BEFORE INDEPENDENT HEARING COMMISSIONERS
AT WHANGĀREI

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
KI WHANGĀREI

IN THE MATTER	**of the Resource Management Act 1991**
AND	
IN THE MATTER	**of the hearing of submissions on applications by the Northport Ltd – Port Expansion project at Marsden Point**

LEGAL SUBMISSIONS FOR PATUHARAKEKE TE IWI TRUST

26 OCTOBER 2023

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MAY IT PLEASE THE COMMISSIONERS:

> [14] It is clear that [Patuharakeke] actively maintain a relationship with this area, including around Marsden Point and One Tree Point, and that it constitutes part of their ancestral lands, waters, sites, waahi tapu and other taonga. We note that there is a Treaty claim in respect of the area. We also acknowledge that, as the eastern extent of the harbour, it would have some particular values. The extensive cultural areas exist both to the east and the west of the 190ha of SEA. To the west of the SEA, the harbour edge is noted as an area of cultural significance. From a cultural perspective, the harbour edge forms part of the cloak between the shoreline and the harbour, which is unbroken for a number of kilometres along the southern edge of the harbour. It is also reinforced by large sandbank areas comprising pipi and the like.[1]

1. INTRODUCTION

1.1 At stake in these proceedings is a tāonga to mana whenua and an irreplaceable natural resource highly valued and heavily utilised by the community. It will sever Patuharakeke's last remaining direct connection to the takutai moana.

1.2 The evidence of the cultural witnesses before you is that the adverse effects on the tāonga of Whangārei Terenga Parāoa and its values is material and permanent. The values of the foreshore will be destroyed, and there is significant uncertainty about potential wider ecological effects, including cumulative effects. Many of the "western science" expert assessments, including the economic analysis, have not attempted to apply a cultural lens to their assessments or integrate relevant findings of the CVA/CEA and therefore offer an incomplete effects assessment. The uncontested mana whenua evidence is that the conditions proffered at the 11th hour by the applicant are woefully inadequate at addressing those effects.

1.3 There is no contrary cultural evidence from mana whenua disputing those cultural effects or their magnitude.

1.4 The stretch of foreshore to be destroyed by the proposed reclamation is sandwiched between two industrial activities (the refinery and the port). The applicant would have you see this environment as so compromised that it is of little value: my client considers it to be complete opposite – in these circumstances its retention and protection becomes even more important.

1.5 While the effects of an activity must be assessed against the environment as it exists, modern environmental jurisprudence has eschewed the notion

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[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2021] NZEnvC 021

that if an environment is compromised, then further adverse effects should be seen as somehow being acceptable.

1.6 Further and more importantly, the Commissioners will understand how repugnant that approach is to tangata whenua. Despite the despoilation of their whenua and moana by the industrialisation of their whenua and moana for the past (at least) 60 years, Patuharakeke have continued to nurture the whenua and the moana. When someone close to you is sick, you care for them more closely; you don't just write them off.

Scope of submissions

1.7 These submissions will:

(a) summarise why Patuharakeke opposes this proposal, noting that evidence that you will hear shortly will express that concern far more eloquently than I ever could;

(b) set out the broader legal framework applicable to your decision, focussing on cultural matters and the lens through which key evaluative decisions need to be made;

(c) with regard to that legal framework, identify matters that require a particular legal response.

1.8 Those specific issues include:

(a) the applicable policy framework relating to cultural effects;

(b) the degree of effects on cultural values.

1.9 Relative to the policy framework and those effects, I will comment on:

(a) the assessment of alternatives undertaken by the applicant;

(b) if consent is to be granted, the appropriateness of the applicant's request for a 35 year lapse date;

(c) whether there is a sufficient information basis to make certain evidential findings of key effects in relation to coastal processes and marine mammals; and

(d) the appropriateness of the consent conditions that have been proposed to address cultural effects.

1.10 I have not repeated the relevant statutory framework described in the s 42A Report or in the legal submissions filed by other parties.

2. WHY DOES PATUHARAKEKE OPPOSE THIS PROPOSAL?

2.1 There is no debate that Patuharakeke are tangata whenua who exercise mana whenua at Whangārei Terenga Parāoa.

2.2 The genuine and consistent evidence of all affected tangata whenua is that the existing industrial activities (including the port and the refinery) has had and is continuing to have significant adverse cultural effects on:

(a) their identity as tangata whenua;

(b) the relationship they have with their tupuna moana, and their taonga species;

(c) their ability to exercise rangatiratanga and fulfil their kaitiaki responsibilities to protect the mauri of the moana and their taonga species;

(d) their mana, cultural wellbeing and mauri through the permanent loss of the takutai moana, Te Koutu/Poupouwhenua beach and foreshore and their ability to exercise mana whenua / mana moana over it;

(e) the further loss and degradation of mahinga mātaitai (particularly Poupouwhenua and Patangarahi mātaitai) impacting the ability of tangata whenua to continue customary fishing practices and to manaaki manuhiri;

(f) the wellbeing and mauri of the moana, and the essential ecosystem services that exist within it; and

(g) the interdependent relationships between the species within the moana, leading to a systematic breakdown of those relationships – including with Patuharakeke as kaitiaki.

2.3 The long-standing nature of the industrial activities has not reduced those effects: instead it has simply served to amplify them, and the mamae that these activities have caused to generations of tangata whenua.

2.4 The current proposal will further exacerbate Patuharakeke's Treaty grievances and will, insofar as the affected area is concerned, nullify Patuharakeke's MACA claim. It will completely sever their remaining relationship with the seabed and foreshore/takutai moana in this location.

2.5 Because of these devasting consequences, Patuharakeke is (understandably) extremely concerned that the western science assessments did not consider the effects through application of a cultural lens or directly in conjunction with mana whenua, in any material way, despite that being either required or recommended by relevant best practise. Further, despite policy direction to this effect, there appeared to be a complete lack of assessment about what economic benefits might accrue to mana whenua as a result of the proposal.

2.6 In light of all of the above, Patuharakeke would have expected that the applicant's alternatives assessment would go beyond what appeared to be a very Northport-centric, cost-centric, and operational-centric alternatives assessment. None of the alternatives assessment incorporated any clear criteria that weighed the costs and benefits of the alternatives against cultural, social, economic and environmental effects – particularly, the impacts of each alternative on the relationship of Patuharakeke with its tāonga, which is at the heart of s 6(e) and which cascades through the New Zealand Coastal Policy Statement (**NZCPS**) and the Northland Regional Plan (**NRP**).

3. LEGAL FRAMEWORK

3.1 This section focuses on the statutory framework supporting the matters of cultural concern.

3.2 I have read and gratefully adopt the legal submissions filed by counsel for the Royal Forest and Bird Protection Society Inc dated 13 October 2023 and the Director General of Conservation dated 4 October 2023, in particular as regards their analysis of the higher order planning documents and the judicial consideration of those documents, as they relate to matters of concern to Patuharakeke.

Te Tiriti o Waitangi

3.3 The Treaty is the foundation on which the laws of this country are based. It is of constitutional significance.[2] The guarantee in Article 2 of tino rangatiratanga applies not only to land but, as the Supreme Court recently recognised, to the "*marine environment*".[3] Local authorities as successors to the Crown have a "*responsibility for delivering on the Article 2 promise*".[4]

3.4 The Treaty's role in the RMA context is confirmed in s 8 of that Act. This section expressly directs decision-makers to take the principles of the

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2 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, at [151]
3 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, at [154]
4 *Ngāti Maru ki Hauraki Inc v Kruithof* [2005] NZRMA 1, at [57]

Treaty into account when exercising their powers under the RMA – these powers include, in this context, whether or not to grant consent and, if so, the conditions of any such consent. The Supreme Court has confirmed that such Treaty provisions should not be narrowly construed, and instead, should be given a "*broad and generous construction*", there being no indication that statutory decision-makers intended "*to constrain the ability of statutory decision-makers to respect Treaty principles.*"[5]

3.5 While there is no set list of Treaty principles, key principles emerging from the courts and the tribunals include tino rangatiratanga (which includes the right to manage resources in a manner compatible with Māori customs and values), partnership, active protection, a duty to act reasonably and in good faith, mutual benefit, and redress.[6]

Tikanga

3.6 Tikanga is another aspect of the legal framework which is relevant for this Hearing Panel to consider. Tikanga was the first law of our country, it forms part of the common law and continues to shape and regulate the lives of Māori.[7] Tikanga is defined in s 2 of the RMA as "*Māori customary values and practices*", and also includes "*custom law*".[8]

3.7 Tikanga guides the relationship Māori have with the whenua and moana and the exercise of kaitiakitanga. Tikanga is determined by the relevant iwi or hapū. The appropriate method of ascertaining tikanga will depend on the particular circumstances of a case.[9] (This is not a case where there is a dispute about what the appropriate tikanga is because all mana whenua interests are aligned in opposition to the proposal.)

3.8 The Environment Court is required to recognise tikanga Māori (where appropriate) when regulating its proceedings[10] and so should this Hearing Panel.

Part 2, Resource Management Act 1991

3.9 Decision makers under the RMA are bound by its terms and these include a "*particular sensitivity to Māori issues*".[11]

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5 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, at [151]

6 *Carter Holt Harvey Ltd v Te Rūnanga o Tūwharetoa ki Kawerau* [2003] 2 NZLR 349 (HC), at [27]; and *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641, at 693. See also https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf

7 *Ellis v R* [2022] 1 NZLR 239 (SC), at [22]

8 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] 1 NZLR 801, at [169]

9 *Ellis v R* [2022] 1 NZLR 239 (SC), at [23]

10 RMA, s 269

11 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC)

3.10 While referral to Part 2 may not add anything where a plan has been competently prepared having regard to Part 2,[12] where there remain gaps in the framework, it is both necessary and appropriate to do so. (As discussed below, an unusual feature of the NRP is that Part F – Objectives and Part D – Policies specifically refers to the RMA being referred to in consent applications "where appropriate". If this were not such a case where Part 2 should be referred to, then what would be?)

3.11 The starting point is s 5 which confirms the RMA's purpose is to promote "*sustainable management*". This includes enabling people and communities to provide for their "cultural wellbeing".

3.12 Sections 6(e), 7(a) and 8 contain "*strong directions*" which must be borne in mind at every stage of the planning process. In particular:[13]

(a) s 6(e) requires the relationship of Māori and their culture and traditions with their ancestral lands, waters, wāhi tapu and other taonga to be recognised and provided for;

(b) s 7(a) requires decision makers to have particular regard to "kaitiakitanga";[14] and

(c) s 8 requires that Treaty principles are to be taken into account.

3.13 Those strong directions, and the emerging jurisprudence around the role of tikanga and the principles of the Treaty, coalesce into a lens through which this Hearing Panel should:

(a) apply relevant policies, including through undertaking the "structured analysis" or identification of "material harm" directed by the Supreme Court's recent *Port Otago* decision;

(b) interpret policies, and, in the event of ambiguity adopt a wording that best gives effect those strong directions, and ensure that any conflict between enabling and protective policies be kept as narrow as possible; and

(c) if consent is to be granted, impose conditions necessary to reflect the nature of the interests affected and how effects on those interests might be avoided, remedied or mitigated to an appropriate lesser magnitude, and how the intrinsic

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12 *RJ Davidson Family Trust v Marlborough District Council* (2018) 20 ELRNZ 367, at [74]-[75]

13 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC)

14 Which is defined as which is defined as the exercise of guardianship by tangata whenua (the iwi or hapū that holds mana whenua over the area) in accordance with tikanga Māori (which in turn is defined as customary values and practices), refer s 2 of the RMA.

environmental and cultural values can be impacted to the least practicable extent.

New Zealand Coastal Policy Statement 2010

3.14 There are strong objective and policy directions in the NZCPS recognising tangata whenua rights and interests.[15] These are directly applicable to your decision making under s 104(1)(b)(iv), and they have also been pulled through into the Northland Regional Policy Statement (**RPS**), and the NRP.

3.15 Of particular relevance to Patuharakeke's concerns and this hearing are the following policies:

(a) Policy 2 – the Treaty of Waitangi, tangata whenua and Māori heritage

(b) Policy 3 – Precautionary approach

(c) Policies 6(1)(b) and (h); 6(2)(a) and (b) – Activities in the coastal environment

(d) Policy 6(2)(e)(iii) - considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay

(e) Policy 9 – Ports

(f) Policy 10 – Reclamation and de-clamation

(g) Policy 11 – Indigenous biological diversity (biodiversity)

(h) Policies 13 and 14 – Preservation and restoration of natural character

(i) Policy 15 – Natural features and landscapes

(j) Policies 18 and 19 – Public open space and walking access.

Regional Policy Statement

3.16 Key provisions include:

(a) 2.6 Issues of significance to tangata whenua – natural and physical resources

(b) Objective 3.4 Indigenous ecosystems and biodiversity

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[15] For example refer to objectives 3, 6 and policies 2 and 15(c)(viii) of the NZCPS.

(c) Objective 3.5 Enabling economic wellbeing

(d) Objective 3.7 Regionally significant infrastructure

(e) Objective 3.12 Involvement of tangata whenua in decision making

(f) Policy 4.4.1 – Maintaining and protecting significant ecological areas and habitats

(g) Policy 4.4.2 – Supporting restoration and enhancement

(h) Policies 8.1.1, 8.1.3 and 8.1.4 – Participation in decision-making, plans, consents and monitoring

Northland Regional Plan

3.17 The provisions I wish to emphasise are:

(a) Part D.1 Tangata Whenua

(i) Policy D.1.1

(ii) Policy D.1.2

(iii) Policy D.1.4

(iv) Policy D.1.5

(b) Part D.2 General

(i) Policy D.2.2 – Social, cultural and economic benefits of activities

(ii) Policy D.2.5 - Benefits of Regionally Significant Infrastructure

(iii) Policy D.2.8 – Maintenance, repair and upgrading of Regionally Significant Infrastructure

(iv) Policy D.2.9 – Appropriateness of Regionally Significant Infrastructure proposals (except National Grid)

(v) Policy D.2.14 – Resource consent duration

(vi) Policy D.2.18 – Managing adverse effects on indigenous biodiversity

(vii) Policy D.2.20 – Precautionary approach to managing effects on significant indigenous biodiversity and the coastal environment

(c) Part D5 Coastal:

(i) Policy D.5.9 Coastal commercial zone and Marsden Point Port zone

(ii) Policy D.5.20 – 21 Reclamation

No "right of veto" but rigorous assessment required

3.18 At the outset of this part of my legal submissions, I acknowledge the settled law that tangata whenua do not[16] have a right of veto over resource consent applications in the marine environment,[17] and the existence of significant adverse effects (cultural or otherwise) is not an absolute bar to the grant of consent.

3.19 However, it is trite to say that in law (as in most things) context is everything, and the existence of significant cultural adverse effects alone can, in some circumstances, be sufficient to decline consent.[18] That is particularly so where the conditions of consent offered by an applicant are insufficient to appropriately avoid or mitigate the adverse effects to the extent required by the relevant policy framework.

3.20 It is also self-evident to observe that while much of the applicant's case is understandably focussed on this being a "port zone" with supportive objectives and policies, the activity status for this proposal is (at least) discretionary and potentially non-complying.

3.21 In other words, approval to reclaim the takutai moana is by no means "a given", and any applicant for consent must satisfy the full gamut of relevant considerations. In this regard two of the key policies both use the phrase "generally" and neither are absolute (emphasis added):

(a) "Development in the Coastal Commercial Zone and the Marsden Point Port Zone will *generally* be appropriate provided it is: consistent with …" (D.5.9).

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16 Noting in future tangata whenua may well have a right of veto if customary marine title is granted in the area.

17 *Maungaharuru-Tangitū Trust v Hawke's Bay Regional Council* [2017] NZRMA 147 (EC), at [126]; *and Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, at p 307.

18 As was recognised in *Aqua King Ltd (Anakoha Bay) v Marlborough District Council* EC Christchurch W71/97, 30 June 1997, where consent was declined principally on the basis of unacceptable cultural effects. See also *Tauranga Environmental Protection Society Inc*. In many other cases, applications have only just "got over the line" through substantial cultural mitigation conditions.

(b) "Resource consent for an activity *may generally only be granted* if the adverse effects from the activity on the values of places of significance to tāngata whenua in the coastal marine area and water bodies are avoided, remedied or mitigated so they are no more than minor." (D.1.4).

3.22 Of further direct relevance are Policies D.2.7 and D.2.8 which, on any structured analysis, must be seen to qualify the earlier policies (such as D.2.5) or the guiding assessment criteria (D.2.9). Policies D.2.7 and D.2.8 are directive policies that set key "bottom lines" for regionally significant infrastructure, including that:

(a) the proposal is consistent with "all policies in D.1 Tangata whenua" (D.2.7(1)(a));

(b) other adverse effects arising from the proposal are "avoided, remedied, mitigated or offset to the extent they are no more than minor" (D.2.7(3));

(c) when upgrading regionally significant infrastructure, "allowing adverse effects where (1) the adverse effects whilst the maintenance or upgrading is being undertaken are not significant or they are temporary or transitory, and (2) the adverse effects after the conclusion of the maintenance or upgrading are the same, or similar, to those arising from the Regionally Significant Infrastructure before the activity was undertaken." (D.2.8).

Section 104 (1)(a)

3.23 Section 104 sets out the matters a decision maker must consider when determining an application for resource consent. These include but are not limited to "*any actual and potential effects on the environment of allowing the activity*".

3.24 Both of the terms "effect" and "environment" are broadly defined.[19] Effects include physical, cultural, intangible, spiritual and metaphysical[20] effects with the environment including people, resources and the cultural conditions which affect them. The cultural effects raised in this proceeding span the full spectrum of these effects and are therefore relevant matters that must be considered in determining this application.

Assessment of cultural evidence

3.25 Decision-makers are required to assess and weigh the evidence of different tangata whenua parties in the usual way. In any event, and as I note

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19 RMA, ss 3 and 2 respectively.

20 *Ngāti Ruāhine v Bay of Plenty Regional Council* (2002) 17 ELRNZ 68 (HC), at [71]-[75]

further below, in this case all of the tangata whenua parties (eg Patuharakeke, Te Parawhau, Ngātiwai Trust Board, Ngāti Kahu o Torongare) are aligned in their opposition to the port expansion and have filed submissions detailing the significant adverse cultural (and other) effects the proposal will have, and they will speak to their concerns today and tomorrow.

3.26 The Courts have provided clear guidance on the approach to considering and weighing cultural evidence:

(a) persons holding mana whenua are best placed to identify the impacts of a proposal on the physical and cultural environment valued by them;[21]

(b) there can be more than one tangata whenua group for a particular area;[22]

(c) where a particular tangata whenua group states that a specific outcome is required to meet the Part 2 directions in accordance with tikanga Māori, RMA decision makers must meaningfully respond to those claims;[23]

(d) recognising and providing for Māori interests under s 6(e) necessarily involves seeking input from them about how their relationship - as defined by them in tikanga Māori - is affected by a resource management decision;[24]

(e) decision makers are entitled to, and must, assess the credibility and reliability of evidence for tangata whenua using the well settled "*rule of reason approach*" set out in *Ngāti Hokopū*.[25] But where the considered, consistent and genuine view of tangata whenua is that a proposal will result in significant adverse effects it is not open to a decision-maker to decide otherwise: a decision-maker cannot substitute its view of the cultural effects for that expressed by tangata whenua;[26]

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21 *SKP Incorporated v Auckland Council* [2018] NZEnvC 081, at [157], which was upheld on appeal, and supported and endorsed by the High Court in *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZRMA 492, at [66]

22 *Director General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203, at [234] and confirmed on appeal in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] at [109], and [254]

23 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whāia Māia Ltd* [2020] NZHC 2768, at [68]

24 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whāia Māia Ltd* [2020] NZHC 2768, at [73]

25 *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EC), at [53]. This rule of reason approach has been cited with approval in (at least) two more recent High Court decisions: *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* (2020) 22 ELRNZ 110 (HC), at [117]; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* (2020) 22 ELRNZ 202 (HC), at [106]-[108], and [167]-[168]

26 *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZRMA 492, at [65]

(f) a logical extension of this principle is that nor should a decision-maker substitute its view for that of tangata whenua as to whether such effects are able to be appropriately avoided, remedied or mitigated; and

(g) while there can be a role for technical evidence in interpreting values and concepts into terms comprehensible to non-Māori,[27] such evidence cannot itself redefine the tangata whenua values and beliefs.

Assessment of alternatives

3.27 Despite this development occurring within a Port zone in which development is "generally" appropriate, the Hearing Panel must consider the question of alternatives. This requirement emerges from (at least) the following:

(a) Schedule 4, cl 6(1)(a): "if it is likely that the activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity".

(b) Policy 10, NZCPS.

(c) Policies D.5.20 – D.5.22, NRP.

(d) The High Court's decision in *Tauranga Environmental Protection Society*, at [131]-[153], and in particular:

> **[151]** I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

(e) The Supreme Court's decision in *Port Otago*, at [83] and [84] (emphasis added, footnotes omitted):

> *(c) How any conflicts between those policies should be addressed?*
>
> Where there is a potential conflict between the avoidance policies and the ports policy with regard to a particular project, **the decision-maker would have to be satisfied that**:

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[27] *Land Air Water Association v Waikato Regional Council* EC Auckland, A110/01, 23 October 2001, at [396]

(i) **the work is required (and not merely desirable)** for the safe and efficient operation of the ports;

(ii) if the work is required, **all options for dealing with these safety or efficiency needs have been evaluated and, where possible**, the option chosen should not breach the avoidance policies;

(iii) where a breach of the avoidance policies is unable to be averted, **any breach is only to the extent required to provide for the safe and efficient operation of the ports**.

[84] Even where the option chosen encroaches on the avoidance policies only to the extent necessary for the safe and efficient operation of the ports, this does not mean that a resource consent would necessarily be granted. In deciding whether to grant a resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case

3.28 In my submission, the types of alternatives that would need to be considered include:

(a) location and size of reclamation, including relative to what is currently consented but not yet constructed;

(b) method of providing berthage (reclamation or piles);

(c) a different mixture of (a) and (b);

(d) the availability of land outside of the CMA for certain activities, including in this case the enormous quantity of vacant land in the immediate vicinity;

(e) alternative timeframes for being required to undertake the works (ie lapse dates);

(f) alternative forms of mitigation or compensation that might be required to address the effects of cultural concern; and

(g) for all of the above, that the breach of the avoidance policies is only to extent required (and no more).

3.29 There is no evidence that the full extent of those alternatives have been appropriately considered or put before this Hearing Panel, at least insofar as effects on cultural values are concerned.

Section 104(6)

3.30 Section 104(6) enables the Court to decline an application "on the grounds that it has inadequate information to determine the application."

3.31 This subsection was relied upon by the Environment Court in the *R J Davidson Family Trust* case to decline an application for a mussel farm in Beatrix Bay, due to the absence of information from the applicant as to the potential cumulative impacts on King Shag habitat.[28]

3.32 In explaining the correct approach to this section the Environment Court noted that the power was discretionary and should be exercised reasonably and proportionately in all the circumstances of the case. If an adaptive management approach were to be employed to address the information gaps, there needed to be a reasonable assurance that use of such an approach would sufficiently reduce uncertainty and adequately manage any remaining risk before consent could be granted.[29] The Court was not satisfied that there was such assurance in that case.

3.33 In this case, the expert witnesses for Patuharakeke have identified information gaps in the monitoring and assessments undertaken by the applicants' experts. Of more concern, in my submission, is the inadequacy of information in respect of how the significant cultural concerns are intended to be addressed (see discussion below). In my submission, in the circumstances of this case, those inadequacies warrant the refusal of the application.

4. MATTERS REQUIRING A MORE DETAILED ANALYSIS

4.1 With the benefit of those overarching considerations that provide an appropriate lens for this particular hearing, I make the following submissions addressing a number of specific matters.

Northland Regional Plan

4.2 The Northland Regional Plan is a combined regional and regional coastal plan. The Environment Court appeal process has just been completed and it therefore represents the most "up to date" policy direction.

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[28] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81. That finding was upheld on appeal and was not disturbed by the further appeals on the relationship between s 104 and Part 2: *R J Davidson Family Trust v Marlborough District Council* [2017] NZRMA 227 (HC), at [100]-[102]; and *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA)

[29] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81, at [26], [290] and [296]

4.3 At the commencement of Part D, which describes the relevant objectives and policies, is the following statement (there is a matching direction at the commencement of Part F - Objectives):

> ## Application of objectives and policies
>
> 1) Regard must be had to all the relevant objectives and policies in this Plan when considering an application for a resource consent.
> 2) Where policies in this plan are in conflict, the more directive policies shall prevail.
> 3) Regard must be had to any relevant provisions of the *Regional Policy Statement and National Policy Statements*, and where appropriate *Part 2 of the RMA*, when considering an application for a resource consent.
>
> This is an index and guide to the policies in this section. It does not form part of this Plan.

4.4 Two matters should be emphasised: that if policies conflict, the more directive policies prevail; and that regard *must* be had to the relevant provisions of the RPS and NPSs, and *where appropriate* Part 2 of the RMA, when assessing resource consent applications.

Policy framework – Cultural effects

4.5 It must be a given that, in terms of Policy D.1.1, this is a situation where an analysis of effects on tangata whenua and their tāonga is required. I note that this analysis is required, even if one or more of the effects is "likely"; here the adverse effects on tangata whenua and their tāonga is certain.

4.6 Likewise, it must be a given that the site of the proposed reclamation and areas of dredging is a site of significance to tangata whenua for the purposes of D.1.5.[30] While this is not a 'mapped' site of significance to tangata whenua, in light of the tangata values identified in this location, significant weight should be afforded to this policy. This is expressly recognised by footnote 39 to D.1.5, and the weight to be given to Ms Chetham's uncontested evidence identifying these sites of significance must reflect the broader cultural lens and strong directions that superior court judgments require consent authorities to consider.

4.7 Accordingly, attention turns to Policy D.1.2. That policy helpfully sets out a non-exhaustive set of steps that must be taken by any analysis of cultural effects that is required by Policy D.1.1. In terms of Policy D.1.2, I would emphasise:[31]

(a) the degree of analysis must correspond with the scale and significance of the effects on cultural values – in this case the scale and significance of the effects are extraordinarily high and the direction is to undertake a commensurately intensive analysis of those effects;

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[30] Refer evidence of Ms Chetham (particularly Table 1: Policy D.1.5 Assessment and Patuharakeke's Cultural Landscape mapped in Appendix 1) and the cultural values assessments provided by Patuharakeke.

[31] This assessment has been carried out comprehensively by Patuharakeke in its cultural values assessments.

(b) a specific (but non-exhaustive) list of matters to which regard must be had;

(c) a range of other very specific (and directive) steps.

4.8 Policy D.1.4 is as follows (emphasis added):

> Resource consent for an activity *may generally only be granted* if the *adverse effects from the activity* on the values of places of significance to tāngata whenua in the coastal marine area and water bodies are avoided, remedied or mitigated so they *are no more than minor*.

4.9 This is a directive policy. The default position is that consent should generally not be granted if the adverse effects on values of significance to tangata whenua are more than minor.

Magnitude of cultural effects

4.10 The unchallenged cultural evidence and the cultural values assessments is that the adverse effects on cultural values are more than more minor (in fact, the unchallenged evidence is that the effects are significant).

4.11 These effects remain significant despite the conditions offered at the 11th hour by the applicants (the inadequacy of these conditions are addressed below).

Proposed consent conditions to address cultural effects

4.12 Mr Isaacs is not mana whenua and, with respect, his evidence should be given little weight as it relates the adequacy of the proposed conditions or to the extent to which those conditions might ameliorate the magnitude of the adverse effects.

4.13 Mr Isaacs' evidence does not coherently engage with the effects and scale of effects mana whenua have identified and how and to what degree they are appropriately mitigated by the proposed conditions as he claims. From questioning by the Hearing Panel, Mr Isaacs appeared unaware of what assessment had been undertaken of the potential economic benefits for mana whenua of the proposal, and he was also unaware of how the quantum of funding in the conditions had been reached. He did not have any experience with proffering conditions of this sort.

4.14 The evidence of the mana whenua witnesses will be that the proposed conditions are woefully inadequate to address the cultural effects of concern.

4.15 From a legal perspective, I would simply note the following matters in respect of the conditions included in Mr Hood's primary evidence, from condition 224 – 229:

(a) It appears to me that the conditions are based on those offered in a recent Environment Court hearing, in which I was the lead counsel for the applicant. However, if that is the case, it appears that a number of the most important elements of that previous cultural mitigation package have been omitted.

(b) Mr Hood said at [14.16] of his primary evidence that: "From my involvement in the development of the proposal since 2017, I am aware that identifying, understanding, and responding to effects on tangata whenua has been a key focus of the consenting team." If that were so, it is hard to understand why proposed conditions were only first provided to Patuharakeke as part of the applicant's evidence.[32]

(c) The Kaitiaki Group only appears to come into existence 2 years prior to works commencing. If a lapse date of 35 years was granted (as sought by the applicant), that would mean that there would potentially be no Kaitiaki Group for over 3 decades. (Even if a shorter lapse date were imposed, that could be many, many years before any offer to establish a Kaitiaki Group were made and such a group established.)

(d) It appears unusual that the Council would have the final say over whether other tangata whenua groups are able to join the Kaitiaki Group – what authority or expertise does the Council have in this regard? (condition 224(c)). (The Council has not opted not to call cultural evidence as part of its assessment of the application, which makes this proposed condition even more unusual.)

(e) The functions of the Kaitiaki Group (condition 227) are extensive, particularly in sub-paragraphs (a) and (b), and likewise the role of the Kaitiaki Group (condition 228). The purpose of proposed fund is specified at condition 231. In light of the nature and scale of that mahi, the proposed funding specified at condition 230 appears woefully inadequate, both in quantum and in duration. (The quantum is also not indexed to any CPI, and so will reduce in real value over time.) It is inconceivable that "harbour restoration and enhancement projects" (condition 231(c)) of any meaningful scale, or any assessment of effects of the works (condition 231(b)) could be undertaken with the meagre funding proposed, even if it were all to be committed to that purpose – and in reality there

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[32] Contrary to what Mr Hood said in response to a direct question from the Hearing Panel, the conditions were *not* provided to Patuharakeke in advance of them being attached to the evidence filed in this proceeding.

would be a plethora of demands on any fund. For example, the fund is also to be proposed to be used for "scoping, designing and implementing specific and targeted cultural and/or community recreation projects in Poupouwhenua and Whangārei Te Rerenga Parāora" (conditions 243 - 244).

Proposed lapse date – it should be 5 or at most 8 years, not 35 years

4.16 If the Hearing Panel nonetheless decides to grant consent, then I make these submissions about the proposed lapse date.

4.17 The applicant is seeking a proposed lapse date that matches the proposed expiry date; ie lapse date of 35 years. On its face, that seems an extraordinary proposition.

4.18 The concept of an appropriate lapse date lies at the heart of sound resource management principles. Imagine for a moment what a resource consent granted in 1990 might have looked like and what the conditions would have required. Then imagine that such a consent was implemented next year in reliance on those conditions.

4.19 Legal principles around lapse dates include:

(a) The "default" lapse period in the RMA is 5 years. That reflects the importance of planning certainty. The Courts have traditionally taken a fairly firm line on imposing shorter lapse periods than the lengthy periods inevitably sought by requiring authorities.

(b) The *Beda* factors are often referred to and they include:[33]

(i) the timeframe within which the project is likely to be constructed;

(ii) safeguarding the alignment from inappropriate uses and development;

(iii) certainty for affected landowners and the local community; and

(iv) the ability to implement the designation in due course.

(c) The Courts have stressed the potential unfairness of a lapse period of longer than 5 years where there is no certainty that a requiring authority intends to proceed with the proposal:

> **[31]** Balancing the positions as best we are able, we have the view that to expect a landowner to endure such a *planning blight* on a

[33] *Hernon v Vector Gas Ltd* [2010] NZEnvC 203 at [26]

> not insubstantial portion of otherwise valuable land, and for such a long period, is unreasonable and unfair. That is not because we see the *proposed,* or perhaps more accurately *envisaged,* runway extension and HIAL installation as unimportant. That is not the case at all. But it should not be that a private landowner has the use of its land significantly limited for such a long period (ie a total of three times the statutory default period) because of a possible third-party requirement that, literally, may never happen.
>
> **[32]** In such a situation, we consider that the fairness of the situation calls for that burden of uncertainty to be borne by the party which wishes to keep its options open for such a length of time. In practical terms, that will mean that unless the parties can agree on a use of the affected land that is satisfactory to both, WRAL could consider buying the land and assuming the risk and uncertainty itself, rather than imposing it on the present owner for such an extended period. We do not consider that a need to resolve this one issue will negate or even lessen the benefits WRAL enjoys from the length of the other designations — it is, rather, simply a consequence of wishing to control the use of the property of another entity. *MERIDIAN 37 LTD v WAIKATO REGIONAL AIRPORT LTD* [2015] NZENVC 119; BC201563703

4.20 The appropriateness of a lapse period was discussed extensively in the Drury Arterials' Recommendation[34] at paras [278]-[300]. A number of comments made in the Recommendation emphasised the importance of ensuring that the requiring authority remains focused on completing the works, rather than it simply being "a future option". See, for example:

> Mr Dawson quoted extensively from the *Beda* decision, which provided a useful insight into the Court's weighing up of the factors involved. In the *Beda* case we note that the lapse period was reduced from 20 years to 10 years. The Court considered that the 'blighting' effect was severe and also that the shorter term *"will assist in giving Transit a focus and commitment ... to complete the project"* and a focus to deal with the owners of affected properties *"in an appropriate and fair manner*. (At [285])
>
> Ms Evitt made the point in her closing that a shorter lapse period is unlikely to drive implementation decisions. We agree that might well be the reality and practicality of the situation into the future. … We also note that the reality of Ms Evitt's submission did not stop the Environment Court in the *Beda* case from shortening the lapse period, one result of which it considered was to encourage a focus and commitment by the requiring authority to complete the project. (At [287] (v))

4.21 To my recollection, none of the lapse cases considered to date comprised such significant new effects on cultural values as is evident here.

4.22 Based on those principles, and with reference to the wider framework identified earlier, including the strong directions and broader cultural lens, I submit that any lapse date should – at most – be 8 years, and preferably be 5 years:

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[34] https://www.aucklandcouncil.govt.nz/UnitaryPlanDocuments/d2-drury-arterial-network-recommendation.pdf

(a) A 35 year lapse date is completely inappropriate and contrary to sound resource management principles. For a project of this scale, in such a sensitive and dynamic environment, and with the unknown impacts of climate change, a 35 year lapse date would be an anathema to the concept of sustainable management.

(b) The precautionary approach would demand a shorter lapse date, and certainly not one that is decades into the future.

(c) The requested lapse date should be seen for what it is – namely an attempt to obtain an "option" to construct the proposed works at any time in the future, while at the same time pre-empting the MACA claims that have been lodged by Patuharakeke and the other tangata whenua submitters.

(d) There is no ability for the Hearing Panel to understand what the potential benefits or adverse effects might be at the time that the works are ultimately constructed – ie potentially in another 35 years.

(e) A 35 year lapse date would represent a "sword of Damocles" hanging over Patuharakeke, not knowing when their takutai moana would be taken from them, and being caught in an invidious position of not knowing whether they should invest very limited time and financial resources into the protection and restoration of the nearby kaimoana sites.

(f) A 35 year lapse date would be completely contrary to:

(i) "Recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua" and to "recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources." (Objective 3, NZCPS).

(ii) "Recognis[ing] that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations" (Policy 2, NZCPS).

(iii) The direction to adopt " … a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change" (Policy 3, NZCPS).

(iv) The requirement to "consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment" and in particular the requirement to "promote the efficient use of occupied space, including by: … (iii) considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay." (Policy 6, NZCPS).

4.23 If the reclamation is essential or of such value to the Northland Region, then that reclamation should be undertaken without delay.

4.24 While a difficult submission to make on behalf of Patuharakeke, whose primary position is – and remains – that this application should be declined; if it is to be approved then Northport should be required to undertake those works now. A lapse date of no more 8 years would be sufficient time for all necessary design and pre-commencement work to be undertaken. Assuming a 1-2 year construction period, that would ensure that the works are completed within 10 years.

5. WITNESSES TO BE CALLED

5.1 Patuharakeke will call the following witnesses:

(a) Professor Karin Bryan, hydrodynamics and coastal processes

(b) Dr Richard Bulmer, marine ecology

(c) Dr Tom Brough, marine mammals

(d) Patuharakeke mana whenua witnesses

(e) Juliane Chetham, cultural

(f) Makarena Dalton, planning

(g) David Milner, closing statement

5.2 The relevant qualifications and expertise of these witnesses are set out in their respective statements of evidence.

6. CONCLUDING SUBMISSION

6.1 Patuharakeke requests that the applications for resource consent be declined.

B J Matheson
Counsel for Patuharakeke Te Iwi Trust