

**BEFORE THE ENVIRONMENT COURT  
AUCKLAND REGISTRY**

**UNDER** the Resource Management Act 1991 (the Act)

**IN THE MATTER** of appeals pursuant to clause 14 of the First Schedule to the Act

**BETWEEN** **NGATI MAKINO HERITAGE TRUST (ENV-2015-AKL-000140)**

**NGATI RANGINUI IWI INCORPORATED SOCIETY (ENV-2015-AKL-000141)**

**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND ( ENV-2015-AKL-000129)**

Appellants

**A N D** **BAY OF PLENTY REGIONAL COUNCIL**

Respondent

**A N D** **VARIOUS**

Section 274 Parties

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**LEGAL SUBMISSIONS ON BEHALF OF**

**CARRUS CORPORATION LIMITED, FORD LAND HOLDINGS PTY LIMITED, TE TUMU KAITUNA 14 TRUST, TE TUMU LANDOWNERS GROUP**

**MOTITI AVOCADOS LIMITED**

Dated: 6 December 2017

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**MAY IT PLEASE THE COURT:****The Te Tumu Landowners' case**

1. Carrus Corporation Limited, Ford Land Holdings Pty Limited, Te Tumu Kaituna 14 Trust, and the Te Tumu Landowners Group<sup>1</sup> (**the Te Tumu Landowners**) remain interested in these appeals to the extent that any relief granted may affect the future development of the land (much of which is located within the coastal environment) identified in the Bay of Plenty Regional Policy Statement as an urban growth area.
2. The Te Tumu Landowners are s 274 parties to the appeals by the Ngati Makino Heritage Trust and the Royal Forest & Bird Protection Society of New Zealand Incorporated.
3. Over the course of the proceedings the Te Tumu Landowners' concerns have been largely resolved and there is general support for the Council's proposed wording. However, there are a few provisions that remain in contention and that require determination by the Court. These relate to the Iwi Resource Management topic.
4. The relief sought by the Te Tumu Landowners that remains outstanding from the first hearing is as follows:<sup>2</sup>
  - (a) Policy NH 6(b) is amended by deleting the reference to "cultural landscapes and features".
    - (i) The wording proposed by the Council for Policy NH 6 is:

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<sup>1</sup> The Group is an unincorporated grouping of Te Tumu Kaituna 14 Trust, Te Tumu Kaituna 11B2 Trust, Ford Land Holdings Pty Limited, and Carrus Corporation Limited.

<sup>2</sup> See also Memorandum of Counsel on behalf of Carrus Corporation Limited, Ford Land Holdings Pty Limited, Te Tumu Kaituna 14 Trust, Te Tumu Landowners Group dated 15 September 2017.

Significant adverse effects must be avoided, and other adverse effects avoided, remedied or mitigated, on the values and attributes of:

(a) Any Indigenous Biological Diversity Area B (as identified in Schedule 2, Table 2); ~~and~~

(b) Natural features and natural landscapes (including seascapes and cultural landscapes and features) in the coastal environment that are not listed as outstanding in Schedule 3.

(ii) The reason for deleting the reference to “cultural landscapes and features” is outlined in the evidence of Keith Frentz, which in his opinion these are already values and attributes of Natural Features and Landscapes, therefore including them is unnecessary.<sup>3</sup>

(iii) Counsel notes that the evidence for Transpower also raised the point that “policy 15(c)(viii) of the NZCPS contemplates regard being had to cultural landscapes and features when identifying natural landscapes and features”<sup>4</sup> and while the addition to Policy NH 6 was not opposed it was considered unnecessary as it duplicated Policy NH 9A(a) which (in Mr Horne’s opinion) appropriately addressed the matter.

(b) Policy IW1A is not included. In Keith Frentz’s opinion this policy is not necessary as it repeats what is already required by the Act, although if the Court considers that clarification is required then

<sup>3</sup> Statement of Evidence in Reply of Keith Frentz, dated 4 November 2017, [22]. Tab 16, p 846 of Common Bundle.

<sup>4</sup> Statement of Evidence of Christopher Mark Horne for Transpower New Zealand Limited: Planning, at [48], Tab 18, p 945 of Common Bundle.

the wording of Council is preferred.<sup>5</sup> For reference, the Policy is included below.

Policy IW 1A Where a proposal is likely to affect the relationship of tangata whenua and their culture, traditions and taonga, decision makers will consider the imposition of conditions to ensure:

(a) The ability for tangata whenua to exercise kaitiakitanga is maintained;

(b) Mauri is maintained or enhanced where practicable particularly in relation to coastal waters or freshwater in the coastal environment; and

(c) Mahinga kai, taonga species and natural resources used for customary purposes are maintained.

- (c) The term “cultural opportunities” should be defined in the definitions section.<sup>6</sup>
- (i) The term “cultural opportunities” is used in Policy RA 2 which provides:

Policy RA 2 Protect the public open space qualities of the coastal environment by ensuring that any new activities or new facilities:

...

(ba) Recognise the national and regional significance of the coast for cultural activities, and give preference to avoiding adverse effects on cultural opportunities, but recognising where avoidance is not possible some effects may be remedied or mitigated.

<sup>5</sup> [27]. **Tab 16 p 847** of Common Bundle.

<sup>6</sup> [61]. **Tab 16, p 855** of Common Bundle.

(ii) In Mr Frentz' opinion, it is not clear what cultural opportunities are and how they differ to recreational opportunities.<sup>7</sup> He suggests that if subclause (ba) remains (noting that it largely replicates subclause (b) and it is not clear what objective it relates to), then to provide clarity to decision makers on what is intended to be protected the term should be defined.<sup>8</sup>

5. I submit that the wording proposed by Mr Frentz reduces repetition and provides a clearer and more workable plan, and should therefore be preferred. A marked-up version of the Council's proposed wording showing the wording proposed by the Te Tumu Landowners is attached to these submissions as **Appendix A**.
6. With respect to the relief arising from the Court's decision, the Te Tumu Landowners support the views of the Regional Council.<sup>9</sup> Counsel notes that the appellant's previous discontent with the Regional Council's wording<sup>10</sup> has not been pulled through into the appellant's proposed wording circulated on 27 October for this hearing, but that the appellants introduce further amendments to Rule SO 2 and Rule SO 6.
7. I submit that the inclusion of assessment guidelines for resource consent applications is incongruous with applying them to permitted activities, and accordingly the appellant's proposed changes to Rule SO 2 and SO 6 should not be adopted.

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<sup>7</sup> Statement of evidence in reply of Keith Frentz dated 4 November 2016, at [60], **Tab 16, p 855** of the Common Bundle.

<sup>8</sup> *Ibid.*

<sup>9</sup> Memorandum of Counsel on behalf of Carrus Corporation Limited, Ford Land Holdings Pty Limited, Te Tumu Kaituna 14 Trust, Te Tumu Landowners Group dated 15 September 2017.

<sup>10</sup> See Memorandum of Counsel on behalf of the Respondent dated 25 August 2017, Attachment B.

8. The Te Tumu Landowners do not wish to make any comment on the wording proposed by Te Runanga o Ngati Whakaue ki Maketu.
9. For the avoidance of doubt, the Te Tumu Landowners support the wording proposed by the Regional Council with respect to the natural heritage provisions.
10. To conclude the case for the Te Tumu Landowners, I submit that the wording of the Respondent should be preferred, subject to the amendments sought in the evidence of Keith Frenz.

**Motiti Avocados Limited's case**

11. Motiti Avocados Limited (**MAL**) owns 145 hectares of land on Motiti Island which is mainly used as an avocado orchard. Vital to the operation of the orchard is the existing barge landing which is located in the coastal marine area on the southwest coast of Motiti Island. Naturally, the key concern for MAL is that it has continued use and access to its barge landing without complication and that the planning framework is not made unnecessarily complex. MAL is a s 274 party to the Ngati Makino appeal.
12. For the purposes of this hearing, MAL's concern relates to the jurisdictional basis for changes to the permitted activity rules and Rules SO 10, SO 12 and SO 14.
13. Changes to the permitted activity rules and rules SO 10, SO 12, and SO 14 were not signalled in the notice of appeal and it was not until reply evidence was filed that the relief sought was expressed.
14. I submit that this is too late to introduce the relief, and that the appropriate mechanism is through a plan change – which will enable

potentially affected parties a right to be heard. I submit that the law on this is clear, and with respect to the legal position I adopt the legal submissions for the Regional Council, presented to this Court today. Essentially, I submit the changes to the SO permitted activity rules and the SO 10, SO 12, and SO 14 rules are out of scope of the notice of appeal and there is no jurisdiction to make those changes. MAL's concern regarding scope is recorded in the Memorandum of Counsel on behalf of the Respondent dated 25 August 2017.<sup>11</sup>

15. However, if the Court considers there is scope, then the standards and guidelines proposed by the Council are supported.
16. For completeness, MAL does not consider that any changes are required to the natural heritage provisions.

**DATED** 6 December 2017



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**Kimberley Jane Jordan**

Counsel for Carrus Corporation Limited, Ford Land Holdings Pty Limited, Te Tumu Kaituna 14 Trust, Te Tumu Landowners Group, and Motiti Avocados Limited.

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<sup>11</sup> Paragraph [46] records "Motiti Avocados Limited does not oppose Council's proposal on [permitted activity rules] but considers the changes are out of scope".

**Appendix A**

The Te Tumu Landowners' proposed wording

- (d) The appropriateness of establishing regionally significant infrastructure and other physical resources of regional or significance;
- (e) The need to design a biodiversity offset to exchange affected biodiversity with the same type of biodiversity and as close as possible to where the impact occurs; and
- (f) Where an exchange of the same biodiversity is not possible, and the affected biodiversity values are not high, a net biodiversity gain may be achieved by offsetting with biodiversity of demonstrably greater conservation value that that to be lost.

Policy NH 6 Significant adverse effects must be avoided, and other adverse effects avoided, remedied or mitigated, on the values and attributes of:

- (a) Any Indigenous Biological Diversity Area B (as identified in Schedule 2, Table 2); ~~and~~
- (b) Natural features and natural landscapes (including seascapes ~~and cultural landscapes and features~~) in the coastal environment that are not listed as outstanding in Schedule 3.

Commented [K1]: Refer evidence in reply of Keith Frenz [23], [24], pp 846, 847 of common bundle.

Policy NH 6A Significant adverse effects on natural character in areas that are not identified as outstanding in Appendix I to the RPS are to be avoided, and other adverse effects avoided remedied or mitigated.

**Advisory Note:**

- 1 RPS Policy CE 8B provides direction on assessing the effects of subdivision, use and development on the natural character of the coastal environment.

...

Policy NH 9A Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

- (a) Avoiding significant adverse effects, and avoiding, remedying, mitigating or offsetting other effects, on habitats of indigenous species that are important for traditional or cultural purposes; and on cultural and spiritual values associated with natural features and natural landscapes;
- (b) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;
- (c) Assessing whether restoration of cultural landscape features can be enabled; and
- (d) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

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## 2 Iwi Resource Management (IW)

### 2.1 Policies

- Policy IW 1 Proposals which may affect the relationship of Māori and their culture and, traditions and taonga must recognise and provide for:
- (a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaītai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;
  - (b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;
  - (c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters;
  - (d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and
  - (e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 1A

[REDACTED]

Commented [K2]: Refer evidence in reply of Keith Frenz [27], p 847 common bundle. The policy is not necessary, but if the Court thinks it is then Council's wording is preferred.

Policy IW 1AA Recognise and provide for the relationship of tangata whenua with the Motiti Natural Environment Area by:

- (a) Incorporating mātauranga Maori in decision-making and resource management;
- (b) Recognising the role of tangata whenua as kaitiaki;
- (c) Taking into account the attributes, values and restoration goals identified in Schedule 6A;



## Definitions

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Terms are not defined in this Plan if they are defined in the Resource Management Act 1991 (the RMA), the Marine and Coastal Area (Takutai Moana) Act 2011, the Crown Minerals Act 1991 or other commonly used Acts. The usual dictionary meaning applies to other terms not defined in this Plan.

The following terms are not included because they are defined in the Resource Management Act 1991 (the RMA), the Marine and Coastal Area (Takutai Moana) Act 2011 or the Crown Minerals Act 1991:

- Aircraft** – defined in the Resource Management Act 1991
- Climate Change** – defined in the Resource Management Act 1991
- Common Marine and Coastal Area** – defined in the Marine and Coastal Area (Takutai Moana) Act 2011
- Contaminant** – defined in the Resource Management Act 1991
- Marine and Coastal Area** – defined in the Marine and Coastal Area (Takutai Moana) Act 2011
- Mining** – defined in the Crown Minerals Act 1991
- Mining Operations** – defined in the Crown Minerals Act 1991
- Prospecting** – defined in the Crown Minerals Act 1991
- Wetlands** – defined in the Resource Management Act 1991

### Definitions of terms used in the Regional Coastal Environment Plan:

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Cultural Landscapes: Tangata whenua have a distinct set of natural heritage values which are conceptualized within a distinct worldview. Cultural landscapes are characterized not only by natural and physical aspects, but also through place names and associated traditions and events that bind tāngata whenua to their landscapes, just as the landscape is a part of tangata whenua, both the tangible and intangible. Such landscapes evoke whanaungatanga that link creation traditions with whakapapa, underpinning manawhenua manamoana, and giving body to kawa and tikanga.

Cultural Opportunities: [to be defined]

**Commented [K14]:** Refer evidence in reply of Keith Frenz [61], p 855 of the common bundle, if RA 2(ba) remains then cultural opportunities should be defined to provide clarity to decision makers on what is intended on being protected.

