), p 9)
58. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place, Waikanae, Kapiti Coast', report prepared for Fitzherbert Rowe Lawyers, April 2018, p 4 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 16)
59. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 5 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 17)

As a result, the company's lawyers commissioned a geomagnetic survey, which was non-intrusive (in the physical sense) and so did not require an authority from Heritage New Zealand. Dr Hans Bader carried out the survey in July 2016. Les Mullens, a Te Ātiawa / Ngāti Awa kaumātua, was onsite during the survey and was later briefed on its results. According to Ms O'Keeffe, Les Mullens was 'present on site at the request of Ben Ngaia, of the Takamore Trustees'.[60] Dr Bader recorded 'a large number of anomalies across the site; more than in the 2000 [ground penetrating radar] survey'.[61] He observed that some of the 'anomalies' were close to those previously recorded in 2000, but 'there are a good number more of similar "anomalies" towards the north and northwest of the area of the previously recorded anomalies, tentatively identified as possible burial pits'.[62] Before Dr Bader's results could be interpreted, however, he required a test pit to show the depth of the dredged material deposited on the site back in 1969–71, to determine whether the 'anomalies' were in the fill or below the original surface of the ground.[63]

The company decided to proceed with a test pit to determine the depth of the fill. According to Mary O'Keeffe, such a pit – dug well away from any known 'anomalies' – would not have required an authority from Heritage New Zealand. She stated:

> In discussion with Heritage New Zealand, we agreed that the selected location was deliberately well away from any possible koiwi, and thus did not technically trigger the requirement for an authority (Heritage New Zealand confirmed this). However, due to the high sensitivity of this entire site, the desire to keep iwi fully informed and involved through their role in the authority process, and my desire to act with transparency and integrity, I decided to seek an authority. Heritage New Zealand supported this action and the research motives underlying it.[64]

We turn next to the issue of archaeological authorities, the particular test pit application in 2016, and the claimants' response to the digging of an archaeological trench in their urupā.

4.3.3 Archaeological authorities under the 2014 Act

The Historic Places Trust Act 1993 was replaced by the Heritage New Zealand Pouhere Taonga Act in 2014. According to Te Kenehi Teira, a deputy director (Kaihautu) at Heritage New Zealand, the Act's 'archaeological provisions offer some of the strongest protection for heritage in the western world'. Heritage New Zealand, he said, 'promotes, to iwi / hapū, the use of the archaeological policies /

60. Mary O'Keeffe, brief of evidence (doc G6), p 22; Ben Ngaia to Mary O'Keeffe, email, 8 July 2016 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 35)
61. Mary O'Keeffe, brief of evidence (doc G6), p 19
62. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 16 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 28)
63. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 10)
64. Mary O'Keeffe, brief of evidence (doc G6), p 23

provisions in the Heritage New Zealand Act, as a tool to assist Māori in their kaitiaki role'.[65]

Anyone seeking to modify or destroy an archaeological site (or part of a site) must first obtain an authority from Heritage New Zealand.[66] It is compulsory for applicants to consult with 'all iwi/hapū that might have an interest in a site', although consultation does not give local Māori a 'veto right'. Mr Teira noted that consultation meant applicants sharing information with Māori and giving them 'the opportunity to meet face to face on the site, having a meaningful discussion, considering each other's concerns and recording the views expressed by all parties'.[67] Heritage New Zealand relied on this kind of consultation by the applicant as one means of ascertaining Māori values in relation to the site. The Māori Heritage team had the task of checking that 'the appropriate iwi/hapū have been satisfactorily consulted'.[68]

In addition to consultation, the Act required the applicants to provide an assessment of Māori values and the effect that the applicant's proposal would have on those values. According to Te Kenehi Teira, this 'may take the form of a signature or an email from iwi/hapū for a simple application to a fully researched Cultural Impact Assessment involving a more complex ancestral landscape'.[69]

Once the applicant provided all the necessary information and the application was considered complete, the Māori Heritage team summarised the details of the consultation, the assessment of Māori values, and an assessment of the effects on those values.[70] This included an 'internal assessment' of Māori values by the Māori Heritage Adviser.[71] The Heritage New Zealand archaeologist then incorporated this advice into a broader report (including an archaeological component) to the Māori Heritage Council.[72] Dean Whiting advised that the Māori Heritage Adviser and the archaeologist would make a recommendation as to whether the application should be approved.[73]

According to Te Kenehi Teira's evidence, the Heritage New Zealand board has delegated power to the council to decide *all* applications relating to sites of interest to Māori.[74] The council's task was to 'weigh up the archaeological and Māori values of the site and the recommendations from staff', after which it would decide whether or not to grant the application.[75] Following the decision, the Act provided a right of appeal to the Environment Court, to be filed within 15 working days.[76]

65. Te Kenehi Teira, brief of evidence, 5 July 2019 (doc G4), p 5
66. Heritage New Zealand Pouhere Taonga Act 2014, s 44
67. Te Kenehi Teira, brief of evidence (doc G4), p 6
68. Te Kenehi Teira, brief of evidence (doc G4), p 6
69. Te Kenehi Teira, brief of evidence (doc G4), p 6
70. Te Kenehi Teira, brief of evidence (doc G4), p 6
71. Dean Whiting, brief of evidence, 8 July 2019 (doc G1), p 2
72. Te Kenehi Teira, brief of evidence (doc G4), p 6
73. Dean Whiting, brief of evidence (doc G1), p 2
74. Te Kenehi Teira, brief of evidence (doc G4), p 6; New Zealand Heritage Pouhere Taonga Act 2014, s 22
75. Te Kenehi Teira, brief of evidence (doc G4), p 6
76. Heritage New Zealand Pouhere Taonga Act 2014, s 58

This was the process to be followed when developers like the Waikanae Land Company applied for an authority. In practice, however, the Māori Heritage Council had delegated some decision-making powers to 'the Senior Management'. The decision was ultimately made in this case by Te Kenehi Teira as deputy director, Kaihautu, as discussed further below.[77] Under the Act, the council was empowered to delegate its functions to any committee of the council or to the chief excutive, who presumably could further delegate the decision-making role.[78]

Mr Whiting explained that there were three categories of decision-making, and the Kaihautu decided which level of decision-making was appropriate in each case:

- Category C – there was no risk of appeal, which involved an application being 'very positive in terms of the relationship of tangata whenua and the applicant', a 'level of engagement in sharing information', and an expectation that the good relationship would carry on. In such cases, the decision was made by the Kaihautu.
- Category B – there was a risk of appeal and an issue requiring a 'higher level of scrutiny in terms of decision-making'. In those cases, the decision was made by the Māori Heritage Council's archaeology committee.
- Category A – in 'higher risk' cases which might involve 'some sort of national precedents in terms of the outcome', the decision was made by the full Māori Heritage Council.[79]

Mr Teira observed that it was difficult for the council, a body composed essentially of 'volunteers', to decide up to 800 applications, which had occurred in the past. Thus, there was a need for some delegation of responsibility to staff in the first instance, and to the council's archaeology committee in the second instance.[80] The council was empowered to appoint committees with 'members who may be, but are not necessarily, members of the Council'.[81]

4.3.4 The application, September 2016

The company's application in September 2016 was for an exploratory archaeological authority to dig a test pit, a metre long and half a metre wide (and probably about half a metre deep). An exploratory investigation is defined in the Act as 'a physically invasive investigation of any site or locality for exploratory purposes so as to determine whether the site or locality is an archaeological site, and, if so, the nature and extent of the archaeological site'.[82]

In terms of consultation, the application stated that the company had been 'engaging on and off with various members of Te Atiawa ki Whakarongotai (TAKW) over the life of development of the land'. In this particular instance, the company specified that its engagement had been with Te Ātiawa ki Whakarongotai

77. Transcript 4.1.21, pp 106–107, 111, 120
78. Heritage New Zealand Pouhere Taonga Act 2014, s 28(2)(b)
79. Transcript 4.1.21, pp 119–121; Dean Whiting, brief of evidence (doc G1), p 2
80. Transcript 4.1.21, pp 149–150
81. Heritage New Zealand Pouhere Taonga Act 2014, s 28(2)(a)
82. Heritage New Zealand Pouhere Taonga Act 2014, s 6

Charitable Trust. Les Mullens, 'representing TAKW', attended the geomagnetic survey in July 2016 and agreed to take the test pit proposal 'back to the iwi'. Then, 'Ben Ngaia of TAKW provided approval on 9 August 2016 via email'.[83] The attached email from Ben Ngaia was in response to Mary O'Keeffe, who sought the agreement of the 'trustees' to a 'small hand dug test pit in a "quiet" area of the site, that is, an area that Hans' results indicate no subsurface "anomalies"'.[84] Mr Ngaia replied by email on the same day: 'I am happy to support this small hand dug test pit taking place.'[85] According to Te Kenehi Teira, it was 'very usual' for the archaeologist to conduct the applicants' consultation with iwi in this way.[86]

The application was accompanied by a covering letter from Mary O'Keeffe, which described the geomagnetic survey and the reasons for digging a test pit. Ms O'Keeffe noted that the archaeological values of the site were less significant than the cultural values, and stated that 'Iwi do not support further development of the area' but did support the test pit.[87] From all of the evidence available to us, it does not appear that the company provided Heritage New Zealand with the cultural impact assessment report as part of its application. Ms O'Keeffe provided her 2012 report on the site.

It is important to note here that 'exploratory' authorities were a subset covered by section 56 of the Act,[88] and contained some exceptions to the regime outlined in section 4.3.3 above. Section 56 allowed Heritage New Zealand to authorise an 'exploratory investigation' of a site rather than an application to modify or destroy a site. Any application involving a 'site of interest to Māori' still had to be referred to the Māori Heritage Council for a recommendation (or be decided by the council if the board had delegated the requisite authority). Importantly, the council was empowered to conduct its own consultation about such applications 'as it thinks approriate'. The application had to show that the site would be returned 'as nearly as possible to its former state'. Perhaps for this reason, applicants for an exploratory authority only had to show evidence of consultation with iwi and did not have to include an assessment of Māori values or the impact of the work on those values.[89]

4.3.5 Heritage New Zealand's assessment of the application

Dean Whiting (acting Māori Heritage adviser and manager at the time) and Kathryn Hurren (regional archaeologist) evaluated the application in October 2016. The assessment of consultation was as follows:

83. 'Application for an Exploratory Archaeological Authority', 23 September 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 712)

84. Mary O'Keeffe to Ben Ngaia, email, 9 August 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 13); transcript 4.1.21, pp 191

85. Ben Ngaia to Mary O'Keeffe, email, 9 August 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 13)

86. Transcript 4.1.21, p 166

87. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 9)

88. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 39–41

89. Heritage New Zealand Pouhere Taonga Act 2014, s 56. Under s 56(2), applicants did not need to include the information required in ss 46(f)-46(g).

4.3.5

> The applicant has met with Les Mullens as a representative of Te Atiawa ki Whakarongotai Charitable Trust on 13–14 July as part of initial geophysical survey of the site and the views were in support as expressed in the email provided by Ben Ngaia on 9 August 2016 [to Mary O'Keeffe].
>
> Consultation is considered adequate for this application.[90]

In terms of a reference to the heritage council, Mr Whiting stated that the application fell under 'Level C: Delegated to Kaihautu'. The reasons were given as:

> Consultation has been adequate
> All views expressed have been considered
> An appeal is not expected.[91]

Te Kenehi Teira defended this recommendation, stating:

> The Tamati Place Test Pit exploratory authority wasn't referred to the Maori Heritage Council as it was deemed exploratory only, on a very small scale and would not be a major disturbance to the original ground material. The council had been advised of the issues relating to the place when the Environment Court was involved. At that time the council was happy to leave this matter to staff.[92]

The evidence of Mary O'Keeffe (for the Crown) and Mahina-a-rangi Baker (for the claimants) is in agreement that Te Ātiawa ki Whakarongotai Charitable Trust were never in fact involved or consulted. Although the applicant claimed to have consulted that trust, Ms O'Keeffe noted that Les Mullens was involved at the request of the Takamore trustees, and that her email to Mr Ngaia was intended for those trustees. Mr Ngaia and the Takamore trustees were, as Ms Baker acknowledged, rightly involved in their role as the 'kaitiaki of our waahi tapu'.[93] The Te Ātiawa ki Whakarongotai charitable trust (formerly the runanga) also had a crucial role. It had processed many such applications previously.[94] Heritage New Zealand staff were under the mistaken belief that both Mr Mullens and Mr Ngaia had been involved as official representatives of the charitable trust (as claimed in the application). Mr Whiting told us: 'It was my understanding that Ben Ngaia was organisationally part of TAKW at the time and the question put to him [in Mary O'Keeffe's email] was on the basis of an organisational response.'[95]

90. 'Form for the assessment of section 56 applications', section C, filled in 11 October 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 17)
91. 'Form for the assessment of section 56 applications', section C, filled in 11 October 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 17)
92. Te Kenehi Teira, answers to written questions, 29 July 2019 (doc G4(b)), p 1
93. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 704). See also Mahina-a-rangi Baker, brief of evidence (doc F11), p 51.
94. Transcript 4.1.18, p 144
95. Dean Whiting, brief of evidence (doc G1), pp 2–3

In response to questions from Crown counsel at the hearing, Mr Whiting reiterated this point:

> there was an understanding that those that were represented in terms of that application had a strong association in terms of Te Āti Awa ki Whakarongotai, whether that was in the role of being involved in a lot of the monitoring work, all that sort of onsite negotiations or engagements as one role [Les Mullens], and the other of course is someone who is involved organisationally as a part of the Te Ati Awa ki Whakarongotai Trust [Ben Ngaia].[96]

Heritage New Zealand staff did not consider it necessary to consult the charitable trust to confirm the information in the application, or seek further information from the developer.

4.3.6 Issues of concern in the application process

4.3.6.1 *The timeframe for processing and determination*

The first issue of concern is the requirement that an application for an exploratory authority had to be *determined* within 10 working days.[97] This was a different timeframe than for applications to modify or destroy a site, which had to be assessed and either accepted or sent back for more information within five working days. Following that initial processing, however, applications to modify or destroy had to be determined within 20, 30, or 40 days of receipt, depending on certain criteria.[98] Mr Teira noted that the period for evaluation had been three months under the previous Act.[99]

Crown counsel advised that Heritage New Zealand interpreted the 10 days for determination as a second step, following the usual five days for processing and accepting an application as suitable to proceed for determination.[100] Dean Whiting underlined the point that the staff only had five days, which obviously gave them little time to consult or check with Māori organisations or to confirm facts.[101] As a result, the responsible staff relied mainly on their own knowledge of representation within iwi on particular issues at any one time, combined with their judgement as to whether the application would be controversial and result in an appeal.

There are obvious weaknesses in this approach, as demonstrated in the present case. In particular, the time constraint is unfair to all involved. On the one hand, iwi workers are often volunteers with heavy workloads and may take time to reply to phone calls or emails or requests to meet. It may also take time for an iwi organisation to decide a collective view if the developers have consulted one or two members (as sometimes happens). Heritage New Zealand staff, on the other hand, have a tight statutory deadline of five days to assess an application and

96. Transcript 4.1.21, p 105
97. Heritage New Zealand Pouhere Taonga Act 2014, s 56(5)
98. Heritage New Zealand Pouhere Taonga Act 2014, ss 47, 50
99. Transcript 4.1.21, p 154
100. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 40–41
101. Transcript 4.1.21, p 122

decide whether the information provided is sufficient for it to proceed to the next stage. They also deal with multiple applications at the same time.

In this particular case, however, the question of consultation could have been resolved quickly and easily. Mahina-a-rangi Baker noted:

> In practice, Heritage was in contact occasionally with us at the Trust to check information provided by applicants for any applications for authorities, and all they would have had to do in processing this application . . . was to follow this standard practice and confirm if we had been contacted and given consent.[102]

4.3.6.2 *Archaeological vis-à-vis cultural values*

It is clear to us that all the Heritage New Zealand staff involved considered this a minor matter that would have little or no effect on the site. This reflects the archaeological situation, in which digging and re-filling a small trench would have little effect on the the site's archaeological values. In our view, this underestimates the cultural and spiritual effects of digging in an urupā that is tapu to its kaitiaki. From the claimants' perspective, Ms Baker likened it to digging around in Gallipoli or any of New Zealand's cemeteries 'in an attempt to find a 0.5 metre squared area that doesn't appear to contain human remains, as a basis for proceeding to develop houses on those sites'.[103] Paora Ropata told us that the kaumatua were strongly opposed to any further tampering with the urupā.[104]

More broadly, this issue reflects an imbalance between archaeological and cultural values in section 56 of the Heritage New Zealand Pouhere Taonga Act. For an exploratory investigation, whatever that may consist of, consultation with Māori is required but not assessment of cultural values or the effects of the investigation on those values. We accept that a small pit dug for archaeological purposes might have little or no effect on kaitiaki and their values, depending on the nature of the site involved, but that cannot simply be assumed as the statute appears to do.

The absence of cultural values in section 56 exacerbates the disjunct between what may be protected in some parts of the Act, such as entering a wāhi tapu in the New Zealand Heritage list, and what may be protected when an archaeological authority is sought. The Act defines an archaeological site as a site associated with pre-1900 human activity or that may provide evidence about New Zealand history.[105] Te Kenehi Teira explained that the archaeological provisions of the Act only pertained to 'tangible places – pa, midden, pits, rock art, koiwi, hangi'.[106] In this particular case, it was only kōiwi that were considered to be of archaeological importance and not the urupā, hence a small pit was permitted away from known 'anomalies' without considering what impact that might have on cultural and spiritual values.

102. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 54–55
103. Mahina-a-rangi Baker, brief of evidence (doc F11), p 52
104. Paora Ropata, brief of evidence (doc F1), p 24
105. Heritage New Zealand Pouhere Taonga Act 2014, s 6
106. Te Kenehi Teira, brief of evidence (doc G4), p 5

Mary O'Keeffe explained that an authority was not technically needed at all for the test pit: 'In discussion with Heritage New Zealand, we agreed that the selected location was deliberately well away from any possible koiwi, and thus did not technically trigger the requirement for an authority (Heritage New Zealand confirmed this).'[107] Crown counsel confirmed this point:

> As a matter of law, there was no strict requirement for the WLC to have lodged an authority application in order to undertake this test pit as the area where the test pit was to be dug (and was dug) does not fall within the definition of an 'archaeological site'. Section 6 of the Act defines 'archaeological site'. The location of the test pit was sufficiently far away from where the previous burial had been located as well as some distance from both the 'anomalies' identified by Dr Bader's 2016 geomagnetic survey and the 'dredged spoil heap' on the eastern corner of the site such that the area did not show 'evidence of pre 1900 human activity' nor does it 'provide, through investigation by archaeological methods, evidence relating to the history of NZ.'[108]

We are concerned that this does not protect an urupā in the absence of some countervailing requirement to consider cultural values.

In that context, we note that decision-makers for exploratory authorities (which are by definition 'invasive') do not have to consider the same criteria as for authorities to modify or destroy. In the latter case, decision-makers must 'have regard to':

- historical and cultural heritage values (and any other factors 'justifying the protection of the site');
- the purpose and principles of the Act;
- the extent to which protecting a site would restrict either the existing or the 'reasonable future use' of the site for lawful purposes;
- the interests of any person directly affected;
- statutory acknowledgements (from Treaty settlements); and
- 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.'[109]

For section 56 applications, however, decision-makers only had to 'take into account' the 'nature and purpose of the proposed exploratory investigation' and the skills and suitability of the person to carry out the work. In addition, they must 'have regard to' any statutory acknowledgements made by the Crown in Treaty settlements.[110]

In the particular application we are considering here, of course, the applicants claimed that the iwi (specifically the charitable trust) had *agreed* to the test pit. The process by which Heritage New Zealand assessed the consultation was therefore a crucial issue, which we consider next.

107. Mary O'Keeffe, brief of evidence (doc G6), p 23
108. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 46
109. Heritage New Zealand Pouhere Taonga Act 2014, ss 49(2), 59(1)
110. Heritage New Zealand Pouhere Taonga Act 2014, s 56(3)(b)-(c)

4.3.6.3 *Consultation processes and decision-making*

The third issue of concern is the role of iwi (or hapū) in the archaeological authorities process and the question of what constitutes adequate consultation. The Wairarapa Tribunal recommended in 2010 that the RMA and Historic Places Act be amended to '*require* Māori involvement in decision-making about consent applications that involve Māori heritage, and also in decisions about heritage orders. Māori need to be involved from the outset, and need to be properly funded to do so' (emphasis added).[111]

In respect of this recommendation, Crown counsel submitted:

> the provisions of the Heritage New Zealand Pouhere Taonga Act 2014 have strengthened the role of Māori in decision-making in relation to consent applications that involve Māori heritage and decisions about heritage orders. The views of tangata whenua are balanced alongside the archaeological considerations during the decision-making processes and consultation is required for all archaeological authority applications.[112]

In essence, then, the Māori role in decision-making about archaeological authorities is seen as their statutory right to be consulted by applicants, and the conveyance of their views by applicants to Heritage New Zealand. Māori must be consulted in all sites of interest to them. Their values (and the impact on those values) must be considered in some but not all such applications. Tikanga experts in the form of the Māori Heritage Council or their delegates will make the decision.

In this case, a lot of weight was put on the brief email from Mr Ngaia, which was not sent on any official email system for either the Takamore trustees or the charitable trust. We noted above that the Takamore trustees had an important role within the various representative bodies of the iwi, caring for wāhi tapu beyond the Takamore urupā itself. This was acknowledged by Ms Baker. But the Waikanae Land Company claimed to have consulted with the charitable trust, and specifically identified the two iwi members involved as representatives of that body. Clearly, the email from Mr Ngaia did not purport to have been on behalf of that body but Heritage New Zealand staff assumed that Mr Ngaia's response was an 'organisational' response on behalf of the charitable trust. Again, we think the nature of the application was a consideration here; it is doubtful that Heritage New Zealand would have accepted this as sufficient consultation for an application to modify or destroy the site.

We note, too, Ms O'Keeffe's statement that she had preliminary conversations with Heritage New Zealand staff about the application before it was made and had agreed with them on the appropriate course of action. This does appear to have

111. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 3, p 1064

112. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 66

influenced the treatment of the application. In her covering letter as archaeologist, Ms O'Keeffe stated that the 'iwi' had agreed to the digging of the test pit, again on the basis of the email she provided to Heritage New Zealand.

In sum:

- this application and its effects were seen as very minor (in archaeological terms);
- section 56 does not require Māori values to be taken into account in the case of exploratory authorities, even though the Act defines 'exploratory investigations' as 'invasive';
- the applicant's information about consultation was incorrect; and
- Heritage New Zealand accepted the applicant's information on face value and made no checks of its own, partly because of the tight timeframe in which applications must be processed, and partly because the application was seen as non-controversial and unlikely to attract an appeal.

Although it is not possible to generalise too far on the basis of a single case, these facts highlight some concerns for us about the process and its legislative foundations.

4.3.7 The right of appeal and the 'consulted' body's reaction to the granting of the application

On 18 October 2016, Te Ātiawa ki Whakarongotai Charitable Trust was notified that the authority had been granted, and that an appeal could be lodged within 15 working days. Ms Baker commented that this came as a 'shock', since the trust had not been aware of the application at all.[113] The trust immediately notified Heritage New Zealand of its intention to appeal the decision, and requested information as to 'who from TAKW was consulted on this authority and when?'[114] Ms Baker's email to Kathryn Hurren on this matter was copied to Ben Ngaia, chair of the Takamore trust 'who are kaitiaki of our waahi tapu', and kaumātua Paora Ropata, who had filed a claim with the Tribunal.[115]

In response, Mr Ngaia explained that his original email to Ms O'Keeffe had been 'on the assumption' that Te Ātiawa ki Whakarongotai Charitable Trust had already approved the test pit. He asked Kathryn Hurren:

> I too am very interested to know who on behalf of our charitable trust (if that at all occurred) has given authority for this to take place.
>
> My primary concern is that the appropriate transparent processes have been undertaken and agreed to by our charitable trust. However, if the chairperson [Andre

113. Mahina-a-rangi Baker, brief of evidence (doc F11), p 53
114. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 687)
115. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 688)

> Baker] is unaware of this, then this raises alarm bells regarding how authority has been granted.[116]

After reviewing the application form, Mr Ngaia clarified to Heritage New Zealand that he was not a representative of the charitable trust (despite what was claimed in the application), nor had he described himself as such. He also clarified that the archaeologist had contacted him in his capacity as chairperson of the Takamore trustees, and added: 'I am happy to support this test pit taking place, but just as long as proper authority and permission has been given.'[117]

Ben Ngaia's response to Heritage New Zealand immediately undermined the basis on which the exploratory authority had been granted. Nonetheless, the charitable trust did not proceed with an appeal to the Environment Court. Mahina-a-rangi Baker explained that the trust simply could not afford the significant costs involved in prosecuting such an appeal. 'This meant', she told us, 'that the test-pit went ahead, and yet again the whenua at Te Kārewarewa was opened up to pursue interests of development, causing further offence and pain to our people.'[118]

Heritage New Zealand, despite the information from Mr Ngaia on 19 October 2016 and the objections of the charitable trust, relied on the formal appeal process as the only avenue to resolve the matter. It is puzzling to us why this was the case, since it must have been clear immediately that mistakes had been made in both the information provided in the application and the assessment of the consultation. There may have been no choice in the matter. Kathryn Hurren observed: 'Once an archaeological authority is granted it cannot be revoked unless withdrawn by the applicant. For all of these reasons, Heritage New Zealand takes its responsibilities to grant archaeological authorities extremely seriously and cautiously.'[119] This statement does not fit well with the extremely tight statutory deadline for the processing and determination of applications.

Ms Baker noted two key points arising from Heritage New Zealand's assessment of consultation and the trust's inability to afford an appeal:

> This presents another example of how the Crown and its processes fail to recognise the rangatiratanga of iwi by not requiring appropriate consultation with the right people. It also sets out [and] highlights the lack of accessible recourse for iwi with regards to decisions made by Heritage NZ.[120]

Crown counsel emphasised that the proper recourse for any mistake made by Heritage New Zealand was to file an appeal:

116. Ben Ngaia to Mahina-a-rangi Baker and Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 700). Mr Ngaia's request for an explanation was made to Ms Hurren.
117. Ben Ngaia to Kathryn Hurren, second email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 693)
118. Mahina-a-rangi Baker, brief of evidence (doc F11), p 54
119. Kathryn Hurren, brief of evidence, 5 July 2019 (doc G3), pp 5–6
120. Mahina-a-rangi Baker, summary of brief of evidence, 8 February 2019 (doc F11(b)), p 8

> The Crown does not accept that the statutory remedy available under the Heritage New Zealand Pouhere Taonga Act 2014 is not a sufficient safeguard against errors such as that made in this case. Moreover, if an appeal had been lodged in this instance, given the nature of the mistake that had been made (in identifying who were the appropriate people to have consulted in regards the proposed test pit dig), the matter may have been resolved through mediation.[121]

A number of Tribunal reports have found that costs are a serious problem for under-resourced iwi organisations, including deterring iwi from exercising their legal rights of appeal to the Environment Court.[122] Most recently, the Freshwater Tribunal noted in respect of resource management processes and appeals to that court:

> most RMA decisions do not reach the Environment Court, and such litigation is still beyond the means of many Māori groups. As at 2009, before the multiple Treaty settlements of the last decade, even fewer groups could afford to engage technical experts or lawyers – or to run the risk of an award of costs against them in either the Environment Court or the High Court. The inadequate resourcing of Māori to participate in RMA processes has been noted in many Crown documents over the past 15 years, and has been admitted by the Crown in this inquiry.[123]

These comments are also applicable to heritage appeals. Although there is a central fund that can assist with some of the litigation costs in appeals to the court (the Environmental Legal Assistance Fund), it is devoted to environment and resource management appeals. We are not aware of any Crown resourcing to assist hapū or iwi organisations with the costs of heritage appeals, but we have not received evidence on that point.

4.3.8 The test pit and further developments, 2017–18

Following the granting of approval in October 2016, the test pit was dug in April 2017. According to Ms O'Keeffe, kaumātua Les Mullens was present at the request of Ben Ngaia, but this may be an error (the email provided as evidence of this point was dated July 2016 and therefore related to the geomagnetic survey).[124] The Waikanae Land Company contacted the charitable trust in early April 2017 to 'observe the work and to undertake any tikanga protocols that may be required',

121. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 52

122. See, for example, Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, pp 1181–1184, 1222–1223; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 585–586, 588; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 153–154, 158, 160, 179–180

123. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication version* (Wellington: Waitangi Tribunal, 2019), p 65. See also pp 94–98.

124. Mary O'Keeffe, brief of evidence (doc G6), p 22; Ben Ngaia to Mary O'Keeffe, email, 8 July 2016 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 35)

but this invitation was declined. Kathryn Hurren reported: 'I am not aware that any representatives of Te Ātiawa ki Whakarongotai Charitable Trust observed the work or undertook any tikanga protocols.'[125] The claimants provided no evidence on this point. Although Heritage New Zealand does monitor compliance with tikanga protocols by 'following up with tāngata whenua', speaking with the archaeologists, and sometimes monitoring in person,[126] Kārewarewa appears to have been an exception.

The test pit was excavated by Dr Hans Bader. His results showed that the 'anomalies' were not located in the material dumped on the site by the dredging in 1969–71, and 'therefore the anomalies can be understood as small pits cut into the original topsoil'.[127] Mary O'Keeffe explained:

- Dredged material is only located over part of the subdivision. Therefore anomalies shown by a geophysical survey are not being interpreted through a thick layer of deposited material, and are likely to be reasonably close (less than 2m) below the ground surface; and
- The topsoil build-up is substantial and sufficiently different to the lower sand layer to express a different magnetic signature. This validates the results of the geophysical survey and the credibility of the anomalies recorded.[128]

At the hearing, Ms O'Keeffe told us that the test pit 'confirmed that the layer of fill across the site was so thin that the anomalies he [Dr Bader] was recording were almost certainly human made pits'. The 'data supports the hypothesis that the anomalies are burial pits', because '(a) we know that there were burials there and (b) they are of the right size that typically burial pits are'.[129] In Ms O'Keeffe's opinion, the test pit supported the view that no further archaeological authorities should be granted.[130]

But, in archaeological terms, it was not possible to 'say 100 percent that they are burial pits' on the basis of the investigation done to date.[131] In April 2018, Dr Bader wrote a report for the developer. In his view, the next step would be to conduct 'ground testing of the results . . . from the fringes to the centre until the extent of burial locations becomes clear'. He argued that burials could have been 'much wider spread over the property than the previous work and the accidental discovery locations suggest'. But Dr Bader acknowledged, however, that 'ground testing possible burial pits' was obviously a 'culturally sensitive' matter.[132]

125. Kathryn Hurren, brief of evidence (doc G3), p 6
126. Kathryn Hurren, brief of evidence (doc G3), p 5
127. Mary O'Keeffe, brief of evidence (doc G6), p 23
128. Mary O'Keeffe, brief of evidence (doc G6), p 23
129. Transcript 4.1.21, pp 187, 188
130. Transcript 4.1.21, p 188
131. Transcript 4.1.21, p 189
132. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 21 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 33). Although the author's name is not mentioned in the text, Kathryn Hurren identified the author as Dr Bader. See Kathryn Hurren, brief of evidence (doc G3), p 6.

This proposal would entail some further excavation of the undeveloped part of the urupā 'from the fringes to the centre' to confirm whether the 'anomalies' were in fact burial pits. Mahina-a-rangi Baker explained:

> In 2018 the WLC's planner contacted the Trust twice with requests to meet and discuss their desire to conduct further test samples to 'physically investigate and confirm what the anomalies are.' This is a euphemistic way of saying they wish to exhume the urupā yet again, recognising that they are likely to encounter human remains.[133]

The company's developer contacted Heritage New Zealand and the charitable trust in July and August 2018, with requests to meet and discuss what was called a 'small test sample'.[134] The trust refused to meet with the developer, citing their 'total opposition' to any development or 'further archaeological testing' of the urupā, and noting that the 'desecration of Kārewarewa Urupā by previous and current landowners is under active inquiry by the Waitangi Tribunal'.[135]

As far as we are aware, there have been no further developments since then, although Ms Baker observed: 'It's honestly quite exhausting to have to be hyper vigilant that at any time, the attempts to exhume could be initiated again. For all I know I could have an email sitting in my inbox right now that relates to this *take*.'[136] She added: 'The developer continues today with their plans to develop the site, with no assurance that Heritage or the District Council will be able to prevent this from occurring, even if they wished to.'[137]

Some issue was taken with Ms Baker's use of the word 'exhume' as an exaggeration.[138] In our view, the claimants are correct to be concerned about the underlying archaeological proposal – to ground test the 'anomalies' – since it involves testing of likely burial pits. Any kaitiaki of an urupā would be deeply concerned about such a proposal, and the Te Ātiawa / Ngāti Awa claimants are no exception.

4.3.9 Treaty findings

In our view, it is not possible or appropriate to make general findings about the Heritage New Zealand Pouhere Taonga Act or Heritage New Zealand's processes on the basis of a single application. For that reason, we are making limited findings that are specific to section 56 of the Act.

In the case of the Waikanae Land Company's application in 2016, incorrect information was provided about the consultees, and this information was accepted without checking the facts. The Crown submitted that everyone makes mistakes and that the statutory regime provides a remedy in the event of a mistake

133. Mahina-a-rangi Baker, brief of evidence (doc F11), p 55
134. Steven Kerr to Kathryn Hurren and Kristie Parata, email, 19 July 2018; Steven Kerr to Kristie Parata, 23 August 2018 (Baker, papers in support of brief of evidence (doc F11(a)), pp 721–722)
135. Mahina-a-rangi Baker to Steven Kerr, email, 27 August 2018 (Baker, papers in support of brief of evidence (doc F11(a)), p 721)
136. Transcript 4.1.18, p 129
137. Mahina-a-rangi Baker, summary of brief of evidence (doc F11(b)), p 8
138. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 27–28

having been made; the right of appeal to the Environment Court.[139] We agree with the Crown that honest mistakes do not constitute bad faith or breaches of Treaty principles.

There are, however, some specific concerns about the process followed for exploratory authorities and the requirements of section 56 of the Act that we consider to be systemic issues in breach of the Treaty. These are:

- The timeframe prescribed for the determination of section 56 applications (10 days). This timeframe has been imposed by statute although it is interpreted to mean that an extra five days may be allowed for the initial evaluation of the application. In our view, the statutory prescription is unfair to the Crown's Māori Treaty partner. It can result in inadequate time for Heritage New Zealand to consult and to confirm facts in respect of applications relating to wāhi tapu, which are of particular importance to Māori due to their cultural and spiritual significance. We accept that the Crown's goal is efficient bureaucracy and the speedy determination of applications, which is important, but the time allowed in section 56 does not accord with Kathryn Hurren's statement that 'Heritage New Zealand takes its responsibilities to grant archaeological authorities extremely seriously and cautiously'.[140]
- Section 56 does not require applicants to provide an assessment of Māori values or the impact of the proposed work on those values, even though exploratory investigations are defined in the Act as 'invasive', and authority may be sought for invasive work on a wāhi tapu (including, in this case, an urupā).
- Section 56 does not require decision-makers to consider Māori values or the impact of the proposed invasive work on those values, even in the case of urupā and of wāhi tapu more generally. Invasive techniques may be considered minor in archaeological terms and yet cause harm and great cultural and spiritual offence to the kaitiaki of those places.

In addition, we consider that enough is known to say that iwi and hapū organisations are under-resourced to participate in many processes (most notably RMA processes), and that recourse to the Environment Court is often beyond the means of those organisations. While the right of appeal is a crucial remedy, the issue of under-resourcing needs to be addressed if it is to be an effective one.

Broader issues, including consultation requirements and the role of iwi and hapū in decision-making, must await a more general consideration of the Act and how it functions in our inquiry district.

In our view, the claimants have been prejudiced by the Treaty breaches found in this section. Although the geomagnetic survey was not invasive and the archaeological effects of the test pit were considered negligible, the negative effects of interference with this sacred site, the burial place of their ancestors, were felt by the tangata whenua who brought claims in this inquiry. The ongoing threat of further housing development remains a constant concern and burden for the kaitiaki.

139. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 51
140. Kathryn Hurren, brief of evidence (doc G3), pp 5–6

4.4 Protection Mechanisms under Current Laws

The Crown provided evidence and submissions about a number of mechanisms under the current laws which could protect Kārewarewa urupā. These included:

- *New Zealand Heritage List/Rārangi Kōrero:* This list was formerly the Historic Places Register under the previous legislation. The Māori Heritage Council has the power to 'enter, or to determine applications to enter, wāhi tūpuna, wāhi tapu, and wāhi tapu areas' on the list.[141] Entry on the list notifies landowners and the public that these sites have heritage value, including traditional and cultural significance. Mr Teira told us that the protection of sites entered on the list comes mainly from the RMA, which requires local authorities to have regard to the sites on the list when preparing or amending their district plans.[142] Mr Teira stressed that there is 'no cost involved in getting a site listed'.[143]
- *National Historic Landmarks/Ngā Manawhenua o Aotearoa me ōna Kōrero Tūturu List:* The purpose of this list is to promote the conservation of the 'places of greatest heritage value to the people of New Zealand'. The place has to be of 'outstanding national heritage' value. The landowner must consent and there must be 'strong evidence of broad national and community support for its inclusion'. After a public submissions process, Heritage New Zealand makes a recommendation to the Minister to decide.[144] According to Te Kenehi Teira, entry on this list provides 'absolute protection' from development. On the question of whether a landowner could be compensated for setting aside their land in this way, Mr Teira responded: 'It's never been tested, it's brand new.' The only site listed so far is the Waitangi National Trust area.[145]
- *Heritage Convenants:* A heritage convenant is a 'voluntary agreement with the landowner' for the 'protection, conservation and maintenance' of a wāhi tapu (or some other site). Such sites are 'included in protected sites listed in district plans' under the RMA. Convenants are usually 'registered on the legal title to land and run in perpetuity'. Mr Teira noted that it is difficult to get owners to agree to a convenant because of the impact on their property value, which limits the applicability of this mechanism in many cases.[146]
- *Taonga Tuturu Protocols:* These protocols are part of the Treaty settlement process. Originally developed for 'newly found taonga tūturu' and their export under the Protected Objects Act 1975, they have expanded to include 'historic graves and memorials in a protocol area'. The protocols establish a 'working relationship' between the post-settlement governance entity and

141. Te Kenehi Teira, brief of evidence (doc G4), p 4
142. Te Kenehi Teira, brief of evidence (doc G4), pp 8–9; Heritage New Zealand Pouhere Taonga Act 2014, s 66(1)
143. Te Kenehi Teira, brief of evidence (doc G4), p 9
144. Te Kenehi Teira, answers to written questions (doc G4(d)), p [3]; Heritage New Zealand Pouhere Taonga Act 2014, ss 81–82
145. Transcript 4.1.21, p 162
146. Te Kenehi Teira, brief of evidence (doc G4), p 17; Te Kenehi Teira, answers to questions in writing (doc G4(d)), p [4]; Heritage New Zealand Pouhere Taonga Act 2014, s 39

the Ministy for Culture and Heritage, 'consistent with' Treaty principles, and provide for iwi 'input' to decision-making processes.[147]

- *Heritage Protection Authorities:* This mechanism was not put forward by Mr Teira because it is part of the RMA, not the Heritage New Zealand Pouhere Taonga Act, although he did note that Heritage New Zealand can act as a heritage protection authority.[148] Any body corporate (including the charitable trust) with an 'interest in the protection of any place' can apply to the Minister for the Environment to become a protection authority. If the Minister agrees, the authority can apply to the district council for a heritage protection order, which prevents any use or alteration of the land in question without the authority's permission. Such applications are treated the same as consents, requiring a submissions and hearing process before a council decides whether or not to grant a protection order.[149] Due to a law change in 2017, however, body corporates can no longer be heritage protection authorities for private land.[150] Ministers and local councils can act as protection authorities for any land (including private), and the Minister for Māori Development may do so on the recommendation of an iwi authority.[151]

Of all of these mechanisms, entry on the New Zealand Heritage List / Rārangi Kōrero is the easiest (and cheapest) to obtain in the absence of a Treaty settlement. But the degree of protection it affords is dependent on how effectively the Kapiti Coast district plan protects wāhi tapu. Although we are not dealing with the district plan and its recent amendment here, we note that the Crown and claimant evidence agreed there are too few wāhi tapu listed or protected in the district plan. Heritage New Zealand appealed the plan for that reason.[152] According to Mr Teira's evidence, Heritage New Zealand has already promoted the entry of Kārewarewa on the New Zealand Heritage list in 'joint meetings with representatives of Te Atiawa ki Whakarongotai', but the iwi has not put forward a nomination.[153] He told us that Heritage New Zealand needed to go and help the iwi with this and other heritage protection mechanisms.[154]

The Crown and claimant evidence also agreed that the battle of Kuititanga was of national historical significance,[155] which would make Kārewarewa a possible site for the National Historic Landmarks list. But this list and heritage covenants are difficult mechanisms to access, as Mr Teira acknowledged. The option for a recommendation to the Minister for Māori Development to become a Heritage

147. Te Kenehi Teira, brief of evidence (doc G4), pp 17–18
148. Te Kenehi Teira, brief of evidence (doc G4), p 4
149. Resource Management Act 1991, ss 187–193. See also Waitangi Tribunal, *Freshwater*, pp 71–73
150. Resource Legislation Amendment Act 2017, s 98(1)
151. Resource Management Act 1991, s 187
152. Mahina-a-rangi Baker, brief of evidence (doc F11), p 27; Te Kenehi Teira, answers to written questions (doc G4(b)), p 1; transcript 4.1.21, p 146
153. Te Kenehi Teira, answers to written questions (doc G4(b)), p 1
154. Transcript 4.1.21, p 161
155. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 8 (Baker, papers in support of brief of evidence (doc F11(a)), p 583); Te Kenehi Teira, brief of evidence (doc G4), p 17

Protection Authority remains open, although decisions about heritage protection orders remain with the Kapiti Coast district council.

In his evidence, Te Kenehi Teira stressed that the archaeological authorities process should protect Kārewarewa in any case:

> I would like to re-emphasise that the Heritage New Zealand Pouhere Taonga Act 2014 does effectively provide protection to all archaeological sites in New Zealand, whether those sites are formally recorded or not. That is because it is an offence to modify or destroy an archaeological site without an authority to do so. Kārewarewa has clearly been identified as an archaeological site and thus there cannot be any legal disturbance to that site without an authority to do so. Given the nature of that site and the history of it since the koiwi were uncovered in 2000, should there be a further authority application lodged which proposes any earthworks which will affect this significant site (ie, not merely a test pit dig located well away from where the koiwi have been reinterred), that authority application would undoubtedly be classified a Category A which would be referred to the Māori Heritage Council for determination.[156]

For the reasons given in our findings above, we do not accept that section 56 of the Act gives sufficient protection in the case of exploratory authorities.

4.5 Recommendations

Under section 4A of the Treaty of Waitangi Act 1975, the Tribunal may not make any recommendations about 'the return to Māori ownership of any private land' or 'the acquisition by the Crown of any private land'.[157]

In the case of the undeveloped part of the urupā block, the claimants welcomed the Crown's concession (see chapter 3) and responded that 'the claimant roopu regard the failing in 1970 to be at the base of the problems that arose later as a result of the development that was allowed to proceed from 1970'.[158] They have therefore sought to work with the Crown on specific remedies.[159] We leave that matter to the parties.

On the issue of meetings of assembled owners, and the loss of authority and land through that mechanism, any recommendations will be made later in the inquiry.

We make the following recommendations to the Crown in respect to section 56 of the Heritage New Zealand Pouhere Taonga Act 2014, in order to prevent the recurrence of prejudice in the event of future applications relating to Kārewarewa urupā or to other wāhi tapu:

156. Te Kenehi Teira, answers to written questions (doc G4(d)), p [4]
157. Treaty of Waitangi Act 1975, s 4A. This section was inserted in 1993 following the Te Roroa Tribunal's recommendations about the Titford farm.
158. Claimant counsel (Wai 1945), submissions by way of reply, 11 February 2020 (paper 3.3.64), p 2
159. Claimant counsel (Wai 1945), submissions by way of reply (paper 3.3.64), pp 2–3

- Heritage New Zealand Pouhere Taonga should undertake a review, led by the Māori Heritage Council (Te Kaunihera Māori o te Pouhere Taonga), of the assessment process for section 56 applications concerning sites of interest to Māori. The Māori Heritage Council should then recommend a more Treaty-consistent timeframe for the evaluation and determination of those applications, so that the Crown's Treaty obligation of active protection of taonga can be met. Heritage New Zealand should then make the recommendation to the Minister for Arts, Culture and Heritage.
- The Minister for Arts, Culture and Heritage should introduce legislation as soon as possible to amend the timeframe in section 56 of the Act, in accordance with any recommendations from the Māori Heritage Council and Heritage New Zealand.
- In the case of applications relating to wāhi tapu (including urupā), section 56 should be amended to require applicants to provide an assessment of cultural values and the impact of proposed work on those values, in the same manner as for section 44 applications.
- In the case of applications relating to wāhi tapu (including urupā), section 56 should be amended to require decision-makers to have particular regard to Māori cultural values and to 'the relationship of Māori and their culture and traditions' with their wāhi tapu.

In our view, these statutory amendments are essential to remove the assumption inherent in section 56 that invasive techniques with little or no archaeological impacts will have little or no impact on wāhi tapu and on 'the relationship of Māori and their culture and traditions' with their wāhi tapu. As we have seen in the present case, this assumption is not correct and section 56 is inconsistent with Treaty principles.

We make no recommendations here about general matters of consultation and the operations of Heritage New Zealand, which would be more appropriately considered later in our inquiry.

Summary of Findings

In this chapter, we summarise our findings as follows:

- The Historic Places Act 1993 protected Kārewarewa urupā after further desecration occurred in 2000, which had exposed kōiwi. Although the Historic Places Trust's prosecution failed, the Act's provisions and the trust's advice do seem to have deterred further destruction of the urupā for the time being.
- Mistakes made by Heritage New Zealand staff in 2016 do not justify a finding of 'bad faith' or Treaty breach.
- There are systemic breaches in the processes for exploratory authorities and the requirements of section 56 of the Heritage New Zealand Pouhere Taonga Act 2014. The statutory timeframe for processing and deciding section 56 applications is inadequate. There is no requirement for applicants to provide an assessment of Māori values or the impact of an invasive exploratory investigation on those values, even though wāhi tapu (in this case an urupā) may be involved. Further, section 56 does not require decision-makers to consider Māori values or the impact on those values, again despite the use of 'invasive' techniques on an urupā. These flaws reflect an imbalance in section 56. Although invasive investigations may have little or no archaeological effects, they may still have profound spiritual and cultural effects in the case of wāhi tapu.
- The appeal rights provided in the Act do not necessarily constitute an effective remedy, given the under-resourcing that has prevented many Māori organisations from taking appeals to the Environment Court.
- The archaeological effects of the geomagnetic survey and the test pit were negligible but the claimants were still prejudiced in cultural terms, especially because the ongoing threat of further development continues to hang over them.
- We recommended that Heritage New Zealand should undertake a review, led by the Māori Heritage Council, of the timeframe required to process and decide section 56 applications in a manner consistent with the principle of active protection. Heritage New Zealand should then make a recommendation to the Minister, following which section 56 should be amended. We also recommended that section 56 should be amended to require applicants to provide an assessment of Māori values in the case of wāhi tapu (including urupā), and an assessment of the impact of any invasive exploratory investigation on those values. Finally, we recommended that section 56 should be amended to require decision-makers to take Māori values (and impacts on those values) into account for wāhi tapu.

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Dated at Wellington this 25th day of May 2020

Deputy Chief Judge Caren Fox, presiding officer

The Honourable Sir Douglas Lorimer Kidd KNZM, member

Dr Grant Phillipson, member

Tania Te Rangingangana Simpson, member

Dr Monty Soutar, member

THE SEAL OF THE WAITANGI TRIBUNAL

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Appendix B. Information from PC2 relevant to Kārewarewa urupā

Information	Reference
Feedback on draft PC2	
Feedback received from the public on draft PC2.	Refer to the *Summary of Public Submissions on Draft Plan Change 2 (Intensification)*. See: https://www.kapiticoast.govt.nz/media/04bbdt13/pc2_s32_appendixb_draftpc2feedback.pdf Refer to submission reference numbers 204 to 213 on pages 91 to 95.
Written feedback received from iwi authorities on draft PC2.	See: https://www.kapiticoast.govt.nz/media/qslplfno/pc2_s32_appendixa_iwifeedback.pdf
Section 32 Evaluation Report for PC2	
Section 32 Evaluation Report for PC2	See: https://www.kapiticoast.govt.nz/media/xmzfukmb/pc2_s32.pdf The following sections of the S32 Evaluation Report are particularly relevant to Kārewarewa Urupā: • Section 6.1.4 New Qualifying Matter: Kārewarewa Urupā • Section 8.3.3 Evaluation of Provisions for Kārewarewa Urupā
Submissions on proposed PC2	
Ātiawa ki Whakarongotai (submission S100)	See: https://www.kapiticoast.govt.nz/media/csro4ydu/s100-%C4%81tiawa-ki-whakarongotai-pc2-submission-15-09-2022.pdf
Waikanae Land Company (submission S104)	See: https://www.kapiticoast.govt.nz/media/2z1n1nxw/s104-waikanae-land-company-pc2-submission-15-09-2022.pdf
Laurence Petherick (submission S116)	See: https://www.kapiticoast.govt.nz/media/qi5hendt/s116-laurence-petherick-pc2-submission-15-09-2022.pdf
Chris Turver (submission S130)	See: https://www.kapiticoast.govt.nz/media/h5lfdfi5/s130-chris-turver-pc2-submission-4-09-2022.pdf
Te Rūnanga o Toa Rangatira on behalf of Ngāti Toa Rangatira (submission S161)	See: https://www.kapiticoast.govt.nz/media/bjdlgys5/s161-te-r%C5%ABnanga-o-toa-rangatira-on-behalf-of-ng%C4%81ti-toa-rangatira-pc2-submission-19-09-2022.pdf
Ngā Hapū o Ōtaki (submission S203)	See: https://www.kapiticoast.govt.nz/media/0g3jruwc/s203-ng%C4%81-hap%C5%AB-o-%C5%8Dtaki-pc2-submission-27-09-2022.pdf
A.R.T (Ātiawa ki Whakarongotai, Ngā Hapū o Ōtaki (of Ngāti Raukawa ki te Tonga) and Ngāti Toa Rangatira) (submission S210)	See: https://www.kapiticoast.govt.nz/media/axcnpsaf/s210-a-r-t-pc2-submission-27-09-2022.pdf

Information	Reference
Further submissions on proposed PC2	
Ātiawa ki Whakarongotai (further submission S100.FS.1)	See: https://www.kapiticoast.govt.nz/media/v1tceokd/s100-fs-1-a-tiawa-ki-whakarongotai-further-submission-24-11-2022.pdf
Waikanae Land Company (further submission S104.FS.1)	See: https://www.kapiticoast.govt.nz/media/pkrkk132/s104-fs-1-waikanae-land-company-further-submission-s116-s130-s210-s049-s097-s100-s161-s203-24-11-2022.pdf
Te Rūnanga o Toa Rangatira on behalf of Ngāti Toa Rangatira (further submission S161.FS.1)	See: https://www.kapiticoast.govt.nz/media/zfgdig53/s161-fs-1-te-r%C5%ABnanga-o-toa-rangatira-on-behalf-of-ng%C4%81ti-toa-rangatira-further-submission-25-11-2022.pdf
Ngā Hapū o Ōtaki (further submission S203.FS.1)	See: https://www.kapiticoast.govt.nz/media/fxugyujx/s203-fs-1-ng%C4%81-hap%C5%AB-o-%C5%8Dtaki-further-submission-28-11-2022.pdf
Council Officer's Planning Evidence for PC2	
Council Officer's Planning Evidence Report	See: https://www.kapiticoast.govt.nz/media/vxmgkhkv/pc2_planningevidence_report-3.pdf Refer to Section 4.13 Qualifying Matters – Kārewarewa Urupā.
Council Officer's Planning Evidence Report – Appendix B Recommendations Table	See: https://www.kapiticoast.govt.nz/media/pp5dcqoy/pc2_planningevidence_appb_rectablestopic.pdf Refer to recommendations table B12 on pages 215 to 217.
Written evidence and statements presented by submitters at the hearing	
Statement of evidence of Maurice Bathurst Rowe on behalf of the Waikanae Land Company	See: https://www.kapiticoast.govt.nz/media/hgvodtp0/s104-waikanae-land-company-maurice-rowe-statement-of-evidence-10-03-2023.pdf
Statement of evidence of Paul Norman Thomas on behalf of the Waikanae Land Company	See: https://www.kapiticoast.govt.nz/media/tuudl5oy/s104-waikanae-land-company-paul-thomas-statement-of-evidence-10-03-2023.pdf
Statement of evidence of Russell David Gibb on behalf of the Waikanae Land Company	See: https://www.kapiticoast.govt.nz/media/xvhh143y/s104-waikanae-land-company-russell-gibb-statement-of-evidence-10-03-2023.pdf
Legal Submissions for Waikanae Land Company regarding the Vires of the Proposed New Wāhi Tapu Listing	See: https://www.kapiticoast.govt.nz/media/ktsldwfr/s104-waikanae-land-company-legal-submissions-31-03-2023.pdf
Statement of Chris Turver	See: https://www.kapiticoast.govt.nz/media/rzcp3nkv/s130-chris-turver-statement-21-03-2023.pdf

Information	Reference
Ātiawa ki Whakarongotai Outstanding Matters re: KCDC hearing on PC2: Urban intensification	See: https://www.kapiticoast.govt.nz/media/dknacvhn/s100-atiawa-pc2-hearing-atiawa-response-to-s42a-report-28-04-2023.pdf
Oral evidence and statements presented at the hearing	
PC2 Hearing 3 April 2023	See: https://www.youtube.com/watch?v=RNo4fO0nLNM&list=PLMkbFqbC0LfCeqMX2qF4drel3vHstWUtw&index=9
Council reply	
Council Officer's Written Reply	See: https://www.kapiticoast.govt.nz/media/u0rocq13/council-reply-andrew-banks.pdf Refer to section 3.0 Kārewarewa Urupā.

IN THE MATTER	Resource Management Act 1991, Subpart 6 concerning an Intensification Streamlined Planning Process.
AND	
IN THE MATTER	of Plan Change 2, a Council-led Intensification Planning Instrument to change the Kāpiti Coast District Plan under the Resource Management Act 1991, Schedule 1 Subpart 6.

THE INDEPENDENT HEARING PANEL'S REPORT TO THE COUNCILLORS OF THE KĀPITI COAST DISTRICT COUNCIL ON PLAN CHANGE 2 UNDER RMA SCHEDULE 1, PART 6, CLAUSE 100

Dated: 20 June 2023

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Tēnā tātou me te kapinga o tēnei kaupapa. Otirā ngā kaikōrero katoa kua tukuna mai o koutou whakaaro hei tirohanga mo mātou. Kua tirohia, kua mutu, kua whakaritea. Oti atu a tātou kōrero - hui ē, tāiki ē.[1]

Section 1 – Executive Summary, Acknowledgements and Formal and Advisory Recommendations

Section 1.1 – Executive Summary

[1] The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("*RMEHS*") was enacted with bipartisan support by the New Zealand Parliament. The RMEHS directed territorial authorities to change their district plans so that much of the residentially zoned land in New Zealand had height and density standards to achieve medium density (3 x 3 storey units) on an average residential section ("*the MDRS*"). The RMEHS also directed the implementation of Policy 3 in the National Policy Statement on Urban Development ("*NPS-UD*"), requiring intensification within and around urban centres (and rapid transit stops) according to their place in the 'centres hierarchy' and commensurate with the level of commercial activity and community services in the case of lower order urban centres. These measures were to be performed on a tight timeframe using a new process called the Intensification Streamlined Planning Process.

[2] The RMEHS was an unparalleled descent by the House of Representatives into managing land use by requiring district plan rules operating at the cadastral scale to enable more intense development on residential land allowing only for limited exceptions called 'Qualifying Matters'. Conventionally, Parliament has set the broad strategic resource management framework with detailed planning to be performed by communities through local government. Community-generated plans lead to nuanced zones and overlays recognising local character and amenities. By contrast, RMEHS is a deliberately homogenising instrument intended to provide a development control palette that substantially enabled increased housing supply in residential areas, sweeping away past conceptions of residential amenities and local residential identity.

[1] Greetings as we wind up this hearing. In particular those of you who have contributed so constructively to the process that we have just gone through. We have reached a decision. Therefore thank you one and all.

[3] Irrespective of one's views about the sophistication and appropriateness of the RMEHS, a careful reading of the statutory enactment demonstrates a resolve by Parliament to require councils to implement its measures through a mandatory planning mechanism called an 'Intensification Planning Instrument' ("*IPI*"). A territorial authority's framing of an IPI was deliberately constrained by Subpart 6 of the RMA to ensure that territorial authorities were not side-tracked from the RMEHS's core aims, viz, enabling land owners to create housing units with far fewer restrictions than has been usual. Notably, the MDRS standards also provided relaxed rules for subdivision and development through non-notified procedures.

[4] Against that backdrop, the Kāpiti Coast District Council, as a Tier 1 territorial authority within the Wellington region, had to pause its plans to implement the NPS-UD, including rezoning greenfield land and direct its attention to implementing an IPI following the RMEHS. That required diversion of financial and human resources to this new task.

[5] The Council engaged Boffa Miskell to lead the planning and spatial analysis necessary to interrogate the implications of the application of the MDRS and the optimal implementation of Policy 3 of the NPS-UD to the circumstances of the Kāpiti Coast District.

[6] Inevitably, many submitters to PC2 identified significant concerns with the overall thrust of the RMEHS and its broad-brush approach to residential enablement against the backdrop of a coastal residential community and environment with distinctive coastal qualities and characteristics expressly acknowledged in the Operative Plan and highly valued by sections of the community.

[7] Many of the submitters' concerns were well made, and there was a note of irony about the recently operative District Plan recognising special character areas only several years before the RMEHS was conceived. However, the Operative Plan had also become somewhat dated by the time it was operative. Because Kāpiti Coast District through the construction of Transmission Gully, the implementation of the Kāpiti Expressway and the completion of rapid transport rail facilities to Waikanae had become more integrated with the Wellington region than ever. It is a district with a changing identity formed by major infrastructure provision, making it a much more viable contributor to Wellington's wider housing supply requirements.

[8] Our main findings are:

(a) The Council officers and consultants responsible for PC2 (the IPI) engaged positively and capably in the Schedule 1 (Part 6) process of fulfilling the statutory directions of the RMEHS. The consequence was that at the end of the process, many of the issues raised by submissions were resolved to the satisfaction of the submitters or not contested. We could, therefore, write a shorter report than would otherwise have been the case. The Panel has referenced the Council reports developed along the process where appropriate for adopting the Council's officers' and consultants' reasoning.

(b) The Council's processes met the principles of Te Tiriti o Waitangi in an exemplary way. The Council showed an excellent appreciation of the Treaty principles both in the design of the process and in the substantive content of the PC2 as notified and later modified in the reply report of Mr Banks, the planning consultant at Boffa Miskell with the primary responsibility for PC2. Procedural examples of recognition of the Treaty principles included the hearing of the Ngā Hapū o Ōtaki submission at the Raukāwa Marae. The Council also followed tikanga when receiving Te Ātiawa's submission on the Kārewarewa Urupā. Substantive recognition of Treaty principles included a co-designed set of new Plan provisions for papakāinga. Also, Mr Banks responded positively to information provided at the hearing at Raukāwa Marae by Ngā Hapū o Ōtaki concerning special historical patterns of development around the Raukāwa Marae, resulting in a new Ōtaki Takiwā Qualifying Matter.

(c) Several submitters challenged the Council's implementation of the RMEHS; however, these were the exception rather than the rule. Of particular note are the following:

(i) Kāinga Ora challenged the continued use of the urban zoning typologies in the Operative District Plan and suggested a hybrid model later adopted by Mr Banks in his reply. Kāinga Ora also sought greater height enablement around centres and rapid transport infrastructure. Mr Banks supported that change and

with some important qualifications, the Panel agreed with Kāinga Ora and Mr Banks' reply conclusions.

(ii) The Retirement Village Association and Ryman Healthcare promoted provisions to accommodate the increasing demand for retirement villages to meet the growing needs of an aging population as a distinct residential activity. The submissions were supported by a highly qualified team of experts, including experts who identified the trajectory of retirement village provision powerfully to meet special needs and the demographic 'tsunami' New Zealand and, indeed most of the Western world faces. The submitters' request was partially accommodated in Mr Banks' reply but not to the extent requested by the submitters. We found the arguments for the Retirement Village Association and Ryman Healthcare persuasive and have recommended the adoption of their proposed provisions.

(iii) Some submitters opposed the extent of PC2's enablement because they considered that PC 2 failed to address flood hazards adequately. We have addressed that in our decision. The Panel accepted the position of the Council that the existing flood hazard maps and related provisions in the Operative Plan are adequate and include appropriate allowance for climate change.

(d) A significant group of submitters opposed PC 2 because it undermines the special character of beach areas such as Waikanae Beach. We accept that this represents a loss of identity and character that is treasured. However, we do not consider their attributes including, comparatively low density, are in themselves are sufficiently qualifying to justify an exception to the MDRS. In this respect, we agree with the Council's assessment.

(e) There were several challenges to the sufficiency of the Council's qualifying matters concerning Nationally Significant Infrastructure. Most of these were addressed during the PC 2 process. We report on Transpower and KiwiRail's submissions.

(f) The most controversial qualifying matter was the Coastal Qualifying Matter Precinct. This qualifying matter is interim in its spatial extent using current Council analysis on the risks associated with coastal erosion over a 100-year planning horizon. Using that information to determine the size of the Coastal Qualifying Matter Precinct, the Council did not intend to foreclose future workstreams where coastal erosion hazard risks will be confronted using a collaborative planning process offering strong community engagement. The Panel considers that the Council's proposed interim measure is the most appropriate and efficient response to ensure that development relying on the MDRS does not occur in locations that, on the available evidence, may not be appropriate for more intensive development.

[9] The Panel had to address a distinctive and important subject concerning the land that the Panel refers to as the Kārewarewa Urupā Block in Waikanae. There is no doubt that the cultural values of the Kārewarewa Urupā Block are, for Te Ātiawa, significant and have endured irrespective of legal and development processes and changes following the acquisition of the land by the Waikanae Land Company in 1968. These values warrant recognition, and we have carefully evaluated the competing equities of the situation as part of our overall evaluation of the proportionality of the Council's recommended planning measures. We recommend retaining the Kārewarewa Urupā Block notation as a wāhi tapu in Schedule 9 of the Plan in the modified form recommended by Mr Banks in the Council's reply evidence.

[10] There were multiple rezoning requests piggybacking on PC2. The Council addressed the scope issue by applying a pragmatic set of criteria to these requests. In most cases, the Council did not recommend greenfield land for rezoning. A significant planning impediment arises for land, which should be developed under the guidance of a structure plan to ensure a high-functioning urban environment. Overall, we agree with the Council's recommendations around rezoning except for the following:

(a) The Mansell land at Otaihangā.

(b) Three properties formerly under the expressway designation at Rongomau Lane.

Section 1.2 – Appendices

[11] Attached are the following appendices:

(a) *Appendix 1* - A hyperlinked summary of the evidence received at the hearing, including links to the version of PC 2 recommended by Council officers and consultants in reply called PC 2 - (R2) with the file name PC2_CouncilReply_AndrewBanks_AppA_IPI_PCR2.

(b) *Appendix 2* - Plans showing the location of re-zoning requests.

Section 1.3 – Acknowledgements

[12] The Panel would like to acknowledge and thank the following people and entities:

(a) Tangata whenua for the gracious mihi whakatau at the start of the hearing, for hosting part of the hearing at Raukāwa marae, and for the important contributions of iwi experts to the hearing process. Tēnā rawa atu koutou katoa.

(b) The submitters for their constructive engagement and thoughtful submissions in the spirit of achieving the common good.

(c) Mr Banks and Ms Maxwell from Boffa Miskell for their constructive approach as consultants to the Council. Our procedural requirements expressed in Panel Minutes placed a heavy workload on the Council team to manage the submissions and to collate and coherently address them. That left the Panel free to focus on the main issues in contention during the hearing. We do not underestimate the effort required by the Council team; however, it was the most efficient way to conduct the process.

(d) The Panel also acknowledges Mr Banks' willingness to engage with submitters and positively reflect on their evidence and submissions. Mr Banks' reply showed an ability to self-reflect and engage with divergent views.

(e) Jason Holland, the manager at the Council, and the staff and consultants supporting him as administrators respected our independence and enabled us to perform our tasks seamlessly.

Section 1.4 – Formal Recommendations under Schedule 1, Part 6 Clause 100

[13] The Panel's formal recommendations are:

(a) Subject to the exceptions below, the Council should approve PC2 in the form identified as PC2(R2) attached to the Council reply evidence and in file name PC2_CouncilReply_AndrewBanks_AppA_IPI_PCR2 viewable from the link in Appendix 1.

(b) Despite (a), the Panel recommends the Council do the following with any necessary and minor consequential changes:

(i) **Allow** submission number 023 by the Mansell family by rezoning the land covered by the submission from Rural Lifestyle to General Residential Zone; and

(ii) **Allow** submission numbers 196 and 197 by Retirement Village Association and Ryman Healthcare (and consequentially Reject the change addressing these submissions in PC(R2)) by replacing the latter and:

(1) Including the provisions in Ms Williams' supplementary statement for the submitters at [16] as stand-alone provision for retirement villages in the General Residential Zone and High Density Residential Zone.

(2) Including a new policy, MRC-P7 – Housing in Centres as set out in Ms Williams' supplementary statement at [25], in the Metropolitan Centre Zone, Town Centre Zone, Local Centre Zone and Mixed Use Zone.

(iii) **Allow** submission number 123 by Ms Liakovskaia with the result that the land within 45 and 47 Rongomau Lane is rezoned to General Residential Zone.

(iv) **Allow** submission number 205 by Classic Developments Ltd applying only to 39 Rongomau Lane so that that land is rezoned to General Residential Zone.

(v) **Reject** the change to height and walkable catchment extensions proposed in PC(R2) for the new High-Density Residential Zone applying to the Raumati Beach Town Centre and keep those elements the same as in PC(R1).

Section 1.5 – Advisory Recommendations

[14] In this report section, the Panel sets out some advisory recommendations. These do not constitute formal statutory recommendations under the RMA. They are more like observations from the Panel because the Panel considers making those observations is helpful for the Council in the future performance of its resource management functions:

(a) The Panel accepts the advice of the Council's reporting planner, Mr Banks, that the Council's flood hazard maps and supporting provisions in the Operative District Plan are robust and allow more intensive rainfall from a warming climate. Recent events, however, reinforce that New Zealand is a pluvial country with powerful short vertical catchments. The Kāpiti Coast is no exception. The Kāpiti Coast has the added feature that its groundwater has hydraulic connectivity to and is affected by the sea level. The MDRS magnifies the risks because more residential infrastructure is potentially affected by flooding. Further, intensification will exacerbate water pooling in certain locations requiring further infrastructure. The Panel recommends that the Council continue to have a critical eye on managing flood hazard risk, including ensuring that it remains regularly informed about environmental changes affecting those risks.

(b) The Panel considers that the changes to Schedule 9 to support the values of the Kārewarewa Urupā Block should be adopted. However, it is evident from our decision that there are differing and respectable views about how PC2 as an IPI can address these matters. Given the significance of the values of the Kārewarewa Urupā Block, the Council may wish to consider preparing a supporting plan change following the usual Schedule 1 process to cover the risk that PC2 is later determined to be the incorrect vehicle to address those values.

(c) The Panel is somewhat sceptical that the MDRS will yield the additional household capacity by intensification that the Council currently projects. Greenfield development must be in the mix to meet the district's housing needs. We do not recommend the adoption of many rezoning requests. However, most submissions on re-zoning addressed in this report had very sensible ideas for greenfield development if properly planned using well-conceived structure plans to manage the opportunities and constraints the site presents. Excellent examples are the Waikanae East proposal and those covering the Otaihangā Block and land owned by Classic Developments Limited. The Panel's view is that PC2 will not meet the Council's required supply of land for housing is supported by the evidence of Kāinga Ora and also the following statement from Mr Foy on behalf of the Mansell family:

> *"9.6 As things stand, and in the absence of rezoning relatively large new greenfields areas for residential activities, KCDC would be reliant on a very significant uplift in residential capacity to occur as a result of MDRS and a move to higher density housing to meet its NPS-UD obligations. In my opinion, it will be very important that other avenues for providing additional residential capacity are also followed, so as to mitigate the risk that those MDRS changes are insufficient. One significant format for providing additional supply will be using new greenfields developments to bring supply online quickly, and in large quantities, rather than relying on small-scale infill by often unmotivated landowners to bridge the supply-demand gap."*

(d) Following from (c), some of the land highly suitable for future greenfield residential development could be developed less intensively, such as for

lifestyle blocks. If that occurred because progress on rezoning was slow, then opportunities to achieve a high-functioning urban environment under NPS-UD could be compromised. The Council should be mindful of this and consider funding further work to rezone greenfield land where feasible.

Section 2 – Overview of Panel's Process and the Panel's Reporting Framework

Section 2.1 – Statutory Context for PC2

[15] PC2 is an Intensification Planning Instrument or IPI that is subject to the direction in RMA, s 80F that states:

> *(1) The following territorial authorities must notify an IPI on or before 20 August 2022:*
>
> *(a) every tier 1 territorial authority:*
>
> *(b) a tier 2 territorial authority to which regulations made before 21 March 2022 under section 80I(1) apply.*
>
> *(2) The following territorial authorities must notify an IPI on or before the date specified in the applicable regulations:*
>
> *(a) a tier 2 territorial authority to which regulations made on or after 21 March 2022 under section 80I(1) apply:*
>
> *(b) a tier 3 territorial authority to which regulations made under section 80K(1) apply.*
>
> *(3) A territorial authority to which subsection (1) or (2) applies must prepare the IPI—*
>
> *(a) using the ISPP; and*
>
> *(b) in accordance with—*
>
> *(i) clause 95 of Schedule 1; and*
>
> *(ii) any requirements specified by the Minister in a direction made under section 80L.*

[16] An IPI, therefore, has the limitations contained in RMA, s80G that states:

> *IPIs*
>
> *(1) A specified territorial authority must not do any of the following:*
>
> *(a) notify more than 1 IPI:*
>
> *(b) use the IPI for any purpose other than the uses specified in section 80E:*

(c) withdraw the IPI.

ISPP

(2) A local authority must not use the ISPP except as permitted under section 80F(3).

[17] Mandatory requirements that an IPI must show are set out in s 80H, and that provision states:

(1) When a specified territorial authority notifies its IPI in accordance with section 80F(1) or (2), it must show in the instrument, for the purposes of sections 77M, 86B, and 86BA—

(a) which provisions incorporate—

(i) the density standards in Part 2 of Schedule 3A; and

(ii) the objectives and policies in clause 6 of Schedule 3A; and

(b) which provisions in the operative district plan and any proposed plan are replaced by—

(i) the density standards in Part 2 of Schedule 3A; and

(ii) the objectives and policies in clause 6 of Schedule 3A.

(2) The identification of a provision in an IPI as required in subsection (1)—

(a) does not form part of the IPI; and

(b) may be removed, without any further authority than this subsection, by the specified territorial authority once the IPI becomes operative.

[18] An IPI is defined in s 80E and s 80E states:

(1) In this Act, intensification planning instrument or IPI means a change to a district plan or a variation to a proposed district plan—

(a) that must—

(i) incorporate the MDRS; and

(ii) give effect to,—

(A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or

(B) in the case of a tier 2 territorial authority to which regulations made under section 80I(1) apply, policy 5 of the NPS-UD; or

(C) in the case of a tier 3 territorial authority to which regulations made under section 80K(1) apply, policy 5 of the NPS-UD; and

(b) that may also amend or include the following provisions:

(i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T:

(ii) provisions to enable papakāinga housing in the district:

(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—

(A) the MDRS; or

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

(2) In subsection (1)(b)(iii), related provisions also includes provisions that relate to any of the following, without limitation:

(a) district-wide matters:

(b) earthworks:

(c) fencing:

(d) infrastructure:

(e) qualifying matters identified in accordance with section 77I or 77O:

(f) storm water management (including permeability and hydraulic neutrality):

(g) subdivision of land.

[19] RMA, Schedule 3A contains permitted activity rules, special subdivision rules and a rule precluding notification requirements in certain circumstances. The standards in Schedule 3A, Part 2 govern building height, height in relation to boundary, set-backs, building coverage, outdoor living space, outlook space, windows to the street and landscaped area.

[20] Additionally, the MDRS includes the following objectives and policies in clause 6 that must be included in the District Plan as part of the IPI.

(1) A territorial authority must include the following objectives in its district plan:

Objective 1

(a) a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future:

Objective 2

(b) a relevant residential zone provides for a variety of housing types and sizes that respond to—

(i) housing needs and demand; and

(ii) the neighbourhood's planned urban built character, including 3-storey buildings.

(2) A territorial authority must include the following policies in its district plan:

Policy 1

> *(a) enable a variety of housing types with a mix of densities within the zone, including 3-storey attached and detached dwellings, and low-rise apartments:*
>
> *Policy 2*
>
> *(b) apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga):*
>
> *Policy 3*
>
> *(c) encourage development to achieve attractive and safe streets and public open spaces, including by providing for passive surveillance:*
>
> *Policy 4*
>
> *(d) enable housing to be designed to meet the day-to-day needs of residents:*
>
> *Policy 5*
>
> *(e) provide for developments not meeting permitted activity status, while encouraging high-quality developments.*

Section 2.2 – PC2 was an iterative process.

[21] The development of a plan change is iterative. That term comes from the Latin verb *iter,* which means to journey. It describes a process of discovery when new information emerges or is revealed that requires reassessment or adjustment by the traveller or, in this context, the plan change proponent, i.e. the Council.

[22] The result is successive changes to the notified version of the plan change.

[23] Following the Panel's Minute, the PC2 version nomenclature the Panel uses is the following:

(a) PC(N) = the notified version of the plan change.

(b) PC(R1) = the recommended changes to the notified version by the Council officers following consideration of the submissions to PC2.

(c) PC(R2) = the changes to the notified version of PC2(N) and (R1) as a result of new information provided as a result of the hearing and recommended by Council officers.

(d) PC(C) = the version recommended by the Panel. The Panel has not made the changes but made recommendations which, if adopted form PC(C).

> To the extent that they are not adopted, PC(C) is the outcome of decisions by the Council on the Panel's recommendations.

Section 2.3 – Context for PC2

[24] Kāpiti Coast District has experienced population growth for some time. The NPS-UD and its predecessors focused the Council's attention on increasing residential land supply. The Council developed the Te Tupu Pai (Growing Well) Strategy to provide local substance to the directions in the NPS-UD.

[25] Ms Maxwell provided context for that growth strategy in her reply at 23-24 as follows:

> *(23) Te Tupu Pai - Growing Well, is KCDC's growth strategy. It was published in March 2022 and establishes the vision and road map for ensuring sustainable development occurs across the Kāpiti Coast. It outlines how the District will grow over the next 30 years, with a mixture of intensification and greenfield development to be enabled. It outlines the priority areas (at the time of publication) for growth (prior to the MDRS implementation requirement), which the Council intends to investigate for future urban development but does not commit to the rezoning of any particular site within those areas.*
>
> *(24) Te Tupu Pai establishes categories for growth, which include high-priority greenfield growth areas, medium-priority greenfield growth areas and longer-term greenfield growth areas. These areas are spatially defined on the map included in the Strategy[2]. Te Tupu Pai also references a greenfield assessment report undertaken to examine opportunities and constraints associated with each potential growth area. This assessment is a technical document, which was commissioned to assist the prioritisation of areas. It is neither part of Te Tupu Pai nor is it an appendix to the document. It was included as an appendix to the Section 32 report (Appendix N) and was only included in relation to the areas proposed to be rezoned as part of PC2, not in relation to the Growth Strategy. Te Tupu Pai is not a Future Development Strategy (FDS) either, as was indicated by a submitter. A FDS is required by subpart 4 of Part 3 of the NPS-UD and is still being prepared for the Wellington Region.*

[26] The RMEHS 2021 somewhat overshadowed these workstreams and required a fresh assessment and framework to implement the required IPI. The preparatory analysis resulted in a report by Boffa Miskell underpinning of the notified PC2 called the Intensification Assessment Report ("*IAR*"). The report is attached as Appendix L to the s32 evaluation report.

[2] Te Tupu Pai - Growing Well, p 16.

[27] The IAR noted that the population of Kāpiti Coast was expected to increase by 32,000 by the year 2051 resulting in additional demand of 16,185 dwellings over the same period.[3] Figure 1 to the IAR summarises the potential scope for intensification around metropolitan centres, rapid transport stops and other lower-order centres.

[28] The IAR summarised the types of intensification prescribed by the MDRS and Policy 3 of the NPS-UD in the table below from page 5 of the IAR:

NPS Policy	**Type of Intensification**	**Applicable area**	**Interpretation of applicable area for Kāpiti District**
3(b)	Building height and density to reflect demand for housing and business use, and in all cases building heights of at least 6 storeys.	The Metropolitan Centre Zone.	The Metropolitan Centre Zone at Paraparaumu.
3(c)(i)	Building heights of at least 6 storeys.	Within at least a walkable catchment of existing and planned rapid transit stops.	The area within a walkable catchment of Paekākāriki, Paraparaumu and Waikanae stations.
3(c)(iii)	Building heights of at least 6 storeys.	Within at least a walkable catchment of the edge of the Metropolitan Centre Zone.	The area within a walkable catchment of the edge of the Metropolitan Centre Zone.
3(d)	Within and adjacent to neighbourhood centre zones, local centre zones and town centre zones (or equivalent) building heights and density of urban form commensurate with the level of commercial activities and community services.	Parts of the urban environment that are adjacent to neighbourhood, local and town centre zones.	The parts of the General Residential Zone that are within a walkable catchment of the Town Centre and Local Centre Zones.
MDRS	3 three-storey dwellings per site.	Relevant Residential Zone.	The General Residential Zone.

[3] Kāpiti Coast District Council and Greater Wellington Regional Council (2022) "*Kāpiti Coast District Council Regional Housing and Business Development Capacity Assessment*".

[29] The IAR summarised Boffa Miskell's (and the Council's) interpretation of the intensification provisions of the NPS-UD and MDRS in this way:

> ***3.1.3 Summary of interpretation of intensification policies***
>
> *On the basis of the analysis above, the approach to interpreting the intensification policies of the NPS-UD in the context of the Kāpiti Coast district is based primarily on appropriate heights and adjacency to centres being determined through each centre's position within the centres hierarchy. This is an appropriate approach for a district made up of several distributed urban areas that each rely on their own centre(s) to provide for current and future local commercial activities and community services. It also acknowledges the logic of the centres hierarchy established through the District Plan, and reinforces this hierarchy by providing that the planned level of intensification within and around each centre is consistent with its position within the centres hierarchy.*
>
> *In summary, in considering the NPS-UD, the MDRS and Te tupu pai together, the following approach has been taken to interpretation of the intensification policies of the NPS-UD:*

Area	**Interpretation of NPS-UD Intensification policy**		**Relevant NPS-UD policy**
	Height and density	**Walkable catchment**	
Within the Metropolitan Centre Zone	Enable buildings of up to 12-storeys.[4]		3(b)
Within a walkable catchment of the Metropolitan Centre Zone and Rapid Transit Stops	Enable 6-storey buildings.	800m	3(c)
Within the Town Centre Zone	Enable 6-storey buildings.		3(d)
Within a walkable catchment of the Town Centre Zone	Enable 6-storey buildings.	400m	3(d)
Within the Local Centre Zone	Enable 4-storey buildings.		3(d)
Within a walkable of the Local Centre Zone	Enable 4-storey buildings.	200m	3(d)
The General Restriction Zone	Enable 3-storey buildings.		MDRS

[4] 12-storeys within the Metropolitan Centre Zone is derived from the consultation document on the District Growth Strategy. This is consistent with policy 3(b), as it enables dwellings that are at least 6-storeys. Refer KCDC. (30 September 2021). *Growing Well: Community Consultation Document (Draft).*

Note: the application of the MDRS to the General Residential Zone is shown for comparison purposes.

[30] The result was an intensification study area illustrated in tabular form below from pages 8 and 9 of the IAR.

Ref. (note 1)	Location	Area description	Building heights to be enabled
Metropolitan centre zone			
UI-PA-5	Paraparaumu metropolitan centre and railway station	Approximate 800m walkable catchment from the Metropolitan Centre zone and the Paraparaumu railway station. Excludes the extents of the area that are located within Future Urban Study Areas PA-01, PA-02 and RB-01.	Up to 12 storeys within the Metropolitan Centre Zone. At least 6 storeys within an 800m walkable catchment of the Metropolitan Centre Zone.
Rapid transit stops			
UI-WA	Waikanae town centre and railway station	Approximate 400m walkable catchment from the Waikanae Town Centre zone and an approximate 800m walkable catchment from the Waikanae Railway Station	At least 6 storeys.
UI-PK	Paekākāriki local centre and railway station	Approximate 800m walkable catchment from the Paekākāriki railway station, and approximate 200m walkable catchment from the Paekākāriki local centre zone.	At least 6 storeys.
Town centres			
UI-ŌT-1	Ōtaki Main Street/Mill Road	Approximate 400m walkable catchment from the Ōtaki Main Street Town Centre Zone	Up to 6 storeys in the Town Centre Zone. Up to 4 storeys within a 400m walkable catchment of the Town Centre Zone.
UI-ŌT-2	Ōtaki railway station	Approximate 400m walkable catchment from the Ōtaki Railway Town Centre Zone	Up to 6 storeys in the Town Centre Zone. Up to 4 storeys within a 400m walkable catchment of the Town Centre Zone.
UI-PA-3	Paraparaumu Beach town centre	Approximate 400m walkable catchment from Paraparaumu Beach town centre zone.	Up to 6 storeys in the Town Centre Zone.

Ref. (note 1)	Location	Area description	Building heights to be enabled
			Up to 4 storeys within a 400m walkable catchment of the Town Centre Zone.
UI-RB	Raumati Beach town centre	Approximate 400m walkable catchment from the Raumati Beach town centre zone.	Up to 6 storeys in the Town Centre Zone. Up to 4 storeys within a 400m walkable catchment of the Town Centre Zone.
Local centres			
UI-WB	Waikanae Beach local centre	Approximate 200m walkable catchment from the Waikanae Beach Local Centre zone	Up to 4 storeys.
UI-PA-1	Kena Kena local centre	Approximate 200m walkable catchment from the Kena Kena local centre zone.	Up to 4 storeys.
UI-PA-2	Mazengarb local centre	Approximate 200m walkable catchment from the Mazengarb local centre zone.	Up to 4 storeys.
UI-PA-4	Meadows local centre	Approximate 200m walkable catchment from the Meadows precinct local centre zone. Excludes the extent to the north of Mazengarb Road, which is associated with Future Urban Study Area OH-01	UP to 4 storeys.
UI-RS	Raumati South local centre	Approximate 200m walkable catchment from the Raumati South local centre zone.	Up to 4 storeys.

Notes:

1. *Area reference numbers are for internal purposes only, and are used to identify each area within the Spatial Influences maps (refer Appendix 2).*
2. *Where parts of an area fall within a greenfield study area, then these have been excluded from the assessment. Refer to the separate report Boffa Miskell (2022), Kāpiti Urban Development Greenfield Assessment for further information on these areas.*
3. *"Building heights to be enabled" is a synthesis of policy 3 of the NPS-UD and the initial direction provided by the draft Kāpiti District Growth Strategy.*

[31] Following the intensification study, a qualitative and quantitative assessment was made for the purpose of establishing:

(a) The range of constraints and opportunities (including potential qualifying matters) associated with intensification of each area.

(b) Estimates of the theoretical dwelling capacity of each area based on the intensification scenario outlined in Te Tupu Pai and as directed by NPS-UD. Key spatial influences and constraints are summarised in the table below from page 12 of the IAR.

"The themes and their associated assessment criteria are identified in the assessment framework, and are broken down as follows:…"

Map theme	**Assessment criteria**
Urban environment	Urban form Local neighbourhoods Activity centres
Urban function	Residential development Business land Transport networks Infrastructure and servicing
Natural environment and landscape	Natural ecosystem values Water bodies Landscape and open space values Heritage Values
Hazards	Natural hazards and land risks
Land development constraints	Topography Land use compatibility Climate change (low-carbon futures)
Mana whenua	Mana whenua Iwi development

[32] The IAR did a detailed assessment of potential qualifying matters. The basic framework is set out in the table below.[5]

[5] The IAR used the term "potential qualifying matters" to recognise that it was not intended to provide a detailed statutory assessment of qualifying matters required by ss77J or 77P of the RMA. Rather it was intended as a scoping exercise for potential qualifying matters in areas where policies 3 and 4 of the NPS-UD apply (i.e. within the walkable catchments only). This is explained in the statement on page 22 of the IAR, which states:

Potential qualifying matter	NPS-UD implementation clause	Spatial reference
Natural character in the coastal environment	3.32(1)(a) (referring to RMA s6(a))	Areas of High or Outstanding Natural Character in the Coastal Environment (KCDC). The definition and extent of the coastal environment within the district is currently being reviewed, and KCDC have prepared a Natural Character Evaluation to support this.
Wetlands, lakes, rivers and their margins, and fresh water generally	3.32(1)(a) (referring to the RMA s6(a)), and 3.32(1)(b) (referring to the NPS Freshwater Management)	Significant Natural Wetlands (GWRC). Outstanding waterbodies (GWRC). Rivers, streams and drains (KCDC). Rivers and lakes (LINZ). Water collection areas (KCDC).
Outstanding natural features and landscapes	3.32(1)(a) (referring to RMA s6(b))	Outstanding natural features and landscapes (KCDC).
Significant indigenous vegetation and significant habitats of indigenous fauna	3.32(1)(a) (referring to RMA s6(c))	Key native ecosystems (GWRC). Indigenous biodiversity coastal (GWRC). Ecological sites (KCDC). Key indigenous trees (KCDC).
Relationship of Māori and their culture and their traditions with their ancestral lands,	3.32(1)(a) (referring to RMA s6(e))	Wāhi tapu sites (KCDC). Additional sites informed through engagement with Iwi.

This section outlines an initial potential scope of qualifying matters only, and is not intended to be a detailed statutory assessment of qualifying matters required for a section 32 report.

This recognises that:
The IAR does not provide an assessment of potential qualifying matters within the broader urban environment where the MDRS apply (but Policies 3 and 4 of the NPS-UD do not).
The IAR was principally developed prior to consultation on Draft PC2, so did not purport to address qualifying matters that may come about as a result of consultation on the Draft (the Marae Takiwā Precinct is an example of this).

The detailed assessment of qualifying matters required by ss77J and 77P of the RMA is contained in section 6.1 of the S32 Evaluation Report.

Potential qualifying matter	NPS-UD implementation clause	Spatial reference
waters, sites, wāhi tape and other taonga		
Historic heritage	3.32(1)(a) (referring to RMA s6(g))	Historic heritage area (KCDC). Historic heritage place (KCDC). Notable trees (KCDC). Geological sites (KCDC). Heritage listed sites (Heritage New Zealand).
Flood hazard	3.32(1)(a) (referring to RMA s6(h))	Flood hazard areas (KCDC).
Earthquake hazard	3.32(1)(a) (referring to RMA s6(h))	Fault avoidance areas (KCDC). High combined earthquake hazard (GWRC).
Areas potentially susceptible to coastal hazard	3.32(1)(a) (referring to RMA s6(h)); or 3.32(1)(b) (referring to the New Zealand Coastal Policy Statement)	Coastal hazard mapping (currently being prepared by KCDC).
Nationally significant infrastructure	3.32(1)(c)	State highway designation (KCDC). Rail corridor designation (KCDC). National grid lines (KCDC). High pressure gas network (KCDC).
Public open space	3.32(1)(d)	Open space zones (KCDC).
Designations	3.32(1)(e)	Designations (KCDC).
Business land for low density uses	3.32(1)(g)	Quarries (KCDC). The Mixed Use Precinct of the Airport Zone (KCDC). General industrial zone (KCDC).

[33] The IAR identified that the key intensification areas were Paraparaumu, Waikanae and Ōtaki. Section 6.1 of the report stated:

This assessment highlights that they key opportunities for intensification in the district are:

- *Paraparaumu Metropolitan centre (12,543 additional estimated dwellings, or 52% of total);*
- *Waikanae Town Centre (4,403 additional estimated dwellings, or 18% of total);*
- *The "twin" town centres at Ōtaki (3,264 additional estimated dwellings, or 13% of total)31.*

Combined, these areas are likely to provide a significant majority of the plan-enabled intensification opportunity that falls within the scope of this study (83% of total). As a set, they have the advantage of being geographically distributed across the district. Over time, this means that the potential benefits associated with intensification, including the ability for intensification to support existing and new commercial activities and community services in each of those areas, will also be distributed across the district. This pattern of development and intensification benefits may also improve the existing population's access to commercial activities and services in each of those areas.

In general, land within each of the intensification study areas is already subdivided and developed to some degree. However, both the Paraparaumu Metropolitan Centre and the areas around the twin centres at Ōtaki contains large blocks of unsubdivided and in some cases undeveloped land. This includes the Coastlands site, the undeveloped land within Paraparaumu metropolitan centre, and a number of large blocks of land in the northern half of Ōtaki. While which they are developed, and the timing of their development, will be dependent on the aspirations and timing of the land owners.

[34] Across the study areas the IAR concluded that intensification would increase dwelling capacity 24,210 dwellings as follows:

Area	**Enabled building heights**	**Estimated additional theoretical dwelling capacity**
Intensification in and around the Metropolitan Centre and Paraparaumu railway station	12 storeys within the Metropolitan Centre Zone. 6 storeys within the surrounding Mixed Use and General Residential Zones.	12,543 dwellings
Intensification around rapid transit stops at Waikanae and Paekākāriki	6 storeys within the Town/Local Centre Zone and surrounding General Residential Zones.	5,788 dwellings
Intensification around Town Centres	6 storeys within the Town Centre Zone. 4 storeys within the surrounding General Residential Zone.	4,904 dwellings
Intensification around Local Centres	4 storeys within the Local Centre Zone and surrounding General Residential Zone.	975 dwellings

	Total estimated additional dwelling capacity	**24,210 dwellings**

[35] In addition to the IAR further investigative work was carried out focusing on the following matters:[6]

(a) Coastal hazards as a potential qualifying matter.

(b) Infrastructure assessments.

(c) Marae Takiwa studies.

(d) Character assessments.

(e) Bulk and location analysis.

[36] The Council prepared a draft plan change and socialised that with the community following good planning practice.

Section 2.4 – Council's process before Panel's Hearing

[37] The Council notified PC2 on 18 August 2022 and the process from there is summarised in the following timeline.

Thursday 15 September 2022	Original deadline for the close of submissions
5pm, Tuesday 27 September 2022	Extended deadline for the close of submissions
Thursday 10 November 2022	Public notice inviting further submissions on PC2
5pm, Thursday 24 November 2022	Further submissions close

Section 2.5 – The Structure and Approach of the Panel's Report to meet Schedule 1, Part 6, Clause 100

[38] This report is arranged to fulfil the requirements of RMA, Schedule 1, Part 6, clause 100. That provision states:

[6] See also section 3.2 of the Section 32 Evaluation Report, which provides a summary of the research and analysis undertaken in preparing PC2.

(1) The independent hearings panel must provide its recommendations to a specified territorial authority in 1 or more written reports.

(2) Each report must—

(a) set out the panel's recommendations on the provisions of the IPI covered by the report; and

(b) identify any recommendations that are outside the scope of the submissions made in respect of those provisions; and

(c) set out the panel's recommendations on the matters raised in submissions made in respect of the provisions covered by the report; and

(d) state the panel's reasons for accepting or rejecting submissions; and

(e) include a further evaluation of the IPI undertaken in accordance with section 32AA (requirements for undertaking and publishing further evaluations).

(3) Each report may also include—

(a) matters relating to any alterations necessary to the IPI as a consequence of matters raised in submissions; and

(b) any other matter that the panel considers relevant to the IPI that arises from submissions or otherwise.

(4) In stating the panel's reasons for accepting or rejecting submissions in accordance with subclause (2)(d), each report may address the submissions by grouping them according to—

(a) the provisions of the IPI to which they relate; or

(b) the matters to which they relate.

(5) To avoid doubt, a panel is not required to make recommendations in a report that deal with each submission individually.

[39] This report addresses the main matters in contention at the hearing according to topics in sections rather than in response to individual submissions. That is consistent with RMA, Schedule Part 6, clause 100(4)(b).

[40] All recommendations are within scope.

[41] The Panel is not required to provide reasons according to the submission number. Indeed, it would make the report unduly long and complex. It would also be repetitive because many submissions were addressed in the primary report of the Council officers, and most submitters chose not to be heard on that outcome.

[42] Therefore, the reasons for the Panel's recommendations are:

(a) The reasons contained in the primary Council officer reports (including the itemised lists prepared by Mr Banks and Ms Maxwell in their primary evidence according to submission number) to the extent those reasons conform with our formal recommendations. In addition, the Panel's reasoning includes the supplementary reasons given in this report to the extent the reasoning pertains to the subject matter of the submission.

(b) For the Panel's recommendations that depart from the recommendations of the Council officers' reply and their PC(R2), our reasons rely on the reasons given in this report on the relevant subject matter.

[43] In fulfilling the requirement in RMA, Schedule 1, Part 6, clause 100(2)(e), our reasons for making the recommendations to Council to depart from PC(R2) and the Council's reply evidence is our reasoning set out in the relevant topic based sections of this report. Similarly, the reasoning in this report constitutes a further evaluation for the Panel's recommendations.

Section 3 – Challenges to PC2's Methods for Implementing ISP Requirements and challenges to the Extent of Enablement of Residential Activity (Both Under and Over Provisioning) in PC2

Section 3.1 – Overview

[44] Several submissions challenged the methods of PC 2 and the extent of enablement in significant ways. That included the Retirement Village Association, which sought special recognition of residential facilities for an ageing population, a fast-growing proportion of New Zealand's population. We address the main submissions in this category in this section of the Report.

Section 3.2 – Kāinga Ora

[45] Kāinga Ora's submission sought the enablement of greater levels of intensification through the provisions of PC2. Mr Banks summarised these in his reply:

(a) In relation to the Metropolitan Centre Zone:

(i) Increasing the enabled building height from 12-storeys to 15-storeys within the Metropolitan Centre Zone;

(ii) Increasing the enabled building height within a 400-metre walkable catchment of the Metropolitan Centre Zone from 6-storeys to 10-storeys. This would include the High Density Residential Zone and Mixed Use Zone 32 adjacent to the Metropolitan Centre Zone;

(b) In relation to the Town Centre Zones at Waikanae, Paraparaumu Beach and Raumati Beach:

(i) In relation to Waikanae, replacing Residential Intensification Precinct A (which enables 6-storey development) around the Town Centre Zone with a High Density Residential Zone (which enables also 6-storey development), but increase the size of the zone so that it covers an 800-metre walkable catchment from the Town Centre (as opposed to 400-metres);

(ii) In relation to Paraparaumu Beach and Raumati Beach, replacing Residential Intensification Precinct B (which enables 4-storey development) around each Town Centre with a High Density Residential Zone (which enables 6-storey development) applied to an 800-metre walkable catchment (as opposed to the 400-metre walkable catchment applied to Residential Intensification Precinct B);

(c) In relation to the Town Centre Zones at Ōtaki Main Street and Ōtaki Railway:

(i) Replacing Residential Intensification Precinct B (which enables 4-storey development) around each Town Centre with a High Density Residential Zone (which enables 6-storey development), but retaining the 400-metre walkable catchment (with some modifications); and

(ii) Expanding the size of the Ōtaki Main Street and Ōtaki Railway Town Centre Zones;

(d) In relation to the High Density Residential Zone generally:

(i) amending the enabled building height from 20 to 21 metres;

(ii) providing for a more enabling height in relation to boundary (HIRB) standard for development of 4 or more residential units, including:

- *A HIRB standard for the first 22 metres of a boundary back from the road frontage with a recession plane that inclines at an angle of 60° from a point 19 metres above the ground level at the boundary; and*
- *For all other boundaries, a recession plane that inclines at an angle of 60° from a point 8 metres above the ground level at the boundary;*

(iii) enabling commercial activities on the ground floor of apartment buildings as a restricted discretionary activity;

(e) Amendments to existing rules for home business activities in the General Residential and High Density Residential Zone;

(f) Expansion of limited notification preclusions to cover non-compliance with outdoor living space, outlook space, windows to street and landscape area density standards;

(g) Consequential amendments to objectives and policies to reflect the additional level of enablement requested;

(h) Amendments to the District Plan maps to give effect to the additional level of enablement requested. [7]

[46] Experts presenting evidence for Kāinga Ora outlined why they considered this increased level of enablement was appropriate. These are summarised in Mr Banks' reply:

a. In relation to urban economics, Mr Cullen's evidence generally identifies that the benefits to enabling greater levels of development include:

i. Increased competitiveness in land development markets;

ii. Improved centres performance;

iii. In relation to the Metropolitan Centre Zone, a greater ability to realise development capacity where future development may otherwise be constrained by existing land uses;

b. In relation to urban design and amenity, Mr Rae's evidence generally identifies that:

i. Increased levels of development sought to be enabled by Kāinga Ora provide for an appropriate urban form in relation to development in and around the district's centres;

ii. Potential effects on amenity associated with higher levels of development are appropriate, particularly in relation to the High Density Residential Zone where increased levels of build form should be anticipated in any case;

iii. The spatial application of the High Density Residential Zone sought by Kāinga Ora is appropriate from the perspective of walkability;

c. In relation to planning, Ms Williams' evidence generally identifies that:

i. In relation to the Metropolitan Centre Zone, the increased level of enablement requested by Kāinga Ora recognises the regional significance of the centre, and improves its consistency with the level of development enabled in relation to other Metropolitan Centres in the region;

[7] Para 137 Council Officer's Reply (Andrew Banks)

ii. In relation to Town Centre Zones, the increased level of enablement requested by Kāinga Ora recognises the additional significance placed on Town Centre Zones by the NPS-UD;

iii. The increased levels of enablement requested by Kāinga Ora support the development of a well-functioning urban environment (under objective 1 and policies 1, 2 and 3 of the NPS-UD) with intensification being focussed on areas directed by objective 3 of the NPS-UD.[8]

[47] In his reply Mr Banks said that he now changed his position on some of the matters raised by Kāinga Ora and the following outlines the matters of agreement:

(a) Increasing the building height enabled as a restricted discretionary activity in the Metropolitan Centre Zone from 12- to 15-storeys (resource consent would still be required, on the basis that the permitted activity height threshold remains at 6-storeys);

(b) Increasing the building height enabled in both the High Density Residential and Mixed Use Zones within a 400-metre walkable catchment of the Metropolitan Centre Zone from 6- to 10-storeys (resource consent would still be required on the basis that the permitted activity threshold for the number of residential units per site remains at 3);

(c) Expansion of the High Density Residential Zone around the Waikanae Town Centre Zone to include areas within an 800 metre walkable catchment of the Town Centre Zone (as opposed to a 400 metre walkable catchment);

(d) Application of a High Density Residential Zone in the manner sought by Kāinga Ora around the Town Centre Zones at Paraparaumu Beach and Raumati Beach[9]

Mr Banks did not agree with the increased enablement at Ōtaki Town Centre on the basis of his analysis below.

[48] He outlined his reasoning for supporting Kāinga Ora position and turned to Objective 3 of the NPS-UD to provide guidance in implementing Policy 3. Objective 3 states:

Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply:

(a) the area is in or near a centre zone or other area with many employment opportunities

(b) the area is well-serviced by existing or planned public transport

[8] Para 139 Council Officer's Reply (Andrew Banks)
[9] Para 140 Council Officer's Reply (Andrew Banks)

> *(c) there is high demand for housing or for business land in the area, relative to other areas within the urban environment.*[10]

[49] In his view, it would be logical based on this, that centres that exhibited more than one of these qualities would be more suited to greater enablement. It follows that those centres that only exhibit one or less of these qualities would not be appropriate for greater intensification. To this end, Mr Banks provided a very helpful table with his assessment of the centres against the qualities outlined in Objective 3:

Areas within and around…	***Objective 3 qualities present in the area?***		
	(a) centre zone	***(b) well-serviced by existing/planned public transport***	***(c) demand***
Paraparaumu Metropolitan Centre	***Yes.*** *The Metropolitan Centre Zone is planned as the principal commercial centre and provides for the greatest level of commercial activities and community services.*	***Yes.*** *The area has access to a rapid transit service at Paraparaumu train station.*	***Partially.*** *Some demand for feasible apartment development is anticipated.*
Waikanae Town Centre	***Yes.*** *The Town Centre Zone provides the urban focus for commercial activities and community services for the surrounding urban community.*	***Yes.*** *The area has access to a rapid transit service at Waikanae train station.*	***Partially.*** *Some demand for feasible apartment development is anticipated.*
Paraparaumu Beach and Raumati Beach Town Centres	***Yes.*** *The Town Centre Zones provides the urban focus for commercial activities and community services for the surrounding urban community.*	***No.*** *The area does not have reasonable access to an existing or planned rapid transit service.*	***Yes.*** *The greatest demand for feasible apartment development is anticipated to be in the areas around Paraparaumu Beach and Raumati Beach.*

[10] NPS-UD Objective 3

Paraparaumu Beach and Raumati Beach Town Centres	***Yes.*** *The Town Centre Zones provides the urban focus for commercial activities and community services for the surrounding urban community.*	***No.*** *The area does not have reasonable access to an existing or planned rapid transit service.*	***Yes.*** *The greatest demand for feasible apartment development is anticipated to be in the areas around Paraparaumu Beach and Raumati Beach.*
Ōtaki Main Street and Ōtaki Railway Town Centres	***Yes.*** *The Town Centre Zones provides the urban focus for commercial activities and community services for the surrounding urban community.*	***No.*** *The area does not have reasonable access to an existing or planned rapid transit service.*	***No.*** *Demand for feasible development beyond the MDRS is not anticipated.*[11]

[50] The Panel partially agrees with Mr Banks' assessment of the Metropolitan Centre and Town Centres. However, we don't agree with his analysis concerning Raumati Beach Town Centre. In the table above Mr Banks states that the greatest demand for feasible apartment development is expected to be around Paraparaumu Beach and Raumati Beach. Referring to the report relied on by Mr Banks from Property Economics, Assessment of Kāpiti Residential Intensification Area Feasibilities, contained in Appendix M to the 32 Evaluation Report, there is significantly less (177) demand for apartments than Paraparaumu Beach (442). In comparison, the demand is less than at Paekakarirki (180)[12] and it is not suggested that this be further intensified. We, therefore, consider that there is less demand for growth around the centre in Raumati Beach Town Centre and do not support further enablement in this location. We do, however, agree that based on the evidence before us, there is reason to support an extension of the walkable catchment around the Town Centres and a new High-Density Residential Zone identified except for Ōtaki Main Street, Ōtaki Railway and Raumati Beach Town Centres.

[11] Para 143 Council Officer's Reply (Andrew Banks).
[12] Figure 5 Property Economics, Assessment of Kāpiti Residential Intensification Area Feasibilities, contained in Appendix M to the Section 32 Evaluation Report.

[51] In all other matters regarding the changes requested by Kaingā Ora, we agree with Mr Banks' recommendations. These are set out at paragraph (151) of his reply (with the exception of paragraph (151)(c)(i) as it relates to the Raumati Beach Town Centre)

[52] The Panel adopts Mr Banks' reasons for supporting or rejecting these requests by Kāinga Ora.

Section 3.3 – Retirement Village Association and Ryman Healthcare

Section 3.3.1 – Retirement Villages in General Residential Zone

[53] Ryman and RVA sought greater clarity in the provision for retirement villages in the context of providing for an ageing population and the MDRS.

[54] How retirement villages are provided for is outlined in the Council Officer's Planning Evidence.[13] They are not provided for in the GRZ as specific activities but are provided for as supported living accommodation. This activity is permitted for up to 6 residents and no more than one residential unit can be provided. Outside this, the activity is a Discretionary Activity.

[55] Mr Banks' main concern was with the effects potentially generated by the non-residential activities associated with retirement villages and considered that the discretionary activity status or non-complying for commercial activities is appropriate. We do not agree with this concern and the effects would not be of a scale to qualify as distributional effects potentially disabling centres . Therefore, further planning controls are not required.

[56] Mr Mitchell for Ryman and RVA and his colleague Ms Williams (who presented evidence at the hearing) considered that a suite of provisions can be developed that specifically and clearly provide for retirement villages. While they regard retirement villages as residential activities, they are aware that there are potentially effects from externalities of the activity and buildings but that these can be specifically controlled. It is their view that a planning framework can be 'designed' to be consistent with the provisions for four or more residential units as required by the NPS-UD and the

[13] 4.6.2 Council Officers' Planning Evidence. (Andrew Banks)

provisions of the MDRS. More clarity in the provision for the ageing population would result.

[57] To this end, Ms Williams proposed a standalone framework for retirement villages and this is outlined in her supplementary evidence.[14]

[58] The Panel considered this a clearer and more certain path in providing for retirement villages. The policy and rule framework proposed by Ms Williams recognises the potential effects of retirement village buildings.

[59] The definition of retirement villages includes the associated non-residential activities. Some of these are listed but also capture *other non-residential activities*.[15] Mr Banks' concerns regarding the potential effects of the non-residential activities associated with retirement villages may be addressed by framing the control of these effects as matters of discretion.

Section 3.3.2 – Retirement Villages in the Centres and Mixed-Use Zones

[60] Retirement villages are not specifically provided for in the Centres and Mixed Use Zones. Rather they are accommodated by bundling the activities that constitute them.

[61] Mr Banks' concern with allowing retirement villages in centres was that they could threaten the commercial viability of centres given their large site requirements.

[62] Ms Williams in her supplementary evidence, offered that retirement villages should have the same permitted activity standards as other activities in centres. In particular, retirement villages should have the same limitation on non-commercial activities at ground floor.

[63] Mr Banks agrees with Ms Williams that retirement villages could be treated in the same way as other permitted activities[16] and recommended new policy wording to reflect this.

[64] The Panel agree that it is entirely appropriate that retirement villages are permitted in centres and subject to the same permitted activity standards as other permitted

[14] Supplementary evidence of Nicola Marie Williams 6 April 2023.
[15] National Planning Standard of Retirement Villages.
[16] 8.2 Council Officer's Reply Evidence (Andrew Banks).

activities. Providing for retirement villages in centres enables wider location choice for the aging population.

Section 3.4 – Submitters Opposing Extent of Enablement based on flood hazard grounds

[65] Mr Duignan, a "retired economist", spoke on behalf of the Munro Duignan Trust and the Waikanae Beach Residents Society. Mr Duignan's criticism concerned the Council's limited economic lens for assessment of the costs and benefits of intensification in light of the major externalities that he claimed will inevitably arise from flood hazards affecting large and more intensively developed communities. Mr Duignan pointed to international research that demonstrates that the indirect losses ranged between 21% to 93% of direct losses.[17] He considered that the flood hazard risk was so significant that the Coastal Qualifying Matter Precinct should be extended to cover the entire coastal environment as defined in the District Plan as a proxy for the extent of flood hazards. Mr Duignan considered it puzzling that the Council was concerned with coastal hazard erosion when the more significant hazard was coastal flooding.

[66] We have addressed Mr Duignan's point in the Advisory Recommendations section of this report. We recognise flood hazard risks are important and should strongly inform urban planning. Mr Duignan is not an expert in the field of flood hazards and we are assured by Council officers that the flood hazard mapping undertaken as part of the Operative District Plan was a robust process.

Section 3.5 - Application of NPS-UD Policy 3

Interpretation of "commensurate with the level of commercial activities and community services"

[67] A number of submitters did not agree with the Council's application of Policy 3(d) of NPS-UD. Policy 3(d) states that Tier 1 Councils must enable:

> *"within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services"*

[17] Mr Duignan referenced [Hammond et al], Centre for Water Systems, University of Exeter, Exeter, UK 2015 and Penning-Rowsel and Parker (1987).

[68] Some submitters referred to the Ministry of Environment (MFE) guidelines[18] for interpretation concerning determining whether centres met these requirements. The Waikanae Beach local centre zone was cited as a small centre with three shops – a bakery, a dairy and a takeaway – and this did not meet the MFE guidelines. In particular, these three shops could not be said to consist of a range of services to meet the reasonable daily requirements of the community.

[69] In Mr Banks' reply, he said that relying on the MFE guidelines was incorrect as they were published in 2020 with the first version of the NPS-UD and before the Amendment Act, which changed policy 3(d). There is an important distinction here, and Mr Banks helpfully outlines this in his reply:

a. *The original version of policy 3(d) as it appeared in the NPS-UD when it was gazetted is as follows:*

   (d) in all other locations in the tier 1 urban environment, building heights and density of urban form commensurate with the greater of:

      (i) the level of accessibility by existing or planned active or public transport to a range of commercial activities and community services; or

      (ii) relative demand for housing and business use in that location.

b. *The new version of policy 3(d) as it now appears in the NPS-UD is as follows:*

   (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.[19]

[70] The first version focuses on the accessibility of an area to services while the second version is focussed on the adjacency of the area to the centre. Mr Banks considered this is a fundamental difference as the planned level of activities must be

[18] Ministry for the Environment. (2020). *Understanding and implementing intensification provisions for the National Policy Statement on Urban Development*. See: https://environment.govt.nz/assets/Publications/Files/Understanding-and-implementing-intensification-provisions-for-NPS-UD.pdf

[19] Para 176 Council Officer's Reply (Andrew Banks)

considered in planning, not just the existing. The Panel agrees with this assessment as planning for the future is the basis of planning, particularly pertinent to the IPI.

[71] There is potential for these areas to grow and provide a wider range of services within the provision of the District Plan.

[72] In addition, in Mr Banks' opinion, as the MDRS had not been introduced when the MFE guidance was published, the new level of development had not been taken into account.

> *"I consider that the MDRS set the context for how policy 3(d) is interpreted, because the MDRS set the standard for the level of development that is considered to be appropriate in areas that are not adjacent to a centre zone. In other words, it sets the standard for the appropriate level of development in areas where policy 3(d) does not apply. Given that objective 3(a) of the NPS-UD seeks that more people live in parts of the urban environment that are in or near a centre zone, I consider that the application of policy 3(d) must mean enabling building heights or density that are more than the MDRS."*[20]

[73] While we agree with Mr Hazelton and Mr Tocker that the existing Waikanae Beach local centre does not currently provide an appropriate range of services for the residents of the area to rely on, the level of commercial services and the anticipated increase in development enabled by Policy 3(d) must be considered. We therefore agree with Mr Banks' recommendation.

Section 4 – Challenge to PC2's Failure to Provide for Special Character in the Kāpiti Coast Beach Areas

Section 4.1 – Overview

[74] A number of submitters sought the retention of the character of beach residential areas by classifying them as 'Beach Residential Qualifying Matter Precincts'. In addition, they sought the removal of Residential Intensification Precinct B from these precincts and the retention of the Operative District Plan provisions for Beach Residential Precincts.

[75] At the hearing, we heard from the following submitters:

[20] Para 182 Council Officer's Reply (Andrew Banks)

(a) Munro Duigan Trust (S106)

(b) Andrena and Bruce Patterson (S124)

(c) Waikanae Beach Residents' Society Inc (S105)

(d) John Tocker (S227)

(e) Andrew Hazelton (S074)

(f) Penelope Eames (S118)

[76] Submitters' concerns related to the potential change in character of residential beach areas arising from increased intensification. From a legal perspective Mr Hazelton questioned the Council's analysis of the character assessments that were completed as part of the section 32 report.

Section 4.2 – Evaluation

[77] Beach Residential Precincts are identified in the Operative District Plan, and the provisions relating to these restrict the level of development to retain the low-density character of the areas. These are now inconsistent with the MDRS and policy 3 of the NPS-UD. Mr Banks provided the following table in his reply[21] as a comparison between the existing provisions and the MDRS:

	Operative special character area provisions	**MDRS**
Building coverage	35% in the Beach Residential Precinct 40% in the Waikanae Garden Precinct	50%
Height	8 metres	11 – 12 metres
Height in relation to boundary	2.1 metres vertically + 45° recession plane	4 metres vertically + 60° recession plane
Setbacks	Front yard: 4.5 metres Side and rear yards: 3 metres	Front yard: 1.5 metres Side and rear yards: 1 metre

[21] Para 324 Council Officer's Reply. (Andrew Banks)

	Operative special character area provisions	**MDRS**
	Side and rear yards for accessory buildings: 1 metre	
Minimum allotment size	Paekākāriki: 950m² with an 18m minimum dimension Raumati: 700m² with an 18m minimum dimension Waikanae Beach: 550m² with an 18m minimum dimension Ōtaki Beach: 450m² minimum and 600m² average, with an 18m minimum dimension Waikanae Garden Precinct: 700m² with an 18m minimum dimension	No minimum allotment size (except a minimum vacant allotment size of 420m² with a 13m minimum dimension)

[78] In order for the existing provisions to be carried over, they would need to be considered as a qualifying matter. Mr Banks, in his evidence outlined the process under the RMA for establishing qualifying matters. Under the RMA, special character areas are not provided for in the list of matters set out in section 77I. The Act then requires them to be considered as "other" matters and they would need to be assessed again. In that regard, Mr Banks referred to the character assessments carried out as part of the Section 32 Evaluation Report. The Council had undertaken a further review of these in light of the direction of Policy 3 of the NPS-UD requiring intensification of residential areas.

[79] His summary of that assessment of the character of the areas is that for this to be provided for, the maintenance of low-density development would be necessary. This is inconsistent with the MDRS and the NPS-UD, which direct to increase density. Policy 6 of the NPS-UD addresses the potential changes that are anticipated and which should be expected:

> *"that the planned urban built form…may involve significant changes to an area, and those changes:*
> *(i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types ; and*

(ii) are not, of themselves an adverse effect"

[80] His conclusion is that as low density is the main characteristic sought to be maintained, this cannot meet the requirements of the RMA for it to be considered a qualifying matter. Specifically, S77L states:

> *A matter is not a qualifying matter …in relation to an area unless the evaluation report referred to in section 32, also –*
>
> *(a) Identifies the specific characteristic that makes the level of development provided by the MDRS… inappropriate in the area; and*
> *(b) Justifies why the characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD*

[81] While the Panel understands and appreciates the character of the beach residential areas, we agree with Mr Banks' interpretation of the RMA, the policy direction provided by the NPS -UD, and the planning standards imposed by the MDRS. The context of all these changes is a fundamental shift towards more intense built form and the consequential higher density of development in order to house more people in existing areas.

[82] Mr Banks acknowledged that other characteristics of these areas do not necessarily constrain development, and these are landform and vegetation. His recommendation is that retention of these values is considered where development breaches density standards. The existing policies relevant to these areas have been amended to address this. The Panel agrees with this recommendation so that these aspects of the character of the areas can be retained while still enabling intensification.

[83] At the hearing, Mr Hazelton submitted that Waikanae Beach should be excluded from the provisions as it has a population of less than 5000 at the 2018 census. (s 2 of the RMA excludes areas that have "….*a resident population of less than 5000, unless a local authority intends the area to become part of an urban environment…"* [22].)

[84] Mr Banks responded in his reply that the Council sought clarification of this clause as part of the preparation for PC2. The legal advice received was made available on the Council website. This opinion concluded that:

[22] Section 2 RMA

> *"…despite the definition of relevant residential zone using the words "unless a local authority intends the area to become part of an urban environment" (our emphasis), it would be consistent with the purpose of the Amendment Act to read this as including areas that are already part of an urban environment. Otherwise, the MDRS would need to be implemented in small areas that will be part of an urban environment in the future but not in small areas that are already part of an urban environment. We cannot see how that would have been the intention."* [23]

Mr Banks' interpretation of this, and with which the Panel agrees, is that Waikanae Beach is already part of an urban environment and ,therefore, is part of the area to which the MDRS is to apply.

[85] Mr Tocker also asserted that there would be little population growth in Waikanae Beach (228 people in the next 30 years) and therefore there was little point in increasing density. However, Mr Banks argued that this does not moderate the NPS-UD requirements and the Council's projected growth for Waikanae Beach is an additional 1,261 people by 2051.[24]

[86] The Panel is satisfied that the Council has delivered on the requirements of the NPS-UD and the application of the MDRS by firstly starting from the intent of these government directions. This is to step up the enablement of housing in urban areas and accept that the character of areas is subject to change to achieve its goal.

Section 5 – Challenge to Qualifying Matters Established by PC2 or PC2's Failure to Adequately Provide for Certain Qualifying Matters

Section 5.1 – Overview

[87] The Council received submissions on the treatment in PC 2 of qualifying matters governed by RMA, Subpart 6. Some submitters said the qualifying matters were too extensive, others said they were not extensive enough, while others suggested that the notified text inadequately addressed the qualifying matters. Some topics in this category are addressed in discrete sections of this report. The remainder is addressed in this section.

Section 5.2 – Nationally Significant Infrastructure

[23] Para 340 Council Officer's Reply Evidence (Andrew Banks)
[24] Para 342 Council Officer's Reply Evidence(Andrew Banks)

[88] The two main submitters in this class were Transpower and KiwiRail, each responsible for nationally significant infrastructure.

Section 5.2.1 – Transpower

[89] The definition in PC 2 of a qualifying matter area includes the national grid yard and the national grid subdivision corridor following RMA, s 77I and 77O

[90] Broadly speaking, Transpower supported the recognition of the national grid yard and the national grid subdivision corridor proposed by PC2. Transpower also sought a better-expressed objective that recognises that qualifying matters provide for nationally significant infrastructure and thus constrains development.

[91] Ms McLeod, a planner for Transpower, proposed amendments to District Objective DO-O3 Development Management, Policy UFD-Px Urban Build Form, Policy UFD-P1 Growth Management.

[92] Transpower also sought incidental changes to rezoning, but these issues fell away during the hearing. Concerning Objective DO-O3, Ms McLeod suggested amendment to Objective DO-O3 and, in particular, additional words after DO-O3(3) commencing "*while recognising that ...*".

[93] There were syntactical difficulties with the wording that Ms McLeod proposed.

[94] Mr Banks, in his reply, recommended acceptance of the relief requested by Transpower by incorporating the following text: "*... while accommodating identified qualifying matters that constrain development*." He also made consequential amendments to the explanatory text, UFD-Px and UFD-P1.

[95] Mr Banks' proposed wording received Ms McLeod's approval, and we agree with the changes.

Section 5.2.2 – KiwiRail

[96] KiwiRail sought four amendments to PC 2:

(a) A 5m building setback from boundaries adjoining a designation for rail corridor purposes.

(b) Amendment to noise rule NOISE-R14 to require noise-sensitive activities within 100m of the boundary of a designation for rail corridor purposes to comply with noise design standards set out in the rule.

(c) A new vibration rule and standards.

(d) Policy recognition for reverse sensitivity in relation to rail and other infrastructure in the General Residential Zone.

[97] Concerning (a) above, KiwiRail sought a 5m setback "to ensure that people can use and maintain their land and buildings safely without needing to extend out into the railway corridor"[25]. Their concern was not about the space needed to undertake work but rather the potential for accidents to occur that resulted in encroachment on the rail corridor and possible risk to the safety of its operation. Mr Brown giving evidence for KiwiRail, helpfully provided diagrams sourced from WorkSafe that demonstrated the space requirements for scaffolding for a 12m building and the paths that dropped objects would follow:

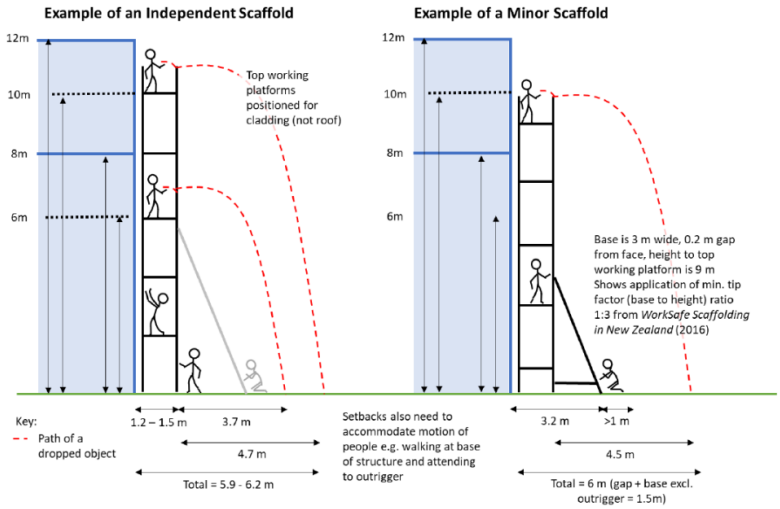


Figure 3: diagram from Mr Brown's evidence for KiwiRail, showing various scaffolding installations[26].

[98] Mr Banks considered that a HIRB standard would provide sufficient space for this setback rather than introduce a new standard. He calculated that this would require

[25] Para 256 Council Officer's Reply (Andrew Banks)
[26] Para 257 Council Officer's Reply(Andrew Banks)

a 4.6m setback from the boundary. While this is 0.4m less than sought by KiwiRail, Mr Banks considered that in keeping with good management of reverse sensitivity effects, KiwiRail could employ methods to minimise the risk. Examples that he gave include fencing, and monitoring of the rail corridor.

[99] The Panel agrees with Mr Banks' recommendation that the HIRB standard can be relied upon to address KiwiRail concerns and that consideration be given to the management of activities within the corridor.

[100] Concerning the amendment sought to the noise rule NOISE-R14, Mr Chiles, the acoustic expert for KiwiRail, explained that 100m is necessary (as opposed to 40m as specified in the Plan) as the noise level required by the standard can only be achieved at this distance without having to undertake additional measures to building design such as acoustic treatment. Mr Banks agreed that given the information provided by Mr Chiles, there is sufficient evidence to justify amending the rule.

[101] The Panel agrees with this recommendation.

[102] Thirdly, KiwiRail sough a "*new rule for indoor railway vibration to apply to buildings containing noise sensitive activities within 60m of the boundary of the designation.*"[27]

[103] In his reply, Mr Banks reiterated his concerns that there is a lack of certainty with this rule as to the design and building implications.

> *"I considered that it was unclear what the implications of compliance with the rule would be for the design, construction and feasibility of buildings subject to the standard, but that judging by requirement in the acceptable design solution tabled by KiwiRail that buildings would have "no rigid connection to the ground", a novel design approach would likely be required. At paragraph 309 (of main evidence) I concluded that the risk of incorporating a rule into the plan that may not be able to be reasonably complied with was high, because there is a high level of uncertainty about whether the standard proposed by KiwiRail can be reasonably and feasibly incorporated into the design, construction and ongoing maintenance of buildings"*[28]

[104] KiwiRail referenced a Norwegian standard and while this sets out the performance required, it does not provide requirements on how to comply, which leaves

[27] Para 271 Council Officer's Reply (Andrew Banks)
[28] Para 272 Council Officer's Reply. (Andrew Banks)

uncertainty. Mr Banks and the Panel agree that this is insufficient certainty for a standard as it contains too much risk for compliance and certainty for the plan user.

[105] The Panel considers that there is a lack of information that could be included in the Plan, including reference to a standard that lacks measurable details.

[106] In addition, the requirements of Clause 34 of Schedule 1 cannot be met. If the standard was to be included in the Plan, people are entitled to have a reasonable opportunity to comment on material proposed to be included and given the potential implications for design and building.

[107] The Panel adopts the reasons given by Mr Banks in his reply and does not support inclusion of a new rule for vibration as requested by KiwiRail.

[108] Fourthly, KiwiRail supported the request by the Fuel Companies to amend General Residential Zone policy GRZ-P10 to provide for the minimisation of reverse sensitivity effects on existing non-residential activities in the zone.

[109] Mr Banks replied that this is not necessary as policy INF-GEN-P2 (Reverse Sensitivity) located in the Infrastructure chapter, already provides for reverse sensitivity effects on infrastructure from subdivision, land use and development.

[110] The Panel agrees with Mr Banks' conclusion on this matter and adopts his reasoning.

Section 5.3 – Coastal Qualifying Matters

[111] The beleaguered planning issue of coastal hazards in Kāpiti Coast spans the first two decades of the 21st Century leading to raw grievances about fairness, scientific rigour and appropriate process amongst some community members.

[112] The coastal hazard lines in the notified version of the Operative Plan were removed due to earlier arguments. The Council later developed a distinct project for addressing coastal hazards called *Takutai Kāpiti Coastal Adaptation Project*. The concept was a more community-led process addressing the science of sea level rise ("*SLR*") and opportunities for adaptation. Deficiencies of previous processes include a lack of scientific peer review and contestable assumptions of the Shand Report, together with an

unintegrated approach to managing hazards which requires an eye to both adaptation and hazard management.

[113] The Panel considers the Takutai Kāpiti Coastal Adaptation Project should take its course, and the spatial extent of Coastal Qualifying Matter Precinct should not be treated as anything other than a placeholder.

[114] As part of the Takutai Kāpiti Coastal Adaptation Project, it was necessary for the Council to advance assessments of the following matters:

(a) The extent to which SLR will occur within a 100-year period and the extent of the impact on coastal margins following best practice. Without that, there was no information that the community could engage with or even contest. The product of that work is the Kāpiti Coast Coastal Hazards Susceptibility and Vulnerability Assessment Volume 2: Results (Jacobs 2022) ("*the Jacobs Assessment*").

(b) Identification of adaption areas to consider options for hazard management.

[115] The RMEHS was a side wind to the Takutai Kāpiti Coastal Adaptation Project. The Council was confronted with the unexpected reality that the MDRS would enable intensification on the coastal margin before the Takutai Project was complete. The MDRS, therefore, potentially opened the door to further development in locations facing coastal erosion in the long term. Confronted with this problem the Council used the Jacobs Assessment to identify the area (precinct) assessed as liable to erosion within the 100-year time frame and treated that land as being outside the operation of the new density and height standards that would otherwise apply under the MDRS. The MDRS would not apply through a new Coastal Qualifying Matter Precinct in that area.

[116] Several submitters disagreed with the Council's use of the Jacobs Assessment to create the Coastal Hazard Qualifying Matter. Mr Rush, an expert on reviewing climate science, gave evidence for Coastal Ratepayers United on the over-estimation of erosion hazard in the Jacobs Assessment.

[117] In summary, the submitters' claims were, with sub-para (a) borrowed from Mr Rush's evidence, the following:

(a) *The Jacobs Assessment was inaccurate for the following reasons:*

(i) *Applies the various planning documents conservatively to achieve its purposes, i.e. for present purposes, the inland extent of the coastal erosion line does not represent what is likely during the planning horizon.*

(ii) *Adopts RCP 8.5 and RCP 8.5H+ as its baseline for the spatial extent of the CQMP whereas such scenarios are regarded as no longer 'plausible'.*

(iii) *Assumes a need to assume Antarctic ice sheet instability when that is not likely over planning horizons.*

(iv) *Does not take account of more recent science about sea level and the known events of recurring land uplift on the Kāpiti Coast that reduce the rate of sea-level rise and defer the projected sea-level rise and consequent coastal erosion and potential inundation.*

(v) *Has used novel satellite data, with comparatively short-term measurements, that are not designed to measure either sea-level rise or vertical land movement, at the shoreline.*

(vi) *Has ignored the tide gauge data in its forecast, which is a tool designed to measure the sea-level rise and vertical land movement at the shoreline.*

(b) The PC2 process was another attempt by the Council to unfairly draw hazard lines against the agreed principles in the Takutai Kāpiti Coastal Adaptation Project.

(c) The Council should not have introduced the Coastal Hazard Qualifying Matter before the Takutai Kāpiti Coastal Adaptation Project was completed.

(d) If (c) does not apply, then the Council should to ensure the opportunities for coastal hazard adaptation are sufficiently broad do the following:

(i) Use the coastal adaption area; or

(ii) Use the entire coastal environment envelope within the Operative District Plan;

as areas which are within the Coastal Qualifying Matter Precinct.

[118] Mr Todd, a coastal geomorphologist, gave evidence for the Council and spoke to his evidence. He opined that the Jacobs Assessment was a reasonable assessment consistent with MfE guidelines and subject to a peer review.

[119] As seen above, some submitters proposed a different, more expansive coastal hazard precinct (for example, using the entire adaption area derived from the Takutai Kāpiti Coastal Adaptation Project) while also contending that the Jacobs Assessment was overly conservative. Their position, therefore, rested on the contradiction of seeking an enlarged qualifying area that required the Panel to make even more conservative assumptions about the extent of coastal erosion in the next 100 years than in the heavily critiqued Jacobs Assessment.

[120] The principles that the Panel applied to this matter were the following:

(a) Any Coastal Qualifying Matter Precinct and its aims must not run across the Takutai Kāpiti Coastal Adaptation Project.

(b) The Panel should not attempt through the PC2 process to reach conclusions about the appropriateness of the Jacobs Assessment or what hazards may arise by SLR over the 100-year timeframe because that would run against the principle (a) above.

(c) Qualifying matters are easier to remove than introduce and, in the meantime, it is necessary to address coastal hazards to ensure that development does not occur in places that could foreseeably be affected by coastal hazards based on present information until more comprehensive planning processes concerning those coastal hazards are completed.

[121] Applying those principles the Panel concluded as follows:

(a) The Jacobs Assessment is the best information available on the potential extent of coastal erosion in the next 100-year period. It has not been through a contestable quasi-judicial process through the Takutai Kāpiti Coastal Adaptation Project but was made available for public feedback.

Recognising the Jacobs Assessment's current value for use in PC2 does not foreclose legitimate and reasonable debate about the extent of coastal hazards. We do not clothe the Jacobs Assessment with any higher value than its present and contingent value as the best available information.

(b) Identifying the Coastal Qualifying Matter Precinct in the Plan is appropriate and reasonable, pending completion of other processes, including the Takutai Kāpiti Coastal Adaptation Project and any future plan change.

(c) To ensure there is no implicit bias created by introducing the Coastal Qualifying Matter Precinct at this stage to address the unexpected requirements of the RMEHS, PC2 should make it plain that the extent of the Coastal Qualifying Matter Precinct is provisional and subject to further processes.

[122] Mr Banks, in his reply, helpfully suggested amendments to the relevant policy to achieve the points in subparagraph (c) of the above paragraph. We agree with that solution.

Section 5.5 – Marae Takiwā Precinct

[123] In the Kāpiti Coast district, marae in urban areas have been exposed to substantial environmental change associated with town development for over a century.

[124] Potential enablement of development around those marae through an IPI could further disable the function of the marae and weaken the relationship of tangata whenua to these significant natural and physical resources.

[125] The Marae Takiwā Precinct was conceived as a new qualifying matter to limit the effects on the urban marae that would otherwise arise from development under the MDRS or Policy 3 of the NPS-UD.

[126] The concept was explained in the Council's s 32 analysis as follows at pages 165-166 of the s32 Evaluation Report:

1. *Tikanga and kawa associated with events that occur on a marae (for example, powhiri, karanga, and tangihanga) would be sensitive to overlooking by surrounding development;*
2. *Visibility from the marae towards key features in the landscape (for example, the Tararua range) is likely to be disrupted by surrounding development;*
3. *Surrounding development may have reverse sensitivity effects that impact on the cultural and traditional practices of the marae (for example, additional surrounding development is likely to be sensitive to the noise generated by a karanga, or the traffic generated by a tangihanga).*

Because intensification surrounding a marae may have adverse effects on the cultural and traditional practices associated with marae, it is appropriate to reduce the level of development otherwise required by the MDRS and NPS-UD in the area surrounding marae as a qualifying matter under s77I(a) and s77O(a) of the RMA.

The precinct covers the marae and the sites surrounding the marae. Within the precinct, the following are proposed to be provided for:

- *The existing permitted maximum building heights in the District Plan would be retained. The existing permitted maximum building heights are:*
  - *Within the General Residential Zone: 8 metres (2-storeys);*
  - *Within the Town Centre Zone: 12 metres (3-storeys).*
- *Where there are existing 'recession plane' controls at the boundary of the marae, these would be retained. Recession plane controls require taller development to be increasingly set-back from the boundary;*
- *The permitted number of dwellings per site in the General Residential Zone would be reduced to one per site. This would ensure that denser development triggers a resource consent process.*
- *Development that breaches any of these standards will require a resource consent. The rule will be worded to ensure that the owners and occupiers of the relevant marae are given consideration as an 'affected person'. This means that tangata whenua who are responsible for the marae would be notified of the resource consent application, and would have an opportunity to submit on the consent. In practice, this provision would encourage developers to talk to those responsible for the marae, and resolve any issues prior to submitting the resource consent application.*
- *In addition to considering tangata whenua who are responsible for the marae as an 'affected person', the District Plan would include policies that require decision-makers to have regard to the matters outlined above when considering resource consent applications for development within the precinct.*

This package of provisions would maintain the status quo permitted building heights provided for around marae, and provide for the recognition of tangata whenua who are responsible for the marae on resource consents for development proposing greater heights or densities on sites surrounding the marae.

The following provisions proposed by PC2 are relevant to the Marae Takiwā Precinct. Refer to the PC2 document for a description of these provisions:

Chapter	***Provision***

General Residential Zone	*GRZ-Px8, GRZ-Rx3, GRZ-Rx8*
Town Centre Zone	*TCZ-Px2, TCZ-R6, TCZ-Rx4*
District Plan Maps	*PRECx6 - Marae Takiwā Precinct (General Residential Zone*

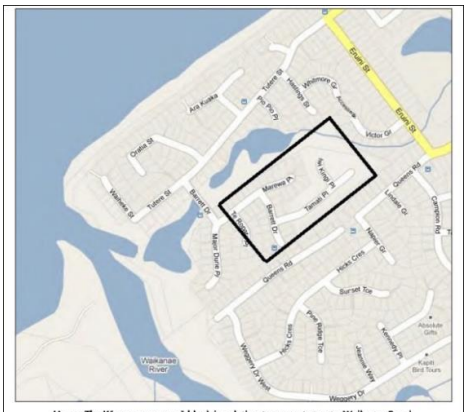
6.1.5 New qualifying matter: Marae Takiwā Precinct

Raukāwa marae, located in the General Residential Zone at Ōtaki and Whakarongotai marae, located in the Town Centre Zone at Waikanae are two marae located within urban environments that are otherwise subject to the MDRS and policy 3 of the NPS-UD. As part of engagement with iwi on the development of PC2, iwi identified that marae function as a living site of significance integral to the cultural and traditional life of tangata whenua. The purpose of the Marae Takiwā precinct is to recognise that the cultural and traditional practices that occur at marae are sensitive to the adverse effects that may result from increased heights and densities of development on sites adjacent to marae.

[127] The Panel agrees with the Council's thoughtful response on this topic. The Panel also agrees with the refinements suggested by Mr Banks in his reply evidence.

Section 6 – Kārewarewa Urupā

[128] Nestled in the residential community of Waikanae Beach is developed and bare residential zoned land adjacent to Waimanu Lagoon fed by a diverted Waimea Stream. Part of the area includes a 20-acre block once identified as "Ngarara West A14B1", shown in the map below, sourced from the archaeologist Mary O'Keefe ("*the Kārewarewa Urupā Block*"). The Kārewarewa Urupā Block was to be inalienable Māori land.



Map 1: The Kārewarewa urupā block in relation to current streets, Waikanae Beach
Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 19 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 21).

[129] This land has a complex modern history that requires the Panel's consideration because in the notifed PC 2 the Council identified the Kārewarewa Urupā Block as wāhi tapu using Schedule 9 of the Plan.

[130] A kaumātua of Te Ātiawa, the late Paora Ropata, filed a claim in the Waitangi Tribunal (WAI 1945 Claim) about the Kārewarewa Urupā Block in 2008. He claimed that the 20-acre block was the Kārewarewa Urupā of great significance to Te Ātiawa. That claim came for an urgent hearing before the Waitangi Tribunal during the Tribunal's consideration of the Te Ātiawa/Ngāti Awa hearings in 2018-2019. The Tribunal issued the Kārewarewa Urupā Report (Wai 2200) 2020.

[131] The Waitangi Tribunal report is a significant work supported by detailed historical evidence. The Panel considered much of that evidence as part of its assessment of PC 2 and for the Panel's assessment of a submission from the landowner of the bare land, Waikanae Land Company Limited.

[132] Waikanae Land Company opposed scheduling its bare land within the Kārewarewa Urupā Block as wāhi tapu because PC 2 was not the correct vehicle to recognise the land as wāhi tapu. Waikanae Land Company also claimed that the archaeological evidence does not support such a spatially extensive and restrictive planning control; hence, the Council's response is disproportionate. The first point raises a jurisdictional question that has been addressed in a recent Environment Court decision.

[133] It is convenient to succinctly set out the relevant history and facts and deal with the jurisdictional question last.

[134] The Kārewarewa Urupā Block is now residentially zoned land partly developed. The bare land is still owned by Waikanae Land Company, the bulk of which has access from Tamati Place, a partially formed road. That bare land is gently rising and, at its northern boundary, provides elevated views across the Waikanae's relict foredunes near the Waikanae's River mouth.

[135] There is also a piece of land owned by Waikanae Land Company off Barrett Drive. In that location, there is a remnant sliver of the Kārewarewa Urupā Block that is an access strip to adjoining land owned by the Waikanae Land Company that is not within the Kārewarewa Urupā Block. The Environment Court has before it, by direct referral, an

application for subdivision and development of that portion of Waikanae Land Company's land off Barrett Drive. The Council, Heritage New Zealand and Te Ātiawa oppose the disturbance of the sliver of land within the Kārewarewa Urupā Block, which is crucial for access to the Waikanae Land Company's other land off Barrett Drive.

[136] In preparing PC 2, the Council wanted to ensure that any development potentially enabled by the MDRS did not adversely affect the cultural value of sites of significance to tangata whenua. During the Council analysis, the issue of the Kārewarewa Urupā emerged strongly. That is understandable, given the recently issued Waitangi Tribunal report. The MDRS potentially increased the development capacity of the residentially zoned bare land within the Kārewarewa Urupā Block, underscoring the urgency for the Council to progress management of the cultural values reposing in the land.

[137] In assessing the Kārewarewa Urupā Block's values, the Council considered the following sources of information in its RMA s 32 evaluation:

(a) The Waitangi Tribunal 2020 Kārewarewa Urupā Report.

(b) Engagement with iwi authorities (including Te Ātiawa ki Whakarongotai).

(c) Feedback from landowners (including Waikanae Land Company) and others on draft PC2 about the proposal to add Kārewarewa Urupā to Schedule 9 of the District Plan.

(d) The matters required to be considered concerning qualifying matters under RMA, s 77J(3).

[138] The Council formulated as part of its draft plan change for consultation a scheduling scheme for Kārewarewa Urupā to be included in Schedule 9 of the District Plan. The Council proposed scheduling the Kārewarewa Urupā as a wāhi tapu while recognising the difference between land already residentially developed and the Waikanae Land Company's bare land in the rule stream. The notified table showing this is below:

District Plan ID	**Name**	**Type**	**Iwi**	**Key access and view points**	**Wāhanga**
WTSx	Kārewarewa Urupā	Urupā	Āti Awa		Tahi

WTSx	Kārewarewa Urupā	Urupā	Āti Awa		Rua

[139] Te Ātiawa ki Whakarongotai also made a submission on PC2 requesting adjustments to the boundaries of Kārewarewa Urupā. The Council officers adopted these changes in their reply, so the Proposed Plan for scheduling is below.

[140] The PC 2 scheme for the Kārewarewa Urupā scheduling is, therefore, the following:

(a) By operation of the existing Plan provisions with the amended Schedule 9, the entire Kārewarewa Urupā Block is a qualifying matter; therefore, the Council may make the District Plan less enabling of development than otherwise required by the MDRS.

(b) For the Wāhanga Tahi portion of the Kārewarewa Urupā Block (the bare land within Kārewarewa Urupā), the provisions in rules restricting subdivision, earthworks and site development in Schedule 9 apply

supported by existing policies that recognise the values supporting the scheduling.

(c) Less restrictive earthworks and development provisions apply for land already developed within Wāhanga Rua. Nevertheless, there are controls on earthworks and development to enable culturally appropriate treatment of discoveries and to facilitate appropriate dialogue between Te Ātiawa and residents.

[141] The Council also consulted residents that own land within Wāhanga Rua, and there was little opposition when the Council explained how the provisions work. Mr Turver, an affected resident and former local government representative in the Wellington region, spoke to his submission on the Kārewarewa Urupā Block. He observed that the affected residential community were astounded and dismayed to find that their residences sat on such a historically important piece of land that was also an urupā. His view was that existing residents supported the controls and valued the opportunity to liaise with Te Ātiawa, particularly in the event of accidental discoveries. Te Ātiawa in their evidence, described past occasions when they had to assist residents at times because earthworks resulted in human remains being exposed.

[142] The Waitangi Tribunal report on the Kārewarewa Urupā is an enlightening document like so many of the Tribunal's reports. It is remarkable for the level of historical enquiry that supports the assessment.

[143] The Tribunal report's function is to report on breaches of Te Tiriti o Waitangi and with that lens, does not involve the existing landowner or purport to affect the landowners' interests. Nor does the Tribunal make a report with an eye to resolving planning issues affecting landowners of private land. Indeed, it is a Crown principle that Crown breaches do not give rise to obligations of landowners to remedy those breaches.[29]

[144] The Tribunal's enquiry considered whether the Crown agencies overseeing the interests of Te Atiawa concerning the Kārewarewa Urupā Block observed the Treaty

[29] Office of Treaty Settlements "*Ka tika* ā muri, *ka tika* ā mua, Healing the past, building a future", March 2015.

principles. These agencies included the Native Land Court, Heritage New Zealand and Crown surrogates such as the Māori Land Court, and the Horowhenua County Council.

[145] The starting point for the Tribunal's enquiry was an assessment of whether or not the Kārewarewa Urupā was indeed that urupā of great cultural significance to Te Ātiawa. Because that question necessarily brings into focus the enquiry as to whether or not Crown agencies had behaved in a way consistent with the principles of Te Tiriti o Waitangi.

[146] At s 1.2, page 7 the Waitangi Tribunal stated:

> *"In our view, the traditional, historical and archaeological evidence is clear that this block was an urupā. We have no doubts on that point. Although we have only provided a brief summary here, further historical and agroecological evidence is discussed in the following chapters. For the claimants, this urupā has great significance in cultural and spiritual terms".*

[147] The report notes that Mahina-a-Rangi Baker for Te Ātiawa gave evidence that:

> *"Te Kārewarewa Urupā is located within an old dune belt at the confluence of the Waikanae River and the old course of the Waimeha Stream (or Waimea depending on dialect), north of the Waikanae River and estuary, and east of the Waimeha Stream, and the coastal settlement of current day Waikanae Beach".*

[148] The Tribunal report on the significance of the Kārewarewa Urupā Block noted that Mere Pomare stated that it was on the north side of the Waikanae River and was a burial ground where her mother, the famous chieftainess Te Rauoterangi was buried.

[149] The Panel received a powerful presentation from Te Ātiawa at its hearing which did not attempt to address the breadth of evidence presented to the Tribunal. Quite properly, Te Ātiawa rested that argument on the report's conclusions and the supporting information presented to the Waitangi Tribunal that we were encouraged to consider.

[150] The Waikanae Land Company's first opportunity to address in a hearing the Waitangi Tribunal report and the appropriate planning controls arising from the Tribunal report was during our hearing. [30]

[30] WLC had the opportunity to provide feedback on the proposed inclusion of Kārewarewa Urupā when the Council consulted on draft PC2, and they did so. Their feedback was analysed and included in the S32 Evaluation Report. This is set out on pages 93 and 94 of Appendix B to the Section 32 Evaluation Report.

[151] The Waikanae Land Company contested the values attributable to the land because human remains are located in only a small area of the Kārewarewa Urupā Block. Mr Gibbs, a heritage management consultant, gave the expert basis for that view. It is useful to set out the executive summary of Mr Gibbs evidence.

> 13. *Plan Change 2 proposes a new wāhi tapu listing that encompasses an area formerly known as the 20-acre block (8.0936 hectares) which is claimed by Te Ātiawa ki Whakarongotai to be the Kārewarewa Urupā, a place where dead from the Battle of Kuititanga and known ancestors are said to be buried. Research undertaken for this assessment has revealed that part of the Stage 4B property (at the Barrett Drive end) was previously within the 20-acre area block boundary and all of the Stage 6 development falls within this boundary. This block was designated under the 1968 Horowhenua County District Scheme as "Māori Cemetery" with an underlying residential zoning, this designation having been removed on 10 August 1970 by the County Council on application of the WLC as purchaser from the Māori owners. The original 1896 cemetery designation by order of the Māori Land Court was to set aside a 10 acre area of land for a cemetery, but in 1919 a later Māori Land Court order changed the area to 20 acres. No documentation could be found to verify the reason for this increase.*
>
> 14. *I feel it is important to emphasise that, with regards to archaeology, very little is known about the 20-acre block apart from the burial site R26/456 discovered in 2000 in Stage 6 of a previous WLC development and a small midden (R26/88) with an inaccurate location recorded prior to the WLC initiating development in the area. No other human remains had been discovered during any previous subdivision developments of WLC land (including the development of 28 sections in the Barrett Drive, Marewa Place and Te Ropata Place areas and dedicated roadways being part of the land formerly designated "Maori Cemetery"), nor during the subsequent residential development works undertaken on the land between Stage 6 and the Stage 4B property.*
>
> 15. *Much has been written about the presence of dead from the Battle of Kuititanga within the 20 acre block but no evidence has been presented to support this, and historical research and the archaeological record does not support this. The analysis of the kōiwi (from R26/456) by Dr Tayles identified three individuals of Māori origin and six of European or indeterminate origin, many of which were children. This does not appear consistent with a burial ground of dead warriors from a battle and appears more representative of a burial context associated with an epidemic that took a number of young lives. Without detailed analysis of the kōiwi this is indeterminate and merely conjecture. Furthermore, the context of these burials does not conform to the descriptions or burials of the battle dead offered by the primary sources who attended the battlefield immediately after the event.*
>
> 16. *No archaeological site has been identified at Stage 4B and there is no persuasive evidence to suggest that any material exists, thus no archaeological values can be assessed. The only archaeological values identified on WLC property are attributed to the burial site R26/456 located within Stage 6 and even though this is a disturbed context – kōiwi in secondary deposition - the archaeological values of R26/456 are still high. However, these values cannot be universally applied across*

> *the whole 20 acre block, particularly in the absence of verified proof of extant burials beyond the known burial area and a lack of evidence of other in situ archaeological material.*
>
> *17. Geophysical surveys since undertaken on the uncompleted WLC Stage 6 development area indicate that some additional human remains could possibly exist in the area to the north of where the remains were uncovered in 2000, but that the area to the southwest of this (towards Stage 4B) is devoid of anomalies that could be interpreted as possible burials.*
>
> *18. The rectilinear boundary represented in the plan change is not representative of the actual extent of burials as established by the accidental discovery of the kōiwi in Stage 6 and subsequent investigations and research. No explicit spatial extent is currently delineated for site R26/456; the extent simply inferred by the description of the nature of the finds which is recorded in the site record form as "at least nine individuals disturbed during trenching for services in a planned subdivision".*
>
> *19. A greater spatial extent, to incorporate the area to the north of the known burial/reinterment site where the geophysical surveys indicate potential further burials are located, would truly represent what the archaeological record and research informs us about the area where high archaeological values can be attributed. This area can be protected through the creation of a reserve and would be a more appropriate extent for listing as a wāhi tapu in the proposed Plan Change".*

[152] Of course, the Kārewarewa Urupā Block's cultural and spiritual values are not confined to burial grounds or archaeological values. The area signifies a sacred space with the cultural memory of many events. For example, Te Ātiawa considers the Kārewarewa Urupā Block is a defined area marked by esteemed forebears and also to memorialise the historically important battle of Kūititangā. That occurred in the Waikanae district ending a period of conflict between Te Ātiawa/Ngāti Awa and Ngāti Raukāwa. Many of those who died were buried on land at the eastern confluence of the Waikanae and Waimeha Rivers. Other prominent ancestors were also buried there. For example, Te Waipunahau, the mother of Wi Parata.

[153] On the burial values, Waitangi Tribunal noted in s 1.2 the following:

> *"The historical evidence is that the first people buried at the site known as Kārewarewa was some of those who fell at Kūititanga. The custom of Christian burial was followed but gravesites were not marked. Ms Baker explained:*
>
> > *The area was then no longer appropriate for occupation or food cultivation and thus was abandoned and deemed waahi tapu. In the mid 19th century the site has been used as a urupā. Several significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pakeha that had some connections to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu".*

[154] The Waitangi Tribunal found a continuous desecration of the Kārewarewa Urupā Block since the early 1960s, enabled by the failure of the Crown and its surrogates to protect the cultural and spiritual values pertaining to the Kārewarewa Urupā and its environs. The Crown made significant concessions about its failures.

[155] The Waikanae Land Company has been involved in land development in Waikanae since the 1960s. It went into receivership in the 1970s, and its development operations became dormant for decades. It is now out of receivership. As part of developing Waikanae as a beach settlement, it formed the Waimanu Lagoon by dredging using heavy machinery. Anecdotally, evidence of human remains were found during this process, but there is no formal record.

[156] Mr Rowe, who is a lawyer at the Palmerston North firm Fitzherbert Rowe, at all material times acted for Waikanae Land Company during the 1960s and onwards. He has had a long legal career in the Manawatū and was also a director of the Waikanae Land Company. He was, from time to time, involved in site visits to view the dredging of Waimanu Lagoon. He has no recollection of people discussing the topic of human remains through those site visits or communications with the company.

[157] Waikanae Land Company recommenced development between 1990 and 2000 while still in receivership. That resulted in further litigation and controversy. A narrative is set out in section 4.2.1 of the Tribunal report as follows:

> *Work began in 2000 to 'prepare the site and construct service trenches'[31] The trenches were dug along the centre of the two proposed roads, which were named Tamati Place and Wi Kingi Place (a short offshoot from Tamati Place).[32] During the course of this work, kōiwi were exposed on two separate occasions. The remains of at least nine individuals were found (some evidence says 11).[33]*
>
> *In brief, based on the accounts in the District Court and High Court cases about this incident, kōiwi were uncovered on 5 July 2000 as a result of the earthworks. Historic Places Trust staff decided that the situation should be dealt with on an emergency basis. This meant that the site would not be treated as an 'archaeological site' for the purposes of the Historic Places Act, so that the kiwi could be disturbed further by removing them for*

[31] Mary O'Keeffe, 'Tamati Drive Subdivision, Waikanae: Archaeological Assessment', May 2001 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p50).
[32] Mary O'Keeffe, 'Tamati Place - Archaeological Issues' (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 6).
[33] Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc Fii(a)), p 595); Paora Ropata, brief of evidence (doc F1), p2i; *Higgins Contractor Ltd v. Historic Places Trust* High Court Wellington AP 10/02,30 April 2002 at [15]. (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 99).

> *reinterment. Those working at the site were advised, however, that further work would need an authority from the trust and would also need to be monitored. A contentious point, however, was that some limited work was allowed to be completed but without enough specificity as to where. Susan Forbes, the archaeologist called to the site on 5 July 2000, advised contractors at that time of the existence of what appeared to be middens, which she said indicated the whole area was potentially an archaeological site. On 19 July 2000, a driver contacted Ms Forbes because further kōiwi had been found, at least 10 metres away from the original site of exposure. According to the contractors, the work underway at the time was necessary because pipe testing had showed leaks, and so - for safety purposes and to protect their materials - they had to complete some of the drainage work.*[34]
>
> *Paora Ropata told us that the people only found out what was going on from Susan Forbes through 'word of mouth' not from the developers, and 'there was a sense of anger and betrayal once the Iwi learned of the continuation of diggings'.*[35]
>
> *In 2001, the Historic Places Trust prosecuted Payne Sewell Ltd and Higgins Contractors Ltd for a breach of section 99 of the Historic Places Act 1993. The Kaunihera Kaumātua, a council of tribal elders, 'actively supported' the prosecution.*[36] *The District Court convicted the defendants for continuing to work on the site after 5 July 2000 because they had been 'put on notice by archaeologist Susan Forbes'.*[37] *Higgins Contractors were fined $15,000 and Payne Sewell Ltd were fined $20,000.*[38]
>
> *The High Court overturned this conviction on appeal, however, on the basis that the information laid against the contractors had failed to specify the correct date and place. The information laid against Payne Sewell and Higgins Contractors had specified Tamati Place, whereas the kōiwi had been exposed on Wi Kingi Place. The Historic Places Trust had argued that 'Tamati Place' was a single archaeological site but the court did not accept that argument. Also, the work which uncovered the kōiwi had occurred on 17-19 July, whereas the information charged that the offence occurred on 20 July (the day Ms Forbes was contacted and work was carried out with her to complete uncovering the kōiwi so that they could be removed). Further, the trust had allowed some work to continue without the need for an authority. The judge therefore found that the District Court had been mistaken in finding that the 'lack of authority from the Trust was made out'. For these two reasons, the High Court overturned the conviction.*[39]

[158] Mr Rowe, in support of Mr Gibbs' assessment about the extent of the values in the Kārewarewa Urupā Block, noted that if the site was the site of a significant battle one would expect to find muskets and other weapons during the course of land development.

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[34] *Historic Places Trust v. Higgins Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001; *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington ap 10/02,30 April 2002 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), PP80-109).
[35] Paora Ropata, brief of evidence (doc F1), pp 21-22.
[36] Paora Ropata, brief of evidence (doc F1), p 22.
[37] *Historic Places Trust v. Higgins Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001 at [55] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), P95.
[38] *Higgins Contractor Ltd v. Historic Places Trust* High Court Wellington ap 10/02,30 April 2002.
[39] *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington ap 10/02,30 April 2002 at [35]-[48] (Woodley, papers in support of' Local Government Issues' (doc A193(c)(iii)), pp 104-108).

[159] The Panel's findings on the values of the Kārewarewa Urupā are the following:

(a) The Kārewarewa Urupā Block values are historical, spiritual and cultural associated with the occupation of Te Ātiawa and events associated with that land. These are not solely burial values as an urupā but importantly include those values. That includes the remains of esteemed ancestors that engage the highest obligations for protection and care following Te Ātiawa's tikanga.

(b) The Kārewarewa Urupā Block was demarcated and deemed sacred by Te Ātiawa elders since at least 1839 onwards as wāhi tapu.

(c) Mr Gibbs identifies an area in the northeastern boundary as almost certainly containing human remains. This shows that it is possible to establish burial activity using modern imaging techniques. However, Mr Gibbs as an archaeologist is particularly interested in artefacts and, therefore, his enquiry is of limited scope and does not constitute a cultural/spiritual impact assessment.

(d) Mr Gibbs conceded that the imaging techniques used to assess the probability of human remains are not fail-safe. It would require development to establish definitively the presence or absence of human remains. Mary O' Keeffe made the same point in her archaeological report.

(e) The absence of battle armoury at Kārewarewa Urupā, referred to by Mr Rowe, does not give rise to an inference that it was not a site of Kūititanga battle. These items were valuable in their own right and likely to have been collected from the battlefield.

[160] It follows from our findings that human decency and the provisions of the RMA, Part 2, demand recognition and provision of these important cultural values in a meaningful and extensive way. Indeed, the Panel cannot see how good government, which requires the peaceful coexistence of peoples, can be secured other than by appropriate respect and recognition for culturally significant places like the Kārewarewa Urupā Block.

[161] The Tribunal report relates the ongoing consternation and protest associated with using the Kārewarewa Urupā Block for residential development purposes.

[162] Mr Paul Thomas, the Waikanae Land Company's planner, conceded when questioned that if the land were a greenfields block he would not recommend the Kārewarewa Urupā Block be zoned residential in light of the existing cultural values. He considered the issue only becomes more complex given the history since Waikanae Land Company's purchase giving rise to what Mr Thomas called 'residential development expectations'.

[163] We agree with Mr Thomas's assessment and that brings us to an evaluation of the proportionality of imposing restrictions on the subject land (private land), likely to inhibit residential development of the scheduled Wāhanga Tahi land recognising it is zoned residential and has been for decades.

[164] As noted, the Waitangi Tribunal undertook a detailed analysis of the history of administration of the Kārewarewa Urupā Block. It was assisted by a detailed historical analysis by Suzanne Woodley's[40] Porirua ki Manawatū Inquiry District: Local Government Issues report and report by the archaeologist Mary O'Keeffe.[41]

[165] The Tribunal report addressed the following key events:

(a) The designation of the Kārewarewa Urupā Block as a cemetery in the Horowhenua District Plan (s 3.2 of the Waitangi Tribunal report).

(b) The sale of the Kārewarewa Urupā Block in 1968-1969 to the Waikanae Land Company (s 2.5).

(c) The removal of the designation in 1970 by the Horowhenua County Council paved the way for land development in the Kārewarewa Urupā Block in accordance with the underlying zoning of residential.

[40] Suzanne Woodley, '*Porirua ki Manawatū Inquiry District: Local Government Issues Report'* June 2017 (doc A193) pp267-627.
[41] Mary O'Keeffe, Tamati Place – Archaeological Issues: '*Report to Neil Carr, Property Pathways Limited*' August 2014; and a brief of evidence by O'Keeffe to the Waitangi Tribunal.

[166] We do not intend to canvas in detail the historical narrative fully addressed in the Waitangi Tribunal report and amply supported by Woodley's 'Local Government Issues' (doc 193).

[167] As noted above, the Tribunal's assessment was done with an eye to potential failures by the Crown. Our lens is different. We must consider whether or not there are any competing considerations of what we generically describe as 'equitable' in nature that should influence the assessment of whether or not it is appropriate and proportional to require the subsisting cultural values to be recognised formally in the District Plan to the extent that development expectations will be significantly curtailed.

[168] More pointedly, the question is whether or not the Waikanae Land Company could have ever reasonably concluded that the cultural values recognised by the earlier 1960s designation were not values that applied to the land. If not, then there is less reason not to identify and protect the values now following the requirements of current legislation. Many landowners have had restrictions on use imposed for values recognised by contemporary legislation that did not apply previously. We address that matter below.

[169] The Waikanae Land Company became concerned about the designated cemetery status of the Kārewarewa Urupā Block during the purchase process. This is addressed in Section 3.3.4 of the Waitangi Tribunal report.

[170] At the time of the purchase, the Kārewarewa Urupā Block was identified as a Māori cemetery in a Horowhenua County District Scheme made under the Town and Country Plan Act 1953 and this was recorded by means of a designation. An extract from the District Scheme is below:

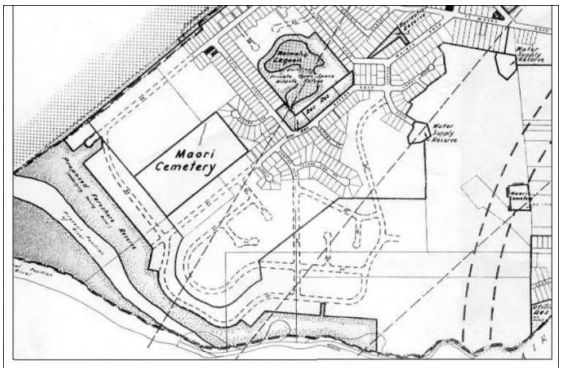


Figure 1: Horowhenua County district scheme map showing the 'Maori Cemetery' block
Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 18 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 20).

[171] The Town and Country Plan Act 1953, Second Schedule, identified the matters that may be dealt with in District Schemes. Relevantly clause 3 states:

> *"The designation of reserves and proposed reserves for national, civic, cultural, and community's purposes for forestation and water catchment purposes, for recreation grounds, ornamental gardens, and children's playgrounds and for open space".*

[172] Following the purchase of the Kārewarewa Urupā Block, the Waikanae Land Company applied to the Horowhenua District County Council to remove the cemetery designation. The story is narrated in Chapter 3 of the Waitangi Tribunal report, and the following parts are relevant:

> ***3.3.4 The company tries to clarify the status of the land, 1969***
>
> *As noted in chapter 2, Mr Simpson had raised the issue of the 'Māori cemetery' at the meeting of assembled owners in December 1968: 'At first, it was thought that the cemetery was in this block, but he had since learnt that it was not.' From the evidence available to us, the Waikanae Land Company became concerned about this issue in August 1969, prior to purchasing the land from the Māori Trustee. The company's solicitors wrote to the Māori Land Court on 26 August 1969, inquiring about whether the block had been used as a 'Māori burial ground'.*
>
> *The deputy registrar responded on 11 September 1969, enclosing the court minutes from the 1919 partition hearing. He noted that the minutes described the purpose of the partition as 'cutting out a graveyard'. The land had not, however, been 'set apart as a Māori reservation for the purposes of a cemetery, nor have trustees been appointed at any time'. As a result, the block remained 'ordinary Māori freehold land'. The deputy registrar also referred to Mr Simpson's statement at the meeting of assembled owners (quoted in section 2.5.1). The company's solicitors were referred to Mr Simpson in case he might be able to 'enlarge on this statement'. The deputy registrar advised that the court's records 'do not disclose anything further about the actual use of this block as a Māori burial ground'.*

At the company's request, the deputy registrar sent an abbreviated letter on 23 September 1969. This second letter stated only that the minutes had referred to a 'graveyard' but that no action had been taken to set it aside as a Māori reservation. The land was simply 'ordinary Māori freehold land'. This more limited statement was later used in support of the company's case to change the Horowhenua district scheme (discussed later below).

Suzanne Woodley commented that the court officials failed to refer to the earlier minutes from 1896 and 1905. Nor did they 'suggest speaking to local Māori about the matter' or engage themselves with the owners or with Waikanae kaumātua and kuia. We agree that these were very important points.

In February 1970, however, the court deputy registrar responded to further requests for information and did inform the company of the 1896 partition request to cut off a 'cemetery', to be named A14A. The deputy registrar explained that this partition order was never completed because there was no survey. He did not mention the proceedings in 1905 to cut out the same land as an 'urupa', which the court had dismissed because the original orders simply needed to be completed. It appears that the company did not pass the information about the 1896 partition on, and there was no mention of it in the proceedings to change the district scheme (see below).

Ms Woodley added: 'There was also no record of any attempt to check valuation rolls or district planning maps which as noted above, recorded that the block was a cemetery'. This brings us to a crucial point: the company's attempt to remove the protection offered to the urupā block by its designation as 'Māori cemetery' in the district scheme.

3.3.5 Te Ātiawa / Ngāti Awa objections to removing the cemetery designation

The council received four written objections from Te Ātiawa / Ngāti Awa:

- *Te Aputa Kauri, the great-granddaughter of Wi Parata, stated in her objection form that the land was tapu, that she had ancestors buried in the 'cemetery', and that it was 'the resting place of many persons connected with the early history of Waikanae'. Mrs Kauri said that her objection would only be met by the land remaining a 'Māori Cemetery'.*
- *Sylvia Tamati lodged her objection on behalf of the marae trustees, stating that the block was the 'burial ground of my Tribal ancestors of "Te Ātiawa", Taranaki'. Mrs Tamati also said that her objection was lodged on behalf of her mother, Ngāwati Morehu, the 'beneficiaries' (that is, the former owners), and others who had relations buried in the 'cemetery'. She asked that a block of land be set aside for the 'interment of human remains unearthed on this block' in a casket. Further, Mrs Tamati noted that none of the other tribal burial grounds had been made reservations either or had had trustees appointed, and that action had only just been taken (in November 1969) to appoint trustees for Takamore.*
- *Jillian Simmonds objected that the block was 'tapu land' and that she had ancestors and relations buried there. She asked that the 'Burial Ground' be left as it was.*
- *Johnson Te Puni Tamati Thomas objected, stating: 'My ancestors fought, died and are buried in this cemetery and Tapu ground'. He added: 'Although this block of land was never registered as a cemetery reserve [meaning a Māori reservation], it was connected with the early history of Waikanae and the resting*

place of my ancestors'. Mr Thomas asked for land to be set aside for reburial. He also wanted to be notified of all arrangements so that a special church service could take place. Paora Ropata told us that Mr Thomas and other objectors were 'descendants of Unaiki Parata (my Great Great Grandmother)'.

Although all of these objections were signed before the cut-off date of 6 April 1970, only Te Aputa Kauri's objection was received by the council in time. Because one valid objection had been received, the council then had to advertise for the filing of statements in support or opposition to the objection, and set a date to hear the objection. The objectors who filed too late were advised that they could support Mrs Kauri's objection if they chose.

The objection form included a category for how the objection could be met, and this had revealed a significant difference of views: two had sought for the urupā to retain its designation as a Māori cemetery and the other two had said that their objection could be met by the council setting aside a new piece of land for the reinterment of any human remains disturbed by the developers. Mrs Tamati felt strongly enough about that to file a statement in opposition to Te Aputa Kauri. In that statement, she argued that the development of the land represented progress and would benefit the whole of Waikanae. At present, however, the land was covered with gorse and other 'noxious weeds', and it had proven impossible to obtain funding or the cooperation of all the (former) owners to deal with that problem.

The Waikanae Land Company also registered its opposition to Mrs Kauri's objection. The company's position included three possible grounds:

- *the land could not be shown to be 'the burial place of any of the ancestors of the objector or of Maoris connected with the early history of Waikanae'; and/or*
- *the land was not a 'traditional Maori burial ground'; and/or*
- *it was in 'the public interest and the interests of good town planning that the designation be removed'.*

Following the receipt of these statements in opposition, Te Aputa Kauri's objection was heard by a special committee of three councillors on 25 May 1970. Mrs Kauri appeared in person at the hearing but was not represented by counsel. The company had the benefit of legal submissions on its behalf, in addition to which one of the directors gave evidence opposing Mrs Kauri's objection. Sylvia Tamati did not appear in person but her objection was read out (noting that this was confined to what should be done with the land now and was not an objection to the rest of Mrs Kauri's evidence).

Te Aputa Kauri told the committee that her opposition was driven by 'the deep feelings of emotion and sentiment which I have concerning our Maori heritage – feelings of respect and veneration which were first instilled in me as a child' by her parents and elders. She was not, however, optimistic that her objection would be successful, being aware that 'sentiment for the past will not stop progress', and that the committee was obliged to consider the public interest and 'good town planning'. Nonetheless, Mrs Kauri stated that her objection stood. If the council disallowed it then at 'the very least' she sought the reinterment of any human remains in 'a common grave on an adjacent piece of reserve land', and for a commemorative plaque to be erected.

William Lawrence, director of the Waikanae Land Company, gave evidence stating that:

- *he had inspected the ground and found two headstones as the only evidence that any burials had ever occurred;*
- *the Māori Land Court had advised that there was 'no Court record nor any knowledge on the part of the Court which would indicate that this block was a traditional Māori burial ground';*
- *the 1919 minutes indicated that the partition was to set aside land for a new graveyard, not an existing one, and the 23 September 1969 letter from the registrar confirmed this point and indicated that no attempt had been made to appoint trustees or establish a Māori reservation;*
- *the objector's belief that the block was the Kārewarewa burial ground was wrong, because Carkeek's book stated that the location of this burial ground was unknown;*
- *a meeting of assembled owners had unanimously resolved to have the land sold by the Māori Trustee; and*
- *there was nothing visible that suggested the land had any historic significance or should be left in its current state for that reason.*

The company's solicitors repeated all of these points but accepted that, if the land was a traditional burial ground, it could only be Kārewarewa. Nonetheless, the solicitors argued that the company's case did not turn on whether the land had been used for burials or not. Rather, even if it could be proven that there was a cemetery on the land, the key issue was whether leaving the block in its present state was an appropriate way of dealing with the land. In the company's submissions, its plans for development of the land were 'in the public interest' and in 'the interest of good town planning'. The company did give an assurance that it would 'honour and respect any remains which may be uncovered and arrange for them to be dealt with in the manner suggested by Mrs Kauri'. The company would not object if the council chose to make this a formal condition on their development of the land.

It is clear that a number of important matters were either not presented to the committee or not given sufficient weight:

- *No weight whatsoever was accorded to the traditional knowledge of local Māori.*
- *No reference was made to the minutes of 1896 or 1905, which made it clear that the owners had been trying to set the urupā block apart for a number of years, and had not decided in 1919 to cut out land for a new cemetery.*
- *The company director's search of the overgrown land for headstones was not a valid method for determining the site of a traditional urupā, although it demonstrated that some burials had occurred.*
- *Significant weight was placed on the point that the urupā had not been made a Māori Reservation since the 1919 partition. The Māori land titles system, however, made it difficult for a large number of owners, with many absent or owning tiny fractions, to deal with their land collectively (such as by agreeing to appoint trustees, establish a Māori Reservation, or clear a 20-acre block of 'noxious weeds').*
- *Significant weight was placed on the point that the owners had 'unanimously' voted to sell their land at a meeting of assembled owners. This was correct as far as it went – the 13 owners had voted either to sell directly or to appoint the Māori Trustee as agent to sell – and it is obvious why the owners' sale of the land for development was a crucial aspect of the case. But this argument took no account of the fact that, as the law allowed, only a small minority of owners had actually attended the meeting in 1969.*

> *Owners representing about 11 per cent of interests in the land had voted in favour of the resolution to vest it for sale. All other owners were disenfranchised and lost their land. Over and above the 77 legal owners, there were more tribal members who had interests under custom, as their tūpuna were buried in that land. We have already found that the statutory scheme that allowed the land to be sold in this way was in breach of the Treaty (see chapter 2).*

The committee reported back to the council in July 1970, recommending that the cemetery designation be lifted. Two reasons were given. First, the Māori owners had sold the land to a development company. Secondly, there was 'no certain evidence that it is an historical Maori Burial Ground', or that any burials had taken place since it was 'set apart for a future Maori Cemetery in 1919'. Undermining this reasoning, the committee added that there was nevertheless 'the possibility that human remains may be uncovered as development of the land proceeds'. This indicates that the committee accepted the company's main argument: even if the urupā existed, it was not in the public interest or the interests of good town planning to leave the land in its present state if it could be developed and turned into residential sections.

The committee's decision reflects the monocultural nature of the Town and Country Planning Act 1953. Suzanne Woodley commented in respect of the committee's decision:

> *It is of note that the legislation at the time did not provide for a role for tangata whenua in respect to the decision-making process concerning the change of designation. There was also no requirement at the time for local authorities to recognise, when preparing their district plans, 'the relationship of the Maori people and their culture and traditions with their ancestral land'. This was not introduced until 1977 as per section 3 of the Town and Country Planning Act.*

Claimant counsel submitted:

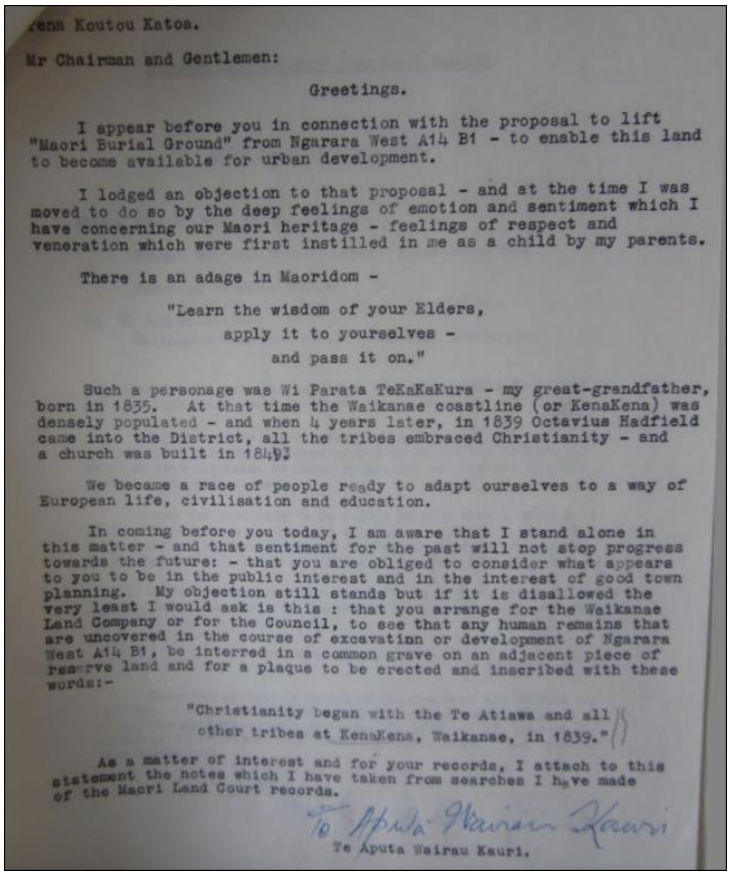
> *The failure to protect the Urupā from desecration is a number of errors documented by Suzanne Woodley. However, those errors have a single underlying cause: the failure of public bodies established by the Crown to respect the tino rangatiratanga of Te Atiawa. This is the thread that runs through the failure of Māori Land Court officials to properly advise on the designation of Ngārara West A14 as an urupā, the failure of the Horowhenua County Council or Kāpiti District Council to give weight to the evidence of Te Aputa Kauri, to the failure to consider the objections of other Māori.*

The claimants accepted that the Crown was not directly responsible for the committee's decision to prioritise residential development. But claimant counsel submitted that the Crown's legislative framework had not provided for partnerships in local government. As a result, iwi lacked 'real power in relation to decisions affecting their land'. (footnotes omitted)

[173] The Panel has reviewed the records from Woodley, Local Government Issue 193, notably those in Wai 2200, A193(c)(viii). Respectfully, the analysis of the Waitangi Tribunal is supported by that documentary record.

[174] While several submissions from Te Atiawa members opposed the uplifting of the designation, the only person appearing at the Horowhenua County Council hearing for

Te Ātiawa was a kuia called Te Aputa Wairau Kauri. It is worthwhile to include Ms Kauri's submission in full to the Council. It is below carefully typewritten:



ena Koutou Katoa.

Mr Chairman and Gentlemen:

Greetings.

I appear before you in connection with the proposal to lift "Maori Burial Ground" from Ngarara West A14 B1 - to enable this land to become available for urban development.

I lodged an objection to that proposal - and at the time I was moved to do so by the deep feelings of emotion and sentiment which I have concerning our Maori heritage - feelings of respect and veneration which were first instilled in me as a child by my parents.

There is an adage in Maoridom -

"Learn the wisdom of your Elders,
apply it to yourselves -
and pass it on."

Such a personage was Wi Parata TeKaKaKura - my great-grandfather, born in 1835. At that time the Waikanae coastline (or KenaKena) was densely populated - and when 4 years later, in 1839 Octavius Hadfield came into the District, all the tribes embraced Christianity - and a church was built in 1849.

We became a race of people ready to adapt ourselves to a way of European life, civilisation and education.

In coming before you today, I am aware that I stand alone in this matter - and that sentiment for the past will not stop progress towards the future: - that you are obliged to consider what appears to you to be in the public interest and in the interest of good town planning. My objection still stands but if it is disallowed the very least I would ask is this : that you arrange for the Waikanae Land Company or for the Council, to see that any human remains that are uncovered in the course of excavatinn or development of Ngarara West A14 B1, be interred in a common grave on an adjacent piece of reserve land and for a plaque to be erected and inscribed with these words:-

"Christianity began with the Te Atiawa and all other tribes at KenaKena, Waikanae, in 1839."

As a matter of interest and for your records, I attach to this statement the notes which I have taken from searches I have made of the Maori Land Court records.

Te Aputa Wairau Kauri

Te Aputa Wairau Kauri.

[175] Mr Rowe told the Panel that Ms Kauri presented as an impressive and thoughtful person, so he was moved to emphasise to the Council hearing the commitment of the Waikanae Land Company to ensure appropriate treatment of human remains uncovered during the course of development.

[176] Ms Kauri's submission seems to the Panel to be cleverly humble, subtle and pointed simultaneously. Ms Kauri emphasises that Te Ātiawa is a Christian iwi. That point was probably to underscore the Christian concept of the 'community of saints' and hence the equality of treatment that her interred forebears deserved in the same way as Europeans. Ms Kauri assumed her audience would consider it unthinkable to allow a

European Christian burial ground to be used for development. Ms Kauri's point was that the same should apply to the remains of Te Ātiawa ancestors.

[177] Also included in the Woodley record is the evidence of Mr Lawrence, a director of the Waikanae Land Company. The Waitangi Tribunal addressed the low quality of that evidence. It does not appear that Mr Lawrence had any qualifications or experience in ascertaining the true archaeological, cultural and spiritual significance of the Kārewarewa Urupā Block, yet he gave evidence on these matters. He viewed the designation as acting to enable a future cemetery. Inexplicably, Mr Lawrence did not identify the counter-evidence available from submitters and perform an analysis respecting that oral history.

[178] We conclude that the Waikanae Land Company could not reasonably have considered , as Mr Lawrence claimed, that the Kārewarewa Urupā Block was a future Māori cemetery because:

(a) The size of the Kārewarewa Urupā Block was far too large relative to the size of the existing Māori population, and there is no historical precedent for such a large over-allocation by Māori local authorities for Māori burial.

(b) It was not common for the local authorities to set aside public funds exclusively for a Māori cemetery.

(c) Māori owned the land as inalienable when designated, so there was no sense in which the designation could operate for future public work or as a 'gateway' to land purchase.

(d) It was noted in the Waikanae section of the Horowhenua County Council 1960's scheme attached to the Te Ātiawa cultural impact assessment that the land was a 'reserve' and not for a local purpose work. Interestingly, the watercolour map and legend is reminiscent of simpler times.

(e) Designations under the 1953 Act have different characteristics than under the RMA and allowed for designations to reserve land for cultural purposes.

[179] We also conclude that the Waikanae Land Company had credible evidence before it sought to uplift the designation that the land was culturally significant to Te Ātiawa as a burial ground and for other cultural reasons. Also, this information was readily discoverable as the submissions to the proposal to uplift the designation demonstrate that local Māori were aware of the situation. Waikanae Land Company decided that these values did not trump the desirability of using the land for its underlying zoned purpose of residential. It held the view that development best advanced the purpose of the 1953 Town and Country Planning Act.

[180] Based on our analysis, therefore, the situation the Waikanae Land Company finds itself in is one where it owns land that it did or should have known had special cultural value. These values are now in a statutory setting that is rather different than in the late 1960s and early 1970s when the designation was uplifted in light of the strong directions of RMA, Part 2. In this respect, the Waikanae Land Company is in a no worse situation than many other landowners where values exist within or on the land and through changing requirements of the law, those values justify more controls than in the past.

[181] In many ways, PC2 merely restores the resource management and legal situation to the one that applied when the land was purchased and sold, and, to that extent, PC 2 has a certain historical symmetry. Although, also it should be acknowledged that the PC2 regime is less restrictive than a designation. There are pathways for obtaining consent, albeit challenging ones.

[182] We now return to the jurisdictional issue. As noted, the Waikanae Land Company had a direct referral to the Environment Court for an application for subdivision of land off Barrett Drive requiring access along part of Wāhanga Tahi in that location.

[183] That proceeding confronted the fact that PC2 had notified a change to Schedule 9 to identify the access sliver as part of Wāhanga Tahi.

[184] Waikanae Land Company raised a preliminary jurisdictional issue as follows:

> *7. WLC will contend that the new wāhi tapu listing cannot be introduced under an IPI. There is a limited statutory power to introduce 'new qualifying matters': the power can only be used to make medium density residential standards (MDRS) 'less enabling of development'. WLC will submit the new wāhi tapu listing goes far beyond making MDRS less enabling. The listing disables the underlying residential*

> *zoning of the land. WLC will submit that the correct process for introducing a change of this sort would be a regular plan change, rather than an IPI*
>
> *8. Given the Court's broad declaratory jurisdiction, WLC will seek a ruling that this aspect of PC2 exceeds Council's statutory power. WLC respectfully submits it is open to the Court to make a ruling of this sort within the context of the consent application; and furthermore that this is necessary, as it will determine whether the Court does or does not need to resolve the contested planning evidence described above. (If the Court concludes this aspect of PC2 exceeds Council's power, it will become unnecessary for the Court to determine which of Mr Thomas or Ms Rydon has correctly applied the heritage policies that are triggered by the PC2 listing.) (footnotes omitted)*

[185] That contention is noted at [3] of a decision of the Environment Court in *Waikanae Land Company v. Heritage New Zealand Pouhere Taonga.*[42]

[186] The Environment Court found that the change to Schedule 9 was *ultra vires.*

[187] The Waikanae Land Company accepted that the Environment Court decision did not bind us and in any event could only apply to the affected sliver. However, we must consider the Court's reasoning carefully out of respect for the Environment Court and because the issue is important for all parties. The Panel was told the Council has appealed the decision to the High Court.

[188] The Environment Court reasoning is contained in paragraphs 19-32 (including footnotes) as follows:

> *[19] WLC contends that the Council had no statutory power to list the Site in Schedule 9 through the IPI process and that the appropriate way for it to do so was through the usual plan change processes contained in Schedule I RMA.*
>
> *[20] To some extent the arguments advanced by the Council, Ātiawa and by WLC in response appeared to veer into the reasons for and merits of the listing as part of the Council's obligation under s 6(e) to recognise and provide for the relationship of Māori with the urupa. We do not address that issue. The Court has not yet heard any evidence in these proceedings but it seems to be fundamental that in order to list the Site in Schedule 9 the Council must first make a factual determination as to whether or not it falls within the urupa. Its opening position in that regard (as indicated by listing the Site in the Schedule through PC2) is that it does tie within the urupa but that position is subject to challenge by WLC. Who is right or wrong in that regard will be determined by the Council's PC2 hearing process with its factual determination unassailable through the usual appeal process to this Court. Exactly the same issue is of course before the Court in this direct referral. The*

[42] *Waikanae Land Company v. Heritage New Zealand Pouhere Taonga* [2023] EnvC 056.

unsatisfactory consequences of the Court and the Council reaching different conclusions are abundantly apparent.

[21] Turning to the Council's statutory power to list the Site in Schedule 9 as part of the IPI process, we note that unsurprisingly there is no specific reference in the statutory provisions imported into the RMA by the EHAA directly addressing this issue. Whether or not the power exists must be gleaned by interpretation of the legislation. In undertaking that interpretation we consider that the draconian consequences of listing the Site in the Schedule on WLC's existing development rights (particularly those identified in para [17] above) when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose.

[22] The purpose of the EHAA was to enable housing development in residential zones. However counter balancing that purpose is the EHAA also provides for the accommodation of qualifying matters which might make MDRS less enabling and those qualifying matters extend to s 6(e) matters. Further to that it is apparent that provisions inserted into RMA by the EHAA give very wide powers to territorial authorities undertaking the IPI process. They go so far as to enable territorial authorities to create new residential zones or amend existing residential zones.[43]

[23] As wide as territorial authorities' powers may seem to be in undertaking the IPI process it is apparent that they are not open ended. They are confined to the matters identified in a number of relevant provisions.

[24] We refer firstly in that regard to the definition of MDRS and density standards set out in paras [9] and [10] above. Those provisions identify and limit the matters which may be the subject of MDRS requirements introduced through the IPI process. Those are the nine matters either listed in the definition or identified in cls 10-18 of Schedule 3A.

[25] That finding is consistent with the provisions of s 771 cited in para [13] (above) which enable a territorial authority to "…make the ***MDRS and the relevant building height or density requirements****… less enabling…"*[44] *through the IPI process to accommodate qualifying matters. We consider that on its face the consequence of that provision is to require qualifying matters introduced through the IPI process to relate to the standards identified in the definition and cls 10-18 of Schedule 3A and to make those standards less enabling.*

[26] Those observations lead to consideration of the provisions of s 80E RMA which relevant provide:

80E Meaning of intensification planning instrument

(1) In this Act, ***intensification planning instrument*** *or* ***IPI*** *means a change to a district plan or a variation to a proposed district plan-*

a. that must-

[43] RMA, s 77G(4).
[44] Our emphasis.

i. incorporate the MDRS; and
ii. give effect to,-
(A) In the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or

…

b. that may also amend or include the following provisions
…
iii. related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on-
(A) the MDRS; or
(B) policies 3, 4, and 5 of the NPS-UD as applicable.

*(2) In subsection (1)(b)(iii), **related provisions** also includes provisions that relate to any of the following, without limitation:*
a. district-wide matters:
b. earthworks:
c. fencing:
d. infrastructure:
e. qualifying matters identified in accordance with section 771 or 770:
f. storm water management (including permeability and hydraulic neutrality)"
g. subdivision of land.

[27] On their face these provisions are extremely wide. The Sites and Areas of Significance to Māori identified in Schedule 9 are both district-wide matters and qualifying matters identified in s 771(a). Section 80E(2) provides that provisions relating to those matters may be included… "without limitation". Notwithstanding that apparently unlimited descriptions, it appears to us that the term "without limitation" is used to identify matters which may fall within the related provisions category. The effect of prefacing s 80E(2) with the term without limitation is that related provisions may extend beyond the matters identified in ss 2(a)-(g) to include other matters as well as those identified.

[28] In our view however there is in fact an inherent limitation in the matters which fall within the related matters category that is apparent on reading s 80E(1)(b)(iii) set out in para [26] above.

[29] Section 80[E](1)(b)(iii)(B) is not relevant in this case. What is relevant is whether or not the change of permitted activity status identified in para 55 of the WLC's submissions[12] is a change in which supports or is consequential upon the MDRS. Mr Slyfield made the following submission in that regard:

> *71. Whether the new wāhi tapu listing may be said to be a "related provision" in that it is "consequential" on the MDRS is less obvious. Prior to notifying PC2, Council received legal advice that concluded it would "arguably be consequential" to an IPI to schedule a previously unscheduled wāhi tapu site in an area subject*

> *to the IPI. The advice considered that an inability to notify new wāhi tapu sites would be an "illogical outcome" on the basis of Parliament's "clear intentions" that such sites would be qualifying matters. Council appears to have adopted this advice.*
>
> *72. The issue with that approach is its apparent focus on whether a new wāhi tapu listing (and the operative rules that accompany such a listing) are "related to" that qualifying matters – that is, the focus is on the statutory language in the specific definition of "related provisions" in s 80E(2)(e). What that approach fails to do is refer back to the overarching gateway in s 80E(1)(b): that the related provision may only be included in an IPI if it is consequential on the MDRS.*
>
> *(original emphasis, footnotes omitted)*
>
> *[30] We concur with that submission. Inclusion of the Site in Schedule 9 does not support the MDRS. It actively precludes operation of the MDRS on the Site. Nor do we consider that inclusion of the Site in the Schedule is consequential on the MDRS which sets out to impose more permissive standards relating to the nine defined matters.*
>
> *[31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 771. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.*
>
> *[32] We find that amending the District Plan in the manner which the Council has purported to do is ultra vires. The Council is, of course, entitled to make a change to the District Plan to include the new Schedule 9, using the usual RMA Schedule 1 processes.*

[189] The jurisdictional issue came before the Court by an unusual route. There was no formal declaratory proceeding and, apparently, no detailed evidence before the Court concerning the significance of the Kārewarewa Urupā Block. The Panel notes this point because RMA, s 80E, as the Court acknowledged at [27], is wide, and the Court at [28] applied an "inherent" limitation. The interpretation exercise was, therefore, not straightforward and, to some extent, one of fact and degree. The Panel has reservations about whether an interpretation question, which is partly a matter of fact and degree, is

suitable as a preliminary question. We are reminded of the cautionary words of the Supreme Court in *Ngāti Awa v. Marlborough District Council*[45] at [5].

[190] The Panel respectfully disagrees with the analysis by the Environment Court on the jurisdictional question. The Panel accepts the Court's observation that the inclusion of the Wāhanga Tahi in Schedule 9 affecting the Waikanae Land Company's land not only operates to qualify the operation of the building height and density requirements of the MDRS but also other existing land use controls in a more restrictive way. The central question is whether or not that is authorised by an IPI. We also accept the Court's proposition that the key provision to consider is RMA, s 80E.

[191] The Panel disagrees with the analysis at [30] of the Environment Court decision because the Court appears to have assumed that the MDRS is simply the relevant building height and density requirements in Schedule 3A. That is not correct. The MDRS in Schedule 3A includes the objectives and policies in clause 6 already quoted in this decision. The core objective is Objective 1, which has the following goal: "*a well-functioning urban environment that enables all people and communities to provide for their social, economic and cultural wellbeing and for their health and safety, now and into the future*". A supporting policy is Policy 2, that states "*apply the MDRS across all relevant residential zones in the District Plan except in circumstances where a qualifying matter is relevant (including matters of significant such as historic heritage and relationship of Māori and their culture and traditions and ancestral lands, water, sites, wāhi tapu and other taonga*".

[192] It is evident from the above and the text of RMA, s 77I that cultural heritage values of significance to Māori can qualify in whole or in part the density and building height standards that form part of the MDRS. The wording of Policy 2 does not suggest the values it addresses are not relevant to achieving a well-functioning urban environment more generally under Objective 1.

[193] The key interpretation question then is whether or not an ISP can restrict existing development rights and still fall within the meaning of RMA, s 80E(b) as *related provisions*, including objectives, policies and rules, standards and zones that *support* or are *consequential on* the MDRS.

[45] *Attorney-General v. Ngāti Apa* [2003] 3 NZLR 641 at [5].

[194] The Panel considers that if a local territory authority analysing the appropriate content of an IPI establishes that there are qualifying matters of such significance that:

(a) The MDRS should not apply; and

(b) The tools available in the Plan that recognise those values and impose further restrictions on land use should be used and will also achieve Objective 1 MDRS together with the aim in (a);

then the provisions fulfilling aim (b) above can be characterised as *related provisions* that *support* or are *consequential* on the MDRS.

[195] Applying the analysis to another context is helpful. Consider the situation where a territorial authority examines whether or not the MDRS should apply to land subject to flood hazards. It becomes apparent to the territorial authority when examining recent flood hazard information that certain land not previously identified as flood-prone is not only unsuitable for greater density and height but is also unsuitable for existing levels of development. As a consequence, the Council considers further restrictions on development should apply. Consequently, in its IPI, the Council extends the existing flood hazard mapping tool in its Plan to apply to land identified as flood-prone. On the Environment Court's analysis, that would not be a supporting or consequential provision of the MDRS because it has the added effect of introducing more restrictive land use controls rather than simply disqualifying the MDRS. Even though the measure is necessary to achieve a safe and well-functioning urban environment under Objective 1 of the MDRS.

[196] It is apparent from the example above that the conclusion of the Environment Court unduly restricts sensible planning necessary to achieve Objective 1, and the 'inherent' limitation found in s 80E runs across the purpose and principles of the RMA in Part 2.

[197] We accept the proposition that further restrictions beyond those necessary to qualify the density and height requirements would not be a usual outcome of an IPI where the focus is on more enablement of housing supply. It is not appropriate for a territorial authority to use the IPI to introduce entirely new measures to restrict urban development outside an IPI's true scope and legitimate qualifying matters under RMA, Subpart 6.

However, incidental or consequential adjustments to the Plan provisions to support the overarching objectives and policies of the MDRS within a legitimate qualifying category are not in that class.

[198] The Panel does not take a hostile view about the scope of an IPI just because the usual procedures for appeal to the Environment Court do not apply. Increasingly, streamlined planning processes are becoming a feature of the RMA. There is no evidence that Parliament intended the interpretation of the legitimate scope of an IPI to be construed narrowly or introduce 'inherent' limitations manifestly against Part 2 and Objective 1. Indeed, the term "*supporting or consequential on*" is terminology that suggests an element of appropriate judgment. Hence the openness of the language in RMA, s 80E(1)(b) and (2).

[199] If the Environment Court decision is applied to its logical end, then the provisions authorised by RMA, s 80E(2) could not be more restrictive than existing provisions governing those matters in any way. Respectfully, we cannot understand how a territorial authority could sensibly implement the MDRS except in a way that ensures other or further requirements than in the existing Plan for earthworks, fencing, infrastructure, and stormwater management would be applied in the face of the enabled intensification. These potential new restrictions will then operate on any development, even if individual development does not take full advantage of the MDRS. The management regime operates across a new urban landscape of greater development potential, not just the site under construction.

[200] Respectfully, the line the Court drew using the 'inherent' limitation is unworkable and insensitive to context and the statutory scheme.

[201] The scheduling of the Wāhanga Tahi area under Schedule 9 will significantly impede the development of the bare land accessed from Tamati Place. The Waikanae Land Company prefers a process by which scheduling occurs in an ordinary way rather than through the IPI. One reason for that may be that the company can then take the opportunity to seek relief under RMA, s 85, which enables the Environment Court to make directions in respect of plan provisions that would render a land interest *incapable of reasonable use*. Because of the way the IPI process works, the normal appellate structure does not apply, and, therefore, the Environment Court is not seized of the matter in that way. It would trouble us if access to the Environment Court were unavailable outside

the IPI process because the Panel considers that a landowner is entitled to put that argument to the Environment Court.

[202] However, the Waikanae Land Company has options. The Waikanae Land Company can apply to change the Plan under clause 21 of Schedule 1. It would not be difficult considering the historical background and information already gleaned. In the meantime, the benefits of preserving the cultural values outweigh any inconvenience that might arise for the landowner.

[203] In conclusion, we support the provisions recommended by the Council as amended by the Council's reply evidence.

Section 7 – Rezoning Requests

Section 7.1 – Overview and Question of Scope

[204] The Council received submissions on PC2 seeking the rezoning of greenfield land. These areas are shown in the maps in Appendix 2 that formed an appendix to the evidence of the Council's planning officer, Ms Maxwell.

[205] Some of those requests related to land identified by the Council as part of a greenfield opportunities and constraints assessment implementing Te Tupu Pai and the NPS-UD. That assessment was included in the Council's notified s 32 analysis at Appendix N. That was so even though PC2 did not purport to evaluate greenfield options given the constrained nature of an IPI and the tight timeframes for developing PC2.

[206] Rezoning requests by way of submission must be within scope. Mr Conway, legal counsel for the Council, reminded us about the law on scope and, in particular, summarised the principles following recent case law as follows:

> *3.11 These tests were followed by the High Court in Motor Machinists Limited v Palmerston North City Council. In that case, the Court found that the first requirement above (being the 'dominant consideration') would be unlikely to be met it:*
>
> *(a) a submission raises matters that should have been addresses in the section 32 evaluation and report; or*

> *(b) a submission seeks a new management regime for a particular resource (such as a particular lot) when the plan change did not propose to alter the management regime in the operative plan.*
>
> *3.12 Importantly, in Motor Machinists Limited, the Court found that these tests will not altogether exclude zoning extensions by submission. It found that "incidental or consequential" extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that zoning change.*
>
> *3.13 In Motor Machinists Limited, the Court ultimately found that the submissions was not 'on' the plan change because:*
>
> *(a) the plan change concerned very limited rezoning of the 'ring road' and three adjoining roads, which MML's (the submitted) property was not located on:*
>
> *(b) there was an extensive section 32 report, which did not address rezoning MML's property; and*
>
> *(c) there had therefore been no consideration of the effects or rezoning MML's property.*

[207] At [603] of her report, Ms Maxwell summarised the criteria for addressing scope for requests for rezoning in the following way:

> *(603) Sites proposed to be rezoned as part of PC(N), were identified using a set of criteria, which are outlined in section 5.2.3 of the Section 32 report. The criteria are:*
>
> - *The site is located next to an urban area that is connected to infrastructure services;*
> - *The site has a relatively low degree of constraints (and any existing constraints can be managed through existing District Plan rules);*
> - *The site is not sufficiently large or complex enough to require a 'structure planned' approach:*
> - *The site would provide a notable contribution to plan-enabled housing supply, or where this is not the case, re-zoning is appropriate to regularise the area in the surrounding zoning pattern.*

[208] In response to submitters relying on Appendix N to the section 32 report as the basis for scope, Ms Maxwell said at [607]:

> *(607) Appendix N to the Section 32 Evaluation report assesses the general constraints and opportunities for future urban development in a range of areas across the district but makes no recommendations on zoning. It was commissioned in 2021 to inform KCDC's earlier process to develop the scope for a future greenfield plan*

> *change and was undertaken prior to the Council being required to develop an IPI. Its use is limited to be referred to by Appendix V as a source of information for the areas proposed to be rezoned as General Residential Zone as part of the PC(N). Therefore, I consider that Appendix N should only be given very limited weighting in its consideration for sites not proposed to be rezoned by PC(N) because it makes no recommendations on these sites. Therefore, it would not have been clear to submitters on PC2 that these sites were being considered.*

[209] It will be noted above that one of the criteria for scope is whether or not a structure plan is required. Ms Maxwell reinforced the importance of structure planning in her reply at [10]-[14] as follows:

> *(10) Several submitters requested their land be rezoned from a rural zone to General Residential Zone as part of PC2, without any other amendments to the Operative District Plan (ODP). In line with Council's own rezoning process, the requested rezonings were assessed against the criteria applied to rezoning decisions. Most of these sites did not meet one or more of the Council's criteria and were accordingly recommended to be refused on this basis. The key criterion not met in most cases was the need for a "structure plan" approach given the size or complexity of the site. I outline below the importance of completing a structure plan before enabling urban growth and development on greenfield land.*
>
> *(11) A structure plan is an essential tool in enabling the rezoning of low density or undeveloped greenfield land. It provides an integrated approach to the management of complex environmental issues within a defined geographical boundary. It identified the opportunities available and constraints of the area, including:*
>
> - *Areas of cultural significant*
> - *Ecological features*
> - *Waterways and waterbodies*
> - *Landscape features*
> - *Transport connectivity*
> - *Natural hazards*
> - *Open space and recreation opportunities*
> - *Infrastructure provision*
> - *Location of centres*
> - *Reverse sensitivity risks*
>
> *(12) A structure plan ensures the co-ordinated staging of development, compatible patterns, and intensities of development across land parcels in different land ownership and connection with existing areas of development. It ensures infrastructure and service provision supports the development of land. Structure*

plans also provide certainty to developers, key stakeholders and the wider public regarding the layout, character, and costs of development in an area identified for urban growth. Structure plans are generally a good method for promoting cohesive development and enabling new urban development to meet urban design outcomes, regardless of current market conditions, and provide a longer-term view for growth and development.

(13) A structure plan must be embedded in a district plan, as without statutory weighting in place, it is unlikely to be fully implemented as market conditions and landowners change over time. Once a structure plan is embedded in a district plan, it also forms part of the District's strategic vision, as it illustrated an area of urban expansion.

(14) To develop and implement a structure plan, the following steps are considered best practice:

- *Scoping and project planning – which includes boundary definition, a desktop review of existing information, opportunities and constraints analysis, defining structure plan outcomes, identification of iwi partners and stakeholders, and confirming the method of implementation. This step includes commissioning technical investigations to support the formal development of a structure plan.*

- *Iwi partnership – which is essential in the development of a structure plan and provides a significant opportunity to recognise and provide for the relationship of Māori with their ancestral land, waters, sites, wāhi tapu and other taonga*

. This includes the recognition and provision for Māori values in a structure plan, and the identification and protection of areas of cultural significance.

- *Stakeholder and community engagement – based on stakeholders identified earlier and the size and extent of issues in a structure plan, engagement with stakeholder groups and the wider community will be undertaken, to allow local experience to inform the structure plan.*

- *Structure plan development and report – developed based on feedback from iwi, key stakeholders, the community, and technical specialist reports. Maps are created to support the spatial layout of the structure plan area.*

- *Implementation – following the completion of the structure report and mapping, it is typically implemented through a plan change process which included updating district plan provisions to incorporate the structure plan, notification of the proposed change, a submission and further submission period, followed by a hearing and then a final decision.*

Section 7.2 – Waikanae East (SO87)

[210] The Kāpiti Coast Urban Development Greenfield Assessment (Boffa Miskell 2022) identified an area in Waikanae East (WA-04) as a potential area for development, as shown in the figure below:

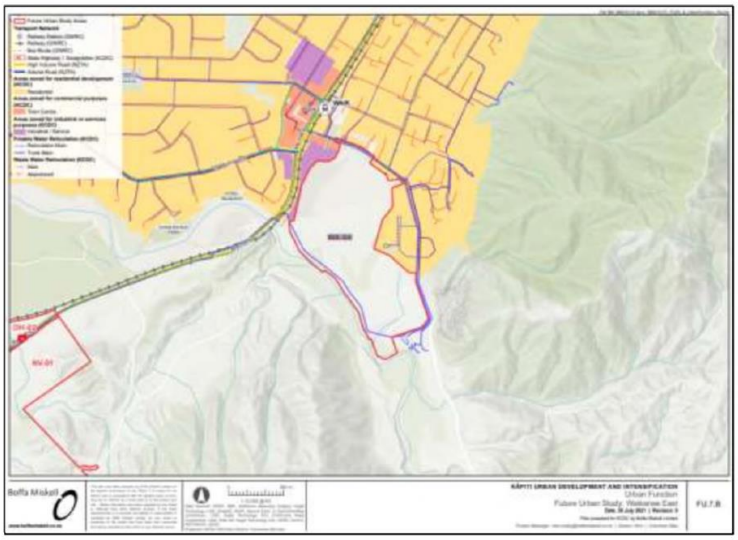


Figure 2: Extent of WA-04 (Section 32 Evaluation Report Part 1: Appendix N, Spatial Influences and Constraints Mapping – Urban Function Pg 51)

[211] The spatial influences and constraints mapping identifies the location of the land adjacent to the Waikanae River, which has a range of cultural values for Te Ātiawa over the relevant reach.

[212] A landowner collective called the Waikanae East Submitters (submission S087 and further submission S087.FS.1) seeks rezoning land containing 40.45 hectares, also referred to as *Waikanae East*.

[213] But for certain industrial-zoned land, all of the land within Waikanae East is within the cadastral boundaries of WA-04 in the Boffa Miskell, Kāpiti Coast Urban Development Greenfields Assessment Parts 1 and 2 (2022).

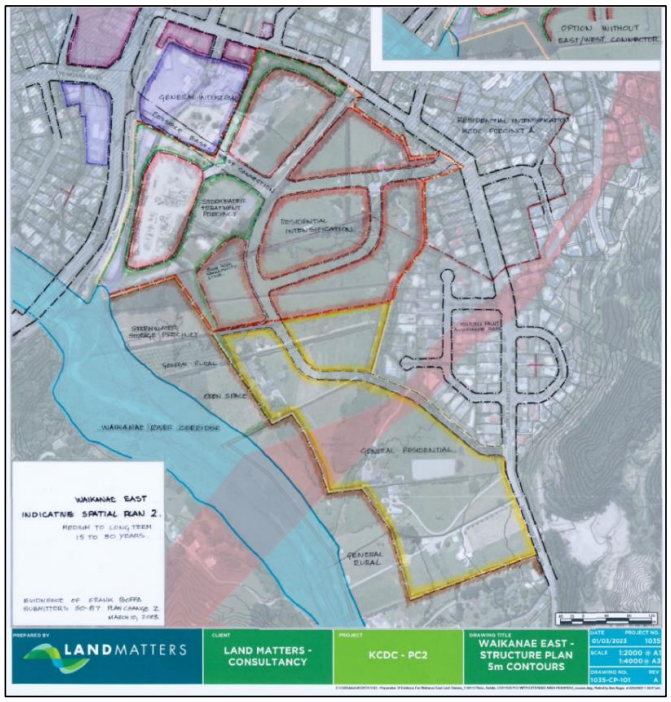
[214] The Waikanae East submitters presented the following evidence:

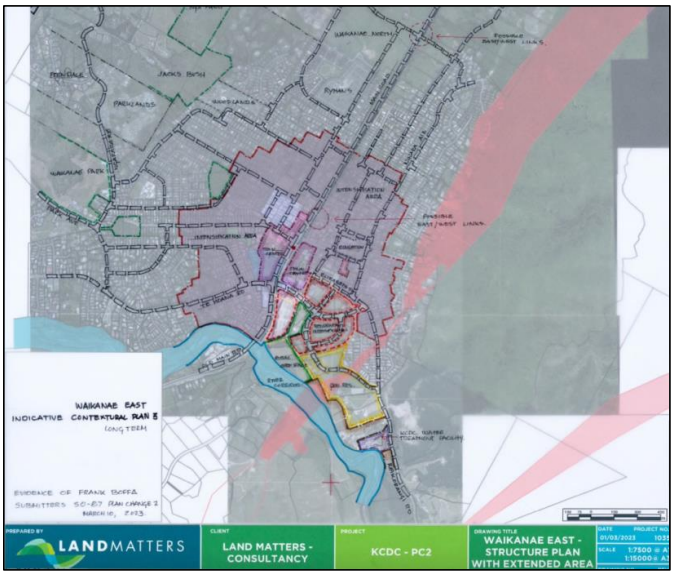
(a) Evidence from Dr Frank Boffa about the suitability of the land for intensification, including a potential structure plan to maximise high-quality urban form;

(b) Evidence from Harriet Fraser on transportation about the long-term ability of the Council to accommodate Waikanae East with transport infrastructure changes; and

(c) Ms Carter provided planning evidence, including an assessment of whether or not the land should be rezoned, applying the criteria employed by the Council as set out in [26] onwards of her evidence

[215] The following two figures are different scales prepared by Dr Boffa showing a structure plan for development in Waikanae East:





[216] Ms Fraser identified that there were significant constraints in the transport network at present, leading to poor levels of service at peak times. Notably the lack of additional vehicle capacity across the railway line.

[217] Ms Fraser identified potential solutions for these at [8.3] – [8.8] of her evidence as follows:

> *"8.3 There are a number of potential infrastructure solutions to provide additional capacity across the railway line. One option would be to construct an additional or replacement at grade level crossing to the north of the existing station in a location where the crossing would not need to be closed as trains travel between Wellington and Waikanae. There would likely be a signalised intersection where the new crossing link connects with Old SH1. Based on my earlier calculations I would expect a left turn out to have weekday morning peak hour capacity of around 900 vehicles.*
>
> *8.4 If a grade separated link were to be provided under the railway, this would most logically be located to the south of the existing crossing as the ground level starts to fall towards the river. In my view it would be most efficient to connect directly into Te Moana Road. I note that Kiwirail will have requirements regarding clearances, and ground levels for an underpass would need to consider flood risk along with tie-in with adjacent property frontages as a result of changes to the road levels. There would be the potential to increase the stop line capacity with separate turning lanes for each of the left turn into Old SH1, through into Te Moana Road and right turn onto Old SH1 towards the town centre. Based on an assumed potential arrival*

flow of around 1,500vph from Waikanae East and around 65% of the cycle time being allocated to traffic exiting Waikanae East, a capacity of around 1,000vph might be achieved.

8.5 If a grade separated link were provided over the railway line, I consider that this would most likely occur towards the north and likely tie in with roading associated with the ongoing development of Waikanae North. In this location it might be possible to provide a crossing that would not be constrained by adjacent intersections, unlike the previous options described. It should however be noted that the main travel desire lines are to and from the south (Paraparaumu and Wellington) and therefore a crossing in this location can only be expected to accommodate part of the demands. An overpass with a single westbound lane across the railway that is not constrained by adjacent intersections could be expected to have a capacity of around 1,500vph.

8.6 Towards the end of the 30-year period there will be a need to provide significant additional travel capacity across the railway line. Given that it is likely that there would be additional train services per hour across the crossing along with longer trains within this timeframe, with an associated reduction in vehicle capacity across the existing crossing, I consider that there are two longer term options. Both would involve the existing at-grade crossing being relocated to the north of the train station such that the crossing is only affected by the less frequent longer distance passenger and freight trains. The benefits of the relocation of the at-grade level crossing will be reduced if frequent rail services start running through to Ōtaki. The difference between the two options is that one would include an underpass approximately aligned with Te Moana Road and the other an overpass connecting in with Waikanae North.

8.7 Around the 10-year timeframe it then makes sense to provide for the relocation of the existing crossing further to the north.

8.8 There are also non-roading measures that could help delay the need for infrastructure interventions, these include:

(a) Working with the Ministry of Education to use school zoning and locations of primary schools to minimise the likelihood of children living on the opposite side of the railway to the school they attend;

(b) Minimising non-residential activity on the eastern side of the railway that does not serve the immediate needs of residents on the eastern side; and

(c) Improved bus services into and out of Waikanae East."

[218] Ms Carter evaluated her client's submissions in accordance with higher order policy and the criteria applied by the Council for rezoning. On the need for a structure plan, Ms Carter said at [105]:

"[105] There has been a number of references to 'structure plans' and the lack of a structure plan to support the rezoning of Waikanae East. A structure plan that is

> *embedded in the District Plan such as the 'Waikanae North Development Area' structure plan, is an ineffective method to achieve the purpose of the NPS-UD. Structure plans are problematic in that they can often reflect a utopian situation based on a point of time, that is not responsive to a market once the plan change has become operative. Waikanae North is a case in point whereby the underlying structure plan has been extensively ignored in favour of new consented developments. What is left at Waikanae North are lots with inappropriate and illegible zoning and where development is constrained by conditions of consent. A much more effective process is the IPI process where land is zoned General Residential but where activity status is constrained in areas where there are qualifying matters. This enables site specific planning to occur taking into account those qualifying matters. This is the approach favoured for Waikanae East."*

[219] In conclusion, Ms Carter said at [108]:

> *"[108] In my opinion the proposed rezoning of this land, including the Industrial zoned land, achieves the objectives of the NPS-UD and contributes to the necessary development capacity required for the Waikanae urban area within the medium term. Waikanae and Otaki have been identified in Council reports as the area where most of the future residential development is likely to take place on the basis that it has greater opportunities for greenfield development. Without the contribution of land within Waikanae East, I do not consider there will be sufficient plan-enabled housing that will be infrastructure ready, feasible that will be realised for residential development in the Waikanae urban area by the medium term."*

[220] Concerning the interests of Te Ātiawa, Ms Carter noted at [125] the following:

> *"[125] While Atiawa have not opposed the proposal to rezone the land, they are seeking further work be undertaken to ensure that Te Mana o te Wai is provided for throughout the site; and that access to special sites is maintained; and to understand the potential cumulative flooding impacts from increased residential development including to downstream communities. Atiawa considers that a structure planning process that is developed through a 'future urban development' plan change (i.e. schedule 1 process) is more appropriate for this site. Atiawa would look to ensure that any recommendations from the Whaitua Kāpiti and Takutai Kāpiti projects would inform this plan change process."*

[221] Ms Carter also undertook preliminary flood hazard assessment, stormwater treatment, geotechnical analysis and reticulation modelling. Many of those matters were not within her expertise, but we acknowledge her significant experience in the locality.

[222] In her reply, Ms Maxwell for the Council said at [33] – [35] the following:

> *"(33) The submitter requested their site be rezoned to General Residential Zone. As indicated in my original recommendation, the site is sufficiently large or complex enough to require a structure planned approach. The submitter proposed an*

indicative structure plan as part of their request, but only to inform how the area might be developed and are not seeking its inclusion in the District Plan. While the structure plan they proposed has merit, without its inclusion in the District Plan, there is no guarantee the outcomes it seeks will be achieved through a straight rezone to General Residential. While the current landowners may have every intention to develop in this pattern, there is no requirement under the General Residential Zone alone to follow this approach. A structure plan embedded in the District Plan would be the only way to ensure the development outcomes set out in the submission would be achieved.

(34) Also raised at the hearing was the question of whether development without a structure plan would foreclose options, particularly with respect to additional vehicle crossing points over the railway line. While these may be retained through a subdivision consent, if development is staged these may not be considered comprehensively across the site. Improved access across the railway line for the Waikanae East area is a key strategic issue. It was noted that the existing Elizabeth Street intersection is already at capacity during peak times and rezoning the site would add to existing capacity issues.

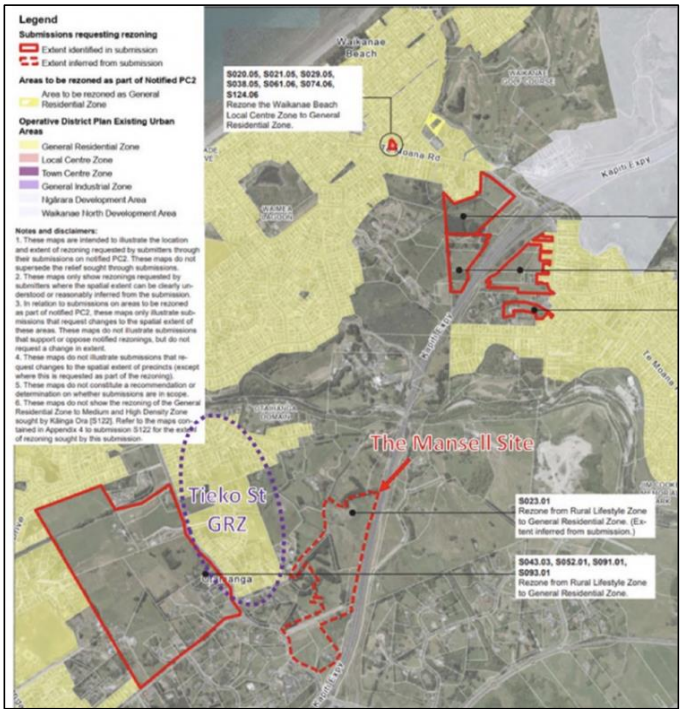
(35) Further to this, Ātiawa have also expressed their preference for the site to be structure planned. They have indicated their interest in being involved in its drafting to ensure that Te Mana o te Wai is provided for throughout the site, to understand how their cultural landscapes will be impacted (including the access to special sites and ability to undertake cultural practices), how Te Ao Turoa will be provided for (including understanding the potential cumulative flooding impacts from increased residential development) and potential impacts to their taonga fish species. They do not consider it appropriate for these matters to be addressed at the consenting stage."

[223] The Panel considers that the Waikanae East concept, as presented by Dr Boffa, has much to commend it. It is the type of intensification next to a strategic transport hub that is likely to secure the best urban outcomes for the community. However, as is evident from the discussion above, many matters need to be considered and addressed by the Council. For example, planning for infrastructure provision to accommodate additional transport demand across a range of modalities. Furthermore, Dr Boffa's approach can only work through a structure plan. This presents an immediate impediment to simply rezoning the land without that structure plan. Plan Change 2 is not the place to address these issues, requiring a more detailed engagement process with the community and affected landowners.

Section 7.3 – Mansell Property (SO23)

[224] Parts of Otaihangā were identified in the the Kāpiti Coast Urban Development Greenfield Assessment (Boffa Miskell, 2022)as scoring highly for future residential development. The submitters M R Mansell, R P Mansell and A J Mansell ("*the Mansells*")

own one of those greenfield blocks, contained within one of the areas identified by the Council in *Te Tupu Pai*, comprising approximately 18 hectares of land at Otaihangā (48 and 58 Tieko Street, 141, 139 and 147 and 155 Otaihangā Road). The land forms part of the old Mansell family farm that was severed for the development of the Kāpiti expressway. The Mansells seek to rezone their land from General Residential zone and to have the MDRS provisions applied as part of PC2. The figure below shows the Mansell land (identified in the figure as the "Mansell site").



[225] The Mansell land abuts the urban environment of the Otaihangā residential zone, and the farm is now uneconomic for farming, having been severed by the Expressway.

[226] The Mansells engaged an urban design landscape expert, Mr Compton-Moen, who estimated the site could accommodate 372 new dwellings if rezoned to General Residential while ensuring that the stormwater, ecological, natural wetlands and habitat for lizards can still be provided for.

[227] On 2 December 2022, the Mansells obtained resource consent from the Council to develop their land into 46 residential lifestyle lots on 2 December 2022.

[228] That consent was appealed.

[229] Ms Tancock, at [1.6] of her legal submissions, summarised the reasons for the zoning request as follows:

> *(a) The land has been identified by KCDC as being within a larger area intended for urban development in the medium term.*
>
> *(b) Their site adjoins the existing urban environment (**Otaihangā GRZ**) meaning it is in an ideal and logical location for further urban growth in Otaihangā – the consent reinforces this transition from rural to more intensive residential.*
>
> *(c) Development of the site will achieve a compact and efficient urban form with excellent connectivity - it is well serviced by car and pedestrian/shared path/cycleways and is within cycling distance from amenities.*
>
> *(d) The site is well serviced by existing infrastructure –can be connected to power, internet, sewer, reticulated water, wastewater. These networks have sufficient capacity to service more intensive residential development of the site.*
>
> *(e) The Mansells have worked closely with Atiawa ki Whakarongotai as manu whenua of the site and cultural impact assessment and archaeological assessments were completed as part of the bulk earthworks approval from Heritage New Zealand Pouhehre Taongā. Atiawa supported the subdivision application (and their further submission on PPC2 supports the Mansells' rezoning request).*
>
> *(f) Unlike other rezoning requests, this site has very recently been through a robust district and regional consent process. The characteristics of the site are well understood. That included peer 4 review of technical assessments and the evidence tested by the hearing panel. The district and regional consents obtained for the site for 46 dwellings mean that the suitability for residential development has already been confirmed. The Panel can place significant weight and have a high degree of confidence in those assessments.*
>
> *(g) From a hazards perspective, the necessary assessments have confirmed the site is in a sensible location for GRZ; there are no flooding or ponding issues, no waterways, the land is not highly productive land, it is geotechnically suitable for residential development and is not subject to liquification risk and can be developed to ensure hydraulic neutrality.*
>
> *(h) The mature Kanuka stands and four natural wetlands have been assessed and delineated and accommodated in detail design.*
>
> *(i) The Mansells' experts have also considered further assessment of the site's suitability for increased residential intensification as part of PPC2, in light of the Panel's Minute 1. All have determined that, in their expert view, there are no barriers to rezoning the site GRZ that cannot be resolved at detail design phase, they have considered the costs and benefits of doing so, and confirmed that the proposed GRZ/MDRS provisions could be applied to the site without amendment.*

(j) If rezoned, the land could be developed at higher density, more efficiently, in line with its intended (medium term) zoning. This would add significant development capacity and contribute to the well- functioning urban environment.

[230] The Council and the Mansell family agree that the rezoning application is within scope. The Council, in its first report, opposed the rezoning, including because it was not supported by infrastructure and also required a structure plan. The first point fell away when it was established that there is Three Waters infrastructure and roading available to service the Mansell land. Mr Martell for the Mansells reiterated in his evidence that the land could be serviced easily.

[231] Mr Foy is an independent consultant with expertise in the form and function of urban economies. His statement for the Mansells analysed the appropriateness of rezoning the Mansell land considering the following matters:

(a) Kāpiti growth trends;

(b) The Kāpiti Coast urban environment; and

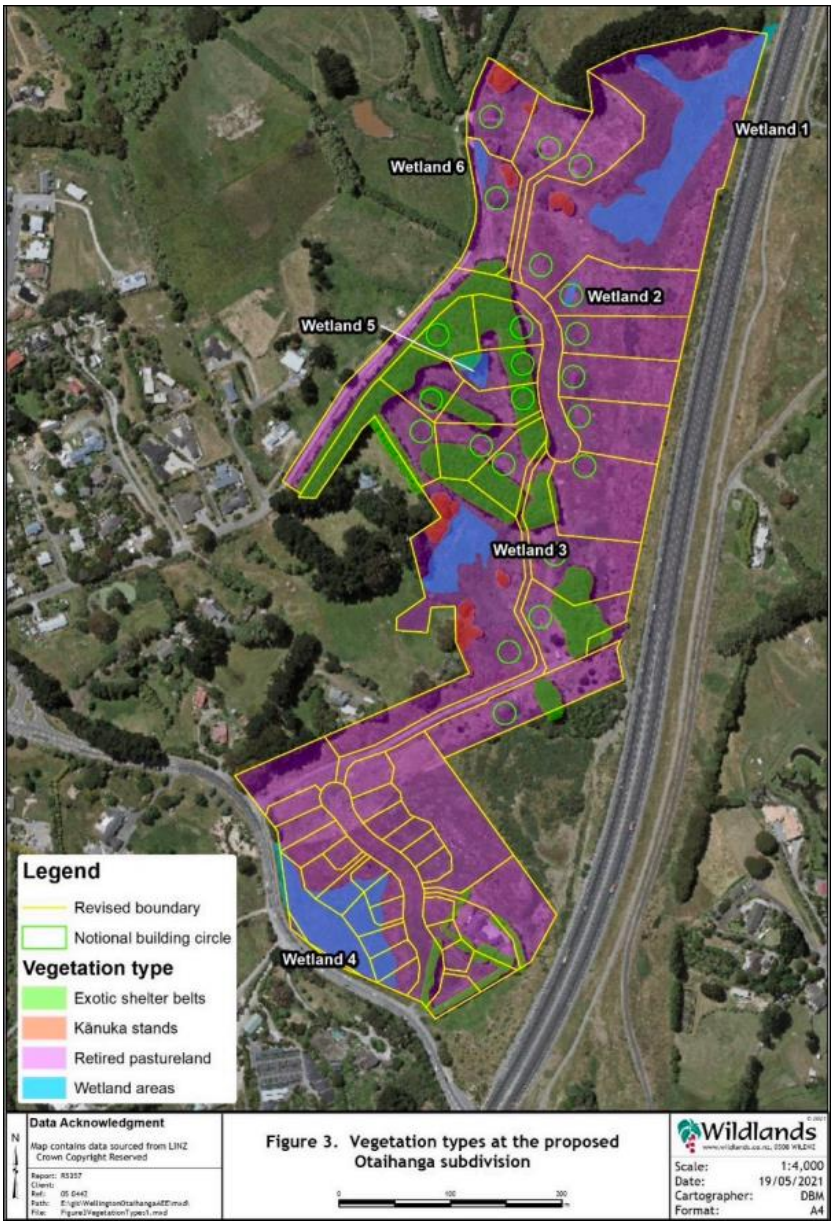
(c) Direction for a well-functioning urban environment in policy 6 NPS-UD.

[232] Overall, Mr Foy concluded that the Mansell site is a good opportunity for greenfield development that should not be passed at this juncture because less optimal land utilisation occurs by implementing the recent resource consent.

[233] Ms Fraser provided transportation evidence to demonstrate that the Mansell land is well connected to the road network and can comfortably support the increased traffic generated by residential activity if residential rezoning occurred.

[234] Mr Wylie described the capacity of the land for site development based on existing geotechnical assessments.

[235] Mr Goldwater from Wildlands described the natural values of the site relative to the existing pattern of the proposed development as shown in the figure below:



[236] Mr Hansen, the planning witness for the Mansells, undertook a full s 32AA evaluation of the proposed rezoning. He noted that the sites' values had been thoroughly interrogated as part of the existing resource consent process. A range of regional and district rules would trigger the need to protect the site's important natural values.

[237] Mr Hansen then addressed the criteria the Council used to demonstrate that the site warranted rezoning even on those Council-chosen criteria. The Panel's summary of that analysis follows.

Criteria 1: "They are located next to an urban area that is connected to infrastructure services"

[238] Mr Hansen noted that the idea of what is *next to* is open to inconsistent application. In planning terms, Mr Hansen said the site is next to the residential zone. Further, it was adjacent to the existing residential zone as many sites identified by the Council as suitable for rezoning.

Criteria 2: "They have a relatively low degree of constraints (and any existing constraints can be managed through District Plan Rules)

[239] The Council accepts that this criterion can be met.

Criteria 3: "They are not sufficiently large or complex enough to require a "structure planned" approach

[240] The Council officers considered that a structure-planned approach was required but did not describe what opportunities or constraints would need to be managed through a structure plan. Mr Hansen criticised a site area assessment as the basis for assessing whether or not a structure plan is required. He described that approach as an *arbitrary determination*. He said relevantly:

> *"I agree that a structure planned approach is required for the wider Otaihangā OH-01 area as it is divided by the Kāpiti expressway and has a number of constraints (as assessed in the s 32 evaluation report Appendix N (it could be addressed through a structure plan). However, I do not agree the size of the Mansell site requires a structure planned approach as a precursor to zoning as any constraints in the site are well known and assessed and would not negate the ability to prepare a structure plan for the wider Otaihangā OH-01 area in the future if this was desirable."*

[241] Mr Hansen also noted the commissioners for the resource consent application (RM 210147) agreed with that view.

Criteria 4: "They would have to provide a notable contribution to plan-enabled housing supply, or where this is not the case, re-zoning is appropriate to regularise the area in the surrounding zoning pattern."

[242] The Council accepted that rezoning the Mansell site would provide a notable contribution to housing supply.

[243] Ms Morris, an adjoining lifestyle block owner, opposed the rezoning because there was a loss of lifestyle character and it would affect the amenities that the area's currently open and undeveloped character provide.

[244] The Panel considers that the Mansell site should be rezoned General Residential Zone for the following reasons:

(a) The land is a good 'strategic fit' for greenfield residential development that make a notable contribution to housing supply;

(b) The rezoning would increase the land's development intensity and hence reduce the likelihood that the landowners will pursue the existing development consent. Development following the existing consent would be a suboptimal use of the land, which is a finite land resource suited to more intense residential development.

(c) District and regional rules adequately address the existing and important natural values of the site, and hence their values will be protected in the course of development;

(d) The economics of development and the operation of economic incentives will secure a well-designed comprehensively-planned development over a relatively discrete pocket of land;

(e) No material internal opportunities risk being foreclosed by the absence of a structure plan. There are equally no constraints or opportunities that development of the land will foreclose to enable coherent and appropriate development on adjoining land, if and when it is rezoned;

[245] Rezoning the land will trigger consideration of residential rezonings in the immediate locality and provide opportunities for integration of these in a way that best serves the Council's need to provide greenfield land in the medium term.

Section 7.4 – Otaihangā Block (SO43)

[246] A large block of bare land in the centre of Otaihangā along Ratanui and Otaihangā Roads comprises approximately 52 hectares. Presently, the land is zoned Rural Lifestyle Zone that enables development down to minimum lot areas of 4,000m^2.

[247] Surrounding the site are residential dwellings to the north and west, and Paraparaumu College is located 400m to the west of the site.

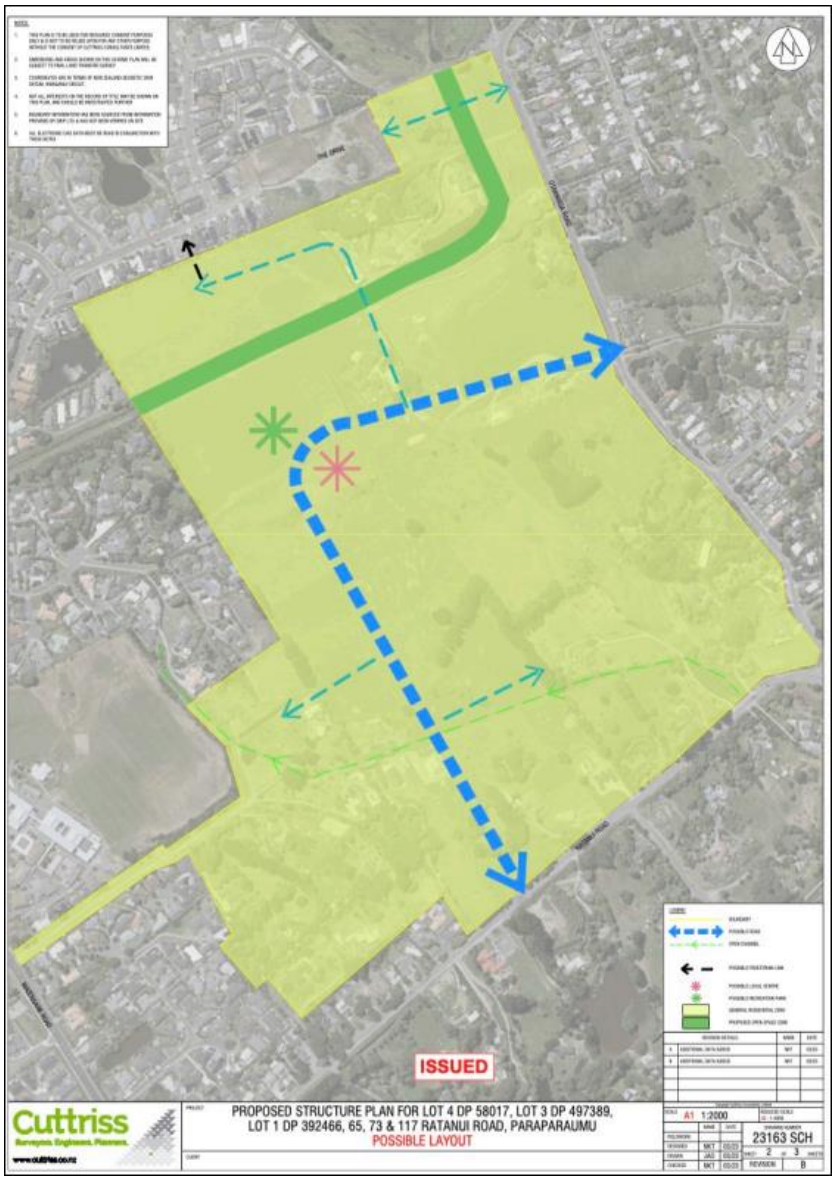
[248] The Mazengarb Stream flows through the northernmost reach of the site, and an open channel stormwater drain flows through the southern reaches of the site. A potential wetland exists on the eastern boundary within the 54 Otaihangā Road property.

[249] The submitter seeks rezoning of the Otaihangā Block (SO43). Mr Elliott Thornton, a planner, represented the submitter.

[250] The site is located within a greenfield growth area in the Te Tupu Pai Growth Strategy and identified in Appendix N to the RMA s 32 report for PC2. Mr Thornton noted that the site has good access to infrastructure and public transport.

[251] The site's northern portion is mapped as Land Use Capability (LUC) 3. However, as Mr Thornton noted, the National Policy Statement for Highly Productive Land does not apply to land identified for urban growth within the next ten years.

[252] Mr Thornton acknowledged that the land would need to be managed by a structure plan, and he included in his evidence a concept structure plan in the figure below. That structure plan had little supporting analysis.



[253] In a very indicative way, this structure plan indicates a potential location for open space provision and a local town centre zone.

[254] The Panel agrees with Mr Thornton that the site represents an excellent candidate for future residential development. However, given its strategic location and potential functional importance in supporting a range of services alongside residential, the site's opportunities and constraints must be interrogated thoroughly by a comprehensive

structure planning process. Mr Thornton's structure plan falls well short of what is required. Further, best practice requires that the structure plans are socialised with the community and are formed with the community's input. That has not been possible through the PC2 process.

[255] Therefore, we agree with Ms Maxwell that the site requires structure planning in accordance with sound planning practice before rezoning.

Section 7.5 – Classic Developments Limited (S205)

[256] Classic Developments submitted (S205) to rezone a block of land on Poplar Avenue, Raumati. The block contains four titles as follows:

Legal description	**Title**	**Area (hectares)**
Section 2 SO 508397	798191	5.0509
Sections 1 & 2 SO 537569	905967 and 905968	17.675
Sections 29-30 & 36 SO 505426	840307	12.0730
Section 37 SO 505426	843525	3.0665

[257] The submitter also sought the rezoning of 39 Rongomau Lane.

[258] The land is sandwiched between residentially-zoned land to the east and west. Approximately 19 hectares of the subject land is currently zoned, General Rural Zone.

[259] Reflecting the site's complex terrain, patterns of vegetation and peatland vestiges, the site currently contains a mix of General Residential Zone, General Rural Zone and Open Space zoning.

[260] Within the site is an ecological site *K131-Raumati South Peatlands.* The narrative description of this ecological value is as follows:

> *"Kanuka dominated habitat on dune systems is rare in Foxton ED. A small area of nationally rare habitat (wetland). Relatively large area of kanuka-gorse scrub although it is highly fragmented and exotic species are common. Bush falcon (threatened-nationally vulnerable reported)."*

[261] The submitter's planner, Bryce Holmes, pointed out that any development would be required to consider and address the matters in the NPS-FM and NES-F together with GWRC's PNRP. Therefore, adequate protections are already in place to manage the interface between residential development and the wetland.

[262] Applying the criteria used by the Council, Mr Holmes considered the site was suitable for rezoning because:

(a) It is located next to the urban area and connected to infrastructure services.

(b) The site has a relatively low degree of constraints.

(c) The site is not sufficiently large or complex to require a structure planned approach.

(d) The rezoning would make a notable contribution to plan-enabled housing supply.

[263] We agree with Ms Maxwell that a structure plan is desirable and, therefore, the Panel does not support the rezoning through PC 2 except for the rezoning of 39 Rongomau Lane. The latter recommendation is for the same reasons as in Section 7.6 and was only rejected initially because of the Expressway designation, and that issue has fallen away.

Section 7.6 – 45-47 Rongomau Lane (SO 123)

[264] Ms Liakovskaia made a submission proposing the rezoning of 45 and 47 Rongomau Lane to General Residential Zone because it is no longer rural being adjacent to the expressway and no longer required for a designation. Nominally, Waka Kotahi's designation remains on the land, but this is only because administrative delays have stalled the process of uplifting the designation. Ms Liakovskaia wishes to take full advantage of the enablement produced by MDRS.

[265] In reply, Ms Maxwell for the Council stated:

> *"(31) The submitter outlined that the expressway designation on-site is no longer required given that they purchased the land off the Crown, and the expressway is complete – therefore, it is appropriate for their land to be rezoned. Following the hearing, the*

submitter provided written correspondence with Waka Kotahi, outlining why the designation remains. None of the reasons provided seemed to relate to the subject sites, but rather some outstanding conditions and the fact that not all properties have been disposed by the Crown. It was also noted that written consent was required from Waka Kotahi in relation to any proposed development within the designation. I can confirm that this was the only matter which prevented the rezoning of the sites. If the Panel do not consider this to be a development-limiting issue, it is open to them to recommend rezoning these sites.

(32) It should also be noted that reverse sensitivity effects in relation to the expressway are addressed through existing District Plan provisions (specifically NOISE-R14)."

[266] Correspondence from Waka Kotahi confirms the designation does not represent an impediment to re-zoning.

[267] The Panel considers that the land should be rezoned and thus agrees with Ms Liakovskaia.

Section 7.7 – 157 Field Way, Waikanae Beach (S168)

[268] Brian Ranford and Michelle Curtis through their registered trusts own an impressive property at 157 Field Way. That land is contained in Computer Freehold Register Identifier WN59A/182 and comprises 1.449 hectares. Access to the land is from Field Way, a local road hosting a standard residential development pattern for Waikanae Beach. The submitters seek to rezone an undeveloped portion of their land with direct frontage to Field Way to create four sections A – D with access from Field Way and the existing access strip.

[269] Development in that form would represent a coherent extension of the pattern of residential development already enjoying access from Field Way. Development of this nature would also represent a significant incursion into a historical dividing line between residential use and rural use with associated differentiation in natural landscape and character.

[270] The request was treated as in scope following an assessment in the Planning Evidence Report on p 245.

[271] The Council's planning report at p 252 noted that the application did not meet one of the criteria for rezoning. Namely, it would not significantly contribute to plan-enabled housing or regularise with surrounding zoning. It was also noted that the site is

outside the Waikanae Northern Urban Edge and there was an insufficient planning justification for altering that line. Ms Maxwell, at [39] of her statement said:

> *"(39) The submitter requested part of their site be rezoned to General Residential Zone from General Rural Zone. Under the assessment process for rezoning, it did not meet all criteria due to the fact it does not provide a notable contribution to plan enabled housing. This was not the primary issue preventing its rezoning however. The site is also outside the urban area and is beyond the Waikanae North Urban Edge (WNUE). The WNUE is a strategic policy in the District Plan which defines the 'edge' of the urban area. The edge exists to manage the spread of urban development, and the Strategy requires that new urban development for residential activities should maintain the integrity of this boundary. The WNUE was not proposed to be amended through PC2. Therefore, I deem it inappropriate to rezone 157 Field Way prior to a wider strategic assessment of the location of the WNUE, and whether it should be extended to include further urban development. The location of/need for the WNUE is a strategic matter that would be more appropriately reviewed as part a future plan change (for example, it could be considered for inclusion in the future urban development plan change)."*

[272] Mr Rainford and Ms Curtis made the following points in their submission:

> *"6.2.1 Historically most of that part of Our Property we desire to be rezoned from rural to urban was already zoned urban during our ownership of our Property, before KCDC changed that part zoning to rural. A return as to part urban is returning to the status quo.*
>
> *6.2.2 If green belting the northern extremities of Waikanae urban areas by virtue of rural block designations was relevant in 2001 it is not relevant now, some 20 years later, as is evidenced by the urban encroachment of subdivided sections occurring north of our Property in Peka Peka. Further greenfield development in this area will advance that urban encroachment.*
>
> *6.2.3 It should be noted we are not requesting a complete rezoning of all of Our Property from rural to urban but essentially just that portion abutting Fieldway.*
>
> *6.2.4 The proposed subdivision of part of Our Property abutting Fieldway is merely a continuation of the existing urban environment all around Our Property in the…"*

[273] We consider the submitter's points have merit but PC2 is not the right vehicle to address the wider strategic issues of altering the WNUE.

Section 7.8 – 11 and 15 Te Rauparaha Street, Street, Ōtaki (S 156 and 254)

[274] Nancy Huang's family own a small block used as a market garden opposite St Mary's Catholic Church on Te Rauparaha Street. It is bisected by a stream, with the market

gardening occurring on the true left bank. It is bounded to the north by the Mangāpouri Stream, which is a small spring-fed tributary of the Waitohu Stream.

[275] West of Ms Huang's family's land is the land of Mr Richards which is pastoral land that abuts relict foredunes immediately adjacent to the Te Wanangā O Raukāwa Ōtaki Campus and the Te Kura Kaupapa, Māori o Te Rito.

[276] Mr Richards regards his land as uneconomic, and Ms Huang considers that her family is in the same position. The land is not particularly easy to grow on and not of sufficient size to operate as a market garden. The submitters argue that because of the proximity of the lane to Ōtaki township, it should be considered for rezoning.

[277] Mr Pirie, representing Mr Richards and Ms Huang, is a surveyor and claimed there were few constraints were operating on land development that could not be overcome.

[278] Mr Pirie also claimed that the submitters' land was identified as a Priority 3 greenfield area in the Council's greenfield re-zoning assessment as part of the Te Tupu Pai project.

[279] In her reply statement at [40], Ms Maxwell for the Council stated:

> *"(40) The submitters requested their site be rezoned to General Residential Zone. I considered these submissions to be out of scope for the reasons outlined in my planning evidence-in-chief. At the hearing, the submitter referenced Te Tupu Pai and stated that their site was identified as a "priority 3 greenfield area" as part of their reasoning. This category does not exist in Te Tupu Pai. Te Tupu Pai in fact identifies no growth area in that location. The site is identified in Appendix N as part of a "priority 3 potential growth area" which means "The area is an unlikely candidate for long term urban development, on the basis that there are numerous and significant constraints that are unlikely to be overcome". As discussed in paragraphs 22-24, Appendix N is not part of Te Tupu Pai."*

[280] The Panel considers that opportunities and constraints for this site would require a full investigation, including consideration of flood hazards, cultural values, and stream margin values and be planned in accordance with good practice structure planning. Significant constraints have meant that the Kāpiti Coast Urban Development Greenfield Assessment (Boffa Miskell 2022) does not identify the site as a particularly good candidate for residential development.

[281] We recommend the Council decline the submission by Mr Richards and Ms Huang.

Section 8 – Application of MDRS and Policy 3 to Ōtaki

Section 8.1 – Overview

[282] It is only since the local government reorganisation in 1989 that Ōtaki has become under the umbrella of Kāpiti Coast District Council and hence the Greater Wellington Region. For much of its history, Ōtaki was within the Manawatū province and the territory of the Horowhenua District Council. Its character is distinctive because of the strong tangata whenua associations that have now blossomed with strong indigenous institutions in Ōtaki Township. Unlike Waikanae, it has no rail link that qualifies as a rapid transit facility. It is on the periphery of the Greater Wellington Region, and because of the history and Ōtaki's development pattern, the MDRS application to Ōtaki is somewhat idiosyncratic.

[283] The two commercial platforms of Ōtaki are the Ōtaki Township on Main Street and the shopping precinct adjacent to Ōtaki Railway and formerly adjacent to State Highway 1. Because both areas have Town Centre Zones, the Council applied Policy 3 in accordance with the methodology described in Section 2.

[284] A key matter of contention concerning Ōtaki Township concerned the submission of Ngā Hapū o Ōtaki on the following issues:

(a) The extent to which Policy 3 enablement impacted t Raukāwa Marae on Main Street.

(b) The extent to which the application of the MDRS to the residential zone around the township was appropriate in light of the historical patterns of development in Ōtaki and the unique associations of tangata whenua to that land for use as papakaingā.

[285] It is those matters of contention that the Panel addresses in the following section.

Section 8.2 – Should there be an extended qualifying matter applying to the Ōtaki Township to recognise tangata whenua values?

[286] To the trained eye, it is plain that historical patterns of land subdivision supporting Māori ownership around Raukāwa Marae and the Ōtaki township churches still operate. The current urban context is somewhat of a palimpsest.

[287] Ngā Hapū o Ōtaki contended that applying Residential Intensification Precinct B to the Ōtaki Township town centre zone and the MDRS to the residential zone in the environment surrounding Raukāwa Marae inappropriately failed to recognise the historical patterns of development important to tangata whenua. Further, Ngā Hapū o Ōtaki also considered that the speed of the IPI process was procedurally unfair and in breach of the principles of the Treaty of Waitangi.

[288] The Ngā Hapū o Ōtaki submission was principally presented by Ngā Aroha Spinks, Denise Hapeta and Kirsten Hapeta.

[289] One of the Panel members had a little knowledge of the history of the Ōtaki Township, and that enabled us to interrogate more fully the underlying concerns of Ngā Hapū o Ōtaki.

[290] The Panel has considered a range of historical materials, but a key research item is Woodley (Wai 2200) – Ōtaki Alienation Draft Report.[46]

[291] Ōtaki Township has a rich history where an underlying theme is the attempts by Ngāti Raukāwa to provide papakaingā for its community centred on the marae and the local churches to maintain a strong community and cultural continuity. These aspirations remain. Chapter 7 of the Woodley (Wai 2200) Report neatly sets out the history as follows:

> *7.1 Introduction*
>
> *The project brief for this report asks for a history of the development of Ōtaki township, including hapū aspirations for self-determination, the desire to establish a township for hapū and the importance of religion reflected in the establishment of different churches in the town. This includes hapū housing and settlements such as Pukekaraka. Also to be addressed is the use of the 'parish housing development model' and how this worked or failed to work for*

[46] Woodley "The Purchase of Ōtaki Maori Land and the Development of Ōtaki Township 1840-2023" "A report prepared for the Porirua ki Manawatū Inquiry" (Wai 2200) and the commissioned by the Crown Forestry Rental Trust.

Ōtaki Māori. The project brief notes that this model promoted the establishment of a large number of small blocks in the immediate vicinity of the church.

Such a history has proved difficult to compile. While the establishment of the township has been discussed by local historians, in other reports prepared for this inquiry and is documented in investigation of title hearings recorded in Native Land Court minute books and newspaper accounts, the ongoing development of the township and the extent to which hapū aspirations were realised has not been covered to any great extent elsewhere and there are relatively few primary sources that can assist.

Little has been discovered in nineteenth and twentieth century government records about Māori aspirations for the township or the parish housing development model. Later records of the Court, the Department of Māori Affairs, the Aotea and Ikaroa Māori Land Board and Ōtaki Borough Council barely mention the original intention for the land or discuss ways of supporting Māori to live at Ōtaki least of all around Raukāwa Marae on Mill Road or Tainui Marae on Convent Road at Pukekaraka. The only exception is the encouragement by Hema Hakaraia, a borough councillor and to a lesser extent the Department of Māori Affairs who supported some housing initiatives in the 1940s and 1950s in the township.

What can be provided, however is an examination of key areas which limited opportunities for Māori to live on Māori land in the township and at Pukekaraka around their marae and churches. These are the ongoing purchase of township sections and at Pukekaraka which began to escalate in the 1890s, the population shift at Ōtaki by 1920 from a Māori dominated town to one populated predominately by Pākehā, the introduction of local government to the area and the resulting vesting of most of the remaining Ōtaki sections in the Ikaroa Māori Land Boardto administer in 1929, and the Europeanisation of both Ōtaki sections and Pukekaraka blocks in the late 1960s and early 1970s. Limited housing development opportunities was also a factor.

This chapter begins with details of how the township was established in the 1840s and how the sections were allocated, followed by a discussion on the building of the churches at Ōtaki township (Rangiatea) and at Pukekaraka (St Mary's) and their proximity to the Māori population and their respective Marae. This is followed by a discussion of the investigation of title by the Native Land Court and the pattern of alienation in the Ōtaki township and the Pukekaraka block including its 'Europeanisaton'. This is followed by a discussion of the shift in the population from predominantly Māori to predominantly Pākehā, the impact of local authorities and the housing initiatives in the 1950s in these areas. The chapter concludes with a discussion as to the utilisation and alienation of land around Raukāwa and Tainui Marae in 2023.

7.2 The establishment of Ōtaki township, 1840's

In the 1840s, Ngāti Raukāwa's base at Rangiuru located at the mouth of the Ōtaki River (in the Taumanuka block) was largely moved to the township of Ōtaki where individual ¼ acre sections had been allocated to individuals and groups within Ngāti Raukāwa.

Local historian Jan Harris and Anderson, Green and Chase in their report for this inquiry have discussed the establishment of a village at Ōtaki. They state that it is 'not entirely clear who first suggested the idea of building at village at Ōtaki – whether it was Bishop Octavius Hadfield, an Anglican missionary based at Ōtaki since late 1839, Governor Grey, or Māori themselves'. They note that Ngāti Raukāwa raangtira Matene Te

Whiwhi, when first giving evidence to the Native Land Court with respect to Ōtaki township in 1867, said that it was suggested to him by the Bishop of Auckland. Tamihana Te Rauparaha, 'suggested that much of the initiative was his and Matene's' and that they had both asked Thomas Bernard Collinson of the Royal Engineers to plan it. Collinson met with Matene Te Whiwhi and Te Rauparaha in Auckland in 1846 and thought it was the missionaries that had 'influenced the two young rangiātira'. 'Indeed, the township was briefly known by the name of Hadfield town' and was at times referred to by this name in some nineteenth century government records (for example the map below calls the township Hadfield).[47]

Anderson, Green and Chase state that Governor Grey:

> *… endorsed the project and actively facilitated it. The concept fitted well with his views on the advantages of the small village as a basis for Māori social organisation and with his "civilising agenda.*[48]

The historian's all record that Collinson assisted with its planning and in the words of the New Zealand Spectator, laid the town out on a '"regular plan, with streets on the principle of an English village and a square reserved at the end of the principal street on which the native village church will raise a spire"'.[49] *This referred to the site of the Rangiatea church which was built in 1851.*

The idea of establishing a village or town for Ngāti Raukāwa was supported by Ngāti Raukāwa. Te Matene Te Whiwhi described at a Court hearing how the land was allocated. He said that the village was divided into ¼ acre sections and surveyed by Mr Fitzgerald who the government sent at their request. He said that each person who it was considered had rights 'had been allocated different allotments as 'individuals or as representatives or as both of their special hapū'. Te Rauparaha explained that all Ōtaki Māori had agreed to the lay out of the township and that the allocations were approved by a 'committee of chiefs' under the oversight of Samuel Williams. Sections were also set aside for a school and courthouse.[50]

The following map shows the boundaries of the township as sketched in 1880 which include the church missionary land, the Ōtaki block (or Ōtaki A), and sections 25-30 (or Te Awamate) on Te Rauparaha Street to the west; the Waerengā block to the south (from what is now called Iti Street) and the Haruatai Stream (and Makuratawhiti and Haruatai blocks) to the east and north-east. The Mangapouri block (as opposed to the Mangapouri Market Reserve) was the northern most section with the Pukekaraka, Waitohu and Titokitoki blocks to the east of the river. It shows too, the site of the Rangiatea Church and the Mangapouri Market Reserve (both on Te Rauparaha Street).

From this map, about 162 township sections are shown as well as Ōtaki (or Ōtaki A) on the western side of Te Rauparaha Street and Manapouri Market Reserve. Ōtaki

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[47] Jan Harris, J., 'The Town of Ōtaki', *Ōtaki Historical Society Journal 31*, 2009, p. 4; Anderson, Green and Chase, (Wai 2200, #A201), pp. 95-96

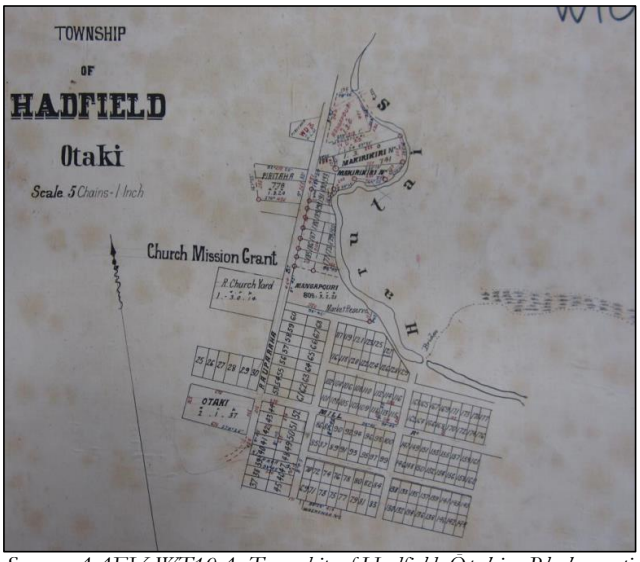
[48] Anderson, Green and Chase, (Wai 2200, #A201), p. 96.

[49] *New Zealand Spectator*, 17 February 1847, p. 2 as quoted by Jan Harris, p. 4 and Anderson, Green and Chase, (Wai 2200, #A201), pp. 3, 96.

[50] Anderson, Green and Chase, (Wai 2200, #A201), p. 96. They record that Te Rauparaha listed the committee as: Kiharoa Te Ao, Te Kingi, Hanita Te Ra Waraki, Mohi Te Wharewhiti, Hukiki, Matene Te Whiwhi, Hakaraia, Karanama, Pairoroku, Te Mahia, Te Mahauariki and Te Whatanui as well as himself who he described as Ngāti Raukāwa and Ngāti Toa.

township sections 181, 182, 183 and 184 are not shown but all, part from section 183, have been identified in later maps. Of note is that sections 39, 40, 41, 42, 47 and 48 were also known as Kiharoa 2; sections 37, 38, 45 & 46 were sometimes known as Kiharoa 1 and were later called section 45A; sections 180, 181, 188 and 189 were also called Piritaha 5 and sections 192 & 193 appear to have been part of the Makirikiri 2 block:

Ōtaki Township, sketch of initial layout of sections, 1880



Source: AAFV WT10A, Township of Hadfield, Ōtaki – Blocks, sections, place names, public gardens, bush – scale 5 chains: 1 inch – Drawing, C.F. Gieson, 1880 (R22824372), Archives New Zealand, Wellington.

[292] Concerning changes affecting Ngāti Raukāwa, Woodley observed the operations in the Native Land Court and also a population shift. Thus at section 7.4 Ms Woodley stated:

One of the factors that is likely to have affected the ability of Ngāti Raukāwa to fully maintain Ōtaki as a papakāinga for Ngāti Raukāwa was the population shift at Ōtaki whereby Pākehā gradually outnumbered Māori.

Estimates give the Māori population of Ōtaki as 664 in 1850. However, this was likely to be wider than the township itself. In 1876, Ōtaki Pā was awarded to 'all of Raukāwa' and the list comprises 346 names. It is likely, however, to have included names of those who did not live at Ōtaki as the population in 1878 at Ōtaki, according to the government census, was 194 which together with the 54 people identified as living at Pukekaraka made a total of 248. The Māori population at Ōtaki did not increase by much as by 1918, there were approximately 276 Māori living in the Ōtaki town board area (which included both Ōtaki township and Pukekaraka). This was 25 per cent of the total population of Ōtaki. By 1927, there were an estimated 300 Māori living in the borough which included blocks such as Haruatai and Makuratawhiti

> *around the township sections as well as the beach area.[51] While the Māori population stayed relatively steady, the Pākehā population began to grow. As noted above, in 1864, there were 12 Pākehā families recorded as living in the township so probably less than 50 people. By 1901, the number of inhabitants had increased to 272 which was similar to Māori. By 1918, there were over 800 Pākehā and within another ten years it was 1200. This meant that by 1929, Māori made up 20 per cent of the inhabitants of the town.[52]*
>
> *This population shift coincided with increased purchase of township sections. By 1930, around 61 per cent of the township sections had been purchased.*

[293] Woodley observed in section 7.5 page 232 and 233 as follows:

> *Increasingly, Māori sold land in the township because they lived away from Ōtaki, were in debt and/or did not have the finances to develop the sections, some of which were undeveloped. In the 1920s, the Ikaroa Māori Land Board confirmed the purchase of Ōtaki township section 50. The sections sole improvements consisted of fencing and it was covered in weeds. The owner lived at Katihiku and had received no revenue from the land. He also appeared to not have the financial resources to develop the section. He said he was 'quite satisfied' with the purchase and that he wanted the money to look after himself.[53] Similarly, in the 1944, Ōtaki township section 44 was purchased because the owners could not secure finance to replace the existing buildings which were being demolished. If they could not re-build, however, they could not lease the land. The purchase by Pākehā who could afford to build on the land was considered in the best interests of the owners and the borough by both the Court and the Ōtaki Borough Council.*

[294] The Woodley Report then continues the narrative across the 20th Century.

[295] The Woodley Report's overarching conclusion at 7.10 at page 238 is the following:

> *This alienation of township sections and the area around Pukekaraka gradually reduced the amount of Māori land in these areas which in turn, limited opportunities for Māori to live on Māori land in the township. This, together with the population shift in Ōtaki, the introduction of local authorities to the area as well as limited opportunities for housing development meant Ngāti Raukāwa were unable to foster Ōtaki as a papakāinga in the same way as was envisaged in the 1840s.*

[296] In light of the history described above it is understandable that Ngā Hapū o Ōtaki harbour the concern that the enabling aspects of the MDRS and NPS-UD Policy could:

(a) Further undermine the central role of the Raukāwa Marae for their community.

[51] Census of the Maori Population, 1878, AJHR 1878, G2; Woodley, (Wai 2200, #A193), pp. 303-304.
[52] Woodley, (Wai 2200, #A193), pp. 303.
[53] Ikaroa Maori Land Board Minute Book 9, 22 February 1921, p. 297.

(b) Detract from the benefits of the papakāinga provisions of PC 2 intended to facilitate long held aspirations by Ngāti Raukāwa that spawned earlier land subdivision.

[297] Mr Banks, the reporting planner for the Council, further consulted with Ngā Hapū o Ōtaki following the formal hearing to prepare his reply. As a result of that further work he proposes an expanded Ōtaki Takiwa Precinct shown in Appendix G to the Council's reply (PC 2_CouncilReply_AndrewBanks_appa_ipi_pcr2).

[298] Supporting his conclusions, Mr Banks stated at [29] of his reply:

> *In my opinion, the network of places that surround the Ōtaki Main Street town centre contribute to a well-functioning urban environment that enables tangata whenua to express their cultural traditions and norms. I therefore consider that the broader network of places described by Ngā Hapū o Ōtaki, and the area circumscribed by them, together constitute a 'living site of significance' which I consider should be provided for as a qualifying matter under sections 77I(a) and 77O(a) of the RMA (as a matter necessary to recognise and provide for section 6(e) of the RMA)*

[299] We agree with Mr Banks' assessment and support the overall thrust of the Ngā Hapū o Ōtaki submission.

[300] Consequently, we do not agree with Kāinga Ora's proposed re-zonings in the Ōtaki Township.

Section 9 – Conclusion

[301] In conclusion, Councillors will see from reading this report that the Panel arrived at more or less the same destination as Mr Banks' and Ms Maxwell's reply evidence except for some notable exceptions. That is not surprising since we travelled the same journey. The Panel confidently concludes that the outcome it recommends fulfils the statutory requirements, serves the community's interests within the legal framework, and is based on the preponderance of the evidence.

Hei kona ra John Maassen (Chairperson) and Rauru Kirikiri (Independent Commissioner) - Jane Black (Independent Commissioner).

John Maassen
Chairperson

pp. Rauru kirikiri

Rauru Kirikiri [54]
Independent Commissioner

Jane Black.

Jane Black
Independent Commissioner

[54] Mr Kirikiri was unavailable to sign the report but endorsed a mature draft of the report by email. Therefore, the Chairperson has signed on behalf of Mr Kirikiri

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The Section 32 Evaluation Report for PC2 is referred to throughout the Council's planning evidence.
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• S023 and S023.FS.1 RP Mansell, AJ Mansell and MR Mansell Craig Martell Statement of Evidence 10.03.2023
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• S023 and S023.FS.1 RP Mansell, AJ Mansell and MR Mansell Derek Foy Statement of Evidence 15.03.2023
• S023 and S023.FS.1 RP Mansell, AJ Mansell and MR Mansell Harriet Fraser Statement of Evidence 10.03.2023

- S023 and S023.FS.1 RP Mansell, AJ Mansell and MR Mansell Nick Goldwater Statement of Evidence 10.03.2023
- S043, S052, S091 and S093 Cuttriss Consultants Ltd Elliot Thornton Statement of Evidence 10.03.2023
- S076 Transpower NZ Ltd Ainsley McLeod Statement of Evidence 10.03.2023
- S076 Transpower NZ Ltd Trudi Lee Burney Statement of Evidence 10.03.2023
- S087 Waikanae East Landowners Frank Boffa Statement of Evidence 10.03.2023
- S087 Waikanae East Landowners Anna Carter Statement of Evidence 10.03.2023
- S087 Waikanae East Landowners Harriet Fraser Statement of Evidence 10.03.2023
- S094 and S094.FS.1 KiwiRail Cath Heppelthwaite Statement of Evidence 10.03.2023
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- S104 Waikanae Land Company Maurice Rowe Statement of Evidence 10.03.2023
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- S114 Z Energy Ltd, BP Oil NZ Ltd and Mobil Oil NZ Ltd Jarrod Dixon Statement of Evidence 10.03.2023
- S122 and S122.FS.1 Kainga Ora Karen Williams Statement of Evidence 10.03.2023
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• S196 and S197 Retirement Villages Association and Ryman Healthcare Ltd Gregory Akehurst Statement of Evidence 10.03.2023
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• S023 – Mansell – Duncan Cotterill – Annexures 18-04-2023
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- S067 – Manly Flats – Legal submissions 15.03.2023
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- S104 - Waikanae Land Company - Legal submissions 31-03-2023
- S104 - [2023] NZEnvC 056 Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga[31]
- S122 Kainga Ora – Legal Submissions 22-03-2023
- S196 and S197 – Retirement Villages Association and Ryman Healthcare Ltd – Legal submissions 15.03.2023
- S196 and S197 – RVA and Ryman – Nicola Williams – Supplementary Statement 6-04-2023
- S218 – Coastal Ratepayers United – Legal submission 17.03.2023

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- S023 – Mansell – Statement to the PC2 Hearing Panel. 24-04-2023
- S045 – John Le Harivel – Housing intensification Power Point John Le Harivel Architect v2[PPSX 94 KB]
- S053 – Waka Kotahi – Statement for Tabling
- S105 – Waikanae Beach Residents Society – Statement 21-03-2023
- S112 – Ministry of Education – Tabled Letter
- S160 and S160.FS.1–3 – Nancy Gomez – Submitter Statement 10.03.2023
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- S67 - Manly Flats - Photos in support of submission
- S105 and S106 - Waikanae Beach Residents Society and Munro Duignan Trust - Economic impacts extreme events jul04 NZIER
- S105 and S106 - Waikanae Beach Residents Society and Munro Duignan Trust - Hammond et al
- S130 - Chris Turver - Statement 21-03-2023
- S186 - Ian and Jean Gunn - Statement 23-03-2023
- S105 - Waikanae Beach Residents Society - Summary of Oral Submission by Pat Duignan 21-03-2023
- S105 - Waikanae Beach Residents Society - Pat Duignan OIA request to the Ministry for the Environment - Ref 507603 OIAD-285
- S160 and S160.FS.1-3 – Nancy Gomez – Submitter Presentation[PPTX 4.29 MB]

• S168 - Brian Ranford and Michelle Curtis - Video in support of submission[MOV 10.56 MB] (**Note:** clicking this link will download the file to your computer for viewing)
• S198 - Helen Ridley - Submitter Statement 31-03-2023
• S252.FS.1 - Low Carbon Kāpiti - Submitter Statement 29-03-2023
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• S20, S38, S61 and S74 – Andrew Hazelton – Memorandum of Counsel
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• S259.FS.1 - Campbell & Susan Ross Trust - Withdrawal of Submission
Additional documents
• Ministry for the Environment Departmental Report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill
• Select Committee Report 2021 - Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill
Council reply
• Council legal reply
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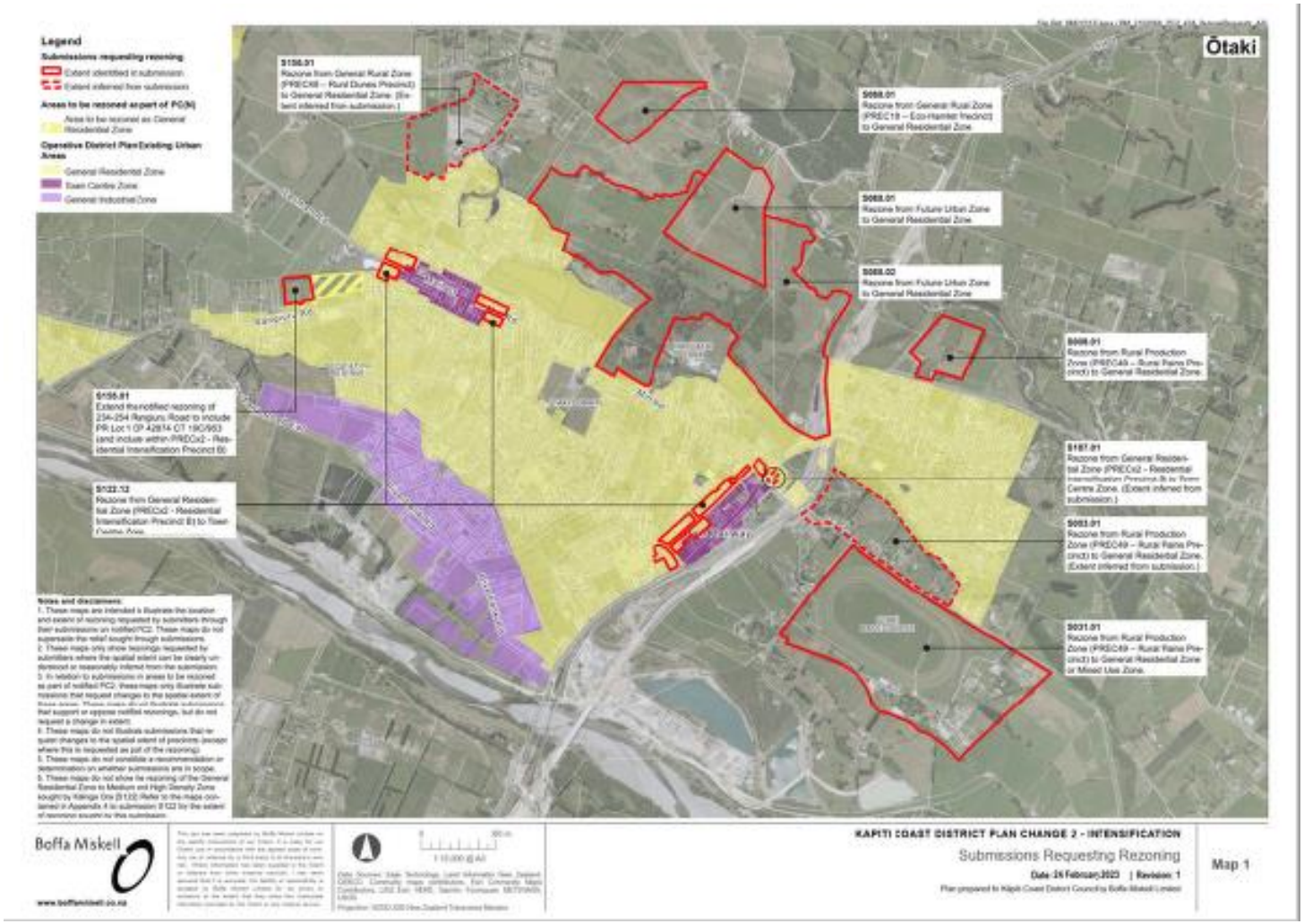
• Council reply Andrew Banks Appendix A
• Council reply Katie Maxwell
• Ngā Hapū o Ōtaki supplied Waitangi Tribunal documents
• Woodley Ōtaki Progress Report No2 28 March 2023
• Woodley Ōtaki alienation draft report 28 March 2023
• Woodley Ōtaki alienation final report 9 May 2023
• PC(R2) Council Officer Reply Version Web-map

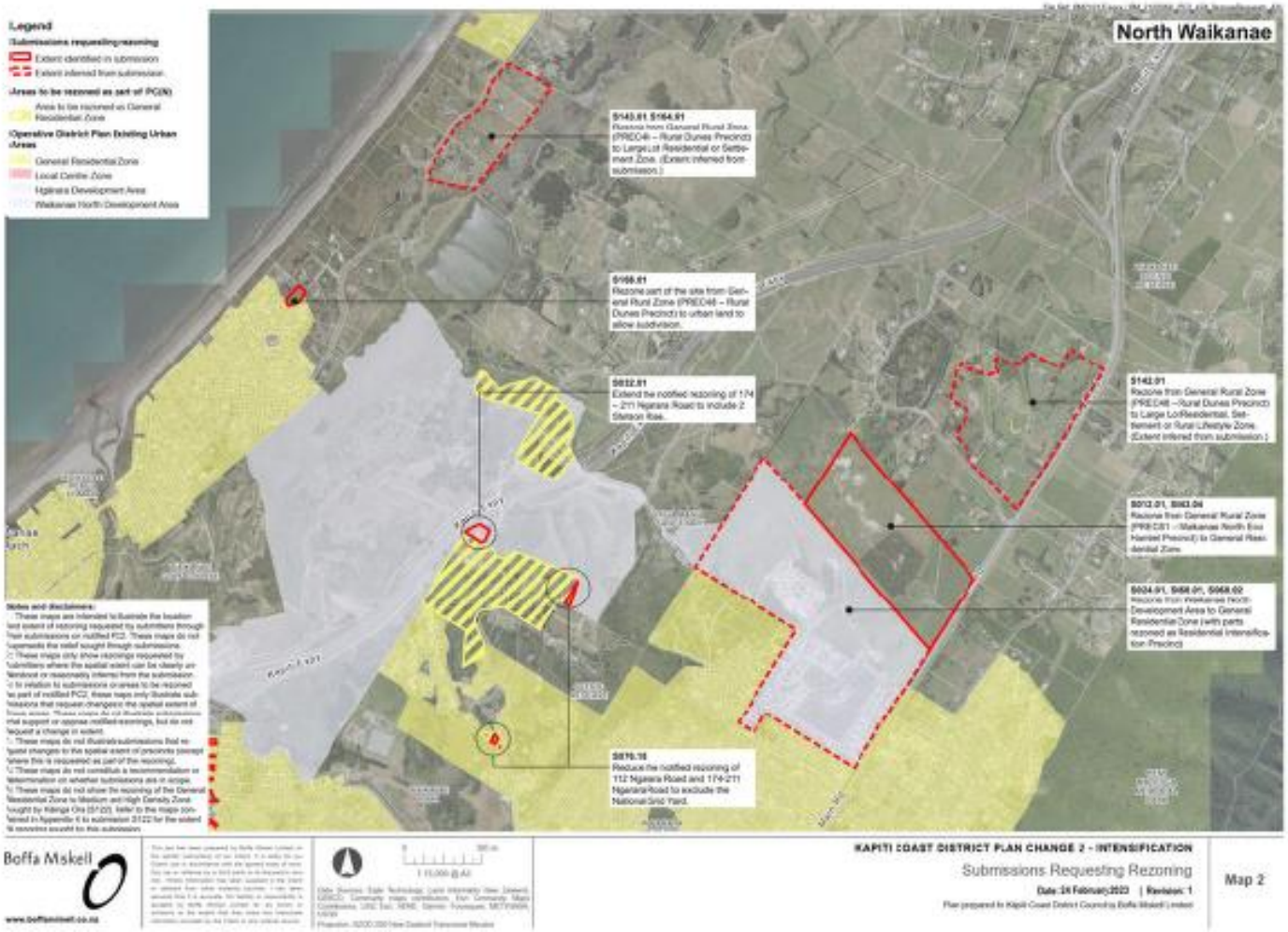
Appendix 2 - Plans showing the location of re-zoning requests

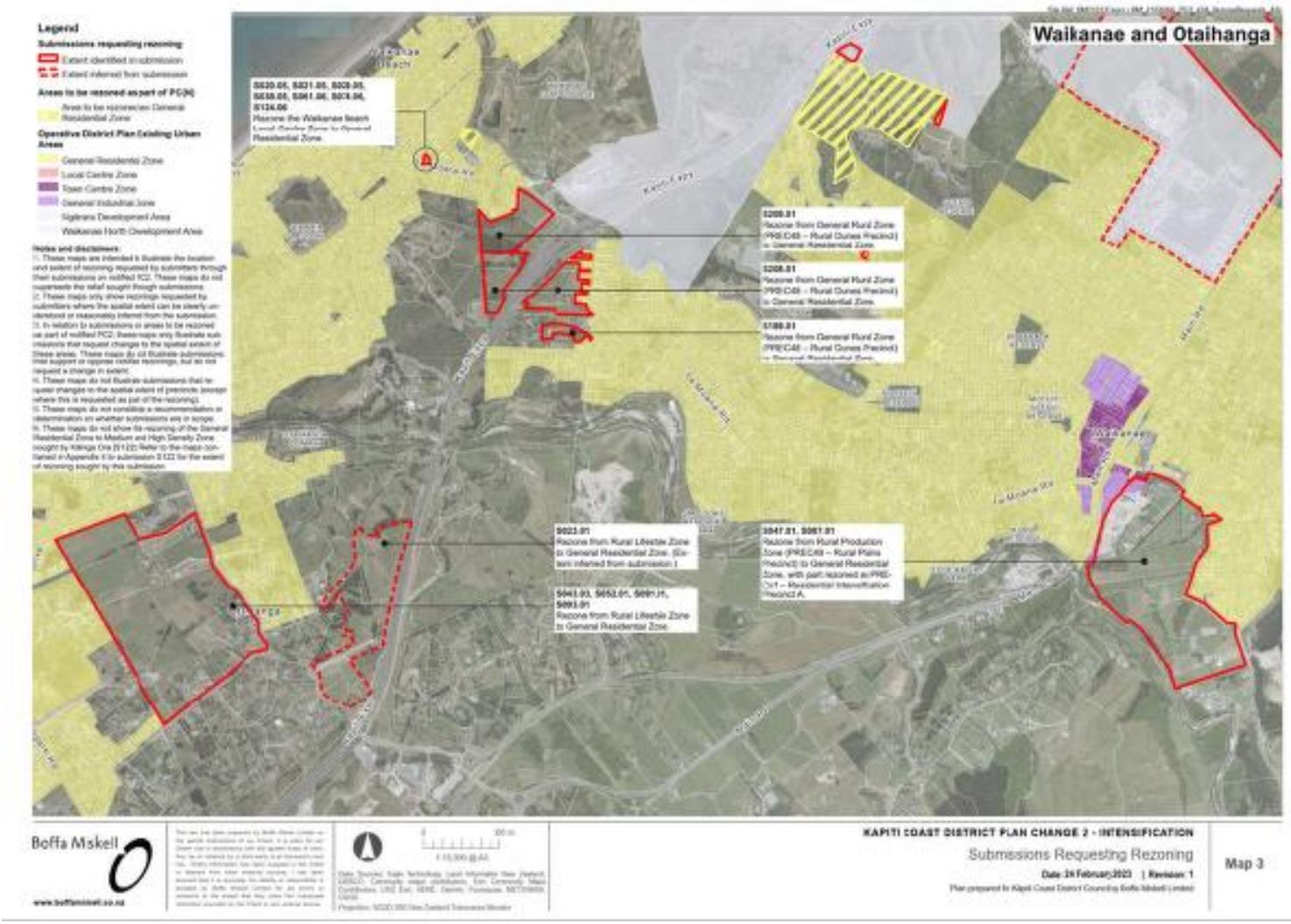
Plan Change 2
Council Officers' Planning Evidence

Appendix F

Maps showing submissions that request rezoning


Legend
Submissions requesting rezoning
Extent identified in submission
Extent inferred from submission
Areas to be rezoned as part of PC3(i)
Areas to be rezoned as General Residential Zone
Operative District Plan Existing Urban Areas
General Residential Zone
Town Centre Zone
General Industrial Zone
Ōtaki
S156.01
Rezone from General Rural Zone (PREC18 – Rural Dunes Precinct) to General Residential Zone. (Extent inferred from submission.)
S088.01
Rezone from General Rural Zone (PREC18 – Eco-Hamlet Precinct) to General Residential Zone
S088.01
Rezone from Future Urban Zone to General Residential Zone
S088.02
Rezone from Future Urban Zone to General Residential Zone
S088.01
Rezone from Rural Production Zone (PREC49 – Rural Fains Precinct) to General Residential Zone.
S155.01
Extend the notified rezoning of 234-254 Rangiuru Road to include PR Lot 1 DP 42814 CT 19C/953 and include within PREC02 - Residential Intensification Precinct B2
S187.01
Rezone from General Residential Zone (PREC02 – Residential Intensification Precinct B) to Town Centre Zone. (Extent inferred from submission.)
S122.12
Rezone from General Residential Zone (PREC02 - Residential Intensification Precinct B) to Town Centre Area
S083.01
Rezone from Rural Production Zone (PREC49 – Rural Fains Precinct) to General Residential Zone. (Extent inferred from submission.)
S031.01
Rezone from Rural Production Zone (PREC49 – Rural Fains Precinct) to General Residential Zone or Mixed Use Zone.
Notes and disclaimers
Boffa Miskell
www.boffamiskell.co.nz
KAPITI COAST DISTRICT PLAN CHANGE 2 - INTENSIFICATION
Submissions Requesting Rezoning
Date: 24 February 2023 | Revision: 1
Map 1


North Waikanae
Legend
Submissions requesting rezoning
Extent identified in submission
Extent inferred from submission
Areas to be rezoned as part of PC(N)
Area to be rezoned as General Residential Zone
Operative District Plan Existing Urban Areas
General Residential Zone
Local Centre Zone
Ngārara Development Area
Waikanae North Development Area
S140.01 S164.01
Rezone from General Rural Zone (PREC46 – Rural Dunes Precinct) to Large Lot Residential or Settlement Zone. (Extent inferred from submission.)
S166.01
Rezone part of the site from General Rural Zone (PREC46 – Rural Dunes Precinct) to urban land to allow subdivision.
S032.01
Extend the notified rezoning of 174 – 211 Ngārara Road to include 2 Stetson Rise.
S142.01
Rezone from General Rural Zone (PREC46 – Rural Dunes Precinct) to Large Lot Residential, Settlement or Rural Lifestyle Zone. (Extent inferred from submission.)
S012.01, S063.04
Rezone from General Rural Zone (PREC81 – Waikanae North Environmental Precinct) to General Residential Zone.
S024.01, S058.01, S068.02
Rezone from Waikanae North Development Area to General Residential Zone (with parts rezoned as Residential Intensification Precinct)
S070.16
Reduce the notified rezoning of 112 Ngārara Road and 174-211 Ngārara Road to exclude the National Grid Yard.
Notes and Disclaimers:
1. These maps are intended to illustrate the location and extent of rezoning requested by submitters through their submissions on notified PC2. These maps do not supersede the relief sought through submissions.
2. These maps only show rezonings requested by submitters where the spatial extent can be clearly ascertained or reasonably inferred from the submission.
3. In relation to submissions or areas to be rezoned as part of notified PC2, these maps only illustrate submissions that request changes to the spatial extent of those areas. These maps do not illustrate submissions that support or oppose notified rezonings, but do not request a change in extent.
4. These maps do not illustrate submissions that request changes to the spatial extent of precincts (except where this is requested as part of the rezoning).
5. These maps do not constitute a recommendation or determination on whether submissions are or are not in scope.
6. These maps do not show the rezoning of the General Residential Zone to Medium and High Density Zone sought by Ngārara Ora (S7.02). Refer to the maps contained in Appendix 4 to submission 2122 for the extent of the rezoning sought by this submission.
Boffa Miskell
www.boffamiskell.co.nz
1:15,000 @ A1
KAPITI COAST DISTRICT PLAN CHANGE 2 - INTENSIFICATION
Submissions Requesting Rezoning
Date: 24 February 2023 | Revision: 1
Map 2


Waikanae and Otaihanga
Legend
Submissions requesting rezoning
Extent identified in submission
Extent inferred from submission
Areas to be rezoned as part of PC3(I)
Operative District Plan Existing Urban Areas
General Residential Zone
Local Centre Zone
Town Centre Zone
General Industrial Zone
Ngārara Development Area
Waikanae North Development Area
Notes and disclaimers:
S020.05, S021.05, S028.05, S038.05, S061.06, S074.06, S124.06
Rezone the Waikanae beach Local Centre Zone to General Residential Zone
S200.01
Rezone from General Rural Zone (PREC48 – Rural Dunes Precinct) to General Residential Zone
S208.01
Rezone from General Rural Zone (PREC48 – Rural Dunes Precinct) to General Residential Zone
S180.01
Rezone from General Rural Zone (PREC48 – Rural Dunes Precinct) to General Residential Zone
S023.01
Rezone from Rural Lifestyle Zone to General Residential Zone. (Extent inferred from submission.)
S047.01, S061.01
Rezone from Rural Production Zone (PREC49 – Rural Plains Precinct) to General Residential Zone, with part rezoned as PREC51 – Residential Intensification Precinct A.
S043.03, S053.01, S091.01, S093.01
Rezone from Rural Lifestyle Zone to General Residential Zone
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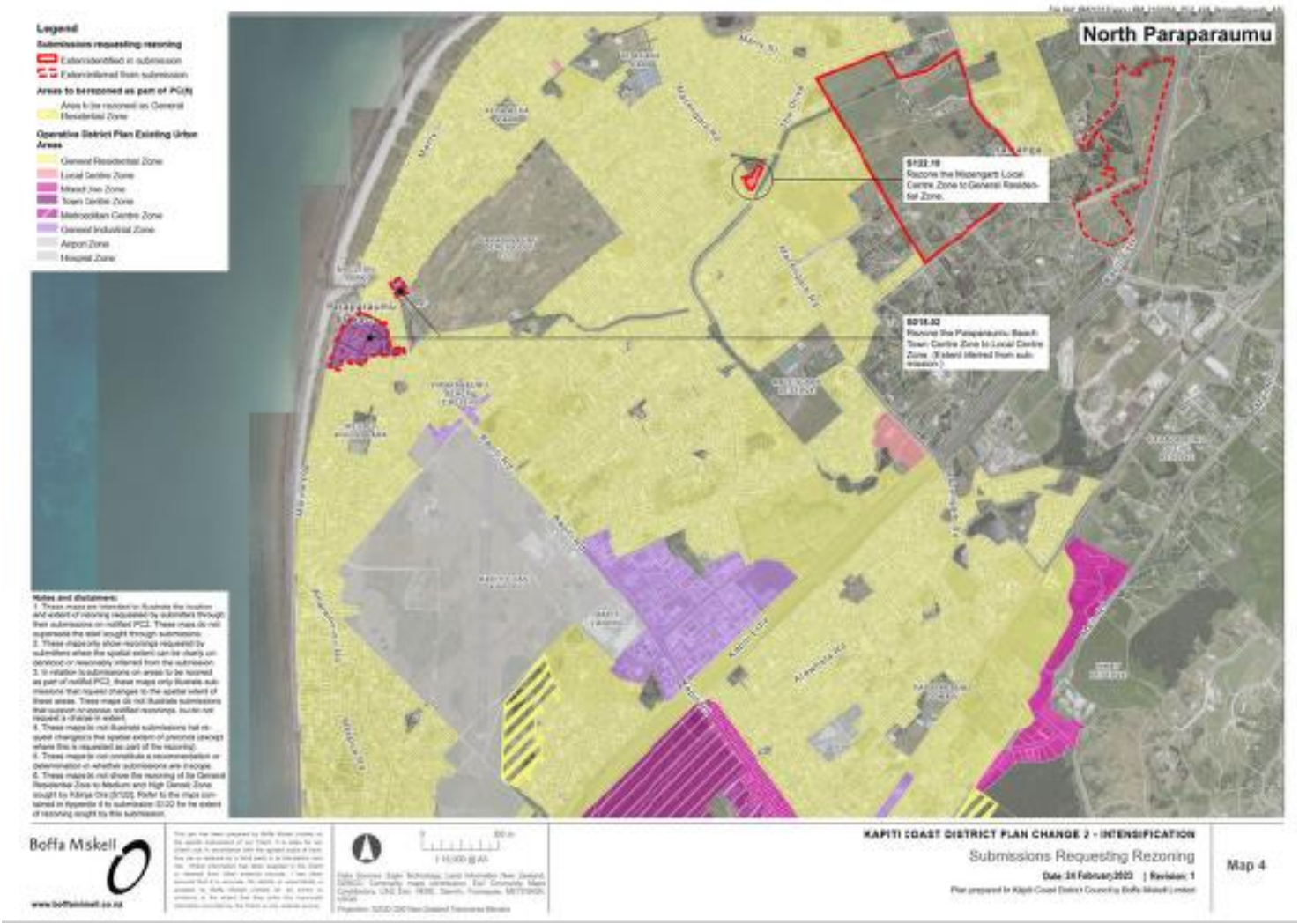
KAPITI COAST DISTRICT PLAN CHANGE 3 - INTENSIFICATION
Submissions Requesting Rezoning
Date: 24 February 2023 | Revision: 1
Map 3


North Paraparaumu
Legend
Submissions requesting rezoning
Extent identified in submission
Extent inferred from submission
Areas to be rezoned as part of PC(3)
Area to be rezoned as General Residential Zone
Operative District Plan Existing Urban Areas
General Residential Zone
Local Centre Zone
Mixed Use Zone
Town Centre Zone
Metropolitan Centre Zone
General Industrial Zone
Airport Zone
Hospital Zone
S122.18
Rezone the Mazengarb Local Centre Zone to General Residential Zone.
S216.02
Rezone the Paraparaumu Beach Town Centre Zone to Local Centre Zone. (Extent inferred from submission.)
Notes and disclaimers:
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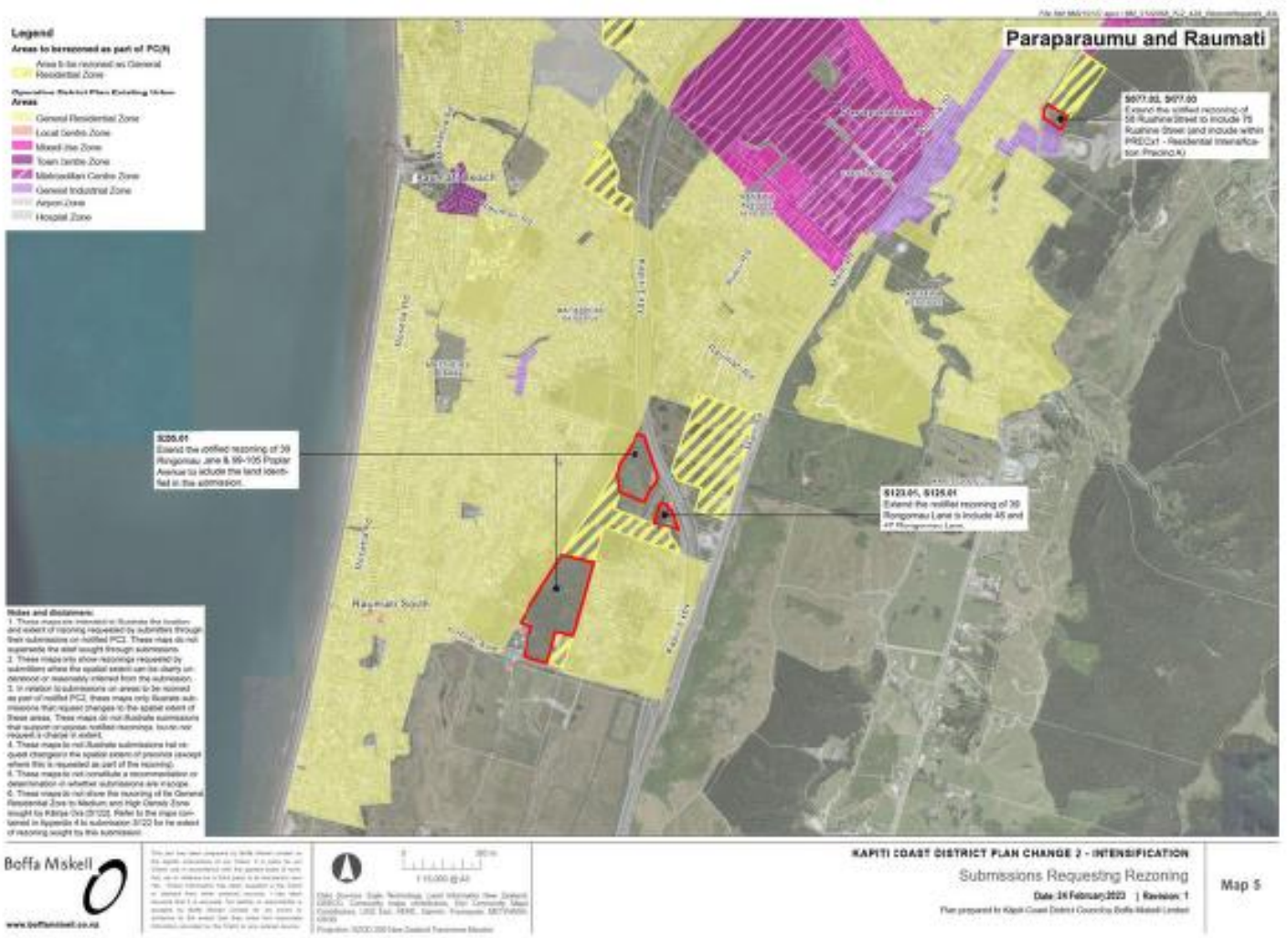
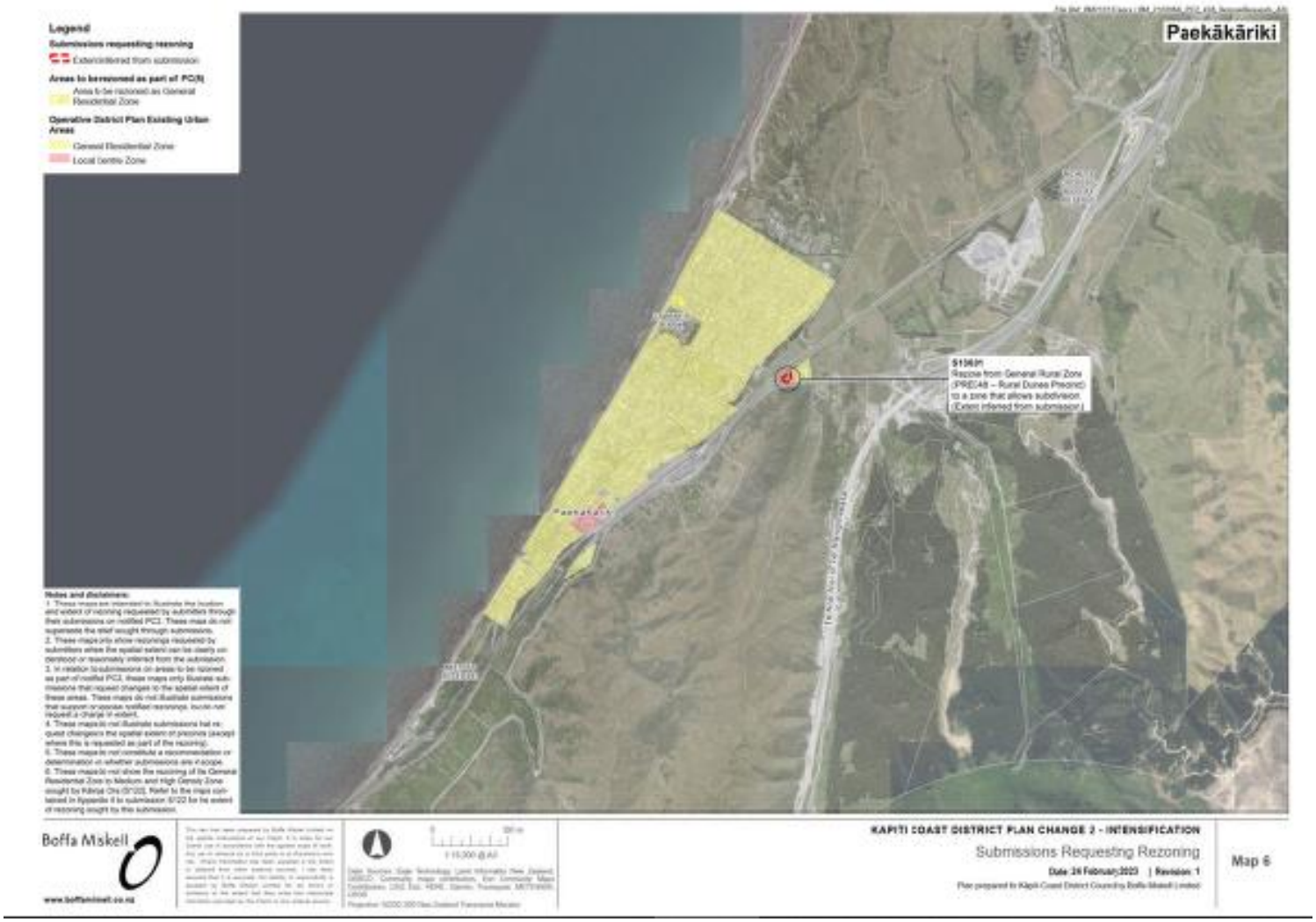
KAPITI COAST DISTRICT PLAN CHANGE 3 - INTENSIFICATION
Submissions Requesting Rezoning
Map 4


Paraparaumu and Raumati
Legend
Areas to be rezoned as part of PC(I)
Area to be rezoned as General Residential Zone
Operative District Plan Existing Urban Areas
General Residential Zone
Local Centre Zone
Mixed Use Zone
Town Centre Zone
Metropolitan Centre Zone
General Industrial Zone
Airport Zone
Hospital Zone
S677.03, S677.03
Extend the notified rezoning of 58 Rushine Street to include 78 Rushine Street (and include within PREC01 - Residential Intensification Precinct).
S200.01
Extend the notified rezoning of 39 Rongomau Lane & 99-105 Poplar Avenue to include the land identified in the submission.
S123.01, S126.01
Extend the notified rezoning of 39 Rongomau Lane to include 45 and
Raumati South
Notes and disclaimers:
Boffa Miskell
www.boffamiskell.co.nz
KAPITI COAST DISTRICT PLAN CHANGE 2 - INTENSIFICATION
Submissions Requesting Rezoning
Date: 24 February 2023 | Revision: 1
Map 5


Paekākāriki
Legend
Submissions requesting rezoning
Extent inferred from submission
Areas to be rezoned as part of PC3
Area to be rezoned as General Residential Zone
Operative District Plan Existing Urban Areas
General Residential Zone
Local Centre Zone
S136/1
Rezone from General Rural Zone (PREC48 – Rural Dunes Precinct) to a zone that allows subdivision
(Extent inferred from submission)
Notes and disclaimers:
Boffa Miskell
www.boffamiskell.co.nz
KAPITI COAST DISTRICT PLAN CHANGE 3 - INTENSIFICATION
Submissions Requesting Rezoning
Date: 28 February 2023 | Revision: 1
Map 6

ĀTIAWA KI WHAKARONGOTAI

Monday, 19 August 2024

Tēnā koutou,

Subject: Support for Plan Change 3 – Kārewarewa Urupā

Te Ātiawa ki Whakarongotai Charitable Trust (the **Trust**) is the mandated authority representing Ātiawa ki Whakarongotai (**Ātiawa**) in response to the proposed Plan Change 3. The primary aim of this plan change is to incorporate Kārewarewa Urupā as a wāhi tapu into Schedule 9 of the Kapiti Coast District Plan.

Located at Waikanae Beach, Kārewarewa Urupā holds significant cultural and historical value for Ātiawa. By designating it as a wāhi tapu in Schedule 9, the plan change will introduce specific provisions to preserve its sanctity and regulate development activities on the site.

The Trust wholeheartedly supports Plan Change 3 as a crucial measure to honour and protect Ātiawa's cultural heritage. We believe this plan change will provide the necessary legal framework to ensure the preservation of this important site for future generations and strengthens the partnership between Kapiti Coast District Council and the Trust.

Ngā mihi,

Dr. Liam McAuliffe
Kairuruku Taiao – Environmental Coordinator
Ātiawa ki Whakarongotai Charitable Trust

NGĀ HAPŪ O ŌTAKI
HE WAKA EKE NOA

20 Ākuhata 2024

Re: Plan Change 3 – Kārewarewa Urupā

Kia ora

Ngā Hapū o Ōtaki extends our full support to the letter submitted by Te Ātiawa ki Whakarongotai Charitable Trust regarding Plan Change 3. We echo their sentiment and emphasize the critical importance of this proposal for the preservation and recognition of Karewarewa Urupā as a wāhi tapu within the Kapiti Coast District Plan.

Karewarewa Urupā, located at Waikanae Beach, is not only of immense cultural and historical significance to Te Ātiawa ki Whakarongotai but also holds deep value for the wider iwi and hapū of the region, including Ngā Hapū o Ōtaki. The designation of this site as a wāhi tapu under Schedule 9 is a necessary step in ensuring that its sanctity is upheld and that development activities in the area are appropriately managed to protect this taonga for future generations.

We believe that Plan Change 3 is a vital measure to honour our shared cultural heritage and to formalize the protection of Karewarewa Urupā. The legal framework proposed through this plan change will strengthen the partnership between the Kapiti Coast District Council and mana whenua, ensuring that the cultural landscape of our rohe is respected and preserved.

Ngā Hapū o Ōtaki stands in solidarity with Te Ātiawa ki Whakarongotai and urges the Kapiti Coast District Council to approve Plan Change 3. We trust that the Council will recognize the significance of this proposal and act in favour of safeguarding our heritage.

Whatungarongaro te tangata toitū te whenua

Nāku iti nei, nā

Denise Hapeta
Chairperson

TE RŪNANGA O TOA RANGATIRA

Ā UPANE KA UPANE WHITI TE RA

20 August 2024

Jason Holland
Jason.Holland@kapiticoast.govt.nz

Tēnā koe Jason,

Kapiti Coast District Plan Change 3 – Kārewarewa Urupā

Thank you for your engagement with Te Rūnanga o Toa Rangatira (Te Rūnanga) regarding the preparation of a change to the Kapiti Coast District Plan to incorporate Kārewarewa Urupā into the District Plan as a Site of Significance to Māori.

Te Rūnanga understands that the purpose of the plan change is to incorporate Kārewarewa urupā into the Sites and Areas of Significance to Māori Schedule in the District Plan as a wāhi tapu. Te Rūnanga acknowledges that Kapiti Coast District Council have previously tried to incorporate Kārewarewa urupā into the District Plan through Plan Change 2, however the High Court decided that this would require a separate plan change.

Kārewarewa urupā is the burial place of tūpuna of Te Ātiawa ki Whakarongotai, Ngāti Raukawa and Ngāti Toa Rangatira. Te Rūnanga acknowledges the history of Kārewarewa urupā and the multiple injustices that have occurred through alienation, removal of the cemetery designation, desecration, dumping of dredged materials, inappropriate development of streets and houses, disturbance of the whenua, exposure of kōiwi, lack of protection, lack of appropriate consultation and the continued efforts being made to further develop on the urupā.

Te Rūnanga acknowledge the grievances that these injustices have caused for Te Ātiawa ki Whakarongotai who have held ahi kā and the mamae that they have endured over such a long period of time through the disturbance and disrespect of tapu, tino rangatiratanga, kaitiakitanga and tikanga. With part of the urupā already being developed and ongoing efforts being made for further development, Kārewarewa needs urgent protection from further damage to the whenua and tapu.

In conclusion, Te Rūnanga support Proposed Plan Change 3 to the Kapiti Coast District Plan and the immediate legal effect for the incorporation of Kārewarewa urupā into the Sites and Areas of Significance Schedule, as well as the values and significance of the urupā for Te Ātiawa ki Whakarongotai.

Ngā mihi

Jarom Hippolite

Team Leader | Te Mana Taiao

Email: jarom.hippolite@ngatitoa.iwi.nz