

BEFORE THE INDEPENDENT HEARING COMMISSIONER

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, Whangarei

**Opening legal submissions on behalf of Onoke Heights Limited
14th of November 2023**

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MAY IT PLEASE THE INDEPENDENT HEARING COMMISSIONER

INTRODUCTION

1. These submissions are made on behalf of Onoke Heights Limited, the applicant for resource consent (“Onoke” or “Applicant”). This is a joint hearing between Whangārei District Council and the Northland Regional Council. A hearing for the purposes of the controlled activity resource consent under the Northland Regional Plan unnecessary in practical and substantive terms, given the status of the activity and that consent must be granted. Accordingly, these submissions focus on the Whangārei District Council (“WDC” or “Council”) resource consent application (“Application”).

CONTEXT

2. The Site is zoned General Residential Zone under the partly operative Whangārei District Plan (“District Plan” or “ODP”). It is bounded by residential development to the south and is adjacent to the Hurupaki Reserve (owned by the Department of Conservation). It is private land and owned by Onoke Heights Limited. As Mr Leather points out in his evidence, the site is an ideal location for residential development and, when developed, will provide a high-quality living environment for its residents. The history of the Site and its surrounds is detailed in Mr Carpenter’s evidence.
3. Onoke acknowledges that it cannot speak as to potential effects on cultural (iwi) values on behalf of mana whenua. It is significant however, that Onoke (and its representatives), have sought to engage with hapu members in a meaningful way to seek to understand the cultural values associated with the Site and how these might be addressed. This engagement commenced prior to lodgement of the Application and included commissioning a CIA following Council’s request (which was based on its position that the Proposal is a Discretionary Activity). Onoke

has continued to write, email, and seek to meet with those who expressed interest and concerns up to, and beyond, a point where it was clear that no support would be forthcoming.

4. The connection between the Hapū submitters and the broader Onoke area is reflected in the submissions. However, the specific nature of the historical use and significance of the Site is not clear or certain. In this regard, it is important at this junction to address the relevance of the underlying zone, given the recommendation from the section 42A author and his apparent rationale for this.
5. The section 42A author cites an historic Environment Court decision in support of his recommendation to decline the Application, which in turn relies on the commentary in the Cultural Impact Assessment (“CIA”). The implication of the section 42A report is that the CDL decision somehow “trumps” the District Plan. It does not and the Commissioner has no jurisdiction to *de facto* reconsider the zoning of the Site through the resource consent process.
6. Relevantly, the decision in CDL concerned a request for a private plan change to rezone the Site from rural zoning to residential. While the Court upheld the Council’s decision to decline the request for the private plan change, that is not determinative of this Application. This Application must be considered on its merits and the Commissioner must consider the evidence before them in doing so.
7. It is pertinent that the Whangārei District Council promulgated two plan changes in recent years for the purpose of re-zoning land to General Residential Zone. The first being the “rural plan changes” and the second the “Urban and Services” plan change, notified on 8 May 2019. The Site was rezoned to General Residential Zone pursuant to the latter plan change, which became operative in 2022.

8. These plan changes were public processes, publicly notified, and open for submissions from any person. No submissions raised issues regarding the cultural significance of the Site. The plan change is now operative and is the basis upon which this Application was made. With respect, the suitability of the Site for residential use has already been determined. It is somewhat alarming that the Council's section 42A author now appears to be revisiting that decision making process in the context of a resource consent application. In my submission he is precluded from doing so – as is the Commissioner in determining this Application.

Engagement and consultation with Hapu

9. Ms McGrath has detailed the efforts of the Applicant to consult with Hapū¹. This has occurred over a period of two and a half years, including prior to lodgement of the Application. To date, as noted above, the Hapū members have advised that they oppose any type of development occurring on the Site – albeit that they did not participate in the previous plan change process. In my submission, concerns about the suitability of the Site for residential development should have been voiced during the recent plan change process.

PURPOSE AND SCOPE OF SUBMISSIONS

10. Against this background, these submissions:
 - (a) Provide an outline of the Proposal.
 - (b) Set out the principles for weighting and considering evidence, with reference to the evidence before the Commissioner.
 - (c) Summarise and discuss the relevant effects for the purpose of the assessment under section 104(1)(a) of the RMA.

¹ Statement of evidence of Melissa McGrath, 31 October 2023, Attachment 3.

- (d) Address the key issue in dispute (effects on cultural values).
- (e) Address the statutory tests for determining the Application (s104).
- (f) Briefly introduce the draft proposed conditions, should consent be granted.
- (g) Provide a conclusion and key submission on behalf of Onoke.
- (h) Introduce the witnesses for Onoke.

OUTLINE OF PROPOSAL

Site description

11. The Site is approximately 6.8ha and zoned General Residential Zone.² It is currently vacant pasture, bounded by the Otapapa Stream³ to the south, with pockets of mixed indigenous and exotic vegetation along the stream edge. There are scattered mature puriri and totara trees in the middle of the Site, and a small area of mamaku scrubland located along the north-eastern aspect of the Site.⁴
12. The northern half of the Site comprises of a converging south facing slope of up to 11 degrees and the southern part comprises of waning slopes towards the Otapapa Stream (at the southern boundary).⁵ The Site sits at the north-western residential edge of the suburb of Kamo, situated between the existing residential streets of Dip Road (a secondary collector road) and Tuatara Drive (an access road).⁶

² Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(a)] and [22].

³ Note that the Application, including AEE's, refer to this stream as the Waitaua Stream, having relied on WDC and the Cultural Impact Assessment's references to it as Waitaua. As set out in the Statement of Evidence of Jonathan Carpenter at [109] and [110], the stream was referred to as Otapapa by Maori in the 1860s and 1870s, and is named Otapapa in a subsequent 1910 survey, and on later topographic, County, and District plans through the 20th century.

⁴ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(b)].

⁵ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(c)].

⁶ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(d)] and [22].

13. A WDC water reservoir (Designation WDC-25) is located directly north of the Site, with water pipelines from the reservoir extending south inside the eastern Site boundary (within a 3m wide easement for that purpose) to Tuatara Drive.⁷
14. Onoke Reserve, a large area of native vegetation, is located directly to the east of the Site.⁸
15. The ODP identifies the southern portion of the Site as Flood Susceptible, and a Critical Electricity Line (Northpower's overhead line) traverses the southern boundary and south-eastern corner of the Site. Portions of the Site are identified as medium land instability and river flooding 10-year and 100-year natural hazards under proposed Plan Change 1 to the ODP.
16. The surrounding environment is summarised in the evidence of Ms McGrath at paragraph [24] and I do not repeat that here, except to highlight that:⁹
 - (a) the surrounding environment predominantly comprises residential and rural residential zoning/developments, with those residential areas being generally of a similar built form to that proposed as a part of the Proposal; and
 - (b) the Proposal will be well serviced with respect to access to schooling (including early childhood education), neighbourhood shops, public transport and pedestrian infrastructure, and public open space networks.

⁷ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(e)].

⁸ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [21(f)].

⁹ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [24].

Proposal

17. The Proposal is described in full in section 4 of the WDC AEE and section 4 of the NRC AEE. I summarise below each of the individual elements of the Proposal.

Subdivision

18. It is proposed to subdivide the Site into 95 residential allotments (lots 1–95), a public road (Lot 300), two jointly owned access lots (**JOALs**) (lots 301 and 302), a drainage reserve (Lot 200), and a recreation reserve (lot 201).¹⁰
19. Attachment 2 to Ms Nijssen’s evidence provides the scheme plan for the Proposal.
20. In Ms Nijssen’s opinion, the layout of the proposed subdivision aims to give improved access to the Otapapa Stream¹¹ without adversely affecting its banks and margins.¹²
21. Ms Nijssen also provides a summary of the proposed upgrade to the WDC water reservoir which relies on a portion of the Site for its construction and use. While this is not material to the determination of this Application, it is noteworthy that Mr Hartstone’s recommendation will have direct consequences on these planned works. One can only assume that this part of Council is unaware of the Council’s process in relation to this Application.

¹⁰ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(a)].

¹¹ Ms Nijssen refers to the “Waitaua stream”, however as noted in the evidence of Ms McGrath and Mr Carpenter, the stream which she refers to is actually named “Otapapa Stream”.

¹² Statement of Evidence of Charlotte Nijssen dated 31 October 2023 at [23].

Access and Parking

22. The existing vehicle crossing from Dip Road will be decommissioned and a new vehicle crossing constructed, to ensure appropriate sight lines and visibility can be achieved for the new crossing.¹³
23. A new public road network will be created comprising of:¹⁴
 - (a) a link road between Tuatara Drive and Dip Road;
 - (b) an internal loop road and a cul-de-sac;
 - (c) a give-way controlled 'T' intersection at the western end of the link road with Dip Road; and
 - (d) 21 inset parking bays within the road reserve.
24. Two private JOALs (to be jointly held by the owners of the lots they service) will be created.¹⁵
25. Four lots (lots 1–4) will be access directly from Dip Road.¹⁶

Pedestrian Connectivity and Open Space Network

26. Concrete footpaths are proposed to be provided on at least one side of the roads within the development, and the larger of the two JOALs. A concrete footpath will also be created on the easter side of Dip Road south of the new intersection, with the existing footpath in the same location being upgraded.¹⁷

¹³ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(b)]; Statement of Evidence of Charlotte Nijssen dated 31 October 2023 at [10] and [11].

¹⁴ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(b)].

¹⁵ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(b)].

¹⁶ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(b)].

¹⁷ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(c)].

27. The proposed link road footpath will be continued along Tuatara Drive as far as an existing pram crossing near the shoulder of the existing intersection.¹⁸
28. A recreation reserve, including a pedestrian footpath connected to Dip Road, will be created along the southern boundary of the Site, adjacent to the Otapapa Stream.¹⁹

Three Waters Servicing

29. All residential lots will be serviced by connections to public reticulated wastewater and water systems.²⁰
30. The stormwater management system includes an onsite stormwater pond, located in the southeastern corner of the Site, to be vested with WDC as a drainage reserve.²¹
31. The proposed stormwater pond will limit peak flows to predevelopment level for the 2-, 10- and 100-year storm events, with a 20% allowance for climate change.²²

Geotechnical Investigation

32. WDC's GIS Land Instability Maps identify the Site as predominantly low instability, with some areas of moderate instability. A Geotechnical Report prepared by LDE includes a number of recommendations which

¹⁸ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(c)].

¹⁹ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(c)].

²⁰ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(d)].

²¹ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(d)]; Statement of Evidence of Charlotte Nijssen dated 31 October 2023 at [13].

²² Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(d)].

have informed the proposed site works, retaining, and the building foundations.²³

Site Works

33. Earthworks are proposed to enable the construction of the proposed building platforms, site access, roading and pedestrian networks, carparking areas, and three waters infrastructure. These earthworks will total approximately 134,349m³ (being 52,799m³ of cut and 81,550m³ of fill), with a maximum cut depth of 6m and a maximum fill height of 4m.²⁴
34. Approximately 400m² of the excavation area will occur within 10m of the Otapapa Stream. These works are to enable the construction of a culvert crossing and stormwater pond outlets.²⁵
35. Silt and sediment control measures will be implemented in accordance with the Erosion and Sediment Control Guidelines for Land Disturbing Activities in the Auckland Region (2016) for the duration of the construction.²⁶

Activity status – Whangārei District Plan

36. Ms McGrath disagrees with the WDC interpretation of the definition of “historic heritage”. In my submission, the WDC position is incorrect, and it was misguided to take the position that the activity is a Discretionary Activity, as opposed to a Restricted Discretionary Activity. Nevertheless, the Applicant has provided an AEE (including CIA), and evidence based on a Discretionary status.

²³ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(e)] and AEE Appendix 6.

²⁴ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(f)].

²⁵ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(f)].

²⁶ Statement of Evidence of Melissa McGrath dated 31 October 2023 at [30(f)].

37. In this regard, it is important to consider the definition of “Historic Heritage” and the implications of this for assessing the Application. The District Plan defines “Historic Heritage” to include, inter alia, includes “c. sites of significance to Māori, including wāhi tapu; and d. surroundings associated with the natural and physical resources”. Unhelpfully, the term “site of significance” (lower case) is not defined. The District Plan also uses the term “Site of Significance to Māori” indicating reference to specific mapped sites.
38. In my submission, the District Plan should be capable of being read, understood, and relied on by plan users on its face. An Applicant should not find itself being taken out by a *side wind* due to uncertainty relating to definitions and terminology in the District Plan. This is inconsistent with the principles of plan making and plan interpretation. Identifying whether a piece of land has a “Site of Significance” within it should be straightforward. 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.

WEIGHTING AND CONSIDERATION OF EVIDENCE

39. It is axiomatic that an issue arises in the context of having regard to all the relevant information and evidence before you, and the weight to be attributed to the competing evidence and information. This is a critical point for the purposes of determining this Application, particularly in the context of the legal principles applying to section 6(e).
40. The principle of weight was articulated in the decision *Shirley Primary School v Christchurch City Council*²⁷ where the Court listed a range of

²⁷ *Shirley Primary School v Christchurch City Council* ENC, C136/98.

criteria for determining the weight to be assigned to expert evidence.

These criteria or considerations included:

(e) The strength of the witness' qualifications and experience;

(f) The reasons for their opinion;

(g) The objectivity and independence of the witness; and

(h) Whether there is a general acceptance of the science and methodology involved.

41. Later sections in these submissions will illustrate why the evidence for the Applicant should be preferred. As such, I provide a very brief comment in relation to each of these considerations.

Witness qualifications and experience

42. The technical witnesses for Onoke are qualified and experienced. They are very familiar with the Proposal and the area. This experience supports the reliability of their evidence.

Reasons for their opinion

43. As illustrated throughout these submissions, the witnesses for the Applicant provide comprehensive and complete statements of evidence. This is particularly important in the context of the planning evidence, where Ms McGrath provides a detailed assessment of all aspects of the Proposal and considers all relevant parts of the policy framework. This contrasts with the section 42A report which does not provide a complete analysis in respect of effects on cultural values.
44. Mr Carpenter's evidence is the only expert archaeologist who has given evidence. His evidence is detailed and well-reasoned. While he is not a cultural expert, the historical data he has gathered through his research

is relevant to considering historic use of the Site and therefore its significance when assessing effects on cultural values.

45. Mr Holland has provided a clear explanation as to why he disagrees with a proposed condition which the Council engineer has sought to impose. In contrast, the section 42A report does not provide an explanation for seeking to impose the condition. Whether the Council engineer understands the Site and the Proposal in the same level of detail as Mr Holland is not clear. I anticipate this will be addressed during the hearing.
46. Ms Vilde, Mr Scanlen, and Ms Nijssen similarly provide statements of evidence which clearly set out the reasons for their opinion.

Objectivity and independence of witness

47. The technical witnesses for the Applicant have all confirmed adherence to the Code of Conduct for expert witnesses (Environment Court Practice Note 2023). To date there does not appear to be any expert witnesses for submitters, and it is not clear whether the statement from Ms Kingi is intended to be an expert statement. As such, the Commissioner will form his own view on objectivity and independence as the hearing progresses.

Acceptance of methodology and science involved

48. No party has raised concerns about the methodology and science relied on by the Applicant's experts.
49. Considering each of these factors, the technical expert witnesses for the Applicant have carefully considered the Application in preparing their technical reports, AEE, and evidence. Based on the evidence filed to date, including the section 42A report, this does not present the same careful

and reasoned opinion. In my submission, the evidence for the Applicant should be preferred.

EFFECTS

50. The relevant matters for the assessment of the Proposal's effects are:
- (a) Geotechnical engineering;
 - (b) Three waters (stormwater, wastewater, water supply);
 - (c) Transportation;
 - (d) Ecological;
 - (e) Archaeological; and
 - (f) Cultural.

Geotechnical

51. The evidence of Mr Holland confirms that the Site is suitable for the proposed development, including the proposed earthworks, subject to the recommendations contained in the geotechnical report being implemented.²⁸
52. The geotechnical investigation notes that a 5m minimum setback from the slopes surrounding the Otapapa Stream is required for earthworks. It also notes that the deeper earthwork fill areas (where fills exceed 4m in depth) are expected to undergo some initial settlement during construction due to the Site's volcanic soils. This settlement will be managed and monitored as part of the Site's initial development to mitigate any future effects.²⁹

²⁸ Statement of Evidence of Aaron Holland dated 31 October 2023 at [9].

²⁹ Statement of Evidence of Aaron Holland dated 31 October 2023 at [10(d)].

53. Submitters expressed concern regarding the volume of earthworks, the stability of the land, and the potential effects of the earthworks on the Stream. In response to those submissions, Mr Holland notes:

(a) Extensive site testing and investigations have been undertaken to ensure that any risks associated with the Site's stability or underlying soils are identified and managed through design and construction methods.³⁰ The earthworks will be managed and tested in accordance with NZS 4430 (engineering fill standard for residential development) and best practice, and the proposed retaining walls will be designed for the Site's ground conditions and consider global stability as part of any design.³¹ Tonkin and Taylor, for WDC, have also reviewed the Application material and confirmed that the land is suitable for development.³²

(b) Except for the stream outlets and the 'at grade' gravel walking track proposed alongside the Stream, all earthworks are at least 10m from the Stream. Accordingly, no effects are expected on the Stream, beyond the outlet installations which will be carefully managed and undertaken during low flow times to avoid/minimise any possible effects.³³

(c) Earthworks across the Site will be managed in accordance with GD05 and the erosion and sediment control plans that will be required as a condition of the NRC consent.³⁴

54. Mr Hartstone agrees that any potential effects related to geotechnical elements of the Proposal will be less than minor with the mitigations

³⁰ Statement of Evidence of Aaron Holland dated 31 October 2023 at [13(a)].

³¹ Statement of Evidence of Aaron Holland dated 31 October 2023 at [13(a)].

³² Statement of Evidence of Aaron Holland dated 31 October 2023 at [13(a)].

³³ Statement of Evidence of Aaron Holland dated 31 October 2023 at [13(b)].

³⁴ Statement of Evidence of Aaron Holland dated 31 October 2023 at [13(c)].

proposed. Mr Hartstone further notes that the matters raised by submitters have been appropriately addressed in the Proposal.³⁵

Three waters

Water

55. Water for the Site will be supplied by the existing WDC public reticulated water supply. WDC have confirmed that this system has sufficient capacity for both water supply and firefighting supply for the proposed development.³⁶
56. The Fire Service made a submission expressing concerns that the water capacity for firefighting may be inadequate. Hydrant flow testing was undertaken at Dip Road, which confirmed that there is sufficient pressure and flow for the proposed development for both water reticulation and for firefighting purposes.³⁷

Wastewater

57. WDC have agreed that the existing public wastewater system for that area of Kamo, has sufficient capacity for the proposed development.³⁸
58. Wastewater from the development will flow with gravity to the WDC reticulated system in Tuatara Drive.³⁹

³⁵ Statement of Evidence of Aaron Holland dated 31 October 2023 at [14].

³⁶ Statement of Evidence of Aaron Holland dated 31 October 2023 at [8(a)] and [10(c)].

³⁷ Statement of Evidence of Aaron Holland dated 31 October 2023 at [12].

³⁸ Statement of Evidence of Aaron Holland dated 31 October 2023 at [8(b)].

³⁹ Statement of Evidence of Aaron Holland dated 31 October 2023 at [10(b)].

Stormwater

59. The effects of the additional stormwater runoff caused by the proposed new roads and impervious areas within the Site will be mitigated by a single large stormwater pond, located in the south-eastern corner of the Site. This pond will improve the quality of the stormwater flowing from the Site before it is discharged into the Otapapa Stream. It will also attenuate stormwater flows to ensure that peak flows from the development into the Stream are less than the Site's current discharge rates (for 2-, 10-, and 100-year storm events), thereby ensuring there will be no downstream flooding effects associated with the Proposal.
60. Several submitters have expressed concerns that the development will cause additional downstream flooding, mainly due to the existing flooding which occurs around the Otapapa Stream culvert under Tuatara Drive. The evidence of Mr Holland confirms that this will not be the case. The Proposal has been designed so that stormwater is appropriately mitigated through detention and attenuation of stormwater flows. The stormwater pond will reduce peak flows from the Site to 80% of current levels, therefore resulting in an overall improvement in downstream flooding.⁴⁰
61. Several submitters are also concerned about water quality effects on the Stream from stormwater runoff. The stormwater pond has been designed to treat the Site's stormwater, in accordance with best practice, before it is discharged to the Stream.⁴¹
62. Mr Hartstone agrees that any potential effects related to three waters elements of the Proposal will be less than minor with the mitigations

⁴⁰ Statement of Evidence of Aaron Holland dated 31 October 2023 at [11(e)].

⁴¹ Statement of Evidence of Aaron Holland dated 31 October 2023 at [11].

proposed. Mr Hartstone further notes that the matters raised by submitters have been appropriately addressed in the Proposal.⁴²

63. Mr Holland addresses Mr Hartstone's suggested condition with respect to the stormwater pond (1A-XX) in detail in his evidence. In my submission, this proposed condition is not justified and should not be included in the consent conditions.

Transport

64. In Mr Scanlen's opinion, the Proposal will almost certainly reduce the traffic on Dip Road south of the proposed new subdivision access point.⁴³ In his opinion, the Proposal will have a positive effect with respect to traffic and a positive or neutral effect with respect to safety in the locality of Hurupaki School.⁴⁴
65. The road that will be most affected by the additional traffic generated by the Proposal will be Tuatara Drive.⁴⁵ Submitters raised specific concerns about the safety of people using Tuatara Drive, including pedestrians and children playing on it, and its capacity for the additional traffic.⁴⁶ In Mr Scanlen's opinion, Tuatara Drive is of a suitable width for the expected traffic levels and the traffic safety risk will remain adequate without traffic calming devices.⁴⁷
66. Mr Scanlen also considers that the Three Mile Bush Road/Tuatara Drive/Crawford Crescent roundabout is suitable in its current form.⁴⁸

⁴² Statement of Evidence of Aaron Holland dated 31 October 2023 at [14].

⁴³ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [11].

⁴⁴ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [16]-[19].

⁴⁵ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [11].

⁴⁶ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [21].

⁴⁷ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [11] and [22]-[34].

⁴⁸ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [11] and [35]-[38].

67. Mr Scanlen agrees with the conclusions of Mr Hartstone and WDC's consent engineer's report with respect to traffic and transportation matters and considers the proposed transport related conditions are appropriate.⁴⁹
68. Finally, I note that a submitter, Shaughan Anderson, seeks improvements to parking for the Onoke reserve walking track through this process. Mr Scanlen confirms that all parts of the subdivision are within easy walking distance of the reserve, so will not increase the parking demand at the reserve significantly, if at all. The lack of parking is an existing issue that will not be exacerbated by the subdivision, and therefore is not an effect which must be addressed by the Proposal.⁵⁰

Ecology

69. Mr Hartstone's s 42A report does not outline any specific concerns regarding potential ecological effects of the Proposal and he agrees⁵¹ with the conclusion provided within the Ecological Memo⁵² that any effects on existing ecological values are assessed as less than minor, subject to a requirement for a revegetation planting plan to be prepared for the reserves to vest.⁵³ Further, Mr Hartstone considers that the revegetation planting on the proposed reserve land will potentially generate some positive ecological effects.⁵⁴
70. Ms Vilde agrees with Mr Hartstone's conclusion and considers that any potential adverse ecological effects associated with the Proposal can be avoided, minimised, mitigated or off-set through applying appropriate

⁴⁹ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [11] and [42].

⁵⁰ Statement of Evidence of Dean Scanlen dated 31 October 2023 at [15].

⁵¹ Section 42A Report, at 73.

⁵² Refer to the application for resource consent for the Proposal, Appendix 18: Ecological Assessment.

⁵³ Statement of Evidence of Madara Vilde dated 31 October 2023 at [10].

⁵⁴ Section 42A Report, at 46.

development controls and providing a sufficient revegetated buffer area between the development footprint and the Otapapa Stream.⁵⁵ Further, in Ms Vilde's opinion, the Proposal would allow for appropriate off-set of proposed vegetation clearance and overall enhancement of the Waitāua Stream riparian corridor through revegetation planting and associated ongoing management delivering an overall environmental benefit.⁵⁶

71. It is Ms Vilde's opinion that the proposed conditions of consent attached to Ms McGrath's Statement of Evidence sufficiently address the matters relating to potential adverse effects management, ecological mitigation, and enhancement of the Otapapa Stream riparian corridor. The proposed conditions will result in improved water quality and condition of the Otapapa Stream and improve connectivity between existing ecological areas, and overall ecological functioning within the Site.⁵⁷
72. Finally, several submitters identified concerns related to ecological matters (such as the effects of increased presence of humans and pets on the Site, the clearance of trees and effects on birdlife, and effects on water quality and quantity.). The issues raised in these submissions do not alter Ms Vilde's opinion that the Proposal is appropriate from an ecological perspective.⁵⁸

Archaeology

73. The evidence of Mr Carpenter confirms that there are no archaeological sites recorded on the Site and no archaeological sites have been observed during his assessments of the Site (with the possible exception of a stone heap of indeterminate age and origin around the roots of a puriri tree).⁵⁹

⁵⁵ Statement of Evidence of Madara Vilde dated 31 October 2023 at [11].

⁵⁶ Statement of Evidence of Madara Vilde dated 31 October 2023 at [11].

⁵⁷ Statement of Evidence of Madara Vilde dated 31 October 2023 at [12].

⁵⁸ Statement of Evidence of Madara Vilde dated 31 October 2023 at [84]-[114].

⁵⁹ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [10]-[11].

The nearest archaeological site is 60m east of the eastern boundary, being a pā.⁶⁰

74. Historic survey plans show that most of the Site had been cleared of primary forest by the time it was surveyed for the Maori owners in advance of their title investigation, in 1874, although forest was present immediately north and west and south. The cleared area may indicate that it was gardened or farmed in the years immediately preceding the survey. A cart track may have crossed the southwest corner of the Site, as the track is shown in the vicinity on the 1865 survey plan of the neighbouring block to the south.⁶¹
75. A plan from 1872 shows the Site with an enclosed, cultivated area with multiple structures, probably whare, belonging to Tipene Hari on the Site. Tipene Hari, a chief of Ngati Kahu O Torongare, commissioned the 1874 survey. He claimed title to the land in 1877 along with Te Hira and Wiremu Pepene, and subsequently sold the land to European settler James Whitelaw that same year. Along with these features, an orchard is present on the south side of the Otapapa Stream, opposite the Site.⁶²
76. Because of this evidence of likely occupation at the Site, Mr Carpenter considers there may be unrecorded subsurface archaeological sites and features which will only be identifiable during large-scale topsoil stripping. If discovered at that time, they will need to be investigated, analysed, and reported on and, in his opinion, except in the case of highly significant finds, destroyed.⁶³ The possibility of subsurface archaeological site and features, and the investigation of the stone heap under the puriri tree, will need to be managed through the Heritage New Zealand Pouhere Taonga archaeological authority process (per the Heritage New

⁶⁰ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [10].

⁶¹ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [12].

⁶² Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [13].

⁶³ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [14].

Zealand Pouhere Taonga Act 2014). A condition of consent is proposed which addresses this.⁶⁴

77. Despite this possibility of subsurface archaeological sites and features, Mr Carpenter considers that the archaeological effects are likely to be less than minor to nil, and that the Site has no greater or lesser archaeological significance than any other greenfields site in Whangārei where there is a recorded site within 100m.⁶⁵
78. Several submissions were made which raised concerns related to cultural effects of an archaeological or historic heritage nature (such as effects on the pā, a battlefield, gardens or wāhi tapu). Mr Carpenter addresses these submissions, as they relate to physical/archaeological issues which are within his area of expertise.⁶⁶ As noted elsewhere in these legal submissions, Mr Carpenter’s archaeological evidence assists with an assessment of the historic use of the Site and therefore its significance. These matters are addressed in detail below.

ISSUE IN DISPUTE – EFFECTS ON CULTURAL VALUES

79. Submissions in opposition to the Application have been lodged by representatives for Te Parawhau and Ngāti Kahu o Torongare. The Cultural Impact Assessment (“CIA”) was prepared by a member of Te Parawhau which also confirms that it represents the views of that Hapū.⁶⁷ Council’s section 42A author has relied on this CIA for his recommendation to decline the Application.⁶⁸ One statement of evidence has been filed on behalf of Ngāti Kahu o Torongare which identifies cultural values for the Hapū.⁶⁹

⁶⁴ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [15].

⁶⁵ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [16].

⁶⁶ Statement of Evidence of Jonathan Carpenter dated 31 October 2023 at [94].

⁶⁷ Cultural Impact Assessment, Appendix 16 to AEE, 5 April 2023.

⁶⁸ Section 42A report, paragraph 116.

⁶⁹ Submitter statement of Chantez Connor Kingi, 7 November 2023.

80. While the CIA is not evidence and cannot be treated as such, the statements made in this document have been considered by Mr Carpenter and Ms McGrath in the evidence in chief for Onoke. The task for the Commissioner is to:
- (a) Assess the significance of the Site and its cultural values.
 - (b) Assess the effects the Proposal will have on those values; and
 - (c) Considering the above, assess the Proposal against the statutory tests.
81. In my submission, the section 42A author has not addressed these steps in his assessment. Consequently, his assessment and recommendation are flawed. In contrast, the evidence for Onoke has considered each of these steps in a systematic and comprehensive way, within those witnesses' areas of expertise.

Cultural values associated with the Site

82. The CIA identifies the following cultural values of Te Parawhau Hapū in section 7:
- (a) Mana atua (deity/spirit realm's mana) – effects of earthworks.
 - (b) Mana o te wai (Tangaroa, Maru's (the water's) mana) – “effects on the waterways and includes any physical change or discharge. At this locality, the Waitāua is a place where historically customary activities were carried out by hapū tupuna. The Waitāua is a taonga and wahi tapū. For the reasons outlined in this report, the proposal has the potential to cause significant adverse mana o te wai effects and cannot be supported by the Hapū.”
 - (c) Mana whenua (the land's/Papatūānuku's mana) “The proposal will significantly modify the whenua and as such reduce, if not destroy Papatūānuku's mana to a level whereby sustaining he tāngata and te ao tūroa cannot be achieved or maintained.”
 - (d) Mana ao tūroa (the environment's mana) “It is of paramount importance that the mauri and wairua of the Waitāua and surrounding whenua are protected from further degradation and destruction. The Hapū do not support this application.”

(e) Mana tāngata (peoples' mana) "The Hapū have an obligation to uphold their uara ahurea which includes tikanga and kawa Māori which includes tino rangatiratanga, kaitiakitanga and wairuatanga. The proposal conflicts with all of Te Parawhau Hapū cultural values. The Hapū do not support this kaupapa."

83. Ms McGrath records that she understands from consultation discussions with Te Parawhau representatives: that:

[...] they believe the area was historically used as a battlefield and it may be used as a burial site. The historical use of the area was also described in Environment Court hearing *CDL Land New Zealand Limited v Whangārei DC A99/96* ("CDL Case") dated 25 November 1996 as burial sites, scared trees, a place of burying whenua and the creek that runs through is sacred, from which water is taken to wash sick people.⁷⁰

84. The statement of Ms Kingi on behalf of Ngāti Kahu o Torongare identifies that Onoke is Wāhi Tapu.⁷¹

85. Both the commentary in the CIA and the statement by Ms Kingi refer to the Onoke area and do not specifically address the Site⁷². For example:

Ōnoke and the Waitāua are taonga and are identified as an 'Area of Significance'. The Hapū are obliged to fulfil their kaitiakitanga commitments which includes protecting the whenua, people, all waterways, and the environment from harm. The active protection of Ōnoke, surrounding whenua including all waterways is integral to Hapū wellbeing. Historical customary cultural activities carried out on the whenua and within the Waitāua render the whenua and the awa as unsafe and inappropriate for the living.⁷³

86. Given the generality of this commentary and the "no development" position of both Hapū⁷⁴, it is important to consider how this relates to the Site itself, and therefore the effects of the Proposal on the values associated with the Site. I will refer to the evidence of Mr Carpenter and Ms McGrath in this regard.

⁷⁰ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 87.

⁷¹ Statement of Chantez Connor Kingi, 7 November 2023, page 6.

⁷² Statement of Chantez Connor Kingi, 7 November 2023, pages 4-6.

⁷³ Cultural Impact Assessment, Appendix 16 to AEE, 5 April 2023.

⁷⁴ Which, if accepted, would be a "veto" on any development.

History of the Site

87. Mr Carpenter's evidence is, in summary, that:

- (a) 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.⁷⁵
- (b) There are no other records of the Site being a battlefield or wāhi tapu.⁷⁶
- (c) The water course on the southern boundary of the Onoke Heights property (i.e., the Site), is not known as Waitaua, as from the 1860s if not earlier is referred to as Otapapa by Maori who pointed out boundaries to surveyors and named it in court as such.⁷⁷
- (d) The Site was "happily occupied and gardened by Rangatira of Ngati Kahu into the 1870s, before they sold it to European settlers suggests that such occupation was not prevented by cultural values or historical happenings".⁷⁸
- (e) The Waitaua Stream has been noted as a waterway within which bodies were prepared and transported for burial. However, the Stream from the confluence of the Otapapa, Waipango and Ngau Poaka to where it joins the Mangakino above Otuihu/ Whangārei Falls is four kilometres long, and urban development has been allowed along the entire length of the watercourse.⁷⁹

⁷⁵ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 99.

⁷⁶ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 100.

⁷⁷ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 109.

⁷⁸ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 121.

⁷⁹ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 123.

(f) 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.⁸⁰

(g) There is no suggestion that the land could not be lived on because it was wāhi tapu, prior to its alienation by Rangatira of Ngati Kahu. Likewise, the neighbouring block containing the pā was also previously occupied by Maori without issue, prior to alienation.⁸¹

88. This evidence shows that while the Site may be part of a wider area of importance to Hapū submitters, the history of the Site itself does not align with the key assertions in the CIA which the section 42A author has relied on for reaching his conclusion and recommendation. Indeed, as Mr Carpenter notes in his evidence, an earlier CIA prepared by the same author who wrote the CIA for the Application attaches a map which contradicts the statements made in the latter CIA with respect to the Site.⁸² In short, there is no evidence to support the submitter proposition that the Site is not suitable for the living (indeed the historical records show that the Site was used for gardening purposes).

Legal Principles

89. The importance of the Onoke area to the Hapū is not disputed. At issue is the Site and the basis for the values which have been identified in the CIA and submissions which effectively seek to veto any development of the Site, despite its zoning. Given this conflict, consideration, and application of the case law on section 6(e) is relevant and material. While I will return to the question of whether recourse to Part 2 is necessary in

⁸⁰ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 138.

⁸¹ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 139.

⁸² Refer to Figure 22: Ngati Kahu sites of significance, 2019 in the statement of evidence of Jonathan Carpenter, 31 October 2023.

this case, the caselaw on section 6(e) is relevant and I summarise the relevant principles with reference to the Application as follows.

Evidence

90. As a starting point, personal beliefs do not of themselves bring s 6(e) into play.⁸³ However, if there is specific evidence of Māori landholdings in the area, whanau connections, or historical associations, the provisions of sections 6 and 8 need to be considered.⁸⁴ The Applicant and its witnesses acknowledge this and from the outset has sought to engage with iwi and Hapū. Ms McGrath's evidence has considered and responded to the values identified in the CIA. The connections and historical associations are not in dispute. Rather, it is the question of the significance of the Site which is at issue and the suitability of the Site for residential development and use.
91. In that regard, if there is evidence that no sites of cultural, spiritual, or historical significance are affected by the proposal, section 6(e) cannot apply to defeat a proposal.⁸⁵ The exact "cartographic location" of ancestral land / wāhi tapu / sites of significance is not required for the Commissioner to evaluate the significance of the area to Māori, for the purposes of para (e).⁸⁶ However, if there is no evidence as to location and extent of the alleged wāhi tapu, para (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.⁸⁷
92. Mr Carpenter's evidence provides a detailed summary of the history of the Site within the context of the wider Onoke area. That analysis concludes that there are no such sites which will be affected by the Application. The submission/statement by Ms Kingi does not provide

⁸³ *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123 (HC).

⁸⁴ *JB Anderson Trust v Waitomo DC* EnvC A041/08.

⁸⁵ *JB Anderson Trust v Waitomo DC* EnvC A041/08.

⁸⁶ *Clevedon Cares Inc v Manukau CC* [2010] NZEnvC 211.

⁸⁷ *Hamilton v Far North DC* [2015] NZEnvC 12.

such an assessment insofar as the Site is concerned. In my submission, these broadly stated assertions cannot be relied on to make a finding that there are such sites; nor that the Application will adversely affect the same.

93. Indeed, evidence of something more than '*everyday activities and widespread, but long-lost, random burials*' is needed to qualify as a matter of national importance under para (e).⁸⁸ This principle was applied in *Hemi v Waikato DC*.⁸⁹ Though there was no dispute that the land in question had ancestral significance, there was dispute over the exact nature of the significance and whether certain uses had ever been made of the land, therefore requiring appraisal of tikanga evidence. In that case the Court noted the difficulty in balancing different but opposing "truths" in oral evidence of matters long in the past but held that the disputed evidence was not sufficient to establish a claim within paragraph (e).
94. Similar issues are in play in this Application. However, there is no evidence before the Commissioner of specific uses associated with the Site itself (for the purposes of section 6(e)) except for the historical record described in Mr Carpenter's evidence. While an assertion of wāhi tapu by those with authority to do so (i.e., the Hapū), is generally accepted and should not be questioned by those affected by the wāhi tapu status, where there is conflict between tangata whenua and expert witnesses, a finding on the evidence presented is necessary. The lack of any corroborating evidence for the assertion of wāhi tapu will tend to count against acceptance of an assertion as to the presence of wāhi tapu.⁹⁰
95. In *Hemi v Waikato DC*, there was disputed evidence as to the existence of wāhi tapu at the site. The Court was willing to accept that evidence of the use of land for a use incompatible with wāhi tapu was a reasonable

⁸⁸ *Hemi v Waikato DC* [2010] NZEnvC 216; *Serenella Holdings Limited v Rodney District Council* A100/2004.

⁸⁹ *Hemi v Waikato DC* [2010] NZEnvC 216.

⁹⁰ *Minhinnick v Minister of Corrections* EnvC A043/04.

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.⁹¹ This is consistent with an earlier CIA authored by the same consultant as who authored the CIA for the Application.

96. The question of whether or not a site is wāhi tapu is a question of fact. If there is no physical evidence of a metaphysical concept such as wāhi tapu, the Commissioner should not make findings of fact on assertions alone, but on an objective consideration of evidence tending to show the existence of an established wāhi tapu, to avoid relying on claims about metaphysical matters that may be inconsistent with traditional beliefs. Section 6(e) relies on the traditional association of Māori with wāhi tapu.⁹²

97. While the context of the Application may be distinguished, the principle of the decision in *Maungaharuru-Tangitū Trust v Hastings District Council*⁹³ is relevant. In this decision, the Court accepted that in considering the protection of such a place, wāhi taonga⁹⁴ need to be viewed holistically and in context; not identified by reference to a central or single focal point but as an outstanding natural landscape is viewed, in its whole context. However, the Court also noted that in providing appropriate protection for wāhi taonga, it would also be necessary to avoid unreasonable restrictions on realistic uses of private land. It follows that providing appropriate protection for cultural values for this Application, there cannot be an unreasonable restriction on the realistic use of the Site. In my submission, realistic use of this Site includes residential development, given its General Residential Zoning and the public processes which led to that zoning.

⁹¹ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 120.

⁹² *Minhinnick v Minister of Corrections* EnvC A043/04.

⁹³ [2021] NZEnvC 98.

⁹⁴ The Court accepted the substitution of the term "wāhi taonga" for wāhi tapu, as used in the NZCPS and RMA.

Evidential onus of proof

98. The evidentiary burden is on the person alleging facts (such as the existence of a site of significance) to establish, as a matter of fact, that the place falls within the scope of para (e).⁹⁵ The legitimacy of a claim for protection is a matter of evidence. It is not up to the applicant to disprove the claims made.⁹⁶ Nevertheless, the Applicant in this case has accepted the importance Site and surrounding Onoke area to the Hapū and has taken this into account in its design and philosophy for development Onoke Heights Limited remains willing to consider conditions which recognise the historical significance of the area and the Site's place within that context.⁹⁷

Private land

99. The Site has been in private ownership since 1877 (based on the records described in Mr Carpenter's evidence⁹⁸) and in my submission this is relevant to the Commissioner's evaluation of how the Proposal recognises and provides for the values in section 6(e).⁹⁹ The fact that the Site is in private ownership is relevant in applying paragraph 6(e) and therefore access to it is under the control of the owner and can be restricted.

100. In that regard, the protection and control claimed must be only what is needed to provide for the relationship of tangata whenua with their wāhi taonga. Otherwise, it would amount to an unreasonable interference with private landowners' rights.¹⁰⁰ In my submission, the proposition that the Site cannot be used "for the living" and that residential development

⁹⁵ *Winstone Aggregates Ltd v Franklin DC* EnvC A080/02 at [249].

⁹⁶ *Heybridge Developments Ltd v Bay of Plenty RC* [2012] NZRMA 123 (HC) at [49]-[51].

⁹⁷ Statement of evidence of Philip Leather, 31 October 2023, paragraph 11.

⁹⁸ Statement of evidence of Jonathan Carpenter, 31 October 2023, paragraph 13.

⁹⁹ *Hemi v Waikato DC* [2010] NZEnvC 216.

¹⁰⁰ *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79.

(or any development) cannot occur on the Site¹⁰¹ directly conflicts with this principle and cannot be accepted. To determine otherwise would be an error of law. Moreover, the Court has considered that sections 6, 7, and 8 cannot provide a right of “veto” or priority over other values pertinent to achieving the RMA’s purpose where such other matters fall for consideration.¹⁰²

101. Bearing these principles in mind, based on the evidence before the Commissioner:

(a) There is conflicting information/evidence as to the significance of the Site.

(b) Expert archaeological evidence is relevant to assessing these opinions.

(c) Disputed evidence is not sufficient to establish a claim within paragraph 6(e).

(d) There is evidence of the use of the Site for a use which is incompatible with wāhi tapu as claimed by Hapū submitters.

102. It follows that there is no evidence on which to make a finding that the entire Site or part thereof is “significant” in section 6(e) terms and there is no reason to decline the Application based on adverse effects on cultural values. Ms McGrath summarises the point in her evidence:

I conclude that there is extensive history associated with the area and cultural interest in the wider area, but there remains uncertainty with respect to the historical cultural use of the Site.¹⁰³

¹⁰¹ As reflected in the submissions on behalf of Hapu and the section 42A report.

¹⁰² *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, *Beadle v Minister of Corrections A 74/02*, *Ngati Ruahine v Bay of Plenty RC* [2012] NZRMA 523, *Verstraete v Far North District Council* [2013] NZEnvC 108.

¹⁰³ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 89.

Effects of the Proposal on the cultural values of the Site

103. Against this background, and notwithstanding the uncertainty regarding historical cultural use of the Site, with reference to the values identified by Hapū in the CIA, an assessment of the effects of the Proposal on those values relates to the following components of the Application:

(a) Effects of the proposed earthworks.

(b) Effects of the Proposal on the Otapapa / Waitaua Stream.

(c) Status of the Puriri Trees.

104. Ms McGrath has carried out a detailed assessment of these potential effects,¹⁰⁴ and her conclusions are summarised as follows:

(a) There is extensive history associated with the area and cultural interest in the wider area, but there remains uncertainty with respect to the historical cultural use of the Site.¹⁰⁵

(b) Section 8 of the CIA provides an assessment of potential effects on these general cultural values, including potential effects arising from residential use of the site, bulk earthworks, effects on waterways (including physical change or discharge) and further degradation of the whenua and awa.¹⁰⁶

(c) Whilst the opposition to the use of the Site for residential purposes raised by Te Parawhau is acknowledged, it is in direct conflict with the intent of the GRZ zoning that applies to the Site. The GRZ enables and provides for the use of the Site for residential purposes. Residential

¹⁰⁴ Statement of evidence of Melissa McGrath, 31 October 2023, paragraphs 85 to 101.

¹⁰⁵ *Ibid*, at para 88.

¹⁰⁶ *Ibid*, at para 91.

development of the Site is enabled as a permitted activity (Rules GRZ-R13 - R15) and multi-unit residential development is provided for as a restricted discretionary activity (Rule GRZ-R21), with matters of discretion that do not include consideration of cultural effects.¹⁰⁷

- (d) Extensive bulk earthworks could occur as a permitted activity within the Site, because the ODP has no rules to manage earthworks associated with land use activities. Earthworks associated with subdivision are enabled as a controlled activity under the ODP and bulk earthworks are also enabled as permitted and controlled activities under the PRP.¹⁰⁸
- (e) The bulk earthworks proposed will enable the Applicant to comprehensively manage potential environmental effects and apply extensive mitigation measures such as comprehensive sediment and erosion control, residential allotment boundary and building platform setbacks from Otapapa Stream, and the creation of a recreation reserve along Otapapa Stream.¹⁰⁹
- (f) The CIA identifies Waitaua Stream as an important taonga and area of significance to Te Parawhau. Mr Carpenter has confirmed that the stream adjacent to the Site is in fact the Otapapa Stream, raising doubt with respect to the importance of the stream.¹¹⁰ Ms Vilde has undertaken an assessment of the potential ecological effects of the Proposal and concludes that the Proposal will improve the freshwater quality of the Otapapa Stream.¹¹¹ On this basis, Ms McGrath considers that the Proposal will appropriately address the PRP matter of control.¹¹²

¹⁰⁷ *Ibid*, at para 92.

¹⁰⁸ *Ibid*, at para 94.

¹⁰⁹ *Ibid*, at para 96.

¹¹⁰ *Ibid*, at para 97.

¹¹¹ *Ibid*, at para 98.

¹¹² *Ibid*, at para 98.

105. Regarding the Puriri trees on the Site, the trees are not protected under the ODP, and a Certificate of Compliance has been issued for their removal – this means they can be removed as a permitted activity, irrespective of the Proposal. A qualified arborist has confirmed the age of the trees to be at least 100 years old and Ms Vilde and the arborist have confirmed that the trees have suffered from ongoing pruning, exposure to abiotic factors and ongoing stock grazing pressures.¹¹³ Irrespective of the certificate of compliance and the consented baseline, Ms McGrath points out that the Applicant has proposed to establish large grade puriri trees within the proposed recreation reserve planting zone to off-set the proposed clearance of indigenous vegetation.¹¹⁴
106. In contrast to Ms McGrath, the section 42A author has not turned his mind to these matters. He has made no attempt to consider the cultural values in relation to the Site, as identified in the CIA, for the purposes of an assessment under section 104. Rather, he refers to the CIA and submissions in a general sense as “evidence” to support his recommendation to decline consent.
107. In my submission, the section 42A Report is based on reasoning which is not supported by the information and evidence available to the author. It follows that minimal, if any, weight should be afforded to the s42A report and Mr Hartson’s evidence, insofar as the question of effects on cultural values is concerned. Conversely, Ms McGrath has provided a careful assessment of these matters and reaches a conclusion which is based on the information and evidence available to her. Ms McGrath’s evidence should be preferred.

STATUTORY TEST – SECTION 104

108. Ms McGrath’s evidence and the AEE sets out a detailed assessment of the Application pursuant to section 104 of the RMA. As set out above, the

¹¹³ *Ibid*, at para 99.

¹¹⁴ *Ibid*.

effects of the Proposal are acceptable and include positive outcomes for the Otapapa Stream.

Section 104(1)(b) – relevant planning documents

109. Ms McGrath has provided a detailed assessment of the Application against the relevant planning documents.¹¹⁵ Ms McGrath disagrees with the section 42A author’s opinion that the Application “*would result in unavoidable and unacceptable adverse effects on those identified cultural values such that a recommendation to decline the application is necessary*”. In contrast to Mr Hartstone’s approach to his assessment, Ms McGrath has carefully considered all the relevant provisions (and the evidence). I address the key planning documents with reference to Ms McGrath’s evidence. In my submission, the evidence for Onoke Heights demonstrates that the Proposal is consistent with the policy and planning framework and therefore ought to be granted consent, subject to conditions.

National Policy Statement for Urban Development 2020

110. Ms McGrath’s opinion is that the Proposal will give effect to the objectives and policies of the NPS-UD.¹¹⁶ With regard to matters in contention, in my submission Mr Hartstone has applied a contrived approach to his interpretation and assessment of the NPS-UD. As Ms McGrath explains:

Mr Hartstone concludes that the NPS-UD, “objective and policy are considered to signal that while land may be zoned for residential purposes, development of that land is provided for under the NPS-UD must take into” account the principles of Te Tiriti o Waitangi. I disagree with Mr Hartstone, the NPS-UD sets very clear direction to Council in its consideration of planning processes, it must take into account the principles of the Te Tiriti o Waitangi, it does not provide any signal with respect to plan implementation. I also note that the Urban and

¹¹⁵ Statement of evidence of Melissa McGrath, 31 October 2023, note paragraph 12.

¹¹⁶ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 111.

Services Plan Changes were promulgated to give effect to the NPS-UD.¹¹⁷

Mr Hartstone also states that Clause (c) and (d) of policy 9 apply, I disagree with Mr Hartstone because:

- (a) Clause (c) places an obligation on Council to provide the opportunity for Maori to be involved in decision making;
- (b) Clause (d) requires Council to operate in a way that is consistent with iwi participation legislation.

No iwi legislation is relevant to this Proposal.¹¹⁸

As previously discussed, it is my opinion, that the Applicant has undertaken efforts to engage with and work with hapū taking into account the principles of the Treaty of Waitangi.¹¹⁹

111. Ms McGrath's evidence should be preferred. It provides a complete and balanced assessment of the Application with reference to the evidence before the Commissioner.

National Policy Statement for Freshwater Management (Amended February 2023)

112. Ms McGrath concludes that the Proposal will give effect to the relevant objectives and policies of the NPS-FM.¹²⁰ Relevantly, in relation to the Otapapa Stream, Ms McGrath states:

[...] that policies 1, 2, 3, 5, 7, 9 and 15 are relevant to the Proposal, as the Otapapa Stream traverses the southern boundary of the Site. In my opinion the Proposal is consistent with the objective and gives effect to these policies for the following reasons:

(a) Sediment and erosion control will be in place to mitigate potential effects on the Otapapa Stream.

(b) All proposed allotments and future residential development will be appropriately setback from Otapapa Stream.

(c) Any stormwater runoff from built form and impervious areas will be directed into the proposed stormwater management system.

(d) The water discharged from the onsite stormwater pond (designed to accommodate 2yr, 10yr and 100yr storm events) will be released into the Otapapa Stream. It will not adversely affect the water quality of Otapapa Stream.

(e) A recreation reserve is proposed to extend along the southern

¹¹⁷ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 201.

¹¹⁸ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 202.

¹¹⁹ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 202.

¹²⁰ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 115.

boundary of the Site, protecting the Otapapa Stream and adjoining indigenous vegetation. This will ensure on-going protection of native vegetation and the habitat of the Otapapa Stream.¹²¹

113. In contrast, Mr Hartstone provides an incomplete assessment which Ms McGrath highlights in paragraph 203 of her evidence:

Mr Hartstone has not provided a conclusion with respect to the NPS-FW stating that *“the NPS-FW is read as protecting the health of freshwater, and where water bodies such as the Waitaua Stream are identified as having Maori freshwater values (in this case mahinga kai and wahi tapu), those require consideration as specific values of importance when making a decision on the applications.*

114. Moreover, this statement by Mr Hartstone illustrates an internal consistency in his section 42A report. While he accepts the proposition that the Site should not be developed for residential purposes i.e., not somewhere for the living, due to the CIA references to the stream being used for cleansing the deceased, he then goes on to refer to mahinga kai values of the stream. In my submission, food gathering conflicts with use of water for preparing the deceased for burial or other end of life ceremony. Again, Ms Hartstone’s assessment of this issue is unbalanced and in my submission risks being disingenuous.

National Policy Statement for Indigenous Biodiversity (August 2023)

115. Ms McGrath records that the potential adverse effects on indigenous biodiversity are avoided in the first instance, or where it is not feasible or practicable, that potential adverse effects are appropriately mitigated or off-set so that no overall loss of indigenous biodiversity occurs.¹²² Based on the evidence of Ms Vilde, Ms McGrath concludes that the Application will give effect to the objectives and policies of the NPS-IB. There is no evidence to the contrary.

¹²¹ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 114.

¹²² Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 120.

Northland Regional Policy Statement (2016)

116. Having considered the Application and evidence in her assessment of the NRPS, Ms McGrath's evidence is that the Application is consistent with the NRPS:

(a) There will be an (expected) improvement to the Otapapa Stream quality.

(b) Regarding indigenous vegetation, the Proposal provides and promotes restoration of indigenous biodiversity through enhancement of Otapapa Stream riparian margins through appropriate revegetation planting.¹²³ Policy 4.4.1 will be given effect to.

(c) the Proposal will give effect to Policy 5.1.1 as it is in accordance with the Regional Form Development Guidelines and the Regional Urban Design Guidelines. In particular, the proposed development incorporates quality urban design principles including context, character, choice, connections, creativity custodianship and collaboration.¹²⁴

(d) the Proposal will be managed to minimise the risks from natural hazards by way of comprehensive design of onsite stormwater management, earthworks and retaining design and avoidance of areas with high instability hazards.¹²⁵ The proposal will give effect to policy 7.1.1.

117. The Application is not contrary to and, in my submission, implements Policy 8.1.2 which requires the WDC to recognise and provide for the

¹²³ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 122(b).

¹²⁴ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 122(c).

¹²⁵ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 122(d).

relationship of tangata whenua and their culture and traditions, have particular regard to kaitiakitanga, and take into account the principles of the Treaty of Waitangi, including partnership, when processing resource consents. As Ms McGrath states, a key outcome is that the Proposal will provide for the kaitiakitanga of Otapapa Stream and avoid or mitigate the potential cultural effects such that they are acceptable.¹²⁶

118. Mr Hartstone reaches a contrary conclusion in respect of Policy 8.1.2 which in my submission reflects an incomplete and unbalanced assessment, particularly as this appears to rely on the CIA. It is erroneous to suggest that the evidence before the Commissioner supports Mr Hartstone's somewhat exaggerated conclusion that:

“[the] Proposal will be in direct conflict with the stated objective [3.12] and policy [8.1.2] of the RPS by not recognising the role of kaitiaki as it relates to the cultural values on the site, nor does it recognise and provide for the evident relationship between tangata whenua and the site and the values it contains”.¹²⁷

119. It is not clear what recognition Mr Hartstone anticipates or expects; nor is it “evident” what the relationship is between tangata whenua and the site and “values it contains”. Indeed, Mr Hartstone has not identified what those values are and therefore has not assessed the effect of the Proposal on the same. In contrast, Ms McGrath has detailed how the Proposal has recognised the role of hapū as Kaitiaki and subsequently considers that the Proposal is consistent with objective 3.12 and policy 8.1.2.¹²⁸

120. Similar issues arise in relation to Mr Hartstone's consideration of the Proposed Regional Plan Policy D.1.5 which conflicts with the fact that the

¹²⁶ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 122(e).

¹²⁷ Section 42A Report, paragraph 96.

¹²⁸ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 206.

activity status is controlled.¹²⁹ Policy D.1.5 is irrelevant to the assessment of the district consent application.

Operative in Part District Plan (September 2022)

121. Ms McGrath's evidence addresses the relevant objectives and policies of the operative in part Whangārei District Plan.¹³⁰ I do not repeat that detail here. In summary, Ms McGrath's detailed assessment concludes that the Application will give effect to the relevant policies of the District Plan.¹³¹

122. Again, Mr Hartstone has not provided a substantive assessment or analysis of the Proposal against the relevant provisions. To the extent that he has provided an evaluation, he focuses on the issue in dispute with reference to "Provisions relating to historic heritage, tangata whenua, sites of significance to Maori, and cultural values". He offers brief and generalised commentary in respect of the District Plan provisions where he says:

[...] as a general theme, the WDP provisions emphasise the consultation process to identify and protect sites of significance to Maori and historic heritage. Several of the provisions are considered to be directive and specific in respect of what is required, including the following provisions:

- ***'TWP-O1 Protection of Taonga of Tangata Whenua***

Within the respective domains of the exercise of rangatiratanga and kawanatanga, ensure that priority is afforded to the act of protection of taonga of tangata whenua, and to the relationship of tangata whenua and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.'

- ***'SUB-O2 Valued Features and Resources***

Subdivision provides for the protection and enhancement of the District's:

-8. Sites of Significance to Māori.*
- 9. Historical Heritage.'*

- ***'HH-P3 Adverse Physical and Visual Effects***

¹²⁹ See the statement of evidence of Melissa McGrath, 31 October 2023, paragraphs 208 -210.

¹³⁰ Statement of evidence of Melissa McGrath, 31 October 2023, paragraphs 126 – 162.

¹³¹ Statement of evidence of Melissa McGrath, 31 October 2023, paragraph 158.

To protect historic heritage from adverse physical and visual effects of internal and adjacent subdivision, land use and earthworks particularly where:

1. Proposals are in proximity to scheduled built heritage resources, known archaeological sites, or sites of significance to Māori.....'¹³²

123. Having picked out these examples, he goes on to state:

The evidence provided by way of the CIA and submissions received as previously addressed in this report is that the activities will not protect or provide for the cultural values identified on the site. In the absence of any evidence indicating how such potential adverse effects may be avoided or mitigated by the proposal, those adverse effects on cultural values are considered to be unavoidable and unacceptable. The proposal is therefore considered to be contrary to the provisions in the WDP as they relate to protection of sites of significance to Maori and historic heritage.

124. Mr Hartstone provides no context or explanation of his contention that these provisions emphasise the “consultation process to identify and protect sites of significance to Maori and historic heritage”, nor how the policies referred to are “directive”. This is a resource consent application, not a plan change. Furthermore, the policies he cites cannot be characterised as “directive”. There are no relevant “avoid” policies. In contrast, the policies anticipate development. Even if there was evidence that the Site is “significant” in the context of these policies, this does not mean that development is effectively prohibited.

125. Mr Hartstone’s lack of engagement with the detail of the provisions and the Application itself is evident in his paragraph where he states that:

The evidence provided by way of the CIA and submissions received as previously addressed in this report is that the activities will not protect or provide for the cultural values identified on the site. In the absence of any evidence indicating how such potential adverse effects may be avoided or mitigated by the proposal, those adverse effects on cultural values are considered to be unavoidable and unacceptable. The proposal is therefore considered to be contrary to the provisions in the WDP as they relate to protection of sites of significance to Maori and historic heritage.¹³³

¹³² Section 42A Report, paragraph 104.

¹³³ Section 42A Report, paragraph 105.

126. First, the CIA and submissions are not “evidence”. Second, Mr Carpenter’s evidence highlights the inconsistency between the historical records and the assertions in the CIA. Nevertheless, Ms McGrath has considered the values identified in the CIA and assessed the effects of the Proposal on those values. These are recognised and provided for.
127. In my submission, Mr Hartstone’s conclusion that the Proposal is “contrary” to the provisions of the WDP as they relate to protection of sites of significance to Māori and historic heritage is flawed. He has not considered the Application wholistically against the suite of relevant objectives and policies in the District Plan and other policy documents. For the reasons set out in these submissions and as articulated in Ms McGrath’s evidence, Mr Hartstone’s recommendation to decline the Application is based on an incomplete and unreliable assessment which renders it deficient.
128. Ms McGrath’s conclusion at paragraph 214 of her evidence succinctly captures my point:

213. Mr Hartstone concludes:

“The objectives and policies throughout the hierarchy of relevant planning provisions reflect Part 2 of the RMA as they relate to Sections 6(e), 7(a), and 8. The proposal will not provide for or protect the cultural values associated with the site. It is considered that granting consent to the application would result in unavoidable and unacceptable adverse effects on those identified cultural values such that a recommendation to decline the application is necessary”.

214. I disagree with Mr Hartstone’s conclusion for the following reasons:

(a) I have provided a complete assessment of the Proposal, confirming that it does in fact give effect to or is consistent with all relevant policy within the hierarchy of relevant planning provisions.

(b) I conclude that the Proposal will give effect to sections 6(e), 7(a), and 8.

(c) I consider that no policy directs “avoidance” of adverse effects on cultural values, instead policy direction seeks to “protect”, “enhance”, “does not adversely affect” cultural values.

(d) On balance, taking into consideration the permitted baseline, the

receiving environment and the proposed mitigation measures, it is my opinion that the potential for the Proposal to have adverse effects on cultural values as described in the Te Parawhau CIA will be avoided or mitigated such that the potential effects are acceptable.

129. As noted at the outset, I do not intend to provide a detailed explanation of the controlled activity consent application to the Northland Regional Council for earthworks. Mr Hartstone recommends granting this consent subject to conditions. Ms McGrath concurs.

Section 104(1)(c)

130. While Ms McGrath (and Mr Hartstone) do not identify any matters under section 104(1)(c) from a planning perspective, in my submission the consistent administration of the District Plan ought to be considered. This principle is well-established. In the context of this Application, it is relevant that similar subdivision applications and within the same Kamo area were granted by the Council.¹³⁴ These call into question the approach of the Council officers in relation to this Application and the recommendation to decline consent.
131. Based on the recommendation from the section 42A author, I note that the Applicant is interested to see how the Council intends to progress the upgrade of its water reservoir if the decision on this Application is not consistent with earlier decisions of Council to grant subdivision consent.

Part 2

132. Both Ms McGrath and Mr Hartstone consider there is nothing about the relevant planning framework to suggest that it has not been “competently prepared” or that there is some uncertainty, invalidity, or incompleteness whereby recourse to Part 2 is necessary.¹³⁵ This reflects the outcome of the Court of Appeal decision in *RJ Davidson*¹³⁶ whereby

¹³⁴ “The James” and “Three Mile Bush” – both referred to by Mr Leather.

¹³⁵ Section 42A report, paragraph 111.

¹³⁶ *RJ Davidson v Marlborough District Council* [2018] NZCA 316.

recourse to Part 2 may not be necessary where the relevant planning instruments have been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes.

133. In this regard, the objectives and policies of the ODP and NRPS reflect the language of section 6(e); and the recent plan changes to zone the Site General Residential were, in law, required to “give effect” to Part 2 of the RMA. Nevertheless, Ms McGrath provides a complete assessment of the Application against Part 2 of the RMA.¹³⁷ In my submission, this approach is appropriate, particularly given the issue in dispute.

CONDITIONS

134. Ms McGrath’s evidence attaches a set of draft conditions which in my submission are appropriate to address the effects of the Proposal. For the reasons set out in Mr Holland’s evidence, the conditions proffered by the Applicant for the purposes of managing stormwater are based on an expert assessment and do not require amendment in the manner suggested by the section 42A report.

CONCLUSION

135. 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. As explained by Ms McGrath, it is appropriate to apply a permitted baseline in the assessment, given the range of permitted components of the Proposal and the level of effect which is permitted in that Zone.
136. There is no conclusive evidence that the Site is a “significant” cultural site (or any part thereof). Mr Carpenter has many years of experience in archaeological and historic heritage matters. This includes a detailed

¹³⁷ Statement of evidence of Melissa McGrath, 31 October 2023, paragraphs 164-174.

knowledge of those matters in the Whangārei District and, relevantly, the Site and its surrounds. While he is not mana whenua, he has nevertheless completed detailed research into the history and Māori Land Court records relating to the Site. This has, *inter alia*, led to conclusions which highlight the disconnect between the commentary in the CIA as it relates to this Site. In my submission, his research and findings should be afforded significant weight.

137. The section 42A author has inadequately considered this key issue. Indeed, 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.
138. 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. Consistent implementation of the District Plan supports the grant of consent. To decline the consent would be to ignore the expert evidence and would set an inappropriate precedent for residential development in the Residential Zone of the Whangārei District.
139. In summary, based on a fair appraisal of the objectives and policies of the relevant planning instrument as a whole¹³⁸, the Proposal achieves the purpose of Part 2 of the RMA. In my submission, the Application should be granted consent, subject to the conditions attached to Ms McGrath’s evidence.

¹³⁸ *R J Davidson v Marlborough District Council* [2018] NZCA 316, paragraph [73].

WITNESSES FOR ONOKE HEIGHTS LIMITED

140. I will call the following witnesses who have prepared evidence on behalf of Onoke:

- (a) Mr Philip Leather.
- (b) Ms Nijssen (surveying and subdivision layout).
- (c) Mr Scanlen (transportation).
- (d) Mr Holland (geotechnical engineering and three waters).
- (e) Ms Vilde (ecology).
- (f) Mr Carpenter (archaeology and historic heritage).
- (g) Ms McGrath (planning).



M Mackintosh
Counsel for Onoke Heights Limited