

## **Taranaki Regional Council and New Plymouth District Council Mt Messenger Bypass Project**

**In the matter;** of the Resource Management Act 1991

**and**

**In the matter;** of application for resource consent and a notice of requirement by the NZ Transport Agency for an alteration to the State Highway 3 designation in the New Plymouth District Plan, to carry out the Mt Messenger Bypass Project

**LEGAL SUBMISSION ON BEHALF OF TE RUNANGA O NGATI TAMA**

**8 AUGUST 2018**

## **INTRODUCTION**

### **Te Runanga o Ngati Tama**

1. This submission is on behalf of Te Runanga o Ngati Tama Trust ("**Runanga**"). The Runanga is the post settlement governance entity for Ngati Tama and representative entity for Ngati Tama on various matters, including resource management matters.
2. Ngati Tama has a long and proud history of occupation and exercise of mana over the land and moana between the Mokau river southward to the Titoki stream that flows into the sea at Waiiti Beach.
3. Unsurprisingly, there are strong views about the proposed SH3 realignment by the New Zealand Transport Agency ("**NZTA**"). This is not unexpected given the potential requirement for Treaty settlement land returned to Ngati Tama as part of its historical Treaty settlement. The role of this process is to ascertain the issues and potential effects and determine the appropriate planning response.

### **PWA agreement and Runanga position on the RMA approvals**

4. While land acquisition under the Public Works Act 1981 ("**PWA**") is not an issue for this forum, it is significant that the Runanga and the NZTA have entered into an agreement that the compulsory acquisition powers of the PWA will not be used to require the Ngati Tama land. This recognises the ancestral and Treaty context to this land.
5. This agreement allows the Runanga / Ngati Tama to engage in the RMA process without the threat of compulsory acquisition and allows the Runanga to retain its power of free consent beyond this process. As stated in the evidence of Mr Greg White, it allows Ngati Tama to maintain its mana intact within this process.
6. On this basis, the position of the Runanga is that it can support the grant of the RMA approvals, subject to conditions to properly address the cultural effects.

## CONSULTATION

7. Consultation is not required for resource consent applications or notices of requirement (s36A RMA) – and consultation is not in contention for the Runanga.
8. The RMA requires proper assessment<sup>1</sup> of relevant matters and necessary information to enable informed decision-making.
9. This has been noted by the High Court<sup>2</sup>:

“[86] **The points made... reflect to some extent the provisions of ss 5-8 of the RMA.** The importance of those sections in the context of consultation obligations was underscored by the Environment Court in *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001. At [447] the Court said:

[447] **The essence of consultation is such that, at the end of the day, we can make an informed decision. That is, one that is sufficiently informed as to the relevant facts and law, so that we can say we have had proper regard to the provisions of ss 6(e), 7(a) and 8 of the Act....”**

10. The Runanga has no issue with the consultation process, which has involved:
  - a. Participation in the MCA process;
  - b. Ongoing negotiation meetings;
  - c. Hui-a-iwi, including attendance by NZTA at some;
  - d. Input into design meetings;
  - e. Facilitated discussions with Department of Conservation;
  - f. Meetings on property related matters.
11. As the Runanga and NZTA have not reached agreement on some matters, consultation will continue to occur. As these discussions are still occurring, the detail of these matters remain without prejudice.

---

<sup>1</sup> Section 88 and Schedule 4.

<sup>2</sup> *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* CIV2009-419-1712, Allan J, 3 June 2010 (HC).

12. There are a number of ongoing processes to address the outstanding issues beyond this hearing, including:
  - a. Ongoing consultation;
  - b. Any further RMA process;
  - c. The discussion of PWA matters.
13. The Runanga has also taken an active approach with iwi members with a number of hui-a-iwi.
14. The consultation has enabled the project to respond to cultural concerns as it has evolved and allows necessary information on cultural matters to be provided to the commissioner.

#### **ALTERNATIVES**

15. The legal basis for the consideration of alternatives is outlined in the legal submissions for NZTA.
16. During the MCA process, the Runanga analysis identified the online route as the preferred option on cultural grounds. The route ultimately selected by NZTA was the next preferred (among the short-listed options) on cultural grounds. Options to the west of the existing high-way rated poorly on cultural grounds as part of the MCA analysis.
17. Since notice of the selected route, the Runanga has consulted with NZTA to consider measures to avoid, remedy or mitigate the cultural effects arising from the proposed alignment.
18. The Runanga submission highlighted the issue of alternatives. This has been partly addressed by the agreement not to use the compulsory powers to require the Ngati Tama land. For the Runanga, the online route remains relevant to the Treaty relationship issues in this case.

## PART 2 PROVISIONS

19. The legal submissions for NZTA and DOC addressed the effect of the Supreme Court decision of *King Salmon* and subsequent High Court authorities which have produced different views on the application of Part 2 to notices of requirement and resource consent applications.
20. Either way, it is submitted that *King Salmon* provides an exception to the general position where Maori issues are at play, such that s8 (and associated sections 6(e) and 7(a)) continue to apply to both the notice of requirement and resource consent applications.

21. The relevant extract from *King Salmon* provides:

“[88] ... Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, **which decision-makers must always have in mind**, including when giving effect to the NZCPS.”  
[emphasis added]

22. This was noted by the High Court in *Hokio Trusts*, which stated:

“[43] ... Whichever of *Davidson* and *New Zealand Transport Authority* is correct, *King Salmon* made clear pt 2 is still relevant in assessing resource consents in certain specific circumstances - including those relevant to the current appeal. As the Supreme Court observed in *King Salmon*:

“... the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind ...”

[44] To the extent the appeal is based on the question of whether the Environment Court fulfilled its obligation to have regard to the principles of the Treaty, art 2, and in particular s8, remains relevant to its decision.”

23. Section 8, and associated sections 6(e) and 7(a) are significant in this case, particularly given the impact on land returned to Ngati Tama as part of their Treaty settlement.

## SECTION 7

24. Section 7 of the RMA provides:

## “7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to-

(a) kaitiakitanga: ...”

25. The kaitiakitanga provision was considered recently by the Environment Court in *Tuwharetoa Maori Trust Board v Waikato Regional Council* [2018] NZEnvC 093 (“**TMTB**”). The Environment Court noted the associated statutory definitions, being:

“a) *kaitiakitanga* means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship;

b) *mana whenua* means customary authority exercised by an iwi or hapu in an identified area;

c) *tangata whenua*, in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area; and

d) *tikanga Maori* means Maori customary values and practices.”

26. The position of the Runanga is that Ngati Tama exercises mana whenua and kaitiakitanga over the project area. The kaitiakitanga of Ngati Tama to the project area is not in dispute. There may be issues as to whether other groups claim kaitiakitanga.

### Poutama

27. The Runanga has not yet had an opportunity to review the cultural assessment for Poutama and therefore seeks the right to reply to the Poutama submission if necessary.

### Te Korowai

28. There appears to be common ground that some of the people within Te Korowai are Ngati Tama. Te Korowai appears to state that it is a representative entity for Ngati Tama in addition to the Runanga. This is an issue of mandate, rather than mana whenua. As noted in the legal submissions for NZTA, the

Environment Court has generally held that issues of mandate are not matters for this forum to determine. The Maori Land Court for example has jurisdiction to address issues of mandate.

29. Relevantly, the Runanga has fully engaged with its members throughout the process for these applications, including six hui-a-iwi. The hui-a-iwi have endorsed the approach by the Runanga.
30. While there can be cases of particular hapu or ahi ka associations within iwi, the evidence is that Ngati Tama operates at the iwi level.
31. The Runanga does not seek to detract from the right and ability of Ngati Tama members to present to the commissioner and this project clearly raises issues of identity and cultural effects relevant to all Ngati Tama members, including the Runanga trustees themselves.<sup>3</sup>
32. In the circumstances, the key task is ensuring the RMA approvals properly avoid, remedy or mitigate the cultural effects, which has been and continues to be the focus of the Runanga.<sup>4</sup>
33. Similar to the position with Poutama, the Runanga seeks the right to reply to the submissions and evidence of Te Korowai should this be necessary.

## **SECTION 6**

34. Section 6 states:

### **“6 Matters of national importance**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga: ...”

---

<sup>3</sup> Refer TMTB at paragraph [128].

<sup>4</sup> Refer TMTB at paragraph [135].

35. The recognition of the relationship of Ngati Tama to their ancestral lands, water, sites, wāhi tapu and taonga has not been in issue. This recognition has been assisted by the fact that the project affects lands returned to Ngati Tama through their historical Treaty settlement.
36. What is required to provide for the relationship of Ngati Tama to their ancestral lands, water, sites, wāhi tapu and taonga is a more substantive task of which there remain different views which are subject to ongoing consideration.

### **CULTURAL EFFECTS**

37. The consideration of ecological effects in this case, including substantial evidence on methodologies of no net loss, offsetting and compensation, have provided a point of contrast to the cultural matters in question in this case.
38. The cultural dimension is an important part of the RMA.
39. The metaphysical dimension was expressed in *TMTB* with references to the statutory provisions as follows:

“[120] We have given careful thought to the inclusion of new conditions for cultural indicators. We have concluded that these are needed in order to directly address the metaphysical issues that are at the heart of the requirement in s 6(e) of the Act. Without more specific recording of the matters that are integral to cultural identity, there is a clear risk that they will be lost sight of ...

[121] We conclude that these metaphysical considerations are fairly and reasonably related to the exercise of the consents. It is abundantly clear that the purpose and principles in Part 2 of the Act encompass not only the physical elements of the natural and physical environment but also the metaphysical dimensions of the environment at least through express inclusion of references to abstract concepts such as:

- a) social and cultural well-being in s 5;
- b) ancestral relationships of Maori culture and traditions with resources in s6(e);
- c) the protection of historic heritage (defined to include resources contributing to people's understanding of New Zealand's cultures, including sites of significance to Maori) in s 6(f);
- d) the maintenance and enhancement of amenity values (defined to include an area's contributions to people's appreciation of its cultural attributes) in s 7(c);



e) the principles of the Treaty of Waitangi / Te Tiriti o Waitangi in s 8, which are to be found in the spirit of the Treaty rather than its particular words in either English or te reo Maori; and

f) the corresponding breadth of the definition of *environment* in s 2 to include communities of people, amenity values, and the social, aesthetic and cultural conditions which affect or are affected by those matters."

40. It is relevant that the RMA provisions define the environment as including "people and communities ... and cultural conditions which affect [them]".<sup>5</sup> In this vein, Ngati Tama identify with and are part of the environment affected by the project. As Ngati Tama are ahi ka, their relationship to their ancestral lands, water, sites, wāhi tapu and taonga spans both the physical and metaphysical dimensions and reflects the combination of both sections 6(e) and 7(a).
41. Unlike ecological effects, there is no agreed or common methodology for avoiding, remedying or mitigating cultural effects.

#### **AVOIDING EFFECTS – FREE CONSENT**

42. The Runanga position has been and remains that the area affected by the project is of such importance that the project should not proceed without the free consent of Ngati Tama. This is not to claim a right of veto. But that the RMA provisions, and the cultural importance of the area in question are such that where Ngati Tama does not consent to the project, the proper planning response must be that the cultural effects should be avoided.
43. This issue has been met through a number of related measures, including:
- a. The Runanga and NZTA have been in thorough discussions to consider measures by which Ngati Tama might be able to consent to the project;
  - b. The RMA process allows the Runanga to consider and develop measures further;
  - c. NZTA has agreed not to use the compulsory acquisition powers under the PWA. While the PWA is not a direct matter for the commissioner, this

---

<sup>5</sup> Section 2 of the RMA.

agreement ensures Ngati Tama retains control to freely consent to the project beyond this process.

44. On this basis, as outlined in the evidence of Mr White, the Runanga supports the grant of the RMA approvals conditional on it being able to advance appropriate measures to address the cultural and ecological effects.

### **MITIGATING CULTURAL EFFECTS**

45. The evidence of Mr White outlines the matters that have been and continue to be discussed between the Runanga and NZTA.

### **Trust fund**

46. The Runanga and NZTA have discussed the concept of a fund, which would be the principle mechanism to mitigate the cultural effects.
47. The purposes of such fund would be to support the integrity, functioning and resilience of Ngati Tama within their rohe. This language has a link to the RMA definitions of environment and 'intrinsic values' in relation to ecosystems.<sup>6</sup>
48. At the time of this submission, there are still different views on the amount of the fund, and the details of this are still subject to without prejudice discussion. It is anticipated that discussions will continue beyond this hearing. For current purposes, the Runanga is content that the RMA approvals can be approved without inclusion of a condition on this issue on the basis that this can continue to be addressed through and discussions with NZTA and future processes as necessary.

### **Kaitiaki Forum – condition 4**

49. Condition 4 provides for a Kaitiaki Forum Group ("KFG"). The Runanga considers the proposed condition for the KFG incorporates the relevant matters to form part of the kaitiaki forum, being:
- a. Cultural expression in artwork and road corridor features;

---

<sup>6</sup> Section 2 of the RMA.

- b. Water management;
  - c. Biodiversity offset and ecological mitigation proposals;
  - d. Signage of local features;
  - e. Naming the new highway;
  - f. Accidental discovery protocols;
  - g. Cultural protocols for the works;
  - h. Cultural indicators;
  - i. Cultural monitoring.
50. With the additional change proposed through this hearing, the condition provides sufficient direction and flexibility to ensure the intent and purpose of the tasks listed above will be achieved. Ngati Tama governance and operational structures to sit alongside the KFG are also being developed.

## **PEST CONTROL**

### **Pest control**

51. Mr Lee Shapiro (Boffa Miskell) has provided technical support to the Runanga, with a view to ensuring that any pest control programme is successful in achieving the outcomes it is intended to achieve. Mr Shapiro has made suggestions on the methods and monitoring associated with the pest control.
52. As noted in the evidence, Ngati Tama has proven experience in pest control, as well as kaitiaki principles that value the restoration of the natural environment. There may be the opportunity for Ngati Tama to implement the pest control which is also a matter being discussed with NZTA and DOC.

### **PMA area**

53. The Runanga has relied on the ecological experts as to the size and location of the PMA. As noted by Mr Shapiro, the relevant principles include proximity to the area of effect.

54. The evidence in relation to Parininihi is that it does not have any long-term committed pest control resourcing and therefore the Runanga supports the inclusion of Parininihi in the PMA.
55. DOC submitted that the PMA should be defined in the conditions and if this cannot be confirmed, it has proposed an alternative site.
56. Adding the cultural dimension to this issue, the view of the Runanga is that the PMA should remain within the Ngati Tama rohe. There are concerns with moving the PMA to the more distant location suggested and this should occur only after all efforts have been exhausted in the affected area.

### **OTHER OPPORTUNITIES**

57. The land exchange which has been mentioned in evidence is proposed under the PWA and therefore separate to the mitigation matters discussed above.
58. The project involves other opportunities that the Runanga is exploring with NZTA, including employment opportunities for Ngati Tama members.
59. Overall, the Runanga consider the project involves a package of opportunities for Ngati Tama that warrant ongoing consideration, which would be provided by the approval of the RMA applications.

### **CONCLUSION**

60. While there are ongoing discussions between the Runanga and NZTA, the Runanga supports the grant of the RMA approvals for the following reasons:
  - a. Measures to address metaphysical effects have been incorporated in the consent conditions;
  - b. There are a number of ongoing processes to address the outstanding issues including:
    - i. Any further RMA process;
    - ii. Ongoing consultation;
    - iii. The negotiation of PWA matters.

- c. The Runanga has taken an active and open approach with its members in relation to the project, and will continue to do so;
- d. Ngati Tama (through the Runanga) retains sufficient control to freely consent to the project outside this forum given the agreement by NZTA not to use the compulsory acquisition powers in respect to the Ngati Tama Treaty settlement land.

8 August 2018

Tama Hovell

**Counsel for Te Runanga o Ngati Tama**