BEFORE THE Waikato District Council Hearing Commissioners

UNDER the Resource Management Act 1991

IN THE MATTER of the Proposed Waikato District Plan

LEGAL SUBMISSIONS ON BEHALF OF WAIKATO-TAINUI – HEARING 4: TANGATA WHENUA, WHAANGA COAST AND MAAORI FREEHOLD LAND

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INTRODUCTION & POSITION

1. These legal submissions on the Tangata Whenua Chapter (**Chapter 2**) are made on behalf of Waikato-Tainui.

2. They are supported by technical planning evidence of Mr Gavin Donald. The Panel will also receive presentations from Ms Marae Tukere (General Manager, Development and Wellbeing at Waikato-Tainui) and Mr Donald.

3. Waikato-Tainui is committed to the Waikato District Plan review process, to ensure positive outcomes for Waikato-Tainui and the community in general.

4. However, Waikato-Tainui are concerned that important matters have not been considered in the Chapter 2 S42A report. Those concerns, and proposed solutions to address them, form the basis of these submissions

PURPOSE & APPLICATION OF TANGATA WHENUA MATTERS

5. Waikato Tainui is of the view that the current defects in Chapter 2 stem from confusion in the Section 42A Reports prepared to date regarding the purpose and application of Chapter 2. This has led to inconsistent recommendations in relation to key tangata whenua matters.

6. By way of example:

   (a) The Chapter 1 Section 42A Report states that "The purpose of Chapter 2: Tangata Whenua is to provide background and better understanding of Maaori

issues. It describes the legislative context, outlining the obligations of councils under the RMA. It then lists the key principles of Te Tiriti o Waitangi."[1]

(b) The Chapter 2 Section 42A Report states that the purpose of Chapter 2 is "to present objectives and policies for tangata whenua management and planning for their land, with special emphasis on enabling Maaori land use".[2]

7. As a consequence, recommended amendments in the Chapter 1 Section 42A Report (which suggest relocation of details of 'Māori Values of Importance'[3] to Chapter 2) are not reflected in the Chapter 2 Section 42A Report.[4]

8. The result for Chapter 2 is a chapter that:

(a) stands in isolation from the remainder of the plan;

(b) lacks any linkages to, or visibility in, other parts of the Proposed Plan; and

(c) poses a material risk:

(i) that matters of importance to iwi may be inadvertently removed from the Proposed District Plan (**Proposed Plan**); and

(ii) of misrepresenting that the matters raised in the chapter only apply to sites of significance to Maaori and Maaori freehold and customary land, rather than across the entire Plan.

9. The Section 42A Report authors' positions can be reconciled. The matters in both 6(a) and (b) properly fall within Chapter 2. However, to improve visibility of tangata whenua matters,

[1] Chapter 1 Section 42A Report at [295]. As a result, the author considers the information contained within Chapter 1.6.2(b) repeats the information contained within Chapter 2.4; suggesting its deletion because it represents unnecessary duplication within the Proposed Plan.
[2] For this reason, the author recommends that reference to the Waikato River Settlement Legislation in Chapter 2 is not necessary and should be rejected: Chapter 2 Section 42A Report at [42].
[3] The values are: 1.6.4.1 Kaitiakitanga, 1.6.4.2 Manaakitanga, 1.6.4.3 Tikanga.
[4] This matter has been acknowledged in the Section 42A Rebuttal Report at [44] to [47]. The author identifies that the Hearings Panel may wish to indicate a preference for this material going forward.

express objectives, policies, methods and rules should be included throughout the Plan, not just in Chapter 2. Cross-references should also be used to improve navigation of the Proposed Plan. One such cross-referencing option is to use advice notes.[5]

Amendments required

10. In his presentation, Mr Donald shall cover the Waikato Tainui preferred approach to Chapter 2.

11. Waikato-Tainui welcome the opportunity to work with the Council and other Chapter 2 submitters to produce a revised Chapter 2 and suggests that the joint conferencing approach to be taken with respect to Hopuhopu should also be engaged here.

TE TURE WHAIMANA

12. As the Panel is aware, how Te Ture Whaimana, the Vision and Strategy for the Waikato River, might be given effect in various parts of the Proposed Plan has been the subject of submission and presentation in Hearings 1, 2 and 3.

13. The matter arises in these legal submissions because Waikato-Tainui are of the view that it has not been satisfactorily addressed by the Section 42A Reports to date, inclusive of the Report the subject of this hearing. In particular, and directly relevant to paragraph 8(c)(i) above, Mr Donald's evidence identifies that both the Chapter 1 and 2 Section 42A Reports recommend deleting references to Te Ture Whaimana.

14. Te Ture Whaimana is:

    (a) a statutory instrument, given legislative effect through the Waikato and Waipā River Settlement Legislation, including the foundational Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato River Act**);[6] and

[5] Refer Part E Section 21 of the Waipā District Plan for an example of their effective use.
[6] The other Waikato and Waipā River Settlement Legislation is the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and the Ngā Wai o Maniapoto (Waipā River) Act 2012.

(b) "…intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the Waikato River."[7]

15. It is relevant to the preparation of the Proposed Plan because of the functions of the Waikato District Council under s 31 of the RMA, which include:

(a) the effects of land use:

(b) the control of land use for the purposes of:

(i) avoiding or mitigating natural hazards
(ii) the management of contaminated land
(iii) the maintenance of indigenous biological diversity; and

(c) activities on the surfaces of rivers and lakes.

Legal status

16. Te Ture Whaimana holds a unique place in the RMA planning hierarchy:

(a) The Environment Court in *Puke Coal Ltd v Waikato Regional Council* confirmed that it has led to a fundamental change in the interpretation of the provisions of Part 2 for the purposes of the Waikato Region.[8]

(b) It prevails over any inconsistent provision in a national policy statement, the NZ Coastal Policy Statement and a national planning standard. It also prevails over a national environmental standard if more stringent than the standard.[9]

(c) Te Ture Whaimana, in its entirety, is deemed part of the Regional Policy Statement (**RPS**).[10]

[7] Waikato River Act, section 5(1).
[8] [2014] NZEnvC 223 at [133] and [143] – [146] (***Puke Coal***), reflecting on the implication of the Supreme Court's decision of *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38 (***EDS v King Salmon***) with respect to Te Ture Whaimana. This position was unanimous.
[9] Waikato River Act, s 12.
[10] Waikato River Act, s 11(1).

(d) In addition to the statutory direction to "give effect to" Te Ture Whaimana,[11] a district plan must "give effect to" any regional policy statement.[12]

17. Case law provides guidance on what "give effect to" means. The Supreme Court in *EDS v King Salmon* found that it:

> "...means 'implement'. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it."[13]

18. The Court's approach affirmed that local authorities are required to develop express provisions to give effect to higher order documents:

> [79] The requirement to "give effect to" the NZCPS "gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS **and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.**"
>
> [Emphasis added]

19. Waikato-Tainui further submit that the obligation to "give effect to" Te Ture Whaimana must be interpreted in its statutory context. The genesis of Ture Whaimana is found many generations ago in the Crown's past dealings in relation to the Waikato River, which constituted acknowledged breaches of its obligations under Te Tiriti o Waitangi (the Treaty of Waitangi), and the subsequent 1987 Waikato River claim[14] filed by Robert Te Kotahi Mahuta.[15] In respect of the Waikato River, the claim stated that Waikato-Tainui was prejudicially affected by acts, policies and omissions of the Crown, including:

> In providing a legislative framework for land use planning, water use planning and resource planning which fails to properly take into account Waikato-Tainui concerns for the Waikato River and which is

[11] Waikato River Act, s 13.
[12] RMA, s 75(3)(c).
[13] *EDS v King Salmon* at [77].
[14] Part of Wai 30.
[15] It was filed on 16 March 1987 on behalf of himself, Waikato-Tainui, the Tainui Maaori Trust Board and Ngaa Marae Toopu: Deed of Settlement 17 December 2009, cl 2.2.

inappropriate for the protection of Waikato-Tainui rights guaranteed by the Treaty.

20. Accordingly, the long-negotiated settlement that was finally given effect through the enactment of the Waikato River Act[16] forced a new legal framework to achieve what the Waitangi Tribunal has recognised in *Ko Aotearoa Tenei* "the RMA was supposed to deliver in any case."[17]

21. Against this historical and statutory context, Waikato-Tainui submit that "giving effect to" Te Ture Whaimana requires the Proposed Plan to ensure express and visible references to it throughout the Proposed Plan.

Amendments required

22. Waikato-Tainui do not seek to repeat large parts of Te Ture Whaimana in the Proposed Plan.[18] For the purpose of ensuring the visibility and voice of Te Ture Whaimana in the Proposed Plan, they consider that the following amendments are required:

    (a) A condensed synopsis of Te Ture Whaimana in Chapters 1 and 2.

    (b) The objectives of the Vision and Strategy for the Waikato River to be included at clause 2.3 of the Tangata Whenua Chapter.[19]

    (c) Including express Te Ture Whaimana objectives and policies, and developing express methods and rules, in zones the activities associated with which could affect the Waikato River. These amendments will be addressed at future hearings. [specific zone, topic or as otherwise identified by the Hearing Panel].

    (d) Using advice notes, or other forms of cross-referencing, to:[20]

[16] Which received its Royal Assent on 7 May 2010.
[17] Waitangi Tribunal (2011) *Ko Aotearoa tēnei: a report into claims concerning New Zealand law and policy affecting Maaori culture and identit*y. Te taumata tuarua, Volume 1, page 273.
[18] A concern identified by the Hearing 1 Section 42A Author at [321].
[19] This amendment is consistent with the approach in the Operative District Plan (Waikato and Franklin Sections).
[20] Refer Part E Section 21 of the Waipā District Plan for an effective example.

(i) identify where the full text of Te Ture Whaimana, which should be referred to when considering effects of activities, can be found;

(ii) indicate that guidance on how Te Ture Whaimana can be achieved is contained within iwi planning documents, including the Waikato-Tainui Environmental Plan.

'ENABLING' MAAORI LAND PROVISIONS

23. Waikato Tainui support the policy intent of enabling Maaori land use identified in the Proposed Plan, and agree with the Section 42A Report author that the burden that is placed on Maaori land owners to satisfy the Te Ture Whenua Maaori Act and the RMA should be acknowledged when attempting to utilise their land.[21]

24. However, the implementation of this policy intent is cause for concern, particularly given it is proposed to replace the Paa Zone.

25. The Maaori land provisions provide that a 'Marae Complex' or 'Papakaainga Housing Development' on Maaori Freehold Land or Maaori Customary Land is a permitted activity in the following zones:

(a) Residential Zone – Rule 16.1.2 P2;

(b) Business Zone – Rule 17.1.2 P16;

(c) Rural Zone – Rule 22.1.2 P1 (Land Use Activities);

(d) Rural Zone – Rule 22.8.2 P1 (Lakeside Te Kauwhata Precinct); and

(e) Village Zone – Rule 24.1.1 P2,

provided that it complies with these conditions:[22]

[21] Chapter 2 Section 42A Report at [56].
[22] Waikato-Tainui supports the deletion of condition (a) of these Maaori land provisions in the Residential and Village Zones (which refers to the total building coverage not exceeding 50 percent): As per Waikato District Council submission [698.88]. The Council confirmed that this was an unintentional error; it was not intended to restrict building coverage for papakaainga activities. The Hearing 4 Section 42A author recommends that the submission be accepted: at [155] and [213].

(i) the activity complies with Rule 17.2 Land Use – Effects and Rule 17.3 Land Use – Building rules (unless the activity-specific rule and/or conditions identifies a condition(s) that does not apply);

(ii) a Concept Management Plan endorsed by the Maaori Land Court is provided to Council with the associated building consent application; and

(iii) a licence to Occupy, lease or occupation order is provided to Council (depending on whether or not land is vested in a trust or a Maaori Incorporation).

26. The use of a Maaori land permitted activity exception to the general zoning rules is problematic where conditions are attached that, if not met, will result in application of those default zoning rules.

27. Mr Donald has identified that, if eligible Maaori land does not meet the prescribed conditions, the following issues will arise:

(a) papakaainga and marae in the rural and residential zones will become a discretionary activity;

(b) associated development aspirations, such as the addition of a museum (to house tribal taonga or history, for example), or a café for the manaaki (hosting) of manuhiri (guests), will become a discretionary[23] or non-complying activity;[24]

(c) new or replacement papakaainga buildings on a site, or additions to marae buildings, will become a discretionary activity.[25]

28. Nor is it clear whether Maaori freehold land (with or without a Concept Management Plan) will be required to satisfy, and indeed will satisfy, other permitted activity standards listed in the relevant zone activity tables.

[23] Proposed Plan, 16.1.4 D1.
[24] Proposed Plan, 16.1.5 NC1.
[25] Proposed Plan, 16.1.4 D1.

29. To this end, Waikato-Tainui struggle to see the benefit of these provisions over a fit-for-purpose Paa Zone (or other Special Maaori Purpose Zone) that is expanded both in its application, and the activities that are authorised, in order to meet the policy intent of enabling flexible development for Maaori land.

Enabling development of land received through Treaty of Waitangi settlement

30. Waikato Tainui seek an extension of the scope of Maaori land provisions to encompass not only Maaori freehold and customary land, but also, and by way of proposed definition:

> land that has been returned through settlement processes between the Crown and tangata whenua of the district

31. Counsel understands that the policy intent of the existing Maaori land provisions in the Proposed Plan includes:

    (a) addressing historical and contemporary impediments to effective land use; and

    (b) supporting traditional Maaori cultural living on Maaori land.

32. This intent is equally applicable to land returned through Treaty of Waitangi settlement.

33. Historical barriers include raupatu (land confiscation), while contemporary barriers include the very issues the subject of this Plan Review: compliance with central and local government regulation such as national planning documents and regional and district plans.

34. Further, land returned through Treaty of Waitangi settlement originates in redressing acknowledged historical grievances. The basis of its return in the settlement process is the unique relationship between tangata whenua and that land. It is therefore entirely foreseeable that, as a consequence of cultural empowerment and revitalisation, a papakaainga housing development (for example) might be a matter for which land returned through Treaty of Waitangi settlement utilised.

35. Counsel submits that precluding this opportunity through a narrow definition of the application of enabling provisions cannot be the intention.

CONCEPT MANAGEMENT PLANS

36. Concept Management Plans are proposed for the revised Maaori land provisions as identified at paragraph 25 above.

37. The evidence of Mr Donald at paragraphs 5.11 to 5.20 sets out the engagement Waikato-Tainui has undertaken to seek clarification from the Council on the range of questions arising in respect of this proposal, including information requirements and Council staff's understanding of the legal standing of concept management plans. He notes that the engagement has been characterised somewhat by frustration from Waikato-Tainui based on the inadequate responses of Council staff.

38. The Chapter 2 Section 42A Report and associated Rebuttal have sought to clarify the concept management plan proposal. However, those comments have raised additional questions:

    (a) At [72] of the Section 42A Report: *"The underlying rules of the zone still apply under the* ***consent application*** *(setbacks, roading, utilities etc)."*[26] This comment regarding a consent application is at odds with the proposed permitted activity status.

    (b) At [81(a)] of the Section 42A Report:[27] *"The Concept Management Plan is not compulsory…"* This comment is at odds with the activity specific conditions.

    (c) At [58] of the Section 42A Rebuttal Report: *"An Ahuwhenua Trust administering a Maaori Freehold land block would likely have a Concept Management Plan* ***or identified activities within their Trust Order what they may carry out on the land****."*[28] Under current drafting, a Concept Management Plan endorsed by the Maaori Land Court is required even where a Trust Order already permits an activity.

[26] Emphasis added.
[27] Page 28.
[28] Emphasis added.

39. It appears that a purpose of Concept Management Plans is to provide for future planning for marae complexes and papakaainga housing developments. The Hearing 4 Section 42A Report states:

> … the concept management plan is a tool that gives Council a preview of owner aspirations, and enables Council to engage in conversation before application to the court is made by the land owners. The rules required to meet Building Consent assures Council that MLC process has been followed. This is also Council's way of working in collaboration with the [Maaori Land Court] and Maaori land owners to meet RMA and Regional Policy Statement obligations.[29]
>
> A Concept Management Plan can be used for all the foreseeable uses for the land over time. By placing papakaainga alongside the future uses on one single map, the project manager and the Land Trust can make decisions about placement of buildings and infrastructure so as not to cut off the possibility of future developments. The Concept Management Plan … is an important process to carry out if the Land Trust wants to maximise the use of the land for future generations.[30]

40. While on one hand admirable, the rule is for an ulterior, and not a resource management, purpose. If it was for a resource management purpose then, in order to effectively regulate consistent with the RMA, Council would need the power to approve the Concept Management Plan, which is *ultra vires* a permitted activity status.[31]

41. We make the following further submissions in respect of the proposed Concept Management Plan.

Basis for Concept Management Plans (reliance on section 338 TTWMA process) flawed

42. Proposed Chapter 2[32] relies on the process associated with setting aside a Maaori reservation for communal purposes under Te Ture Whenua Maaori Act 1993 (**TTWMA**) to support

[29] Hearing 4 Section 42A Report, Amendments (a), page 28.
[30] Hearing 4 Section 42A Report at [72].
[31] Discretion should not be required to determine if an activity is permitted, as it is up to the person undertaking the activity to demonstrate compliance with the required conditions of the rules: *Wawatai v Hamilton City Council* PT Wellington W017/96 26 February 1996.
[32] See clauses 2.6 to 2.8.

the requirement to provide a Concept Management Plan being a condition of permitted activity status.[33]

43. It order to address this position, it is necessary to speak to Maaori reservations. A Maaori reservation is a special type of status that can be established over both Māori freehold and general land under section 338 of TTWMA. Typically reservations will be set aside over land that is culturally, spiritually or historically significant to Māori. Common purposes include papakaainga, marae, urupaa, church sites, sports and recreation grounds. Reservations can also be set-aside over fishing grounds, springs, timber reserves, places of scenic interest and waahi tapu.[34]

44. In order to clearly identify the dimensions of a reservation, Rule 4.6 of the Maaori Land Court Rules 2011 requires a "plan of land" to be filed with an application under section 338. The plan may be a sketch plan, and in any proceeding where a plan of land has been filed, the Judge may direct that a better or more comprehensive plan be filed. This is seemingly the genesis of the Concept Management Plan proposal.

45. Māori reservations cannot be used for commercial operations, which would apply to the following current permitted activity uses of Riria Kereopa Drive land under the operative Paa Zone (for which counsel notes the purported retention of permitted activity status in respect of all of said uses in the Proposed Plan does not appear to have occurred[35]):

    (a) Facilities for surface water activities
    (b) Recreation
    (c) Public toilets
    (d) Camp site and associated car wash, grocery or boating store and marae
    (e) Restaurant
    (f) Conference facilities
    (g) Travellers' accommodation.

[33] That s 338 is the genesis of this proposal is affirmed by the numerous references to Maaori reservations in Section 42A Rebuttal evidence.
[34] Te Puni Kōkiri, *Māori Reservation*: https://www.tpk.govt.nz/en/whakamahia/effective-governance/what-is-governance/maori-reservation.
[35] These submissions provide greater detail on this point at paragraphs [82] to [83].

46. Further, and most problematic, a Maaori reservation carries heavy limitations, including:

(a) It requires the establishment of a trust to administer the reservation.

(b) The reservation is governed by another set of legislative rules – the Maaori Reservations Regulations 1994.

(c) Trustees:[36]

(i) are prohibited from delegating their responsibilities;
(ii) may grant a lease or occupation licence for a term not exceeding 14 years;[37]
(iii) must seek the Court's consent to any lease or occupation licence.

(d) The land also cannot be 'alienated'. While this is viewed favourably in terms of preventing sale or gift of a site, under TTWMA alienation is defined broadly. An alienation includes the making or grant of any lease, licence, easement, mortgage or charge, or any kind of encumbrance or trust in respect of the land in the reservation. This means that there can be no borrowing against the reservation lands and leaves trustees with problems as to how to raise money to maintain and preserve buildings, services, and the grounds and other facilities on the reservation.[38]

47. Finally, before the following activities can take place, prior written authority of the trustees is required for:

(a) the use of any building on the reservation;

(b) the promotion or holding of a hui, meeting, or other large gathering of people

[36] Maaori Land Court *Maaori Reservations* at page 7: https://maorilandcourt.govt.nz/assets/Documents/Publications/MLC-maori-reservations-english.pdf
[37] Recognising longer leases for health or education have previously been arranged.
[38] 'Leases / Licenses of Maaori Reservation Land' MLC 2012 August 'Judges Corner' – Judge Milroy: https://maorilandcourt.govt.nz/assets/Documents/Publications/MLC-2012-Aug-Judges-Corner-Milroy-J.pdf

(c) the promotion or holding of a sports event, competition, or concert

(d) other activities or events as decided by the trustees.

48. The only major benefit, therefore, to a Maaori reservation over Maaori freehold land in this case is that the land cannot be taken under the Public Works Act 1981.[39] In many cases, this benefit may not be sufficient to deem a Maaori reservation the appropriate vehicle for realising Maaori landowner aspirations, so the Proposed Plan arrangements should not proceed on that basis.

49. Indeed, it appears that concept Management Plans are being advanced based on an expectation that either:

(a) Maaori freehold and customary land owners will apply to set their land aside as a reservation in order to obtain the benefits of the Proposed Plan's enabling provisions for Maaori land. That is erroneous and, for the reasons identified above, problematic.

(b) Similar Maaori Land Court endorsement is required *in every instance* that a marae complex, papakaainga, or activity associated with each, is pursued. That is not the blanket position:

(i) Trusts and Maaori incorporations subject to TTWMA do not require Maaori Land Court approval or endorsement for every proposed use of their land. Where a Trust Order or Order of Incorporation deals broadly with land administration, application to the Maaori Land Court may not be required. The activities proposed may already be permitted within existing constitutional documents.

(ii) Maaori freehold land owned by a single owner, joint owners or small number of owners is also less likely to require application to the Court if there is agreement between the owners.

[39] TTWMA, section 388(11).

50. It is worth noting that Maaori Land Court Judge Stephanie Milroy has written extra judicially on the limitations of Maaori reservations regarding the raising of finance to support aspirations for the land. She recommends that land owners apply to exclude an area from a reservation and then set up an ahu whenua trust on the excluded area with the object of using that more permissive structure to raise finance. Beyond that, she suggests legislative reform is needed.[40]

51. Basing the need for Concept Management Plans on a process borne out of section 338 Maaori Reservations is flawed.

52. Ironically, the Concept Management Plan will be an added constraint in a proposal that is supposed to enable flexibility for papakaainga development on Maaori Freehold Land. That cannot be the aim. As the Hearing 4 Section 42A Report author states, "it is important to note that Maaori Freehold Land is … subject to a number of constraints, which are considered relevant when the need for flexibility is considered."

NO JURISDICTION TO IMPOSE CONCEPT MANAGEMENT PLAN REQUIREMENT

53. As a matter of law a territorial authority has no jurisdiction to:

    (a) force an application to the Maaori Land Court where one may not otherwise be required, by establishing a permitted activity condition that is dependent on Maaori Land Court endorsement;[41]

    (b) impose examination criteria on the Maaori Land Court that is not within the jurisdiction of the Court under TTWMA and associated regulations; or

    (c) make an RMA process contingent on satisfaction of the TTWMA process if there is no provision in either legislative framework for that approach.

54. Subject to express provisions identifying where TTWMA and the RMA interact, which do not apply in the present case, the

[40] Ibid at page 2.
[41] The Section 42A Report states, in relation to Te Ture Whaimana, that it is "not the purpose of the district plan to … make rules which are covered under other jurisdictions": Hearing 4 Section 42A Report at [72].

TTWMA and RMA jurisdictions are distinct, and it is for Maaori landowners to decide how they wish to engage in each process depending on what they are seeking to do.

55. The Section 42A Rebuttal Evidence states that one advantage of the requirement to furnish a Concept Management Plan is that:[42]

> It assures Council that the Māori Land Court has endorsed the land activities, which means there is a legal entity (land governance with a Trust and Trustees and a Trust Order approving the concept management plan and having it endorsed by the MLC.

56. It is not the role of Council to police TTWMA requirements.[43] Indeed, that is not enabling of Maaori land. Further, against the background of a dark history of overwhelming regulation of Maaori land under prior Native Lands Acts, which saw both the loss of land and onerous regulation on those land owners who retained their land, counsel submits that it is highly inappropriate.

No requirement for concept management plans under Building Act 2004

57. Counsel is aware that section 37 of the Building Act 2004 provides that, if a territorial authority considers a resource consent under the RMA has not yet been obtained and the consent will or may materially affect building work to which an application for a building consent relates, the territorial authority must issue a certificate confirming that until the resource consent has been obtained no building work may proceed.

58. The Section 42 Report states that the "rules required to meet the building consent assures Council that MLC process has been followed." Counsel understands that the Report may be relying on section 37 in this regard. However, section 37 relates only to resource consents required under the RMA.

59. Section 37:

(a) does not extend to TTWMA;

[42] Hearing 4 Section 42A Rebuttal Report at [55].
[43] The Section 42A Rebuttal Report addresses jurisdiction by stating that "Council can only deal with the land use and its rules, but we can work collaboratively with the other government agencies …":

(b) has no application in the case of a permitted activity where a resource consent is not required; and

(c) does not refer to the need for a Concept Management Plan.

Amendment required: Advice Note

60. Consistent with Mr Donald's evidence, counsel considers that there is a place for Concept Management Plans. While further engagement with submitters will be required to realise their value, they do appear to provide best practice guidance on future planning.

61. Counsel therefore suggests that the potential for use of Concept Management Plans is identified in an advice note in the Proposed Plan. There is no legal barrier to including advice notes within a plan. They are not 'provisions' as defined in section 32 RMA. Rather, the usage of advice notes is primarily to advise users of requirements that sit outside the Proposed Plan.

MAATAURANGA MAAORI AS A DECISION-MAKING CRITERION

62. Waikato-Tainui have their own ways of planning for and managing the environment that are steeped in maatauranga Maaori – generations of wisdom, knowledge and practical implementation.

63. Accordingly, their submission sought the inclusion of maatauranga Maaori as a decision-making criterion in the Proposed Plan in respect of activities requiring resource consent.[44]

64. Waikato-Tainui propose that this criterion is included not only as a matter over which control is reserved, or discretion is restricted (in relation to controlled or restricted discretionary activities), but that the Proposed Plan provides clear direction that it is a matter to be decided in relation to discretionary activities also.

65. This latter issue is particularly important for Waikato-Tainui and is demonstrative of a failing in RMA implementation with respect to tangata whenua matters. The conventional planning approach, which sees assessment criteria primarily attached to controlled and restricted discretionary activities

[44] Waikato-Tainui Submission, page 9.

only, precedes on the basis that the discretion afforded RMA decision-makers in relation to (unrestricted) discretionary activities ensures all relevant resource management matters are considered. This is not the case.

66. The Waikato-Tainui experience is that while determinations on consent applications are "subject to Part 2"[45] (which confirms and acknowledges tangata whenua matters[46]), decision makers exercising full discretion do not draw on maatauranga Maaori unless prompted to by a Plan, or other policy or legislative direction.

67. The balance of this section touches on inclusion of maatauranga Maaori in respect of each activity status.

Controlled and restricted discretionary activities

68. The limitation of a decision maker's power to:

(a) for controlled activities, impose conditions on a resource consent to the matters over which control is reserved, is found in RMA s 87A(2)(b).

(b) for restricted discretionary activities, decline consent, or grant consent and to impose conditions on the consent, to the matters over which discretion is restricted, is found in RMA s 87A(3)(a).

69. The appendix in the evidence of Mr Donald demonstrates that including maatauranga Maaori assessment criteria for controlled and restricted discretionary activities is familiar ground in other plans. He references the Auckland Unitary Plan as an example. In the Auckland-wide chapter alone it includes maatauranga Maaori assessment criteria as follows:

Controlled activities

Activity	Assessment criteria
Vegetation pruning, alteration or removal	• The provision for Mana Whenua, mātauranga and tikanga values.[47] • Whether the location of development is appropriate to provide for Mana Whenua, mātauranga and tikanga values.[48]

[45] RMA, s 104.
[46] Through RMA sections 6(e), 6(f) and 6(g), s 7(a) and s 8.
[47] Auckland Unitary Plan, Chapter E Auckland-wide, Rule E15.7.1(2)(b).
[48] Ibid, Rule E15.7.2(2)(c).

Restricted discretionary activities

Activity	Assessment criteria
Land disturbance activities	Whether the proposal will protect the relationship of Mana Whenua with their cultural heritage by incorporating mātauranga, tikanga and Mana Whenua values, including spiritual values.[49]
Vegetation pruning, alteration or removal	Whether the location of development is appropriate to provide for Mana Whenua, mātauranga and tikanga values.[50]
All restricted discretionary activities	Mana whenua values: The extent to which any adverse effects on Mana Whenua values can be avoided, remedied or mitigated, and having regard to the objectives and policies in E20 Māori Land whether the proposed works are appropriate to provide for Mana Whenua, mātauranga and tikanga values.[51]

Discretionary activity status

70. While it is not necessary to attach assessment criteria to discretionary activities, it is permitted and increasingly common.

71. RMA section 87A states that, in relation to discretionary activities, where a consent authority grants consent:

> "the activity must comply with the requirements, conditions, and permissions, **if any**, specified in the Act, regulations, **plan, or proposed plan**."
>
> [Emphasis added]

72. Case law confirms that issues only arise where restrictions imposed by a plan seek to fetter the otherwise unfettered discretion of an RMA decision maker.[52] Counsel notes that the discretion is 'unfettered' and not 'absolute' – as decision makers discretion falls within the bounds of the relevant plans and policy statements, other resource management planning documents, the RMA and other relevant legislation.

[49] Ibid, Rule E12.8.2(2)(C)(i),bullet 4.
[50] Ibid, Rules E15.8.1(2)(b) and E15.8.2(2)(a)(iii).
[51] Ibid, Rules E15.8.2(1)(j)(i) and E26.6.7.2(1(k).
[52] *Brooke-Taylor v Marlborough District Council* ENV Wellington W067/04, 2 September 2004 at [68].

73. Even then, a Plan can indicate a preference. A notable example is where plans seek to limit consent duration for particular activities by identifying 10 or 15 year duration policies,[53] notwithstanding that the maximum consent duration available is 35 years under the s 123 of the RMA.

74. The evidence of Mr Donald identifies an example of assessment criteria for discretionary activities included in the Waipā District Plan related to iwi management plans. Decision-makers in respect of discretionary activities on lakes and water bodies must consider:[54]

> the extent to which the activity supports outcomes in recognised iwi management planning documents.

75. The Waipā District Plan includes a number of additional assessment criteria for all discretionary activities in Chapter 21, including in relation to matters arising under the following issues:[55]

(a) the Waikato River Vision and Strategy;
(b) cultural
(c) settlement patterns and reverse sensitivity;
(d) visual;
(e) amenity values;
(f) earthworks,
(g) traffic; and
(h) noise and vibration.

76. Rather than fetter discretion, these assessment criteria fall properly within the resource management matters to be considered.

77. Consistent with counsel's submission at paragraph 72, the Guide to using Chapter 21 states, "For discretionary activities the assessment criteria are a guide to the matters that Council will consider and shall not restrict Council's discretionary powers."

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[53] See for example, Policy 15(a) of the Waikato Regional Plan which states "Subject to Policy 19, the Waikato Regional Council will generally ensure that all resource consents for the take of surface and groundwater shall have a term no longer than 15 years …"
[54] Waipā District Plan, Chapter 21, 21.1.26.3.
[55] Waipā District Plan, Chapter 21, Clause 21.1.1.

78. For completeness, reference to the criteria being a "guide to the matters that Council will consider" is a comment directed to plan users; not an indication that decision-makers cannot be compelled to consider certain assessment criteria. That is made clear by the use of discretionary criteria in the Wellington City District Plan, where the assessment criteria for a discretionary activity is preceded by the following statement:[56]

> In determining whether to grant consent and what conditions, if any, to impose, Council **will have regard to** the following criteria:[57]
>
> [Emphasis added]

79. Accordingly, there being no bar to inclusion of maatauranga Maaori as an assessment criteria for discretionary activities, for the reasons identified at paragraphs 65 to 66 of these submissions, counsel submits that such criteria should be included in the Proposed Plan.

DEFINITIONS

80. Waikato-Tainui's proposed amended definition to 'marae complex'[58] has been recommended for rejection by the Section 42A Rebuttal Report on the basis that:

> the Chapter 13 definitions is what has been suggested and commonly used by Marae/Maaori Organisations and what is provided as a guideline in the Te Ture Whenua Act Part 17, s338, although it uses English interpretation.

81. Counsel can find no policy basis for the rejection in the Section 42A Rebuttal Report other than this comment. It appears at odds with the policy intent of enabling Maaori freehold land and represents a regression from that which is enabled in the Paa Zone. Given the limitations associated with section 338 as explored in these submissions, counsel respectfully requests that the Panel engage with Waikato-Tainui as to their more expansive definition, which approaches the matter

[56] See Waipā District Plan, Chapter 15: Rural Area Rules, Clause 15.4.1 as an example.
[57] The Tasman Resource Management Plan uses the language "will have particular regard to": see, for example, Chapter 16, Rule 16.3.3.4.
[58] Gavin Donald Hearing 4 Evidence at [5.26].

through a lens of potential and with the policy intent firmly in mind.

82. In relation to the application of the 'marae complex' definition to Riria Kereopa Drive, counsel notes that the Section 42A Report states that other than 'restaurant' the current definition of 'marae complex' includes all activities previously permitted. Counsel is not confident that the definition sufficiently provides for the following activities:

(a) facilities for surface water activities
(b) Camp site and associated car wash, grocery or boating store and marae
(c) Restaurant
(d) Conference facilities
(e) Travellers' accommodation.

83. Accordingly, counsel respectfully recommends that the Panel interrogate whether the 'marae complex' definition is sufficiently robust to reflect the intended retention of matters previously permitted under the Paa Zone.

84. Reflecting on the term "papakaainga housing development", Waikato-Tainui also consider the following definition problematic for its use of 'traditional':[59]

> a comprehensive residential development for a recognised Tangata Whenua group or organisation residing in the Waikato district to support traditional Maaori cultural living on Maaori land for members of the iwi group or organisation.

85. Waikato-Tainui do not feel that 'traditional' adds anything. Inherent in the words "Maaori cultural living" is the expectation that residents will have the opportunity to reflect a collective form of Māori living, where residents are connected to each other and the land through common whakapapa. While that is an aspect of our heritage it remains a matter of contemporary existence for Maaori.

86. What Waikato-Tainui do see, is the potential for the word to be used to narrow the application of papakaainga housing opportunities by others. For the reason they proposed a definition that deletes the word traditional.

[59] Proposed Plan, Chapter 13: Definitions, page 15.

HOPUHOPU

87. The evidence of Mr Donald confirms that Waikato Tainui:[60]

(a) accept the offer for joint conferencing on the issues relating to Hopuhopu, noting the terms on which they intend to enter into the conversation; and

(b) reserves the right to present at the relevant zoning hearings should conferencing not result in agreement between the invited parties.

CONCLUSION

88. Waikato-Tainui are committed to developing a Tangata Whenua Chapter that reflects their values, interests and aspirations, those of other iwi and Maaori land owners within the district, and provides visibility of tangata whenua matters for all who engage with the Plan in order to educate, assist and lead to stronger resource management outcomes for the district's communities.

89. Waikato-Tainui are of the view that, at present, the Proposed Plan far from reflects this, and represents a regression from the operative plan in some places. They are committed to working collaboratively with the Council and other submitters to improve the plan.

DATED at Wellington this 14th day of November 2019

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[60] Donald Evidence at [5.21] to [5.23].