IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2023] NZEnvC 056

IN THE MATTER	of an appeal under s 58 of the Heritage New Zealand Pouhere Taonga Act 2014 and an application under s 87G of the Resource Management Act 1991
BETWEEN	WAIKANAE LAND COMPANY LIMITED (ENV-2021-WLG-000034) (ENV-2022-WLG-000014) Appellant/ Applicant
AND	HERITAGE NEW ZEALAND POUHERE TAONGA Respondent
AND	KAPITI COAST DISTRICT COUNCIL Consent Authority
AND	ĀTIAWA KI WHAKARONGOTAI CHARITABLE TRUST Section 274 Party

Court:	Environment Judge B P Dwyer Environment Commissioner D J Bunting
Hearing:	In Wellington on 30 January 2023
Last case event:	Memorandum received 8 March 2023
Appearances:	M Slyfield and M van Alphen Fyfe for Waikanae Land Company Ltd Appearance by Heritage New Zealand Pouhere Taonga excused M Conway and S Hart for Kapiti Coast District Council H Irwin-Easthope and A Samuels for Ātiawa ki Whakarongotai Charitable Trust

Date of Decision: 30 March 2023

Date of Issue: 30 March 2023

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY QUESTION OF LAW

A: Inclusion of Site in Schedule 9 of District Plan pursuant to PC2 determined to be ultra vires

B: Costs reserved

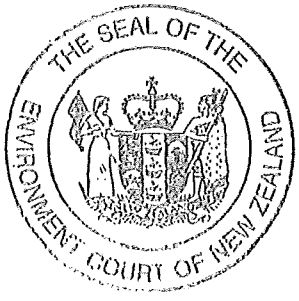
REASONS

Introduction

[1] This decision arises out of two proceedings before the Court relating to a proposal by Waikanae Land Company Limited (WLC) which seeks to develop five new residential lots on a 3,902m^2 parcel of land on the southwestern side of Barrett Drive, Waikanae Beach (the Site). The proposal requires two different statutory consents:

- Firstly, an archaeological authority. An application for an authority was declined by Heritage New Zealand Pouhere Taonga (HNZ) and appealed by WLC to the Court on 14 October 2021. HNZ took no position on the question at issue in this preliminary matter, agreed to abide the Court's decision and its participation was excused;

- Secondly, a subdivision and land use consent (non-complying activity) for various aspects of the proposal. The application for this consent has come before the Court by way of direct referral from Kapiti Coast District Council (the Council) enabling it to "catch up" with the appeal



on the Heritage matter and have the two determined together. The direct referral application was filed on 13 June 2022.

[2] It is immediately apparent on reading the various documents filed in the Court in connection with both proceedings that there is a substantive and seemingly determinative factual matter at issue between WLC and the other parties, namely whether or not the Site is wāhi tapu being part of an urupa known as Karewarewa. HNZ, the Council and s 274 party Ātiawa Ki Whakarongotai Charitable Trust (Ātiawa) all contend that the Site is wāhi tapu. WLC contends that it is not a part of the urupa. Who is correct in that regard will be decided by the Court in due course after hearing all the relevant evidence.

The Legal Issue

[3] On 15 December 2022 counsel for WLC filed a memorandum regarding a legal issue arising in these proceedings concerning what is known as Plan Change 2 (PC2) to the Council's Operative District Plan 2021 (the District Plan) and how PC2 might impact on the direct referral. The memorandum identified the issue in the following terms:

> **The factual and evidential context**
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> 3. The legal issue concerns proposed Plan Change 2 (**PC2**) by the Kapiti Coast District Council (**Council**).
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> 4. PC2 is an intensification planning instrument (**IPI**), notified in August 2022. It includes a proposal to list the site that is the subject of these proceedings (and an area of land around the site) as a new wāhi tapu area. Council has included this in PC2 as a new qualifying matter.
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> ...
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> 5. The new wāhi tapu listing ostensibly protects historic heritage, and therefore has immediate legal effect for the purposes of WLC's consent application. It does not change the activity status of WLC's proposal, but it triggers the application of additional policies that relate to protection of historic heritage. These policies have been addressed in the planning evidence already filed.
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> 6. WLC's planner, Mr Thomas, and Council's planner, Ms Rydon, reach different conclusions regarding the application of the relevant heritage policies: in blunt terms Mr Thomas does not consider WLC's proposal is contrary to the policies, and Ms Rydon considers WLC's proposal is

contrary to the policies.

The legal issue WLC will pursue

7. WLC will contend that the new wāhi tapu listing cannot be introduced under an IPI. There is a limited statutory power to introduce 'new qualifying matters': the power can only be used to make medium density residential standards (MDRS) "less enabling of development". WLC will submit the new wāhi tapu listing goes far beyond making MDRS less enabling. The listing disables the underlying residential zoning of the land. WLC will submit that the correct process for introducing a change of this sort would be a regular plan change, rather than an IPI.

8. Given the Court's broad declaratory jurisdiction, WLC will seek a ruling that this aspect of PC2 exceeds Council's statutory power. WLC respectfully submits it is open to the Court to make a ruling of this sort within the context of the consent application; and furthermore that this is necessary, as it will determine whether the Court does or does not need to resolve the contested planning evidence described above. (If the Court concludes this aspect of PC2 exceeds Council's power, it will become unnecessary for the Court to determine which of Mr Thomas or Ms Rydon has correctly applied the heritage policies that are triggered by the PC2 listing.)

(footnotes omitted)

[4] There was some debate between counsel as to the Court's capacity to determine this legal issue. These proceedings are validly before the Court through (insofar as Resource Management Act 1991 (RMA) issues are concerned) the direct referral procedure. Counsel for WLC has identified what he contends to be a legal issue relating to the potential impact of PC2 on the direct referral and has suggested to the Court that it might determine that issue on a preliminary basis rather than at the time of hearing the merits of the case. It is clearly within the Court's power pursuant to s 269(1) to decide when it might consider that legal issue.

[5] A suggestion was made by counsel that the appropriate vehicle to consider the issue was by way of declaration pursuant to ss 310 and 311 RMA. We do not consider that process to be necessary. Sections 310 and 311 create an originating jurisdiction where a range of matters can be brought before the Court for declaration. The matter under consideration in this case is already before the Court through the direct referral process and is typical of any number of "legal" issues which might come before the Court during any hearing on any topic. There is no need to start from scratch under the declaration procedure.

[6] Further matters of disagreement between counsel arise from memoranda filed by WLC on 21 February 2023 and Ātiawa on 8 March 2023. We make no comment regarding those matters. To the extent that they might require future resolution, they can be determined by the hearing panel.

Background

[7] The Site is in the General Residential Zone (the Residential Zone) of the District Plan. The Residential Zone provisions contain the range of objectives, policies and rules commonly found in such zones in district plans formulated under the RMA. Inter alia, the Zone rules provide (unsurprisingly) that residential activities and new buildings are permitted activities in the Zone subject to compliance with a series of Standards generally described as criteria in the rules. By way of example these Standards address the maximum number of residential units which can be erected on an allotment, maximum building coverage on an allotment, maximum permitted height of buildings and similar matters.

[8] In addition to creating zones the District Plan contains a series of Schedules which identify particular features of value present in the District. These include ecological sites, key/notable trees, significant landscapes and the like. Of specific relevance to these proceedings is Schedule 9 which presently identifies 43 Sites and Areas of Significance to Māori. The matters of significance are wide ranging and include urupa, pa, kainga, marae and a range of other features. A consequence of being identified in a Schedule is that a particular site or area may become subject to additional objectives, policies and rules over and above those normally applying in the zone where such sites or areas are contained. The Site is not presently identified in Schedule 9.

MDRS

[9] The Council notified PC2 on 18 August 2022 as an Intensification Planning Instrument (IPI) described in s 80E RMA. The purpose of IPIs is to incorporate Medium Density Residential Standards (MDRS) into "every relevant residential

zone"[1] of district plans. MDRS were incorporated into RMA in 2021 by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (the EHAA) which sought to address housing unaffordability and supply by (inter alia) setting more permissive land use regulations to enable intensification of housing development. Medium density residential standards are defined in s 2 RMA in these terms:

> **medium density residential standards** or **MDRS** means the requirements, conditions, and permissions set out in Schedule 3A

[10] Schedule 3A requires the Council to include in the District Plan two objectives and five policies relating to housing needs and provisions, subdivision requirements and nine density standards. Density standards are defined in cl 1 of Schedule 3A as meaning:

> **density standard** means a standard setting out requirements relating to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to streets, or landscaped area for the construction of a building

[11] Part 2 of Schedule 3A, identifies the matters which are the subject of the density standards to be incorporated into residential zone standards through an IPI. Those matters are:

- Number of residential units per site;
- Building height;
- Height in relation to boundary;
- Setbacks;
- Building coverage;
- Outdoor living space (per unit);

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1 RMA, s 77G(1).

- Outlook space (per unit);
- Windows to street; and
- Landscaped area.

It will be seen that the Schedule includes the number of residential units which may be constructed on a site in the MDRS as well as the eight matters identified in the definition of density standard.

[12] The MDRS contained in Schedule 3A allow greater intensity of development than the Standards in the Residential Zone presently contained in the District Plan. By way of example, under the District Plan in its present form[2] new buildings are permitted activities in the Residential zone subject to (with some exceptions and qualifications) there being no more than one building per allotment, a maximum of 40% site coverage and a maximum building height of 8 metres. The corresponding figures under the MDRS are no more than three new buildings, 50% site coverage and 11 metres building height. What the MDRS does is liberalise the density standards which a proposal must meet in order to be a permitted activity under the District Plan. However, if a proposal does not meet the new more liberal standards for permitted activities then it still remains a restricted discretionary activity as it is under the District Plan at present.[3]

[13] Section 77G(1) imposes a duty on the Council to incorporate the MDRS into every relevant residential zone and s 80F required the Council (being what is known as a tier 1 authority) to do so by notifying the IPI by 20 August 2022, as it has done. There is however an element of flexibility in that regard. Relevant in this instance is s 77I which relevantly provides as follows:

> **77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**
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> A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of

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2 Rule GRZ-R6.

3 E.g. new proposed rule GRZ-Rx5.

> development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
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> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:
>
> (b) – (j) [not relevant]

[14] In notifying the IPI the Council introduced a definition of qualifying matter area which included… "a place and area of significance to Māori listed in Schedule 9". We understood it to be common ground between the parties that the practical effect of the inclusion of Schedule 9 in the IPI was that the density standards contained in the MDRS would not apply in the scheduled sites and areas. Mr Slyfield initially submitted that this went further than just making the MDRS "less enabling of development" in the Schedule 9 areas but effectively prevented any development at all due to the restrictive rules applying in those areas. However during the course of the hearing he conceded that the term less enabling could mean not enabling development at all. In his supplementary submissions[4] Mr Slyfield acknowledged that… "it is within the statutory powers conferred on the Council to include these existing matters within PC2". We proceed on the basis of that acknowledgement.

[15] The heart of the dispute in these proceedings arises because of a second step taken by the Council as part of PC2. Not only did the Council include existing Schedule 9 Sites and Areas as qualifying matter areas in the IPI but it purported to amend Schedule 9 itself by listing a new qualifying matter area in the Schedule, namely Karewarewa Urupa. The contended spatial extent of the urupa may be found in Fig 8 of the s 32 report on PC2 and was to be identified in the District Plan maps. The urupa was given two classifications under PC2 depending on whether or not land within the contended urupa had been developed (as much of it had previously been) or not. The Site was shown as being in the undeveloped part of the urupa categorised as Wāhanga Tahi. Listing the Site in Schedule 9 had three consequences identified by Mr Slyfield.

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4 Para [17].

[16] The first related to the application of additional policies to consideration of any applications (including the current direct referral) that might be made in respect of the Site. This consequence was described in these terms in paras [28] and [29] of Mr Slyfield's submissions:

> 28. As stated above the proposal was non-complying when the application was lodged. Therefore all of the proposal's effects were required to be considered, as were all Plan policies on relevant subject-matter. This meant general objectives and policies concerning historic heritage might be relevant (if it was determined that the Site triggered the definition of historic heritage in the RMA).
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> 29. However, the Plan contained—prior to PC2—specific guidance for assessing proposals to develop sites listed in the Plan for their significance to Māori. This guidance is in paragraph 5 of Policy HH-P6 and the second part of Policy HH-P9.[5] Prior to PC2 this guidance did not apply to the Site, due [to] the lack of listing.[6] PC2's introduction of a listing invokes the application of the guidance in these policies.

[17] The second was that there was a change in status of a number of activities which might previously be permitted on the Site under Residential zone rules. This consequence was described in these terms in para [55] of Mr Slyfield's submissions:

> 55. The effect of the Wāhanga Tahi rules on the Applicant's land is that:
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> 55.1 Activities that were previously permitted activities are now restricted discretionary activities. This includes, for instance: land disturbance or earthworks in relation to gardening, cultivation, and planting or removing trees; and fencing not on the perimeter of the land.[7]
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> 55.2 Activities that were previously permitted activities are now non-complying activities. This includes, for instance: undertaking earthworks to lay driveways, cabling, or building foundations; building a residential dwelling; and installing fenceposts other than on the perimeter of the land that do not comply with the relevant standards.[8]

[18] The third consequence is that under the IPI process there is no right of appeal to the Environment Court against the Council's determination on WLC's

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5 Historic Heritage chapter [CB vol 2, tab 19, **CB 0586–0587, 0588**].

6 Paragraph 5 of HH-P6 could only be triggered in this instance if the site is a "scheduled historic site", i.e. listed in Schedule 9; and the second part of Policy HH-P9 could only apply in this instance if the site contains "historic heritage features" (i.e. is listed in Schedule 9).

7 SASM-R10 [CB vol 2, tab 19, **CB 0597–0598**].

8 SASM-R16 and SASM R-18 [CB vol 2, tab 19, **CB 0600**].

submission opposing PC2 as it impacts on the Site.[9]

[19] WLC contends that the Council had no statutory power to list the Site in Schedule 9 through the IPI process and that the appropriate way for it to do so was through the usual plan change processes contained in Schedule 1 RMA.

[20] To some extent the arguments advanced by the Council, Ātiawa and by WLC in response appeared to veer into the reasons for and merits of the listing as part of the Council's obligation under s 6(e) to recognise and provide for the relationship of Māori with the urupa. We do not address that issue. The Court has not yet heard any evidence in these proceedings but it seems to be fundamental that in order to list the Site in Schedule 9 the Council must first make a factual determination as to whether or not it falls within the urupa. Its opening position in that regard (as indicated by listing the Site in the Schedule through PC2) is that it does lie within the urupa but that position is subject to challenge by WLC. Who is right or wrong in that regard will be determined by the Council's PC2 hearing process with its factual determination unassailable through the usual appeal process to this Court. Exactly the same issue is of course before the Court in this direct referral. The unsatisfactory consequences of the Court and the Council reaching different conclusions are abundantly apparent.

[21] Turning to the Council's statutory power to list the Site in Schedule 9 as part of the IPI process, we note that unsurprisingly there is no specific reference in the statutory provisions imported into RMA by the EHAA directly addressing this issue. Whether or not the power exists must be gleaned by interpretation of the legislation. In undertaking that interpretation we consider that the draconian consequences of listing the Site in the Schedule on WLC's existing development rights (particularly those identified in para [17] above) when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose.

[22] The purpose of the EHAA was to enable housing development in residential

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9 Schedule 1, cl 107.

zones. However counter balancing that purpose is that the EHAA also provides for the accommodation of qualifying matters which might make MDRS less enabling and those qualifying matters extend to s 6(e) matters. Further to that it is apparent that provisions inserted into RMA by the EHAA give very wide powers to territorial authorities undertaking the IPI process. They go so far as to enable territorial authorities to create new residential zones or amend existing residential zones.[10]

[23] As wide as territorial authorities' powers may seem to be in undertaking the IPI process it is apparent that they are not open ended. They are confined to the matters identified in a number of relevant provisions.

[24] We refer firstly in that regard to the definition of MDRS and density standards set out in paras [9] and [10] (above). Those provisions identify and limit the matters which may be the subject of MDRS requirements introduced through the IPI process. Those are the nine matters either listed in the definition or identified in cls 10-18 of Schedule 3A.

[25] That finding is consistent with the provisions of s 77I cited in para [13] (above) which enable a territorial authority to "...make the **MDRS and the relevant building height or density requirements** ... less enabling..."[11] through the IPI process to accommodate qualifying matters. We consider that on its face the consequence of that provision is to require qualifying matters introduced through the IPI process to relate to the standards identified in the definition and cls 10-18 of Schedule 3A and to make those standards less enabling.

[26] Those observations lead to consideration of the provisions of s 80E RMA which relevantly provide:

> **80E Meaning of intensification planning instrument**
>
> (1) In this Act, **intensification planning instrument** or **IPI** means a change to a district plan or a variation to a proposed district plan—
>
> (a) that must—

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10 RMA, s 77G(4).

11 Our emphasis.

(i) incorporate the MDRS; and

(ii) give effect to,—

(A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or

...

(b) that may also amend or include the following provisions:

...

(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—

(A) the MDRS; or

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

(2) In subsection (1)(b)(iii), **related provisions** also includes provisions that relate to any of the following, without limitation:

(a) district-wide matters:

(b) earthworks:

(c) fencing:

(d) infrastructure:

(e) qualifying matters identified in accordance with section 77I or 77O:

(f) storm water management (including permeability and hydraulic neutrality):

(g) subdivision of land.

[27] On their face these provisions are extremely wide. The Sites and Areas of Significance to Māori identified in Schedule 9 are both district-wide matters and qualifying matters identified in s 77I(a). Section 80E(2) provides that provisions relating to those matters may be included... "without limitation". Notwithstanding that apparently unlimited description, it appears to us that the term "without limitation" is used to identify matters which may fall within the related provisions category. The effect of prefacing s 80E(2) with the term without limitation is that related provisions may extend beyond the matters identified in ss 2(a)-(g) to include other matters as well as those identified.

[28] In our view however there is in fact an inherent limitation in the matters which fall within the related matters category that is apparent on reading s 80E(1)(b)(iii) set out in para [26] (above).

[29] Section 80E(1)(b)(iii)(B) is not relevant in this case. What is relevant is whether or not the change of permitted activity status identified in para 55 of WLC's submissions[12] is a change which supports or is consequential upon the MDRS. Mr Slyfield made the following submission in that regard:

> 71. Whether the new wāhi tapu listing may be said to be a "related provision" in that it is "consequential" on the MDRS is less obvious. Prior to notifying PC2, Council received legal advice that concluded it would "arguably be consequential" to an IPI to schedule a previously unscheduled wāhi tapu site in an area subject to the IPI. The advice considered that an inability to notify new wāhi tapu sites would be an "illogical outcome" on the basis of Parliament's "clear intentions" that such sites would be qualifying matters. Council appears to have adopted this advice.
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> 72. The issue with that approach is its apparent focus on whether a new wāhi tapu listing (and the operative rules that accompany such a listing) are "related to" that qualifying matter—that is, the focus is on the statutory language in the specific definition of "related provisions" in s 80E(2)(e). What that approach fails to do is refer back to the overarching gateway in s 80E(1)(b): that the related provision may only be included in an IPI if it is consequential on the MDRS.
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> (original emphasis, footnotes omitted)

[30] We concur with that submission. Inclusion of the Site in Schedule 9 does not support the MDRS. It actively precludes operation of the MDRS on the Site. Nor do we consider that inclusion of the Site in the Schedule is consequential on the MDRS which sets out to impose more permissive standards relating to the nine defined matters.

[31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building

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[12] C.f. para [17] (above).

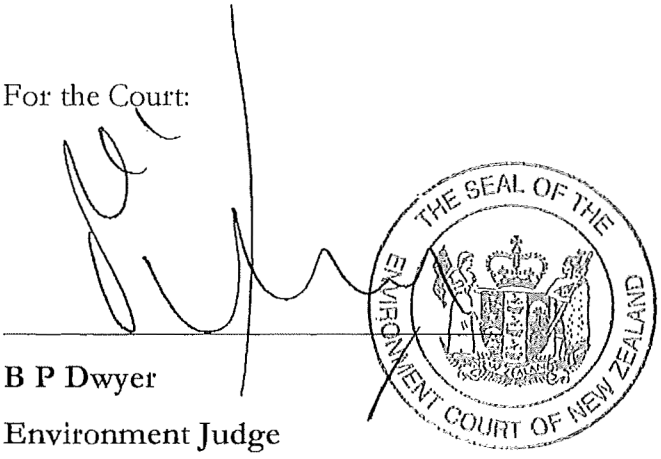
height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.

[32] We find that amending the District Plan in the manner which the Council has purported to do is ultra vires. The Council is, of course, entitled to make a change to the District Plan to include the new Schedule 9 area, using the usual RMA Schedule 1 processes.

Costs

[33] Costs are reserved to be resolved at completion of the hearing process.

For the Court:



B P Dwyer

Environment Judge