

BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER of the Resource management Act 1991 (the Act)

AND

IN THE MATTER of a application by Onoke Heights Limited for resource
consents for a residential subdivision on Dip Road,
Whangārei

**Right of Reply Evidence of Melissa Ivy McGrath on behalf of Onoke Heights
Limited
Dated 15 December 2023**

MAY IT PLEASE THE INDEPENDENT HEARING PANEL

INTRODUCTION

1. This right of reply statement of supplementary evidence has been prepared to respond to matters raised during the hearing. In preparing this evidence statement I have considered the legal submissions and evidence presented during the hearing and further information received from Whangārei District Council (“**WDC**”).
2. In preparing this statement, I note that verbal evidence was presented on behalf of submitter Chantez Connor-Kingi in Te Reo Māori which was not interpreted during the hearing nor has the Council provided hearing minutes or a translation of this evidence¹. Accordingly, I am unable to respond to that evidence and I understand that counsel for the Applicant will address this point in the closing legal submissions.
3. My qualifications and experience are detailed in paragraph 2 of my Evidence in Chief (“**EIC**”). I again record that I read and agree to and abide by the Environment Court’s Code of Conduct for Expert Witnesses as specified in the Environment Court’s Practice Note 2023.
4. In my right of reply evidence, I address the following matters:
 - (a) Plan making history, consultation and relevance of zoning
 - (b) Consultation
 - (c) Historical heritage
 - (d) Activity status and assessment of proposal
 - (e) Section 6(e) of the Act
 - (f) Council reservoir

¹ Independent Commissioner Minute 4 – paragraph 2 (v)

Plan Making History and Relevance of Zoning

5. In response to Commissioner questions and instructions detailed in Commissioner Minute 4², WDC have provided a memorandum dated 29 November 2023, detailing the plan making history as relevant to Onoke Block – 1994 to Present³. I note that the Commissioner has requested information with respect to any significant policy decision that may have referenced the Application Site.
6. The plan making history memorandum does not include reference to the Records of combined Council and hapū, hui and site visits undertaken in 2013. Records which are held in the Whangārei Central Library, Onoke is noticeably absent from this record (**Attachment 1**).
7. The plan making history memorandum does not include any information with respect to Plan Change 93 Urban Transition Environment and Plan Change 120 Kamo Walkability Environment. Both plan changes sought to rezone land around Whangārei City.
8. Plan Change 120 along with Plan Change 86B (Living 1 and 3 rezoning at the edge of Whangārei City) are identified in the Urban and Services Plan Change section 32 evaluation as establishing the Urban Area of Whangārei⁴. Plan Change 120 rezoned the suburb of Kamo to establish the Kamo Walkability Environment and precinct. This plan change became operative in June 2015.
9. I consider that the WDC memorandum reinforces my opinion that via the on-going rolling review of the District Plan and the multiple plan change processes, consultation and engagement with hapū has been undertaken in accordance with the statutory process under the Act. Furthermore, I conclude that hapū would have been made aware that zoning and

² Independent Commissioner Minute 4 – paragraph 2 (i) – (iii)

³ Further information supplied by WDC as detailed in memorandum from Kaylee Kolkman dated 30 November 2023, including attached memorandum detailed plan making history relevant to Onoke Block.

⁴ Urban and Services – Plan Change 88I: Living Zones Section 32 Evaluation Report, Prior to Notification para 17 and 19.

identification and protection of Sites of Significance to Māori were on-going matters and that the *CDL Land New Zealand Limited v Whangārei DC A99/96* (“**CDL Case**”) dated 25 November 1996 decision did not result in protection of the site in perpetuity. That is obvious, given the Site is now zoned General Residential.

10. In my opinion, the plan change processes and any consultation undertaken has no relevance to the determination of the application before the Commissioner. I maintain that the Site and surrounding zoning of General Residential Zone under the Operative Whangārei District Plan (“**ODP**”) is important because residential use and development is enabled and anticipated.
11. I reiterate my opinion that the Applicant has undertaken engagement and consultation with hapū in accordance with the Act.

Consultation

12. Evidence presented on behalf of Chantez Connor-Kingi stated that the Applicant did not directly engage representatives with Ngāti Kahu o Torongare and that the hapū were only notified of the Proposal by Te Parawhau representatives.
13. That statement is factually incorrect and contrary to my involvement throughout the Application process as discussed below.
14. The Applicant first engaged directly with Ngāti Kahu o Torongare representative Richard Shepherd on 30 March 2021. The applicant was directed by both hapū to engage Landform Consulting Limited to undertake any engagement and to prepare a Cultural Impact Assessment (“CIA”). As per contract attached (**Attachment 2**) Landform Consulting Limited, Georgina Olsen was engaged to undertake this role for both Ngāti Kahu o Torongare and Te Parawhau.
15. Details of engagement have been provided in my EIC, and I note that the Applicant offered during engagement to recognise the wider cultural

landscape values by way of story-telling boards, pou or road naming etc, which were not accepted by hapū representatives.

16. I reiterate, my opinion that the Applicant has undertaken engagement and consultation with hapū in accordance with the Act and, in my opinion, over and above what is required under the Act.

District Plan Interpretation

17. Ms Shaw tabled legal submissions on behalf of Whangārei District Council, paragraphs 5 – 17 detail Ms Shaw’s submission with respect to district plan interpretation. This submission does not change my opinion with respect to the interpretation of the definition of Historic Heritage, and the activity status of the proposal.
18. I maintain my EIC position that Council does not have sufficient evidence to determine the Site in its entirety constitutes a “site” of significance to Māori. Furthermore, the presentations from hapu members did not confirm what natural and physical resources contribute to the understanding and appreciation of New Zealand’s history and cultures in order to determine that the site falls within the definition of historic heritage.

Activity Status and Assessment of Proposal

19. Mr Hartstone verbally expressed his opinion during the hearing that the activity status of the application i.e., restricted discretionary activity vs discretionary activity, makes no difference to the assessment of the application with respect to cultural effects. I disagree with this statement.
20. The Act clearly establishes a difference in how applications must be determined according to activity status. A resource consent application for a discretionary activity must be determined under s 104B of the Act, which allows open assessment of all potential effects of a proposed

activity, all relevant objectives and policies, and including an unlimited discretion to impose conditions of consent (provided these are lawful).

21. A resource consent application for a restricted discretionary activity must be determined under s 104C of the Act, which limits Council consideration only to the matters of discretion in the Operative District Plan and limits the imposition of conditions of consent over which discretion is restricted.
22. The Proposal is a restricted discretionary activity under rules:
 - (a) Building and Major Structure Setback from boundary — retaining walls along the western and northern boundaries (GRZ-R4 restricted discretionary).
 - (b) Subdivision of a site within 32m of Critical Electricity Lines (CEL-R2 restricted discretionary).
 - (c) Three waters management — TWM-R2 (stormwater), TWM-R3 (wastewater), TWM-R4 (water supply) and TWM-R5 (integrated three waters assessment) (restricted discretionary).
 - (d) Transport, subdivision, integrated traffic assessment, construction of a new road and major roading alteration (TRA-R13 - TRA-R17 restricted discretionary).

None of these rules include a matter of discretion which references cultural values, historic heritage or sites of significance to Māori.

23. The Proposal complies with Rule SUB-R2.1 and SUB-R5 as controlled activity. Rule SUB-R2.1 states that matters of control are listed in HPW-R9 and no additional matters of control are listed in SUB-R2.1. Rule HPW-P9 applies only to subdivision:

Subdivision HPW-R9 Additional Matters Over Which Control Has Been Reserved or Discretion Restricted

1. The following matters shall apply in addition to any matters of control or matters to which discretion is restricted in the Subdivision Chapter:

24. I acknowledge that the Proposal was lodged as a bundled application, therefore the Proposal has a restricted discretionary activity in the round. HPW-R9 details matters of discretion that apply to subdivision. The only matter of discretion HPW-R9 I consider relevant to cultural effects or historic heritage and to which Council is limited to its consideration and impositions of conditions are:
- p. The location of proposed allotment boundaries, building areas and access ways or rights-of-way so as to avoid sites of historic heritage including Sites of Significance to Māori.*
25. In my opinion Council is restricted only to considering and applying conditions of consent to the location of proposed boundaries, building areas and access ways or rights-of-ways avoid sites of historic heritage including Sites of Significance to Māori.
26. I remain of the opinion that there is insufficient evidence to confirm that a “site” of historic heritage is located within the Site, noting that the matter does not include “areas of historic heritage”. Therefore, it is my opinion that this matter of discretion is irrelevant to the assessment of the Proposal.

Section 6(e) of the Act

27. The Commissioner asked Mr Hartstone, as to whether or not s6(e) of the RMA applies to the proposal.
28. In paragraph 164 of my EIC, I confirm that no assessment of Part 2 is required due to invalidity, incomplete coverage or uncertainty in the planning provisions. I have not changed my opinion on this point. However, I note that my opinion is premised upon the Proposal being a restricted discretionary activity.
29. Should the Commissioner accept the Council proposition that the Proposal is a discretionary activity under the Historic Heritage definition, then I consider that it would be appropriate to refer back to Part 2 because the Tangata Whenua and Sites of Significance to Māori Chapters

have not yet been reviewed and would not be considered to be competently prepared.

30. Regardless, whether recourse to Part 2 is considered appropriate by the Commissioner, this does not change my assessment of s 6(e) in paragraphs 171-174 of my EIC.

Council Reservoir and Potential Alteration to Designation

31. Council's S42A Report, attached Development Engineer report recommends conditions of consent that apply directly to the proposed upgrade of the Council Reservoir. I reiterate that I do not support these conditions of consent and note that Ms Nijssen detailed the implications of the proposed water reservoir in paragraphs 14 – 20 of her evidence in chief. I understand that counsel for the Applicant will also address this point in closing legal submissions.

CONCLUSION

32. My evaluation, recommendations and conclusions of my EIC remain unchanged.
33. In my opinion, the evidence presented by the Applicant has demonstrated that any adverse effects will be no more than minor and acceptable, subject to suitable conditions of consent. There will also be positive effects associated with the application, in particular those relating to the revegetation and ongoing protection of areas of the Site.
34. Overall, having carefully considered all relevant matters, I remain of the opinion that resource consent should be granted, subject to the conditions of consent recommended in my EIC.



Melissa Ivy McGrath

15 December 2023