

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

ENV-2018-AKL-00078

I MUA I TE KOOTI TAIAO O AOTEAROA

UNDER THE

Resource Management Act 1991 ("**Act**")

IN THE MATTER OF

a direct referral of an application for resource consent for the necessary infrastructure and related activities associated with holding the America's Cup in Auckland

AND IN THE MATTER OF

an application under section 281 for waiver of the time period for filing a notice under section 274 of the Act

BETWEEN

PANUKU DEVELOPMENT AUCKLAND LIMITED

Applicant

AND

AUCKLAND COUNCIL

Respondent

**MEMORANDUM OF COUNSEL FOR THE NGATI PAOA TRUST BOARD IN
RESPECT OF SECTION 274 NOTICE AND APPLICATION FOR WAIVER**

6 SEPTEMBER 2018

Counsel instructed:

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MAY IT PLEASE THE COURT:

Introduction

1. I was instructed by the Ngati Paoa Trust Board ("**Board**") in respect of these proceedings on 5 September 2018. That followed the Board's discovery on 3 September 2018 that Panuku Development Auckland Limited and/or Auckland Council have been directly engaged with the Ngati Paoa Iwi Trust ("**Trust**") in respect of the proposal, and based on this engagement the Trust has been a party to the proceedings and holding itself out as and/or adopting a position designed to imply that it is authorised to speak for Ngati Paoa.
2. As recorded in its section 274 notice and application for waiver of time, the Board is the only entity that is mandated, by a "determination and order" of the Maori Land Court in 2009 pursuant to section 30(1)(b) of Te Ture Whenua Maori Act 1993, to speak for Ngati Paoa in respect of resource management matters, including in respect of the proceedings.
3. This memorandum proposes a way forward designed to remove any prejudice to the process and parties of the late joining of the Board to the proceedings.

Proposal / submissions on the waiver

4. As indicated in its application for waiver:

Ngati Paoa ... through the Board as its mandated authority, is *neutral* in respect of the proposal (on the basis of its current understanding of the proposal). The Board's primary focus is the detail of conditions and ensuring that Ngati Paoa, through the Board as its mandated authority, is properly recognised and provided for including in the implementation of the consent (if granted).
5. The Board's mandate to speak for Ngati Paoa is founded in the 2009 Maori Land Court "determination and order" pursuant to section 30(1)(b) of Te Ture Whenua Maori Act 1993 that the Board is the appropriate representative of Ngati Paoa in relation to:
 - (a) The Resource Management Act 1991; and
 - (b) The Local Government Act 2002.
6. The Court has indicated in its Minute of 31 August 2018, at [11]-[12]:

... Whatever may be the issues in the relationship between the applicant and/or the respondent and iwi, this hearing is not a suitable occasion for attempting to solve those issues.

In relation to claims of mana whenua, the Court has stated on numerous occasions that this is not a suitable forum in which iwi might contest their positions. This is particularly so given the broad scope of the requirement in s 6(e) of the Act for the Court and the Council to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.
7. In respect of the relationship between the applicant and/or the respondent and iwi, including in respect of the Board, the Board accepts that the

Court's role is not to resolve those issues. It is for the applicant and/or the respondent to engage with iwi as they see fit, and with whatever consequences that may follow depending on the nature and extent of any such engagement (if any). Unfortunately, the Council did not engage with the Board as Ngati Paoa's mandated representative, nor did it direct the applicant to engage with the Board. Instead, the Council identified, at least on its website resources, the Ngati Paoa Iwi Trust (wrongly) as the appropriate entity to speak for Ngati Paoa.

8. As for claims of mana whenua, while the Board generally agrees that the Environment Court is not the appropriate forum for iwi to contest their respective positions, the Board submits, as relevant to Ngati Paoa:
- (a) The Board has determination orders from the Maori Land Court that it is the mandated authority for Ngati Paoa. To that extent, the Environment Court does not itself have to determine representation or mandate. It can follow and/or take judicial notice of the 2009 Maori Land Court decision, that Court having the jurisdiction to make determinations and orders in respect of representation.
 - (b) The Environment Court has recently accepted, in *SKP Incorporated v Auckland Council* [2018] NZEnvC 81, at [157], that it is:

... persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.
 - (c) This reinforces the need for those who have mandate to speak for mana whenua to be heard by the Court.
 - (d) In *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73, the Environment Court also observed in the context of consents to abandon the remains of the MV Rena on Otaiti:

Much of this case turned, in the end, upon who the various parties before this Court were representing. Initial assumptions that the name of the group displayed who it represented were in the end illusory. Even such phrases as "mandated authority" became less clear in the hearing.
 - (e) The Court in those proceedings went to considerable lengths to understand who was purporting to speak for who, so that it could understand how, and to what extent, the various relationships should be recognised and provided for.
 - (f) The Board's request to join the proceedings and obtain a waiver is in furtherance of sections 6(e), 7(a) and 8, which as the Privy Council observed in *McGuire*, constitute "strong directions, to be borne in mind at every stage of the planning process".¹ The ongoing relevance of the Privy Council decision has recently been confirmed by the Court of Appeal in *RJ Davidson*.²

¹ *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
² *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

- (g) A little earlier in time, the Supreme Court also affirmed the importance of the Treaty principles (which include participation), stating in *NZ King Salmon*³ that:

... 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 decisionmakers must always have in mind.

9. On the basis of all of the above, and being aware of the issues that might arise if the Board sought to file extensive evidence at this late stage, the Board respectfully proposes, if it is joined as a party:
- (a) to not call evidence, but rely on legal submissions and the evidence already filed (which it can adopt to the extent necessary) together with the 2009 Maori Land Court order, to advance the matters of concern to it;
 - (b) the exception would be if the Court wished to hear any evidence from the Board, which could be produced under urgency (eg overnight) to address any specific matter arising; and
 - (c) additionally or alternatively, if the Court wished, a Board representative could be called and sworn in to clarify any specific matter arising.
10. In my respectful submission this is a reasonable, and appropriate, way forward in all the circumstances.

DATED 6 September 2018



J D K Gardner-Hopkins
Counsel for the Board

³ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.