

**DECISION ON A REVIEW UNDER S 128(1)(C) OF THE RESOURCE MANAGEMENT ACT OF THE CONDITIONS OF CONSENT OF LUC0350/20 WHICH AUTHORISES THE USE OF THE SITE AT 5851 GREAT SOUTH ROAD, NGARUAWĀHIA FOR BULK EARTHWORKS IN THE NEW RESIDENTIAL ZONE.**

Hearing Attended by:

Mr T Gibbons (Thomas Gibbons Law)  
Mr B Glover (Director, Perjuli Developments Ltd)  
Mr T Lester (Planner, Blue Wallace Surveyors)

Professor T Roa (Interpreter)  
Ms H Ruamati (Chair Turangawaewae Trust Board)  
Mr F Nepia (Senior Kaumatua Turangawaewae Marae)  
Ms M Takerei (Turangawaewae Trust Board)  
Ms K Huirama (Ngato Tamaiupo, Objector)

Mr G Eccles (Consultant Planner)  
Mr W Hill (Consents Team Leader)  
Mr K Ridling (Senior Solicitor, Waikato District Council)  
Mrs J Thomas (Senior Consents Administrator)  
Mr S Toka (Iwi and Community Partnership Manager)  
Mrs LM Wainwright (Committee Secretary)

Introduction

1. On 7 April 2020 the Waikato District Council, under delegated authority, granted land use consent to Perjuli Developments Ltd (Perjuli) for a discretionary activity under the Operative District Plan to undertake bulk earthworks in the New Residential Zone at 5851 Great South Road, Ngaruawāhia. The legal description of the site is Section 82 Suburb of Ngaruawāhia South (RT SA84/154) (the Site).
2. The consent authorises Perjuli to undertake approximately 6121 m<sup>2</sup> of bulk earthworks on the Site (the proposal). The earthworks is a prelude to the Site being subdivided and developed for residential purposes as envisaged by the zoning in both the Operative District Plan and the Proposed District Plan (noting the Proposed District Plan is at a relatively early stage with hearings having concluded but decisions not yet delivered). The proposal is Stage 6 of the River Terraces subdivision being undertaken by Perjuli, alongside the Waikato River at Ngaruawāhia.
3. As stated in the application for resource consent, final design levels for any future subdivision are yet to be finalized. Consequently, the Site is to be re-contoured at a bulk earthworks level to form a level site for subdivision development at a future point in time. I was advised an application for subdivision consent was lodged with Waikato District Council in 22 April 2020 but that the application is on hold pending a section 92 request for further information.
4. Mr Lester, planning consultant for the applicant, confirmed that in 90% of cases one might see related applications (earthworks and subdivision) proceed contemporaneously. However, in the present case the application for the bulk earthworks consent has proceeded

in advance of the application for subdivision consent. Mr Glover, director of Perjuli Developments Ltd advised that the reason for this was to reduce the prospect of encountering soil stability issues that occurred with one of the earlier stages of the River Terraces subdivision. I refer to this separation of the consent applications later in this decision.

### The Site

5. The application for the consent contains the following site description:

*The site is located on two defined terrace levels, north facing on the southern side of the Waikato River. It is approximately 2 km to the south east of the commercial center of the Ngaruawāhia Township.*

*The flat terraces are bisected by 6m 19 to 26 degree slope separating the top terrace (south) from the lower-lying north terrace. The slope has a north-west to south-east rotation. Land abutting this site (south east) has been extensively modified by virtue of the consented Stage 1, 2 and 3 of the River Terraces Development. Land use to the west of the site is residential (Croall Place) and is bound to the north by a section of the Waikato River esplanade reserve (Te Awa river walk). A section of Great South Road bounds the Site to the south. The northwestern corner of the property borders a section of reserve land as it constitutes a section of the Waikato River esplanade reserve. The Site has historically been used for agricultural reduction purposes (dry-grazing). The landowner's dwelling is located to the east of the 2.779 ha property, along with a farm implement shed and barn structure. In the short-term future, the site subject to the application will be a continual residential development to the consented stages of the River Terraces development (as currently separated by an unformed) paper road. Access to the property's existing dwelling as from a section of Great South road via an access road via the abutting paper road. The Site contains no water features or other ecologically significant features. Access to the site is via the existing crossing from the unborn section of paper road- with Great South Road."*

6. In addition the site contains several borrow pits, which are visually identified as circular bowl-shaped compressions in the landform.

### Planning Background

7. The Site is in the New Residential Zone of the Operative Waikato District Plan (ODP) and the Residential Zone of the Proposed Waikato District Plan (PDP). As referred, decisions on submissions in respect to the Operative District Plan have yet to be released. In respect to the Operative District Plan the site was rezoned from Rural to New Residential under Plan Change 17 – Ngaruawāhia and Surrounding Villages (PC17).

8. Mr Lester advised that the purpose of PC17 was to provide much needed urban growth relief within the Ngaruawāhia Township in the short to medium term. A deferral of the PC17 process to the Notified Proposed Waikato District Plan was submitted by Hamilton City Council and Waikato Regional Council. However given the level of need for residential land, the Waikato District Council progressed the rezoning in advance of the PDP notification. Mr Lester further advised that PC17 was a robust master planning process and it was prepared "full consideration of the required infrastructure provision that was presented to the DWC

2015-2025 Long-Term Plan.” That last statement apparently is taken from the s 42A report for PC17.

9. Mr Eccles, Council’s consultant planner assisting with present application, also confirmed PC17 followed on from structure plan work on Ngaruawāhia and surrounding villages and proceeded ahead of the proposed District Plan because of the building development pressures. Council was concerned that unless earlier provision was made for residential development, it would be faced with a series of private plan change requests. Accordingly PC17 was notified in April 2016. Hearing of submissions occurred in October of that year and a decision released on 11 November 2016. There were no appeals in respect of the decision and PC17 was then made operative in February 2017. It applied the New Residential Zone to the Site and to the land that now forms part of the completed River Terraces subdivisions stages 1-5.
10. The application for consent included a letter from the Turangawaewae Board of Trustees (TBT) dated November 7 2019. This letter is addressed to Mr Craig Blackmore, Chief financial officer of Perrys. It acknowledges an on-site meeting held in respect of the proposed subdivision and includes a series of comments, recommendations and conditions, which if adhered to, would satisfy the TBT in relation to the River Terraces Stage 6 proposed subdivision. The letter advises that the proposed subdivision is “well within the area of responsibility of Turangawaewae board of Trustees.” TBT is mindful that the Council has identified several areas in Ngaruawāhia’s territory for allowing growth projects for the region and TBT’s main interest is to ensure matters significant to TBT are in line with specified sections identified in the Waikato Tainui Iwi Environment Management Plan. Reference is made to a Cultural Impact Assessment Report (CIA) completed by TBT in relation to the earlier stages of the River Terraces subdivision with TBT maintaining the specific recommendations in that document. Reference is also made to maximum protection of Te Awa O Waikato (Waikato River) with TBT maintaining that identified sections of the Waikato Tainui Iwi Management Plan should be adhered to in implementing the application where applicable. The letter then includes four conditions of the TBT approval and concludes that provided those recommendations and conditions stated in the Section 42A report are adhered to then “Turangawaewae Board of Trustees at this stage have no other obvious concerns for River Terraces Stage 6.”
11. It would appear this letter addresses the proposed subdivision but also makes reference to the need for a proposed earthworks, storm water, settlement control devices and other associated works to be implemented within the guidelines set by local and regional authorities. While it does not refer to the bulk earthworks specifically, that is not surprising given the formal earthworks application is dated December 15 2020, six weeks after the TBT letter. However, it is apparent that TBT was then satisfied for Stage 6 to proceed on the terms described in its letter.

Archaeological Authority under Heritage New Zealand Pouhere Taonga Act 2014

12. In addition to seeking bulk earthworks consent, Perjuli applied to Heritage New Zealand Pouhere Taonga (HNZ) for an archeological authority (the Authority) in respect of the two NZAA sites, S14/110, being charcoal remnants, and S14/373, being borrow pits/wider horticultural landscapes. The application and decision of HNZ is under a different statute

and not relevant to the decision on the present review. However the application for the Authority includes some descriptive material as to the Perjuli earthworks and the Site archeology affected by those proposed earthworks. The application includes the following statements:

*Due consideration has been given to preserving any suitable borrow pits on this site. The actual site been extensively farmed over a number of decades with borrow pits being reshaped, physically exculpated, bulldozed or filled with rubbish/fill etc and are generally no longer anything like their original shape. We also sought advice as regards other sites in the area and are advised that numerous pits in a better state have already been preserved relating to these types of cultivation activities in the surrounding area. In particular we have reviewed the adjacent golf course that has sites evident in good condition.*

*As per the draft scheme plan provided the subdivision is a comprehensive and fairly dense development as allowed under the District Plan. Any existing pits that may have had any preservation value would be difficult to locate in the present area other than that which would be surrounded by dwellings. Therefore any sites would not be very suitable for viewing or visitation and difficult to access. Also when parties were consulted the ownership and maintenance of any site was an additional problem where no one wanted responsibility. Discussion and agreement with Turangawaewae representative has been reached to provide a signboard located on site with information and photos of the cultivating history of the area including borrow pits due to the limited benefit in retaining any site. Consultation with Tu Tangata Trust is ongoing, working on creating a link in this area and the river up to the Puke-i-aahua Pa.*

13. Accompanying the request for the Authority is an Archaeological Site Management Plan dated January 2020 and an Archaeological assessment of effects dated January 2019, in each case prepared by W. Gumbley Limited, archaeologists.
14. In the event, Heritage New Zealand Pouhere Taonga granted the application for the Authority on 25 March 2020. The Authority is subject to a number of conditions regulating the undertaking of the works including a requirement at condition six that any that any archaeological work must be undertaken in conformity with any Tikanga Maori protocols agreed by the authority holder and the Turangawaewae Trust and the Ngaruawāhia Trust. Condition six advises that it is not a statement of mana whenua status.
15. The Gumbley January 2019 report contains a detailed description of the land formation of the Waikato and reference to pre-European Maori sites. It states that Maori-made soils are characterized by addition of transported alluvium quarried from borrow pits and the largest concentration of such soils is found in the inland Waikato. In the Waikato pre-European Maori garden sites are identified by two defining features; the presence of borrow pits, and soils heavily modified by the addition of sand and gravel; as well as charcoal. The borrow pits are near circular depressions usually between one and six meters deep and often 100-300 m<sup>2</sup>.
16. In the middle Waikato basin, pre-European Maori garden complexes are concentrated along the Waikato River from Arapuni to Taupiri, in areas on the Horotiu Plain and along the margins of the Waipa River and its triggers the gardens were extensive with Gumbley

indicating over 3000 ha of these gardens in the inland Waikato, giving some understanding of the importance of these sites to Tangata Whenua.

17. The January 2019 report addresses Archeological S14/110 and S14/373 on the application site. Reference is made also to adjacent sites of interest forming further parts of the Maori horticulture landscape, with identified made soils. Gumbley states: (at 3.4)

*It can reasonably be assumed that the horticulture sites in the immediate area that surround the Puke-i-āhua Pā Site would have had a functional connection to the Pā and its inhabitants.*

18. The information in the report appears to be based on a desktop survey, including in respect of the subject Site. S14/110 was disturbed some years ago when the owner was forming a track from the upper terrace to the lower terrace. S14/373 was recorded as part of the desktop site recording exercise carried out by Simmons and Associates on behalf of the Waikato District Council in 2016. Here the site was recoded as a cluster of six borrow pits within Allotment 82. It is one of a dense cluster of similar sites recorded in the area. Altogether approximately 200 borrow pits were identified within the wider local site complex. Gumbley considers S14/110 and S14/373 to be part of a larger complex of archaeological sites adjacent to the Waikato River. Gumbley also makes an assessment against the Waikato Regional Policy Statement and under the Archeological Quality 'Amenity or Education' includes the following statement:

*Selected preservation interpretation potentially have high amenity or education value, in terms of recognizing and understanding this former way of life.*

19. The report is clear in several places that it is not assessing cultural associations, which is a matter for Tangata Whenua. From an archaeological perspective, the report's conclusions and recommendations include a statement that the adverse effects to the archeology are mitigated through archeological investigation to record the physical remains of the identified sites.
20. That recommendation flows through into the Archaeological Site Management Plan and the Heritage New Zealand Authority granted in March 2020.
21. While the Authority granted by HNZ has no direct bearing on the present matter, the Gumbley 2019 report's description of the archaeological sites on the Site and in the wider Waikato area has some limited useful basis, bearing in mind its desktop nature and also that Mr Gumbley has not given evidence at this hearing

#### Review under s128 RMA

22. Section 128 RMA identifies the circumstances when consent conditions can be reviewed. In this case the review is made pursuant to s128 (1)(c) of the Resource Management Act 1991 on the grounds set out in the statutory notice dated 31 July 2020. Following the grant of the non-notified resource consent for the earthworks Council received an email from the representative of Ngāti Tamainupō advising that the Hapū had been working with the Perjuli in relation to the development of the site. The Hapū had had several meetings and were of the understanding the discussions were ongoing but earthworks had commenced at the site, without consultation. Also provided was a letter dated 19 March 2020 from Ngāti Tamainupō to a representative of the applicant confirming the borrow pits located on

the site and the Hapū's opposition to any plans to destroy the pits. TBT also supported Ngāti Tamainupō, citing a general lack of engagement as being the primary concern.

23. The application documentation was considered to be deficient for the reasons stated in the notice. Council invited Perjuli to provide new conditions in relation to the consent and initiated the present review under s128 (1)(c) of the act. Limited notification of the review occurred and submissions received from four parties being Perjuli Developments Ltd, V and M Prendergast, Turangawaewae Trust Board and Ngāti Tamainupō.

24. Section 131 RMA specified the matters to be considered in reviewing the conditions of the consent. With particular relevance is s131(1)(a) which provides that the consent authority shall have regard to the matters in s104 and to whether the activity allowed by the consent will continue to be viable after the change. Section 132 of the act addresses decisions on review of consent conditions, subsection (1) of which empowers a consent authority to change the conditions of a resource consent (other than any conditions as to the duration of the consent) on a review under s128 if, and only if, one or more of the circumstances specified in that section applies. A consent authority may also cancel a resource consent pursuant to s.132 (3) if it;

(a) reviews the consent under s 128(1)(c); and

(b) the application for the consent contained inaccuracies that the consent authority considers materially influenced the decision made on the application; and

(c) there are significant adverse effects on the environment resulting from the exercise of the consent.

25. The Waikato District Council Section 42A report prepared in respect of the original application assessed a range of adverse environmental effects and all relevant statutory matters. The present review is confined to cultural/archeological aspects. In all other respects the earlier Section 42A assessment is accepted.

#### The Submissions and Evidence

##### Vivian and Maureen Prendergast

26. Mr and Mrs Prendergast live at 5851 Great South Road and were vendors of the Site. The sale and purchase is now settled and Perjuli is the new owner. It is understood that the sale and purchase arrangement involves Mr and Mrs Prendergast obtaining a new title for their house site, as part of the wider subdivision for Stage 6. They understandably wish the Stage 6 subdivision to proceed.

##### Perjuli Developments Ltd

27. The Perjuli submission is detailed. While the submission expresses disagreement with Council's decision to review the consent conditions and to limit notify the review, counsel

for Perjuli, Mr Gibbons, advised the focus of his client's submission was on the appropriate consent conditions for the consent, not on any other issues of Council's process.<sup>1</sup>

28. Mr Gibbons pointed out that the Section 42A Report identifies that the review is confined to cultural/archeological effects. He referred section 6.0 of the Section 42A report, which contains a summary of assessment of effects under s 104(1)(a) of the RMA and identifies at 6.2 that submissions of cultural effects have been received both from Turangawaewae Trust Board and Ngāti Tamainupō.
29. Addressing the position of Ngāti Tamainupō to the effect that no further residential development should be allowed to occur on this site or within the vicinity, Perjuli agrees with the Section 42A report that this would "effectively sterilize the site from its zoned residential use", as well as representing an inefficient use of the site. The zoning has been through a public planning process and determined appropriate for residential development. Any approach, which frustrates the zoning or sterilizes the site from its most suitable use, does not in Mr Gibbon's submission reflect good resource management practice, and any consent conditions which leave the site undevelopable are untenable in light of the *Newbury* principles.
30. In support of his submission Mr Gibbons referred to the decision of the Environment Court in *Ngāti Pukenga ki Pakikaitutu v Heritage NZ Pouhere Taonga*,<sup>2</sup> a case that concerned an appeal under the Heritage NZ Pouhere Taonga Act 2014, not the RMA. It involved an appeal against an Authority issued by HNZ to modify or destroy two archaeological sites (midden) enabling land to be developed for residential purposes. HNZ granted the Authority which authorized the holder to build a residential dwelling, driveway and services on the property at Tamaterau, Whangarei on relative standard conditions similar to those that apply to the Authority obtained by Perjuli in the present case.
31. The appeal against HNZ's decision sought that an effort should be made to preserve the site, that is, reinstate the midden and leave it alone. The Environment Court recognised the site as one of significance to the appellants and the Tamaterau area. The primary issue it needed to determine was the significance of the site and middens, whether this site included an archaeological platform, and whether it was appropriate to confirm the Authority to destroy the two middens located on it. While the Court was considering the matter under the HNZPTA, it did note that the Act did not limit its powers of the Environment Court under the Resource Management Act 1991. That said its determination was one in light of the purposes and principles of the Historic Places legislation.
32. The decision very much turns on its own facts, as one would expect. The Ngātiwai Trust Board advised that it had no objection to the proposed building on the site, whereas Mr Palata for the appellant expressed strong opposition to the proposal. In that context, Mr Gibbons refers to paragraphs of the decision where the Court bears in mind the 1996 subdivision consent authorised the creation of seven separate lots, and subsequent 1999 subdivision consent authorised four further lots. Subsequently development of the land

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<sup>1</sup> Legal Submissions Mr Gibbons, para [8].

<sup>2</sup> [2019] NZEnvC 101 at [67] and [70]

surrounding the site had occurred with the result the area has an appearance of a distinctly residential enclave, albeit once set against rural backdrops. The Court in the second paragraph referred by Mr Gibbons, addressed the relationship of Maori and the Site and wider Tamaterau area and had some sympathy for the appellants' view that the heritage values of the rich and wider Tamaterau area were being gradually eroded. It did not, however, consider that the middens at issue in that case were of such historical or cultural heritage value as to prevent the reasonable use of the Site for the lawful purposes enabled by the 1996 subdivision.

33. Obviously the case turned very much on its own facts and is a decision under a different statute. Mr Gibbon's short point is that the result should not inhibit the otherwise lawful use of the Site for its zoned purpose. He further suggested that Ngāti Tamainupō's underlying wishes and concerns "simply cannot be addressed through the consent review process, which is necessarily constrained by s128-133 of the RMA". I take that submission to be directed in part at least, at the Ngāti Tamainupō desire that some other non-residential use, possible gardens, might be found for the land. I accept that on a review such as this that that outcome could not be achieved under the relevant RMA provisions.
34. In response to the respective views and submissions of Ngāti Tamainupō and TBT, Perjuli has proposed amended consent conditions beyond those set out in the consent as granted. They can be summarized as providing:
  - (a) For the protection of one borrow pit in perpetuity, by means of a protective covenant;
  - (b) a provision for broader notification of parties on the discovery of any archaeological artifacts.
35. Perjuli noted that the protection of the borrow pits in perpetuity is supported in the submissions of the TBT, and in the evidence of Mamae Tuanewa Takerei Te Rauangaanga.
36. Perjuli conclude that the amended conditions will address the points raised by almost all submitters and the section 42A report reflects sound resource management practice, in accord with the relevant planning frameworks and the RMA.
37. Perjuli called two witnesses, Brendon Glover a director of the company and project director/manager of the River Terraces Project since Stage 2, and Tim Lester, environmental resource management planner.
38. Mr Glover advised there had been approximately 217 titles created in the overall River Terraces Development each with a house (or the potential for a house although very few sites remain vacant). He made the point that every dwelling that has been built through each of the five Stages provides a home which helps to meet the needs of the Ngāruawāhia community. He advised that Perjuli had settled on the purchase and for the sole purpose of residential subdivision. He considered PC17 went through a full and robust RMA process, including the ability for participation by groups with a relevant interest in site.



39. Mr Glover in particular addressed engagement with iwi in the context of the present consent. He provided a schedule listing by date the liaison that has occurred with each stage of the River Terraces subdivision. It is clear from his evidence and the timeline that Mr Glover provided, that there had been meetings on site, discussion around the new stage, the site archaeology, borrow pits, and a possible link from the pā site down to the river, together with related correspondence between the parties.
40. Mr Lester provided a context for the application and the previous consented stages of the River Terraces subdivisions and development. He described the application process for the earthworks consent as a routine application in that wider context. Mr Lester provided detail in relation to the PC17 process, linking it to the master planning process that preceded the plan change and referred to the linkage with the required infrastructure provision in the WDC 2015-2025 Long-term Plan. These matters were, he advised, addressed in the section 42A report for PC17. No-one has disputed Mr Lester's account, which I accept as an accurate summary of the history of PC17. In that context he advises that the PC17 s42A report makes specific mention of iwi consultation and no identification of cultural significance was made in specific regard to 5851 Great South Road.
41. Mr Lester then addressed in detail the proposed amendments to the conditions of consent referred by Mr Gibbons earlier. They include in particular the use of a covenant to ensure protection of one of the borrow pits towards the northern end of the site and extending the notice requirements in respect of archeological matters to all parties who were notified of this review. In respect of the proposed covenant area for the borrow pit, Mr Eccles queried in his s.42A report whether it's extent was appropriate or had been adequately defined. In response Mr Lester produced a survey plan showing the covenant area set one meter back from the edge of the borrow pit.

#### Turangawaewae Board of Trustees

42. The TBT made a detailed and careful submission addressing the purposes of the Board and in particular its extensive representation of mana whenua in its area relating to resource management matters over a long period of time. In this role it has been engaged in a large number of significant projects in the Waikato District including numerous subdivision applications in the wider Ngaruawāhia area. In relation to the current project the TBT submission outlines its active involvement in and understanding of the River Terraces project since 2013 when Stage 1 of the project commenced. It gave a letter of conditional support to the application. However and as referred earlier Ms Hinerangi Raumati as Chair of the TBT, later wrote expressing certain concerns the Board had and supporting the action of Ngāti Tamainupō ki Whaingaroa.
43. TBT was represented at the hearing by Ms Raumati, Mr F Nepia, Senior Kaumatua Turangawaewae Marae, Mr D Ngataki, Support to the Board, and Ms Mamae Tuanewa Takerei Te Ruaangaanga of the Board. Ms Takerei presented the main evidence for the TBT. Her waka is Tainui, iwi is Waikato, hapū Ngaati Tamaoho, Ngati Mahuta and Ngaati Hako. Ms Takerei described her extended tribal affiliations and whakapapa. She has many years of involvement with and contributions to, the community and significant knowledge of Tuurangawaewae and Kingitanga whakapapa, tikanga and their iwi history of occupation and resource use within the site and wider Naruawāhia areas.

44. Ms Takerei in her written and oral evidence advised that an important part of her role has been to act as mediator and that TBT's main interest in the project has been to ensure that matters significant to the TBT are amicably dealt with and align with specific sections of the Waikato Tainui Iwi Management Plan. TBT she advised is the appropriate authority to engage with in relation to the project and has responsibility for kaitiakitanga over its rohe.
45. Ms Takerei addressed who has mana whenua in the area subject to the project. Her evidence is that Ngaati Mahuta is the exclusive hapū with customary interest in the Ngaruawāhia area, including the Site; thus Ngaati Mahuta has mana whenua over the Site area and will be directly affected by the project. Ngaati Mahuta-Waikato is represented by the TBT as it relates to resource management matters in the Ngaruawāhia area.
46. Ms Takerei addressed tikanga associated with the Site, explaining that the Site is not a known wahi tapu area. That is not to say that the borrow pits are not an important part of their history but the tikanga relating to them does not mean that they are wahi tapu.
47. Ms Takerei said that the Site area is privately owned and part of the wider River Terraces Project. She does not consider it appropriate that Turangawaewae, or any other group, to stand in the way of development of the Site, which should be allowed to proceed. She regarded the Perjuli offer to covenant a borrow pit to be positive for all parties involved. It allowed Perjuli to continue with the project while also acknowledging the cultural position that Ngatai Tamainupō has raised with the project. In terms of how the matter was managed, however, Ms Takerei was clear in her view that Perjuli and any other party was encouraged to engage with Turangawaewae as a starting point as the authority who represents mana whenua in the project area.
48. Representatives of the TBT also gave examples of other borrow pits in their rohe that had been the subject of protective covenant arrangements.

#### Ngāti Tamainupō

49. Ngati Tamainupō's written submission states "We object completely to the decision to grant consent based on the destruction of taonga tukulho associated with Pukeiāhua Pā, which has outstanding cultural, archeological and historical significance."
50. The submission advises that Nga Uri O Tamainupō Ki Whaingaroa Trust is the mandated entity for the hapū of Ngati Tamainupō, which is one of the 33 iwi/hapū in the Waikato District who have mana whenua status as part of the Nga Iwi o Tainui. Ngati Tamainupō recognizes Puke-i-ahua Pā in Ngaruawhaia, including the associated mara kai, as taonga tukuiho with outstanding cultural significance to the hapū dating back to the 1700s. According to hapū research, there were approximately 140 pits connected to the Pā and only 7 remain today. Those pits are located on the Site.
51. Ms Kimai Huirama spoke to the Ngāti Tamainupō submission and commenced with details of their wakapapa back to the 1700's, which in her words "defines who we are as a hapū". She referred also to 2 hui convened in March 2009 at the Turangawaewae Marae and

attended by Ngāti Tamainupō and many other iwi at which the mana of the participants was acknowledged.

52. Ms Huirama spoke of the Pouwhenua o Tamainupō as extending from Huntly in the North, Raglan in the west, Ohaupo in the south and Hamilton to the east. This area includes Ngaruawāhia. She said that many mana whenua sit within their Pou and that was not unusual. However, she maintained that only Ngāti Tamainupō can speak for Ngāti Tamainupō. Others speak for their interests.
53. Ms Huirama maintained other speakers had spoken of the borrow pits, but devoid of history and narrative. Mr Huirama said the point of difference is the cultural significance it gives to Pukeiahua Pā. The gardens were part of the Pā. They sustained a thriving community. The Pā was significant in size and prominent. Following a feast in the 1700's, it gave its name to Ngaruawāhia. The Site and pits are the last remnants of their ancient gardens from that time. The remnants are 300 years old. Ms Huirama said that while others see depressions in the grounds, they tell them that their ancestors gardened there extensively. This she illustrated by reference an aerial photograph (which I understand is taken from an archaeological report) identifying extensive borrow pits locality, all of which she advised are now gone, except the 7 remaining on the Site. Hence they have increased significance to iwi due to their rarity and proximity to the Pā. Ms Huirama identified the top part of the Site (which I understand to be the upper terrace) as part of the Pā.
54. Ms Huirama mentioned an application to Heritage NZ to upgrade the schedule for the Pā to include the wider landscape. However, no corroborating information was provided on that aspect.
55. At a wider level, Ms Huirama advised that Tamainupō is seeking urgent Government and WDC intervention to buy the land at 5851 Great South Road, once part of the Pā. While discussion around the borrow pits provides background, that is not the focus of Tamainupō's decisions, which are more broadly focused on returning the land that was once part of Pukeiahua Pā landscape.
56. As regards the application for earthworks consent, Ms Huirama described the meetings, discussions and communication Tamainupō had with Perjuli prior to the application for consent being lodged with the Council, which lead ultimately to Tamainupō advising that it opposed completely the destruction of the borrow pits on the Site. Tamainupō assumed they would continue to be involved in the consent process. However, when the application was lodged with the Council it failed to mention Tamainupō. Ms Huirama said this was as if they didn't exist. There was no mention in the application of the engagement with Tamainupō that had occurred prior to lodgment of the application. Tamainupō were appearing at this hearing to talk about the consultation timelines and how their matanga was excluded from the consent process.

#### Discussion and Assessment

57. It is noted that some matters raised in the course of hearing extend well beyond the scope of the present s 128 review of the earthworks consent. Ngāti Tamainupō's signaled desire

to own the property is one example, although there are others including any steps Tamainupō may be taking under the Historic Places legislation.

58. The residential zoning of the site is settled by PC17. There has been no mention of any submission on the PDP seeking to change the residential zoning, all though there is I understand a submission seeking for protection of the borrow pits, again subject to future decision.
59. The range of activities provided for in the New Residential zone is quite focused, with housing the most likely activity. In that regard there was no challenge to the evidence of Perjuli as to the need for housing and history of PC17 in that context.
60. Critically the earthworks consent is itself a pre cursor to a subdivision application lodged with the Counsel and is yet to be advanced. There may also be other consent applications, for example to the Regional Council. The earthworks consent itself is for bulk earthworks, which will later be “refined” once the details of the subdivision consent is known.
61. In my view, this is a case (with the benefit of hindsight) where there would have been considerable advantage in all the necessary consent applications being considered at same time. One illustration of that is that the bulk earthworks (in conjunction with the HNZ Approval) enable in the destruction of the borrow pits (or five of them allowing for Perjuli’s offer to protect one pit) before the Council considers the subdivision application. Any opportunity for it to consider alternative subdivision designs (beyond the covenanting of a single borrow pit) in recognition of iwi concerns regarding the pits and cultured landscape, is effectively lost.
62. While I was advised of an indicative road alignment and the site sizes provided for in the New Residential Zone in the ODP, that may not preclude additional flexibility in subdivision design in an appropriate case.
63. Key issues include:
  1. What is the correct approach to the different iwi views expressed at the hearing by TBT and Tamainupō;
  2. Are the iwi issues addressed satisfactorily by the conditions of consent for the bulk earthworks?
  3. Are there likely to be significant adverse effects if the bulk earthworks consent is confirmed, with amendments as proposed by Perjuli?

*First Issue - Correct Approach to Iwi Evidence*

64. The High Court in a recent decision *Ngāti Maia Trust v Ngāti Whātua Orākei Whaia Maia*<sup>3</sup> was required to consider questions relating to mana whenua status and the responsibilities

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<sup>3</sup> [2020] NZHC 2768

of consent authorities particularly in the context of the competing iwi evidence. The High Court concluded:

- (a) The Environment Court does not have the jurisdiction under Part 2 confirm or declare over tikanga based rights, powers and/or authority;
- (b) The Environment Court may make evidential findings about tikanga based rights, powers and/or authority in so far that is relevant to discharge the RMA's obligations to Māori;
- (c) The Court declined to determine whether any tribe may hold 'primary Mana Whenua' in the absence of full argument and evidence in relevance to its decision-making exercise.

65. The High Court's decision includes an overview of the legislative and planning context of the RMA. Relevantly the Court decided that when making resource management decisions, consent authorities are not engaged at Part 2 of the RMA in the process of conferring, declaring or affirming tikanga-based rights, powers or authority whether in State law of tikanga Māori. Similarly, Part 2 does not enable decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that the resource management decision-makers are to be engaged in such decision making. That jurisdiction to declare and affirm tikanga-based rights in State law rests with the High Court and/or Māori Land Court.
66. Nevertheless, the Court stated that the Environment Court (and by implication, consent authorities) is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties. The Court stated that where iwi claim that a particular outcome is required to meet those statutory directions in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations. This may involve evidential findings in respect to the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties.
67. The Court gave an example by reference to s7(a) dealing with kaitiakitanga. The Court said, as the RMA anticipates there will be occasions when there are overlapping iwi interests in the same whenua. Nevertheless, s7(a) directs that regard must be given to their respective kaitiakitanga. Where the views of those iwi diverge as to the responsibilities of kaitiaki a decision may need to be made as to which those views need to apply to that particular application and that may involve evidential findings as to what the iwi consider is required in tikanga Māori.
68. The Court also noted the need for caution when making these types of assessments.<sup>4</sup> However the statutory obligations to recognize and provide for the relationship of Māori and their cultural traditions with their whenua and taonga, to have regard to the kaitiakitanga and to take into account the principles of the Treaty of Waitangi, does not

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<sup>4</sup> Para [72] and [73]

permit indifference to the tikanga-based claims of iwi to a particular resource management outcome.

69. The Court explained that when exercising functions under the RMA:

*'The Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet that statutory directions at ss6(e), (g), 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA.'*

70. In the present case, TBT and Tamainupō each claim an interest in the site and that in itself is not unusual. It is recognized by the High Court there will be occasions where there are overlapping iwi interests in the same whenua.

71. TBT and Ms Takerei maintained quite forcefully that they were mana whenua for the wider area. TBT's mana whenua status is not in dispute. Tamainupō has also established their whakapapa. I note also that TBT supported Tamainupō when it became clear the Tamainupō views had not been communicated to the Council with the application for consent. That indicates TBT does recognize that Tamainupō has a legitimate role in expressing its view on the application for consent.

72. TBT and Tamainupō have different views as to what level of recognition is appropriate in respect of the iwi values each associates with the Site. TBT stated that the borrows pits are not wahi tapu. Accordingly TBT consider the proposal can proceed on the original conditions of consent supplemented by those offered by Perjuli, including protection of the borrow pit. Tamainupō did not claim that the borrow pits themselves were a wahi tapu, but said the Site itself is regarded as a taonga. The result is that while TBT see no conflict between the proposal as advanced and iwi issues, Tamainupō regard the land as a taonga tukuiho with outstanding cultural significance to the hapu.

73. In short, the proposal addresses the iwi issues as far as TBT is concerned, but fails to recognize appropriately the values Tamainupō associate with the Site through its historical connection with the Puke-i-aahua Pa. Put differently, while TBT have mana whenua over a large area including this locality, Tamainupō also have a role in this particular case, as TBT itself recognized given its support for Tamainupō views being communicated to Council in relation to the original application for consent.

74. It follows the views of Tamainupō should also be recognized in the context of this decision.

*Second Issue – Are the iwi issues addressed satisfactory by the conditions of consent for the bulk earthworks?*

75. Neither TBT nor Tamainupō presented their cases specifically referenced to the sections of the RMA requiring attention to Māori matters. Nevertheless, the evidence bears on ss6(e), 7(a) and (aa) in particular.

76. From the perspective of TBT there are no cultural issues of concern not addressed by the proposal conditions of consent. However the evidence from Tamainupō recognizes Puke-i-aahua Pā included the associated former gardens as a taonga. Tamainupō regard the bulk earthworks as inconsistent with that status, even with the amended conditions.

*Third Issue – Whether there would be significant adverse effects on the environment resulting from the exercise of that consent.*

77. The bulk earthworks will destroy all the borrow pits except for one. I conclude that the proposal by Perjuli to covenant the one borrow pit towards the northern end of the site does not sufficiently recognize the values Tamainupō attribute to the Site. A setback of one meter around a single borrow pit and modification of the balance site, involving loss of the remaining borrow pits, is a significant adverse effect in terms of the values attributed to the land by Tamainupō.

78. The land is, however, zoned for residential use. Fuller recognition of the iwi values attributed to the land, alongside its residential use, warrants more detailed consideration. That is not possible in the context of a bulk earthworks application on its own, without also considering the possible form and layout of the land in the context of the subdivision application and associated residential development. Neither is it open for consideration in the context of the current review of consent conditions in respect of the bulk earthworks consent.

### **Decision**

79. The resource consent LUC0350/20 is cancelled pursuant to S.132(3) of the Resource Management Act 1991 because:

- (a) The consent is reviewed under s 128(1)(c);
- (b) The application for consent omitted to include the results of discussion and consultation with Ngāti Tamainupō, those views being material to the decision;
- (c) The bulk earthworks consent, even with the modifications to the consent conditions proposed by Perjuli, does not recognize and provide for the relationship of Ngāti Tamainupō with the Site in terms of s 6(e) and s 7(a) of the Act in particular.

Date: 23 February 2021



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Commissioner J M Savage