

**BEFORE**

the Hearings Panel

**IN THE MATTER**

of the Pukehāngi Heights Streamlined Planning Process (**SPP**) under Part 5, Sub-Part 5 and Schedule 1 Part 5 of the Resource Management Act 1991 (the **Act**)

**AND**

**IN THE MATTER**

of Rotorua Lakes Council's Proposed Change 2: Pukehāngi Heights to the Rotorua District Plan

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**LEGAL SUBMISSIONS ON BEHALF OF TE ARAWA LAKES TRUST, NGĀTI KEAROA NGĀTI  
TUARĀ and NGĀTI WHAKAUE**

**DATED 21 SEPTEMBER 2020**

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## OVERVIEW

1. These submissions are presented on behalf of Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue, and Te Arawa Lakes Trust (**Trust**).
2. The various witnesses describe the status, role and interests of these groups. In brief:
  - (a) Ngāti Kearoa Ngāti Tuarā are a hapū of Te Arawa. Their people have lived in Tihi-o-Tonga and Pukehāngi for several hundred years and have many sites of significance in the area. Ngāti Kearoa Ngāti Tuarā are also connected to the waters of the Mangakākahi and Utuhina Streams and ultimately Lake Rotorua.
  - (b) Ngāti Whakaue are an iwi of Te Arawa whose whakapapa encompasses the Utuhina “ki uta ki tai” – from the mountain to the lake. Ngāti Whakaue ki Ōhinemutu came together and formed Te Kōmiro o te Utuhina an iwi-led group of hunga tiaki (or kaitikai) focussed solely on the restoration, enhancement and protection of their tupuna awa and the wider Ōhinemutu village boundary.
  - (c) The Trust was established under the Te Arawa Lakes Deed of Settlement and the Te Arawa Lakes Settlement Act 2006. It is the mandated governance entity for all registered members of Te Arawa and is responsible for the management of Te Arawa’s settlement assets, including the region’s 14 lakes. Together with the Rotorua Lakes District Council (**Council**) and the Bay of Plenty Regional Council they form the Rotorua Lakes Strategy Group established through the settlement. Its purpose is:

*“the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes”.*

3. The relationships and interests of Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Trust are ones to be recognised and provided for under s6(e) of the Act as a matter of national importance.
4. Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Trust were served notice of the Proposed Plan Change 2 (the **Plan Change**) at the direction of the Minister, and were also consulted by Council prior to notification. Ngāti Kearoa Ngāti Tuarā were invited by Council to prepare a Cultural Impact Assessment.
5. The Plan Change, at its core, is the Council providing a response to the demand for housing within its district. The supply of land at Pukehāngi Heights through Residential and Rural Residential (now Rural 2) Zoning with a Structure Plan is Council's preferred option to deliver such housing at scale.
6. Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Trust support the increase of housing stock in the district as part of a wider strategy to address housing issues in Rotorua. However, they do have concerns about some of the impacts of proposed development at Pukehāngi Heights and downstream that should be addressed via the Plan Change to ensure this increase is achieved in an appropriate manner.
7. Bottom line - it should not be achieved at the expense of the relationship of Te Arawa with te taiao.

#### **Key issues**

8. Key submissions are:
  - (a) The cultural site protection and policy provisions must be strengthened as recommended in the S42A Planning Report (**Planners' Report**).
  - (b) The management of stormwater is a critical issue. Development must not be allowed to increase the risk of flooding or impact

water quality downstream. A further amendment to those changes recommended in the Planners' Report is needed to set a clear direction to protect downstream water quality.

- (c) In terms of Lake Rotorua nutrient management, the Planners' Report recommendations which direct a "no net increase" in nitrogen entering Lake Rotorua" are not supported. If water quality improvements are to be achieved, the direction must be for reductions in nutrient flows as directed by higher order policy.

### **Evidence**

9. Evidence will be presented by:
- (a) Robyn Bargh on behalf of Ngāti Kearoa Ngāti Tuarā;
  - (b) Lani Kereopa on behalf of Ngāti Whakaue;
  - (c) Nicola Douglas on behalf of the Lakes Trust; and
  - (d) David Marshall, consulting planner, on behalf of the Trust.
10. To assist the Panel, I **attach** to these submissions a summary table which tracks the submission relief of each party against the Planners' Report recommendations and records the Trust position on the acceptability or not of the relevant recommendations.<sup>1</sup>
11. I have not recorded a position for Ngāti Kearoa Ngāti Tuarā or Ngāti Whakaue who will speak to this in their presentations.

### **STATUTORY FRAMEWORK**

12. The Plan Change is made under the streamlined planning process in Subpart 5, and Part 5 of Schedule 1 of the Act. This is an alternative to the standard Schedule 1 process that seeks to achieve an "*expeditious*" outcome "*that is proportionate to the complexity and significance of the planning processes being considered*".

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<sup>1</sup> I note a discrepancy in the Council's summary of submissions which does not reflect the adoption by Ngāti Kearoa Ngāti Tuarā's of the Trust submissions relief.

13. Giving effect to Part 2 of the Act, relevant national policy direction, and the Bay of Plenty Regional Policy Statement (**RPS**) remains just as fundamental under this process as it does under the other planning processes.
14. This means that in making decisions about the appropriate provisions to include in the Plan Change this Panel needs to ensure that it has at the forefront of mind the following:

**Part 2 – Māori directions**

15. Directions in Part 2 require recognition and provision for Māori relationships with their taonga resources, particular regard to the ability for them to exercise kaitiakitanga, and the taking into account of the Treaty principles.<sup>2</sup> These are, of course, recognised as particularly “*strong directions to be borne in mind at every stage of the planning processes. ...Special regard to Māori interests and values is required*”.<sup>3</sup>

**National Policy Statements**

16. The National Policy Statement on Urban Development 2020 (**NPS-UD**) (and its 2017 predecessor) is cited at length in the S42A Planning Report.
17. The Panel must ensure that the Plan Change provisions give effect to the 2020 NPS-UD as it supersedes the 2017 version.
18. Sufficient development capacity to meet demand for housing is recognised as a key policy driver (Policy 2, CI 3.2) in the NPS-UD 2020.
19. The enabling of all people and communities to provide for their social, economic and cultural wellbeing and for their health and safety now and into the future remains the focus, in Objective 1.

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<sup>2</sup> Being s 6(e), “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”; s 7(a), kaitiakitanga; and s 8, the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

<sup>3</sup> Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577, 594 at [21].

20. Objective 5 requires planning decisions relating to urban environments and Future Development Strategies (**FDSs**) to take into account the principles of the Treaty. Policy 9 says that in doing this, hapū and iwi must be involved in the preparation of plans and FDSs via early and meaningful consultation and in accordance with tikanga (as far as practicable). Opportunities must be provided for Māori involvement in decisions in appropriate circumstances, including in relation to sites of significance to Māori and issues of cultural significance.
21. Despite very little mention in the Planner's Report, the National Policy Statement on Freshwater Management (now 2020) (**NPS-FM**) is also of particular relevance to the Plan Change.
22. The activities enabled in the Plan Change have the potential to affect freshwater. The District Council has a role to play here. The NPS-FW requires the adoption of an integrated approach (ki uta ki tai), as does the RMA (s31(1)(a)).<sup>4</sup> Land use and development is to managed in an integrated and sustainable way to address effects on the well-being of waterbodies, freshwater ecosystems, and receiving environments (CI 3.5(1)(c).
23. CI 3.5(4) directs every territorial authority to *"include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments."*
24. Earlier versions of the NPS-FW enshrined the concept of Te Mana o te Wai in freshwater management but the 2020 NPS-FM elevates it even

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<sup>4</sup> Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

- (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

higher as a “*fundamental concept*” relevant to all freshwater management.

25. The 6 principles encompassed by Te Mana o Te Wai are set out in CI 1.3(4) and include special recognition of the role of tangata whenua in freshwater management.
26. Importantly, the NPS-FM prioritises the health and wellbeing of freshwater and freshwater ecosystems above all else (refer Objective 1). This is central to Te Mana o te Wai. Action is to be taken where freshwater is degraded – deteriorating trends are to be reversed.
27. The directions relating to tangata whenua involvement and interests in decisions and activities that may affect freshwater and Te Mana o Te Wai are extensive.
28. Tangata whenua are to be actively involved in freshwater management. This includes the making or changing of district plans, so far as they relate to freshwater management as well as other decision-making processes (CI 3.4(b)).

### **Regional Policy Statement**

29. The national policy statements post-date the RPS which affects the weight of the relevant provisions. However, attention is drawn to Policy IW 2B and its recognition of the role of tangata whenua as kaitiaki of the mauri of their resources and that it is only tangata whenua who can identify and substantiate their relationships with their taonga resources.

### **KEY ISSUES**

#### **Cultural Site Protection and Policy Provisions**

30. The relationship of Māori with their ancestral sites and other taonga is a matter of national importance (s6(e)).

31. As a result of the pre-hearing meetings with Council, the cultural site protection and policy provisions are proposed to be strengthened. This is supported. Key amendments set out in the Planner's Report include:
- (a) Recognition that the area, including downstream environments, is significant to all those Te Arawa iwi and hapū that have associations with it.
  - (b) Recognition that sites and areas of cultural value, irrespective of whether physical evidence remains, warrant protection.
  - (c) Recognition of Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Trust, as affected parties for notification purposes where a resource consent application has the potential to effect culturally significant sites.

#### **Stormwater – Flooding and Water Quality**

32. Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Lakes Trust seek that the Plan Change adopt bottom lines or a clear and directive constraint in relation to the management of stormwater – ie, that development must not increase the risk of flooding or impact water quality downstream. In terms of the amendments to provisions set out in the Planners' Report:
- (a) Making non-complying any subdivision in the new Residential 1 or Rural 2 zoned areas that does not comply with the Stormwater Management and Natural Hazard Risk Management performance standards will go some way to ensuring this outcome (of no increase or impact) can be achieved.
  - (b) However, there is no qualifying measure or level in the performance standard for Stormwater Management. Stormwater issues alone may therefore not trigger the new non-complying rule and likelihood of notification. For this reason, it is crucial that tangata whenua be notified of and be able to participate in any subdivision proposal that has restricted discretionary status.



33. The retention of notified objectives and policies<sup>5</sup> are also supported subject to a further important amendment to Objective 2 is sought by the Trust's consulting planner, Mr Marshall so that its reads:

**Objective 2: Pukehāngi Heights Development Area - Integrated Urban Design**

The environmental quality, character, amenity and cultural values of the Pukehāngi Heights Development Area are developed and then maintained and enhanced through appropriate urban planning and design including stormwater treatment design which protects downstream water quality.

34. This is consistent with the integrated approach required by higher order documents and recognises ki uta ki tai.

**Lake Rotorua Nutrient Management**

35. Mr Marshall also addresses in detail in his evidence the issue of nutrient management, recording the general support for the introduction of a new principle, objective and policy as recommended in the Planners' Report. However, if water quality *improvements* are to be achieved as directed by higher order policy, Mr Marshall says that the direction in this Plan Change must be for reductions in nutrient flows, rather than for "*no net increase*". It also needs to be an absolute rather than a nice to have. Allowing for an out if something is not practicable will not ensure improvement as directed by those higher order documents.

36. The changes sought are:

**Introduction A5.2A.1: Principles**

The general principles for the Pukehāngi Heights Development Area are:

...

- Development that is designed within nutrient management limits and demonstrates ~~no net increase~~ reductions in nitrogen entering Lake Rotorua.

<sup>5</sup> Objective 2 (Pukehāngi Heights Development Area – Integrated Urban Design) and Policy 2.3 (Integration of Land Use and Stormwater Management) and Objective 3 (Pukehāngi Heights Development Area – Flood Hazard Risk management) and Policy 3.1 (Flooding and Stormwater).

### **A5.2A.2 Objectives and Policies:**

#### **Objective 5**

Pukehāngi Heights Development Area – Nutrient Management

Development within the Pukehāngi Heights Development Area results in ~~no net increase~~ decreases in nutrient losses thereby contributing to water quality improvements in Lake Rotorua.

#### **Policy 5.1**

Subdivision and land use shall, ~~where practicable,~~ be designed to achieve nutrient losses within the nutrient limits of the land.

### **Affected party status**

37. The Planners' Report recommends that the relief sought by tangata whenua that they be included as affected parties in the rules otherwise providing for non-notification is accepted and revised wording is proposed on that basis. The recommended wording is confirmed by Ms Dahm in her response to the Hunt Family's submission in her correction to the Planners' Report (dated 14 September 2020, at paragraph 5d)-f)).
38. This recommended wording is supported. Ms Dahm's approach to the inclusion of potential areas of cultural importance is also supported. It is not appropriate to limit areas of cultural importance to those that are known or identified. Many sites are not identified. Tailored Accidental Discovery Protocols are sometimes developed to address this issue. Often sites are not identified in order to keep their location confidential (refer s42 RMA). The reference to "known" sites sought by the Hunt Family is unclear; known by who? Where there is a potential for effects on an important cultural site, involving tangata whenua in the application process is essential.
39. It is legally permissible to identify affected persons in the Plan Change. Section 77D allows a plan to specify activities for which the consent authority must give public notification or is precluded from giving public or limited notification. A rule fettering what would otherwise be a

decision made under the general notification provisions of the Act is clearly permissible.

40. A rule that precludes notification to anyone other than certain identified parties must be within this power. Infrastructure providers such as Transpower and NZTA are routinely identified as affected parties in plans.
41. For completeness, the notification provisions of the Act also do not preclude limited notification to affected parties in the same way they do for public notification.
42. It is entirely appropriate that tangata whenua be identified as affected parties where a proposed activity has the potential to affect water, ancestral land, sites, waahi tapu or other taonga:
  - (a) The special and distinct status of tangata whenua is acknowledged in the RMA and all relevant policy and plans:
    - (i) RPS Policy 3BIW *recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public;*
    - (ii) Iwi and hapu are recognised as specific parties to consult in the streamlined planning process and both relevant national policy statements;
  - (b) Section 8 is recognised as having procedural implications as well as substantive,<sup>6</sup> lending support to the proposition that iwi and hapū should also be given the opportunity to participate in RMA processes.

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<sup>6</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ord* [2014] NZSC 38.

- (c) It is difficult for iwi and hapū to be properly be involved in decision making, as directed by both the NPS-UD and the NPS-FW, if they are precluded from even being notified of a proposal. Without affected party status, tangata whenua will lose any right of further say in the management of the land given the limited appeal rights associated with this streamlined planning process.
43. Ms Bargh for Ngāti Kearoa Ngāti Tuarā raises in her evidence the issue of resourcing and the need for adequate levels of funding for iwi participation in these processes. The need for Council assistance to enable effective participation is becoming increasingly recognised. One way of addressing this, if the Panel were minded, would be to include a method requiring the support and facilitation of participation in such processes.

#### **CONCLUSION**

44. Ngāti Kearoa Ngāti Tuarā, Ngāti Whakaue and the Trust support the increase of housing stock in the district as part of a wider strategy to address housing issues in Rotorua.
45. This should not, however, be achieved at the expense of the relationship of Te Arawa with te taiao. Protecting areas of cultural significance and Te Mana o te Wai is fundamental to ensuring this.
46. The impacts of proposed development at Pukehāngi Heights and downstream should be addressed via the Plan Change (particularly the amendments proposed in the Planners' Report together with the further requested changes of Mr Marshall).

**DATED** 21 September 2020



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**Lara Burkhardt**

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