BEFORE THE INDEPENDENT HEARING COMMISSIONER

IN THE MATTER	of the Resource Management Act 1991 (the Act)
AND	
IN THE MATTER	of a applicaton by Onoke Heights Limited for resource consents for a residential subdivision on Dip Road, Whangarei

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Closing legal submissions on behalf of Onoke Heights Limited
15 December 2023

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MAY IT PLEASE THE INDEPENDENT HEARING COMMISSIONER

INTRODUCTION

1. These closing submissions are made on behalf of Onoke Heights Limited, the applicant for resource consent ("Onoke Heights" or "Applicant"). These submissions focus on the Whangārei District Council ("WDC" or "Council") resource consent application ("Application") and respond to matters arising during the hearing on the 14 and 15 of November 2023. They should be read alongside the opening legal submissions dated 14 November 2023.

2. These submissions:
   (a) Address the procedural issues arising following adjournment of the hearing on the 15 November 2023.
   (b) Address the question of activity status and the relevance of the definition of "Historic Heritage" to the assessment of the Application.
   (c) Respond to the legal submissions of counsel for the Council regarding assessment of cultural evidence.
   (d) Address the principles for assessing evidence, focusing on cultural matters and the presentations made by hāpu during the hearing.
   (e) Address the relevance of the CDL decision and reiterate the position as stated in opening submissions.
   (f) Address the matter of Council's consultation with iwi during the plan change processes leading up to and including when the Onoke Heights site ("Site") was re-zoned to a General Residential Zone.
   (g) Address the issues raised by submitters concerning stormwater and flooding.
   (h) Provide a conclusion on the assessment under section 104 of the RMA.

3. In accordance with the Commissioner's Minute #4, a supplementary statement of evidence (in reply) of Melissa McGrath dated 15 December 2023 is **attached** as **Annexure A** to these submissions.

PROCEDURAL ISSUES

4. There are three procedural issues which have arisen following the adjournment of the hearing on the 15th of November 2023. These are:

   (a) Lack of an independent translation of the Te Reo oratory presented by Hāpu at the hearing, despite the assurance from Council officers at the hearing that this would be provided in accordance with the Council's obligations.

   (b) Lodgement of a further "statement" from Mr Scott regarding the onsite meeting on the 21st and an email from Mr Scott directly to the Commissioner dated 16 November 2023.

   (c) Lodgement of an email from a representative of Te Parawhau following adjournment of the hearing, without leave to do so and despite having the opportunity to appear at the hearing.

5. There is no translation available of the presentations in Te Reo.[1] Accordingly, this evidence and/or presentations cannot be considered by the Commissioner in his evaluation of the evidence related to the Application. To do otherwise would result in prejudice to the Applicant and would be a breach of procedural fairness. As noted in verbal submissions at the hearing, Council has a statutory obligation to provide

[1] Counsel notes that they received a hard copy of a translation of the presentation from Hone Kingi in the form of notes recorded by Mr Mark Scott (Email from Mark Scott to Stephanie Opai and Kaylee Kolkman, 15 November 2023, 11.23am re: Onoke Heights hearing day 1). Based on these notes, Hone Kingi spoke of the whole area from Tuatara as being referenced as sacred due to wars. Winiwini Kingi queries why no one has come to hear the accounts from the knowledge holders of the tribe and acknowledges Te Parawhau, acknowledging them and their support and proactiveness. Hone Kingi acknowledged Te Parawhau and Chantez (Connor-Kingi) for their proactiveness with CIA and submission. Taki Kingi referred to Onoke as a sacred area [counsel again notes that the Onoke area covers a much wider area than the Site: 138 acres as per the Māori Land Court records – refer to paragraph [54] of Mr Carpenter's evidence. Taki Kingi also stated that its (Onoke's) extent goes through to Hurupaki and wide Kamo. All these accounts further emphasise that the stories relate to a wider area than the Site and do not explain or identify what part of the Site is wahi tapu (if any). There is nothing in the accounts which suggest or support that the Site is not fit for the living.

translation services at hearings and it appears that the Council has consciously decided not to provide a translation. In my submission, the Commissioner has sufficient evidence and information available to him to determine the Application, regardless of the availability of a translated transcript.

6. Mr Scott sent an email directly to the Commissioner following adjournment of the hearing and later sent additional information which appears to be in the form of further lay evidence. Leave to provide additional comment and lay evidence was not granted in the Commissioner's Minute #4 and should not be considered as evidence when evaluating evidence. In this regard, the Council's memo of the on-site meeting on 21 November 2023 is not entirely consistent with Mr Holland's record of the meeting. While the Commissioner did not expressly grant leave for supplementary evidence from Mr Holland, given the commentary from Mr Scott and Council officers, Mr Holland has provided a supplementary statement. In my submission, lodgement of this supplementary statement is appropriate in the circumstances and counsel respectfully seeks leave to file this statement. This is **attached** to these closing submissions as **Annexure B.**

7. An email from a representative of Te Parawhau which was sent on 16 November 2023 may have been inadvertently included in an email from Council officers to counsel, following a query regarding completeness of the record of the hearing on the Council's website. This email is concerning as it raises a dispute as to the respective mana whenua status of Te Parawhau and Ngāti Kahu o Torongare – despite the presentations on behalf of Ngāti Kahu o Torongare at the hearing that it supported the position and statements from Te Parawhau. As discussed later in closing submissions, the Applicant has not distinguished between the two Hāpu. Rather, it has sought to understand the cultural values held by both Hāpu and respond appropriately.

8. As Ms McGrath states in her supplementary statement of evidence, the Applicant was directed to engage Georgina Olsen to prepare a CIA which represented both Te Parawhau and Ngāti Kahu o Torongare.[2] This late change of position further emphasises the lack of coherency in the narrative of Hāpu in relation to this specific application.

9. In my submission, the email in question does not undermine or alter the position for the Applicant and should not influence the Commissioner's consideration of the evidence before him. The Applicant has had regard to feedback from and sought to consult with both Te Parawhau and Ngāti Kahu o Torongare. The CIA was provided on behalf of Te Parawhau but Te Parawhau chose not to attend the hearing and appear before the Commissioner.

ACTIVITY STATUS

10. The Application was prepared on the basis that the proposed subdivision is a Restricted Discretionary Activity ("RDA"). However, as pointed out in opening submissions, the Council considered the Application to be a Discretionary Activity ("DA") based on a reference to "historic heritage" in the relevant Controlled Activity subdivision rule. This was based on legal advice received by Council officers which was confirmed at the hearing (albeit that it had not been provided in writing at that stage of the process). Counsel for the Council subsequently provided written submissions on this issue which was tabled and circulated on the morning of the second day of the hearing. I respond to those submissions below.

11. The activity status of the Proposal turns on the definition of "Historic Heritage" which is defined in the District Plan as follows:

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[2] Despite this, the CIA was prepared to address Te Parawhau's position only.

> […] means those **natural and physical resources** that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> a. archaeological:
> b. architectural:
> c. cultural:
> d. historic:
> e. scientific:
> f. technological; and includes:
> a. historic sites, structures, places and areas; and
> b. archaeological sites; and
> c. **sites of significance to Māori, including wāhi tapu**; and
> d. surroundings associated with the natural and physical resources.

12. As Ms Shaw notes in submissions at paragraph 17(d), Rule SUB-R2.1 refers to both "Sites of Significance to Māori" (capitalised), and to "areas of historic heritage". Sites of Significance to Māori means mapped sites. The subject Site is not identified in the District Plan as a Site of Significance to Māori. However, the definition of "Historic Heritage" includes "sites of significance to Māori, including "wāhi tapu"[3].

13. The term "natural and physical resources" is defined in the Whangarei District Plan as follows:

> […] includes land, water, air, soil, minerals and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

14. It follows that the "sites of significance to Māori" and "wāhi tapu" relate to or have a connection with a physical feature (whether that remains in situ or not). While wāhi tapu is a metaphysical concept, the reference to "natural and physical resources" implies that these concepts would be associated with a site or feature which is capable of being empirically identified.

15. Despite this, Council's planning team took a default position treating the Site as a "site of significance to Māori, including wāhi tapu", ostensibly based on the CDL decision[4]. It did not seek further information or

[3] The Whangarei District Plan defines "Wahi Tapu" as meaning "a place which is sacred or spiritually meaningful to tangata whenua".
[4] *CDL Land New Zealand Limied v the Whangarei District Council* EnvCt, A99/96.

evidence to support its position; nor did it consider the full definition of Historic Heritage and its reference to "natural and physical resources". Taken further, this position would apply to any circumstances where iwi or Hāpu assert that a site within a Residential Zone is wāhi tapu, without testing the veracity of that assertion. That cannot be what was intended in the District Plan.

16. But for the Council's default position of Discretionary Activity status, the subdivision component of the Application would be controlled, but once the bundling principle is applied, it would become Restricted Discretionary. Ms Shaw submitted that if the Commissioner finds on the evidence that the Site is a site of significance to Māori or wāhi tapu, the Application is a discretionary activity under SUB-R2.1. I agree. However, there is insufficient evidence to make such a finding, given the lack of detail around what is claimed to have occurred in and around the Site. In any event, such a finding could only relate to a specific part or parts of the Site (for example the stream), not the Site in its entirety.

17. This is emphasised by the "matter of control" in Rule SUB-R2.1 which reads:

> Activity Status: Controlled
> Where: 1. The land contains a Site of Significance to Māori, or an area of historic heritage and the proposed boundaries are located to ensure that the whole Site of Significance to Māori or area of historic heritage is entirely within one of the allotments produced by the subdivision.

18. This is further emphasised by the "matter of discretion" which Ms Shaw refers to, namely HPW-R9.1(p). This reads as follows:

> […]
> p. The location of proposed allotment boundaries, building areas and access ways of right-of way so as to avoid sites of historic heritage including Sites of Significance to Māori.

19. This obviously anticipates that any such "sites" will be defined and limited in scale. It cannot mean a wide or general area; nor that an application for subdivision could be declined. Moreover, as the Commissioner knows, a controlled activity must be granted consent. These factors lead to the

conclusion that the term "historic heritage" in the Whangarei District Plan relates to specific, contained, identified (or capable of being empirically identified), physical resources. Not an entire 6.8ha block of land. In my submission, the proposal is, overall, an RDA. Finally, as stated in opening submissions, in any event, the trigger relied on for default to a Discretionary Activity status does not, *ipso facto*, elevate that status to "Prohibited" even if there is evidence of wāhi tapu.

CULTURAL EFFECTS AND ASSESSMENT OF CULTURAL EVIDENCE

20. Counsel for the WDC tabled written submissions which contended that my opening legal submissions "suggest that there is a contest here between the evidence of tangata whenua / mana whenua and the evidence of the Applicant's expert archaeologist".[5] With respect, that is incorrect.

21. The thrust of opening legal submissions was that the evidence of mana whenua must be considered carefully in determining the Application. In that regard, the opening legal submissions focused on the evidence available to the Hearing Commissioner and the veracity of the same. Counsel argued that the evidence of Mr Carpenter demonstrated the information from hāpu[6] contradicted historical records and an earlier CIA prepared by the same author.[7]

22. Counsel for the WDC submitted that two recent High Court decisions were relevant with respect to tangata whenua evidence about effects on cultural values,[8] and went on to list "key principles" relating to the same. However, the decisions cited by counsel for the WDC involved

[5] Legal submissions of counsel for the Whangarei District Council, 15 November 2023, paragraph 19.
[6] Contained in the CIA for Te Parawhau, and the statement of lay evidence lodged by Ms Connor-Kingi for Ngāti Kahu o Torongare.
[7] Opening legal submissions on behalf of Onoke Heights Limited, 14 November 2023, paragraphs [79] and [88].
[8] *Supra* n1.

circumstances where there were competing mana whenua opinions and evidence on the matters at issue. Accordingly, care must be taken when considering the principles of those decisions in the context of this Application.

23. I address each of the principles cited by Ms Shaw as follows:

(a) *Where iwi claim that a particular outcome is required to meet the directions in sections 6(e), 7(a) and 8 in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim*.[9] This is not disputed, and the Applicant has responded meaningfully to the claims of the Hāpu. Ms McGrath addressed the values claimed in the CIA in detail in her evidence. Mr Hartstone did not.

(b) Th*e obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other tāonga must involve seeking input from tangata whenua about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision.*[10] Again, this is not disputed and did not require explicit recognition in opening submissions. It is obvious that tangata whenua have provided input in relation to the Application. Of note is that the paragraph cited by Ms Shaw related to the question of "divergent" iwi claims – a point which was not explained in Ms Shaw's submissions.[11]

(c) *Tangata whenua evidence must be clearly defined according to tikanga Māori and mātauranga Māori, clearly directed to the discharge of an obligation to Māori under the RMA, and precisely linked to a specific resource management outcome.* Again, this is not disputed, and the case law cited in opening is not contrary to this point. As discussed later in closing submissions, the issue in this

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[9] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [68].
[10] *Ibid*, at [73].
[11] *Ibid*. The concluding sentence reads: *[73] …To ignore or to refuse to adjudicate on* ***divergent iwi claims*** *about their relationship with an affected tāonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty*.

Application is the lack of clarity and coherence of the statements made by hāpu members at the hearing and in the CIA.

(d) *The decision maker must assess the credibility and reliability of tangata whenua evidence.*[12] This point was made in opening legal submissions and the principles of the case law cited in opening are consistent with this principle.

24. The legal submissions for the WDC then set out a methodology for assessing the credibility and reliability of tangata whenua evidence (paragraph 19(e)) which draws from the decision in *Ngati Maru*[13]:

(a) whether the values correlate with physical features of the world (places, people);

(b) people's explanations of their values and their traditions;

(c) whether there is external evidence (e.g. Maori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values.

(d) by "external" we mean before they become important for a particular issue and (potentially) changed by the value-holders;

(e) the internal consistency of people's explanations (whether there are contradictions);

(f) the coherence of those values with others;

(g) how widely the beliefs are expressed and held.

25. While this methodology provides guidance for the Commissioner which counsel agrees is helpful, it is nevertheless relevant that the methodology concerned the Court's approach when "assessing divergent claims about iwi and hāpu values and traditions".[14] Bearing this in mind, in my submission, the case law principles cited in opening legal submissions are not contrary to these principles and are relevant to the Commissioner's

[12] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [65].
[13] *Ngati Maru,* supra n9.
[14] *Ngati Maru, supra*, n5 at [117].

determination of the Application. I do not repeat those principles here as the Commissioner will consider opening submissions alongside these closing submissions in making a decision on the Application.

26. Finally, I do not dispute the points made in paragraphs 19(f) and 19(g) of the submissions on behalf of the WDC and no argument was put in opening submissions which is contrary to the principles cited. Counsel did not suggest that the Commissioner should "substitute its own view of cultural effects and decide otherwise". Moreover, counsel stated in opening legal submissions that Onoke acknowledges that it cannot speak as to potential effects on cultural (iwi) values on behalf of mana whenua. It is for Maori to assert and establish.[15]

27. Regarding mana whenua status, the Applicant has not questioned the authority of Te Parawhau and Ngāti Kahu o Torongare as mana whenua. It has sought to engage with both, and the extent of those efforts has been described by Ms McGrath in her evidence in chief and supplementary evidence[16]. There can be no criticism of the Applicant's efforts to engage, consult, and seek to identify and understand the values to be recognised and provided for. As illustrated at the hearing, the hāpu representatives have not, and did not, present a coherent and evidence-based explanation of those values. This point is addressed below.

Mana Whenua / Hāpu presentations at Hearing

28. The presentations from hāpu members are relevant to an assessment of whether there are any sites of significance to Māori ("SoSM") within the Site and the values associated with the same. In my submission, for the reasons stated in opening submissions and as explained below, there is insufficient evidence to determine whether there are any SoSM within the Site and certainly insufficient evidence to determine that the entire

[15] *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79.
[16] Statement of evidence in reply of Melissa McGrath, 15 December 2023.

Site is significant. The evidence before the Commissioner following adjournment of the hearing has not altered the position as stated opening submissions.

29. If the Commissioner nevertheless finds that there is a SoSM in play, the effects of the Proposal on the values which have been listed by Hāpu in the CIA and in presentations at the hearing have been recognised and provided for in the Proposal. Ms McGrath's evidence – both her evidence in chief filed prior to the hearing and as given at the hearing – clearly explains why. In any event, the existence of a SoSM does not create a veto or "default" prohibited activity status. The case law is clear in this regard.[17]

30. It is not clear whether the presentations by Hāpu members are considered expert evidence. None of the statements were lodged in accordance with the directions of the Commissioner for expert evidence exchange. If those witnesses considered themselves to be experts, statements should have been circulated in advance to provide the Applicant opportunity to consider the same. Alternatively, specific Directions regarding evidence exchange could have been made to accommodate these statements. Unfortunately, the Council's process in relation to the Application has not assisted.

31. Putting this aside, as stated in opening submissions, the specific nature of the historical use and significance of the Site is not clear or certain. The presentations from hāpu members at the hearing did not provide that certainty. In short, the statements from members of the hāpu who spoke referred broadly to the general Onoke area, not the Site itself. Moreover, there was no consistency between the stories, these lacked in coherence, and none addressed the historical and empirical research as presented in

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[17] Opening legal submissions on behalf of Onoke Heights Limited, 14 November 2023, paragraphs [91] and [100].

Mr Carpenter's evidence. In the absence of that certainty, the Commissioner is not able to make a finding on its significance. Given the potential consequences for the Applicant and the Council (i.e., given the zoning of the Site), the claims made by hāpu must be tested with an appropriate degree of rigour. I address the statements as follows.

Te Parawhau

32. No representative for Te Parawhau appeared and presented at the hearing. As stated in opening submissions, Te Parawhau provided the CIA which was requested from the Applicant by Council. The CIA author was engaged to prepare a CIA on behalf of both Te Parawhau and Ngāti Kahu o Torongare. However, the CIA was representative of Te Parawhau only.

33. For the reasons stated elsewhere in submissions, the CIA for this Site is inconsistent with an earlier CIA prepared by the same author in relation to another site in the same area, particularly in relation to the map identifying areas of importance to Hāpu in the earlier CIA. This map was attached to Mr Carpenter's evidence.[18] In my submission, this demonstrates a lack of coherence and consistency which undermines the reliability and veracity of the information prepared on behalf of Te Parawhau. This lack of coherence and consistency is similarly apparent in the evidence on behalf of Ngāti Kahu o Torongare.

Nicki Wakefield

34. Ms Wakefield[19] indicated that she represents the descendants of the tribes of Whangarei Panel for Ngāti Kahu o Torongare. She acknowledged whanaunga and expressed support for Te Parawhau's

[18] Statement of evidence of Jonathan Carpenter, 31 October 2023, refer to Figure 22.
[19] Ms Wakefield and all Hāpu representatives presented following the lunch adjournment on the 14th of November 2023. These submissions are based on the verbal evidence given on that day and the written statements tabled on the day and following.

submission. She provided a draft set of speaking notes which were later finalised and made available on the Council website.[20] Regarding the issue of wāhi tapu, Ms Wakefield opined that the Hāpu "uphold" wāhi tapu status. However, with respect, there was no explanation of the nature of the wāhi tapu status and why this is asserted in relation to the Site. While she makes the point that the tāpu remains long after the physical evidence is decayed, it is not clear what physical evidence is referred to and/or where it is or was located. There is no historical evidence which supports this.[21]

35. Ms Wakefield raised concerns about mining subsidence, climate change, development and impermeable surfaces, stormwater runoff, and contends that there will be harmful runoff from the proposed development. This is not supported in the expert evidence for the Applicant.

36. Ms Wakefield noted that the hāpu has disagreed with residential zoning since the 1980s and opined that the Site should have been listed as a SoSM in 1996. As demonstrated in the Council's memo and Ms McGrath's supplementary statement of evidence, Ngāti Kahu o Torongare (and Te Parawhau) were consulted with and provided ample opportunity to participate in these plan change processes but did not. It is not for the Commissioner to revisit those processes and the Commissioner does not have jurisdiction to do so.[22]

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[20] https://www.wdc.govt.nz/Services/Planning/Notified-Applications/SL2100055-Onoke-Heights

[21] Mr Carpenter's evidence is that: *"There is no evidence in the Maori Land Court records of the investigation of the title to Onoke (or the surrounding blocks) that the land was of any particular significance, or that any battle site or other wāhi tapu was present on that block, or that there were any otherwise significant places in need of reservation, or retention by Ngati Kahu."* [Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 99.]

[22] As discussed elsewhere in these submissions, both Ngati Kahu and Te Parawhau lodged multiple claims with the Waitangi Tribunal in relation to the historical grievances for Ngapuhi. This indicates that both Hāpu are sufficiently organised to participate in processes which are important to them.

37. Ms Wakefield spoke of alienation from land, culture, and taonga over generations. Again, with respect, those matters are not relevant to the Commissioner's determination of this resource consent application.

Chantez Connor-Kingi

38. Ms Connor-Kingi opined that the Site is "wāhi tapu" for many reasons. However, she did not explain why. She spoke of urupa and papakainga at Ngāraratunua (not the Site). Ms Connor-Kingi spoke of Tipene Hari as a tohunga and, similarly to Ms Wakefield, noted that tāpu remains after physical evidence decayed. However, there is no evidence of what the physical evidence is or was; no evidence of what the practices were and where these were carried out – i.e., no evidence that it was on the Site subject to this Application.

39. Conversely, the evidence of Mr Carpenter acknowledges Tipene Hari and his status, and that the Site was cultivated by Tipene Hari prior to him and two others selling the site in 1877.[23] In my submission, cultivation and occupation of the Site do not align with the Hāpu contention that the Site must not be used for the living, particularly when Tipene Hari's occupation appears to post-date the timing of the battles in the area.[24]

40. With respect to Ms Connor-Kingi's evidence on Te Mana o Te Wai and comments about the removal of the trees on the Site, the proposed development will actively restore and protect the Otapapa stream which runs along the southern boundary of the Site. While the existing

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[23] Refer to Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 138: *"The portion of the Onoke Block which is the subject of the application was occupied and cultivated by Chief Tipene Hari of Ngati Kahu into the 1870s, that he and two others were granted uncontested title to Onoke in 1877, and subsequently sold the land the same year"*.

[24] https://nzhistory.govt.nz/war/new-zealands-19th-century-wars/the-musket-wars; https://nzhistory.govt.nz/war/northern-war; also see the statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph [51].

(approximately 100-year-old[25]) Puriri Trees will be removed, extensive re-vegetation will be carried out which will offset the loss of these trees and maintain the presence of Puriri and Totara on the Site. This re-vegetation and planting include large specimen Puriri (of a grade no less than 160L or equivalent) at a 1:1 ratio, plus 4540 new native plantings. Overall, this represents a 250:1 ratio of replanting in relation to the loss of the individual trees.[26] Relevantly, Ms Connor-Kingi did not provide any explanation as to why the existing trees were of elevated importance – particularly when these were planted decades after the land was sold by Tipene Hari.

Waimarie Bruce (Kingi)

41. Ms Bruce spoke of Dip Road as a Ngāpuhi track and that stretchers with tanekaha poles and harakeke mats were used to carry the wounded. She explained that they would be carried to Waipapakuri at Hikurangi Swamp then to taumata ta waka. Ms Bruce opined that Ngāpuhi would rest the injured at Onoke. Again, with respect, there is nothing which relates specifically to the Site and the basis for the assertion that the "whole Site" is wāhi tapu and significant. Ms Bruce expressed that Puriri are cultural indicators for tohunga to do mahi/Rongoa. However, as noted previously, the Puriri on the Site were planted in the 20th century and the relevance of these specific trees as cultural indicators is unclear.

42. Regarding the SoSM mapping, the Council's memo[27] and Ms McGrath's evidence demonstrates that Ngāti Kahu o Torongare was consulted by Council in regard to the plan change process to map and recognise

[25] Statement of evidence of Melissa McGrath, 31 October 2023, Attachment 5.
[26] Statement of evidence of Madar Vilde, 31 October 2023, paragraphs [60] and [63].
[27] District Plan Making History as relevant to Onoke Block - 1994 to Present, Whangarei District Council, 29 November 2023.

SoSM. Regarding the statement that tupuna were laid in Onoke, there is no corroborating historical evidence of such burials.

Lissa Davies

43. Ms Davies opined that the ancestors (pito) of the Hāpu were buried at Onoke – although it is not clear whether she was referring to the subject Site or somewhere in the wider Onoke area. Regardless, as discussed in opening submissions and in closing, there is a lack of corroborating evidence or stories of such burials. While this creates a tension between archaeological/historical research and verbal oratory of hāpu members, the lack of a consistent narrative counts against a finding of significance in relation to the Site (in part or otherwise).

Winiwini Kingi

44. Mr Kingi referred to the Tohunga Suppression Act[28], the loss of whenua and assets of the hāpu, and that not many whanau own their own land anymore. He opined that Onoke is a very tāpu place and that his mother, uncles, and cousins said not to go there. Like previous presentations on behalf of the hāpu, the primary concern appears to be historical land grievances and references to Onoke are generalised and not specific to the Site.

Summary of Hāpu evidence *vis-a-vis* principles for evaluating evidence

45. In my submission, the evidence presented at the hearing which expressed grievances about loss of ancestral land is not a matter which is relevant to the Commissioner's consideration and determination of the Application. That is a matter for the Waitangi Tribunal.[29]

[28] Tohunga Suppression Act 1907.
[29] The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Wai 1040, Waitangi Tribunal Report 2022.

46. The evidence and presentations which referred to placenta burial, battle grounds, pathways between battles, preparation of bodies for burial or other end of life protocols, and use of the stream relate to a wider area than the subject Site and did not provide a connection to the Site or a location within it. As stated in opening and in these closing submissions, there is no evidence in the Māori Land Court records of the investigation of the title to Onoke (or the surrounding blocks) that the land was of any particular significance, or that any battle site or other wāhi tapu was present on that block, or that there were any otherwise significant places in need of reservation, or retention by Ngāti Kahu o Torongare.[30] Further, there are no other records of the Site being a battlefield or wāhi tapu.[31]

47. Similarly, the commentary on these matters does not correlate with physical features of the Site, including the Otapapa Stream. The Waipango, which was referred to by a submitter[32], extends beyond the Site and there is no certainty that this is the same stream which was used. In short, the explanations of the values and traditions are disparate and don't have a clear connection to the subject Site. In my submission the Commissioner does not have sufficient evidence to make a finding that the whole Site is wahi tapu. Even if the Otapapa is considered wahi tapu, the Application clearly proposed significant enhancement and protection of this stream thereby recognising and providing for the values associated with it.

48. External evidence sources (e.g., Maori Land Court Minutes) do not support the assertions made by hāpu members. Submitters did not present consistent or corroborating information (e.g., waiata, or whakatauki) at the hearing about the values which would support the

[30] Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 99.
[31] Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 100.
[32] Waimarie Bruce and Ms Connor-Kingi.

assertions as to significance of the Site. Indeed, there are contradictions in the explanations – the Council's own planner demonstrated this inconsistency in his evidence.[33]

49. Finally, the evidence presented is insufficient to assess whether the beliefs are widely held and there is no evidence as to location and extent of the wāhi tapu referred to.

50. Even if the Commissioner were to find that the Site contains a wāhi tapu site or area, section 6(e) cannot be used to defeat an application for resource consent, even where there is no dispute as to the existence and significance of wāhi tapu.[34] As set out in opening submissions, in *Hemi v WDC,* the Court was willing to accept that evidence of the use of land for a use incompatible with wāhi tapu was a reasonable test of evidence against the existence of wāhi tapu. In this case, Mr Carpenter's evidence is that the Site was historically used for gardening purposes.[35] That is incompatible with the suggestion that people should not live on the Site.[36] Nothing in the presentations from Hāpu members disputed this evidence of Mr Carpenter.

HISTORICAL GRIEVANCES AND RELEVANCE TO APPLICATION

51. The presentations from Hāpu at the hearing demonstrate the fundamental issue in play relates to historical grievances over the wider Onoke land area. As stated elsewhere in submissions, such matters are not relevant to the Commissioner's determination of the Application –

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[33] Refer to Opening legal submissions on behalf of the Applicant, 14 November 2023, paragraph [114] re: S42A Report paragraph 92.
[34] *Hamilton v Far North DC* [2015] NZEnvC 12.
[35] Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 120.
[36] This would logically include occupying the Site, which Ngāti Kahu o Torongare has threatened in a recent New Zealand Herald article: New Zealand Herald, "Whangārei iwi threaten occupation if housing development goes ahead", by Tumamao Harawira, 22 Nov, 2023 06:28 AM.

they are outside the jurisdiction of a decision maker pursuant to the Resource Management Act 1991.

52. Relevantly, the Waitangi Tribunal has recently released it's "Stage 2" report on the Ngapuhi claims.[37] The Tribunal has recommended return of all "Crown owned land". The subject Site is not Crown owned land.

53. The responsibility of the Commissioner is to consider the Application pursuant to section 104 of the RMA. There is no responsibility or jurisdiction to reconsider or question the plan change to re-zone the Site to General Residential. Moreover, the CDL decision cannot be considered as "evidence" for determining this Application. To do otherwise would be an error of law and lead to a challenge by way of appeal to the Environment Court.[38]

RELEVANCE OF CDL DECISION

54. In 1996 the Environment Court heard an appeal against a decision by the Whangarei District Council declining a private plan change to rezone the Site from "Rural" to "Residential Landscape Protection" zone (the **CDL decision**).[39] The reason given by WDC for declining the private plan change was that it was not satisfied the statutory obligation of consultation with the local tangata whenua had been adequately fulfilled.

55. The Environment Court rejected the claim that the plan change should be cancelled on the ground of inadequate consultation with the tangata whenua.[40] However, in considering the evidence before it, the Court

[37] Supra n29.
[38] The Applicant reserves its position to seek a Judicial Review of the Council's decision-making process in relation to the Application from the outset, including pre-lodgement discussions and consultation.
[39] *CDL Land New Zealand Limited v Whangarei District Council* [1997] NZRMA 322.
[40] *CDL decision* at p 7.

concluded that the private plan change would not give effect to section 6(e) of the RMA, and therefore must be declined.[41]

56. In my submission, the CDL decision is distinguishable from the current circumstances and therefore is of little relevance for the purposes of this resource consent application. The CDL decision related to a private plan change advancing a particular proposal. This hearing is for a resource consent for a residential subdivision on land zoned for residential activities. The RMA is express that there is no duty to consult any person about a resource consent application.[42] Further, while there is a requirement for any resource consent application to identify any consultation undertaken and any response to the views of any person consulted,[43] the "RMA imposes no invariable obligation on a potential applicant to consult with anyone. The only obligation imposed by the words of the Fourth Schedule, is to report on consultation."[44]

57. Further, the decision specifically notes that it "relates only to the proposed plan change. Nothing should be inferred from it about the lawfulness of any use of the subject land in accordance with the current district plan provisions."[45]

58. Accordingly, at most the CDL decision can be had regard to under section 104(1)(c) as any other matter of relevance to the application, however I submit that it is not relevant nor necessary to consider the CDL decision in making a determination under section 104 of the RMA with respect to this resource consent application. As the Court itself stated, nothing should be inferred from the decision about the lawfulness of any use of the Site in accordance with the current district plan provisions. The current district plan zones the Site for residential use.

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[41] *CDL decision* at p 9.
[42] RMA, s 36A(1)(a).
[43] RMA, Sch 4 cl 6(1)(f).
[44] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNA 111 at [66].
[45] *CDL decision* at p 9.

WHANGAREI DISTRICT COUNCIL PLAN CHANGE PROCESSES

59. By Minute dated 15 November 2023, WDC was directed to provide a statement on the process undertaken with respect to the rural and urban and services plan changes affecting the Site. In particular, WDC was directed to document the engagement with mana whenua in relation to the Site and provide a timeline and summary of consultation. It was also directed to provide a statement on the process it has been undertaking since the CDL decision related to sites of significance to Māori.

60. WDC have provided a memorandum outlining the changes to the district plan as it relates to the Site from 1994 to present and the consultation undertaken with mana whenua during those processes (**WDC Memorandum**).[46] In addition to this, Ms McGrath has provided further information in her Supplementary Statement of Evidence (in reply) dated 15 December 2023.

61. Schedule 1 clause 3 of the RMA requires a local authority to consult certain people during the preparation of a proposed policy statement or plan.[47] Those people include the tangata whenua of the area who may be so affected, with the consultation to occur through iwi authorities.[48]

62. As evidenced by the WDC Memorandum, the consultation undertaken by WDC with the local iwi from 1994 to present has been extensive. Indeed, the work programmes undertaken to identify and map the sites of significance to Māori are demonstrative of the extensive consultation, beginning in 2010:

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[46] Memorandum from Stephanie Opai to Yvonne Masefield – District Plan Making History as relevant to Onoke Block – 1994 to Present, dated 29 November 2023.
[47] RMA, Sch 1 cl 3(1).
[48] RMA, Sch 1 cl 3(1)(d).

(a) Ngati Kahu ki Torongare and Te Parawhau were identified to participate in the project.[49]

(b) The sites of significance to Ngati Kahu ki Torongare had been identified by 1 November 2013, and an agreement drawn up regarding the use of that information. Notably, that agreement allowed WDC to keep a database and to use that information to assess resource consents and to inform applicants and decision makers of sites of significance.[50]

(c) Te Parawhau refused to provide information regarding sites of significance to them to WDC's contractors.[51]

(d) WDC's contractors note that all Hāpu had done the research to identify the sites of significance and held the information (as at December 2014).[52]

63. In 2018 the Site was rezoned from Countryside Environment to Living 1 Environment. In 2022 the Site was rezoned from Living 1 Environment to General Residential. During both plan change processes, WDC not only had access to the information gathered during the sites of significance to māori projects, but also consulted with iwi through Te Karearea and Te Huinga and with the public generally.[53] Ngati Kahu ki Torongare and Te Parawhau had every opportunity to engage with these plan changes and oppose the rezoning of the Site, but did not do so. In my submission, the consultation undertaken by the Council was sufficient to satisfy its obligations under clause 3 of Schedule 1 of the RMA.

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[49] WDC Memorandum at p 8.
[50] WDC Memorandum at p 9-10.
[51] WDC Memorandum at p 10.
[52] WDC Memorandum at p 10.
[53] WDC Memorandum.

64. Further, the only avenue now available to challenge the rezoning of the Site is by way of judicial review. The Council as consent authority (and the Commissioner having been delegated the Council's powers in this respect) has no jurisdiction to enquire into the sufficiency of previous plan making processes in making its determination on a resource consent application. Such processes are not a relevant consideration under section 104 of the RMA. To do so would amount to an error of law.

65. If the Commissioner concludes that there are questions as to the integrity of the Whangarei District Plan, he may refer to Part 2 of the RMA in making his decision, in accordance with *R J Davidson Family Trust v Marlborough District Council*.[54] However, this does not allow a decision-maker to disregard clear objectives and policies of a planning document.[55] The Court of Appeal held that "it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general resource to pt 2 in deciding resource consent applications."[56] In my submission, reference to Part 2 does not change the appropriate conclusion with respect to the application. As set out in the evidence of Ms McGrath, the Proposal is consistent with Part 2 of the RMA.[57]

Flooding issues

66. By Minute dated 15 November 2023, the Council's and the Applicant's engineers were directed to meet with Mr Duncan Scott at his property at 45 Dip Road to discuss flooding concerns from the proposed development. The Minute directed a "statement on matters discussed and any agreement is to be provided."[58]

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[54] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [74]–[75].
[55] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [71]–[72].
[56] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [78].
[57] Statement of Evidence of Melissa McGrath dated 31 October 2023 at [164]–[174].
[58] Minute dated 15 November 2023 at (2)(iv).

67. Three statements have been provided summarising the meeting and matters discussed:

    (a) WDC Memorandum from Kaylee Kolkman to Commissioner Mr Alan Withy dated 30 November 2023;[59]

    (b) Statement from Duncan Scott to Alan Withy dated 21 November 2023; and

    (c) Supplementary Statement of Evidence of Aaron Holland dated 15 December 2023.

68. As will be apparent, the three records of the meetings and matters discussed differ from one another. As detailed in Mr Holland's supplementary statement of evidence, his record of the meeting and the matters discussed was recorded in a file note sent by email soon after the meeting on 21 November 2023. Accordingly, I submit that this contemporaneous record should be given greater weight than the Memorandum of Ms Kolkman dated 30 November 2023. Further, Ms Kolkman's memorandum states the wrong date and time of the meeting, states that Mr Widdup was in attendance when he in fact was not, and makes no mention of the fact that the meeting between Council representatives and Mr Scott lasted a matter of minutes.

69. I also submit that Mr Holland's record of the meeting should be given greater weight than Mr Scott's. While Mr Scott records that he raised various matters with Mr Holland, he also expands further upon those matters, with his statement taking the form of a submission rather than a statement of the matters discussed at the meeting. This goes beyond the direction in the Minute dated 15 November 2023 and is not

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[59] Memorandum from Kaylee Kolkman to Commissioner Mr Alan Withy dated 30 November 2023 at 3.

appropriate. Mr Scott also asserts the Mr Holland made various assurances or agreed to changes to the proposed development design. Mr Holland denies making many of those statements (as detailed in his supplementary statement of evidence dated 15 December 2023).

70. While the Applicant acknowledges Mr Scott's concerns and frustrations with the flooding issue at his property, the engineering experts for WDC and the Applicant have confirmed that the proposed development will have no effect on the existing flooding issue at his property. The opinions of these expert engineers must be provided greater weight than the opinion of a lay submitter.

CONCLUSION

71. For the reasons set out in submissions of counsel for the Applicant and the evidence of Ms McGrath, the status of the Application is, when bundled, a Restricted Discretionary Activity. The presentations by hāpu and other submitters at the hearing does not provide an evidential basis for a finding that the Site is "significant". Indeed, there is little evidence to find that part of the Site is significant. In my submission, Mr Carpenter's evidence should be afforded significant weight when evaluating the evidence on cultural historical matters.

72. Should the Commissioner determine that the activity status is Discretionary, the existence of a wāhi tapu within the Site does not mean that the Application must be declined. To the contrary, it cannot be used to defeat the Application. As demonstrated in the evidence for the Applicant, the values identified by Te Parawhau in the CIA (which appear to align with that of Ngāti Kahu o Torongare), have been recognised and provided for in the Proposal.

73. The evidence for the Applicant demonstrates that the Proposal will generate effects which are minor and acceptable in the context of a residential development within the General Residential Zone.

74. The section 42A author has inadequately considered the key issues in contention. As stated in opening legal submissions, he misses the point that even if a site is considered "significant" this status does not preclude grant of consent and this is reflected in the objectives and policies of the District Plan and NRPS; and the Site's General Residential Zoning.

75. The Application is consistent with all the relevant planning documents. There is no "clash" between policy directions across those documents which would require a reconciliation to determine the Application. Rather, the assessment is straightforward. Should the Commissioner consider is appropriate or necessary to have recourse to Part 2, in my submission this will not lead to a different conclusion than that set out in Ms McGrath's evidence which is that consent should be granted.

76. In summary, based on a fair appraisal of the objectives and policies of the relevant planning instrument as a whole[60], the relevant legal principles for evaluating evidence (including cultural evidence), and the evidence before the Commissioner, the Proposal achieves the purpose of Part 2 of the RMA and should be granted consent, subject to the conditions **attached** to Ms McGrath's evidence.

M Mackintosh
Counsel for Onoke Heights Limited

[60] *R J Davidson v Marlborough District Council* [2018] NZCA 316, paragraph [73].