

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

IN THE MATTER

of the Resource Management Act
1991 (RMA)

AND

IN THE MATTER

of a direct referral application under
section 87G of the RMA for resource
consents for the necessary
infrastructure and related activities
associated with holding the America's
Cup in Auckland

BETWEEN

**PANUKU DEVELOPMENT
AUCKLAND**

(ENV-2018-AKL-000078)

Applicant

AND

AUCKLAND COUNCIL

Regulatory Authority

**JOINT MEMORANDUM OF COUNSEL
SETTING OUT AGREED POSITION AS BETWEEN:
(1) MANA WHENUA IN OPPOSITION
(2) MANA WHENUA IN SUPPORT
(3) NGATI PAOA TRUST BOARD (INTENDING S274 PARTY)
(4) THE APPLICANT
(5) AUCKLAND COUNCIL**

Dated: 7 September 2018

**BROOKFIELDS
LAWYERS**

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MAY IT PLEASE THE COURT

1. Further settlement discussions have taken place in recent days in an endeavour to resolve the concerns of Mana Whenua in opposition. In addition, as the Court is aware, the Ngāti Pāoa Trust Board (**NPTB**) filed a late section 274 notice and waiver application on 6 September 2018 in relation to the application. Discussions have also involved counsel for the NPTB.
2. Those settlement discussions have been successful. In the interests of efficiency it has been agreed to file with the Court a single joint memorandum of counsel for Mana Whenua in opposition, Mana Whenua in support, the NPTB, the Applicant, and the Council (**Parties**) recording the agreed position reached.
3. The Parties' agreed position is as follows:
 - a) The Applicant, the Council, Mana Whenua in opposition, and Mana Whenua in support do not oppose the waiver application by NPTB to join the proceeding as a late section 274 party, on the basis of the proposed scope of NPTB's involvement as identified in the documentation filed with the Court by NPTB on 6 September 2018, and the further clarification provided by Mr Gardner-Hopkins by email today.
 - b) The Parties have agreed on amendments to the Mana Whenua Engagement conditions, and to the section 128 review conditions. The agreed amendments are described further below, and shown in tracked form in the **Annexure** to this memorandum.
 - c) Counsel for both NPTB and Mana Whenua in support confirm that it is agreed that the conditions of consent should refer simply to "Ngāti Pāoa", without any reference to any specific Ngāti Pāoa entity.
 - d) On the basis of the agreed amendments to the conditions, counsel for Mana Whenua in opposition, Mr Warren, confirms that:
 - i. There is now a suitable framework in the proposed conditions to assist Mana Whenua to express tikanga, fulfil their role as kaitiaki, and

establish an appropriate engagement process before, during and after the completion of construction activities for implementation throughout the project;

ii. All Mana Whenua groups in opposition are now neutral towards the AC36 Application; and

iii. Mr Warren intends to present only brief submissions at the hearing to confirm the position of Mana Whenua in opposition, and no longer intends to cross-examine any witnesses.

e) On the basis of the agreed amendments to the Mana Whenua Engagement Conditions (conditions 5 – 5F), counsel for NPTB, Mr Gardner-Hopkins, confirms that:

i. NPTB is satisfied that its concerns to ensure that Ngāti Pāoa is appropriately recognised and provided for as part of the Mana Whenua Engagement Conditions (without any exclusion of the NPTB or exclusivity given or implied to the Ngāti Pāoa Iwi Trust) are satisfactorily addressed;

ii. It remains neutral in relation to the application; and

iii. Mr Gardner-Hopkins likewise intends to present only brief submissions at the hearing to confirm the position of the NPTB, and does not intend to cross-examine any witnesses.

f) Counsel for Mana Whenua in support, Mr Enright, confirms that his clients agree with the proposed amendments. On the basis of the agreed position reached, Mr Enright wishes to record that he no longer intends to cross-examine Luke Faithfull.

The proposed amendments to the conditions

Mana Whenua Engagement Conditions (conditions 5 – 5F)

4. The Applicant's proposed Mana Whenua Engagement conditions, as set out at conditions 5 to 5F of Attachment A to Mr Cook's and Mr Lala's rebuttal evidence, are based on using the existing Auckland Council Mana Whenua Kaitiaki Forum (**ACMWKF**) and the 19 hapū and iwi groups involved in the ACMWKF. The ACMWKF is not a project-specific forum.
5. The **Annexure** to this memorandum sets out the specific agreed amendments in relation to the forum. The agreed position is that a project-specific forum should be established, in place of the ACMWKF, with the membership invitation being sent to the 19 iwi and hapū groups listed in amended condition 5 c).
6. Also, as noted above, a key element of the agreed position is that the wording of all conditions in the consent should simply refer to "Ngāti Pāoa", without any reference to any specific Ngāti Pāoa entity. This addresses the concerns raised by the NPTB (and is acceptable to Mana Whenua in support, including the Ngāti Pāoa Iwi Trust).
7. Consequential changes will be required to other conditions to replace references to the ACMWKF with the "Forum" (the glossary of terms and conditions 40, 70, 96, 114, 117, 138, 142, 180 and 181).
8. The parties agree that this is an appropriate and workable resolution, and jointly commit to working together to establish the proposed project-specific forum as quickly as possible.

Section 128 Review Conditions (condition 12)

9. The other proposed amendment stems from the proposal in the planning evidence of Luke Faithfull on behalf of Mana Whenua in opposition that an additional review condition be imposed as follows¹:

Pursuant to sections 128 to 131 of the RMA, the Consent Authority may serve notice on the consent holder of its intention to review any, or all, of the conditions of the consent within 12 months following:

¹ E86, page 2547.

- a) the granting of a customary marine title or protected customary rights or the vesting of ownership over any part of the foreshore or seabed encompassing the Project or Event Area.
- b) any agreement between Ngā Mana Whenua o Tāmaki Makaurau and the Crown as a result of Treaty negotiations involving the Waitematā Harbour as provided for in Ngā Mana Whenua o Tāmaki Makaurau Collective Deed.

The purpose of the review is to address any specific Resource Management Act 1991 matters that arise from the granting of the title or right.

10. The Applicant has agreed and volunteered on an **Augier** basis an amendment to existing review condition 12(c), as set out below:

Within six (6) months from the date the Team Leader Compliance Monitoring – Central is notified of completion of the final stage of construction work (in accordance with Condition 44), and thereafter in the month of November annually for 10 years, and thereafter at 5 yearly intervals, to deal with any adverse effect(s) on the environment which may arise from the exercise of the consent, or which may be identified following:

- (i) the granting of a customary marine title or protected customary right or the vesting of ownership over any part of the foreshore or seabed encompassing the Project area; or
- (ii) the outcome of any Treaty negotiations involving the Waitematā Harbour.

11. The existing condition 12(c) is a broadly worded review condition, allowing the Council to initiate a review annually for 10 years (and at 5 yearly intervals thereafter), to “*deal with any adverse effect(s) on the environment which may arise from the exercise of the consent*”. Counsel for Mana Whenua in opposition confirms that the proposed additional wording above, which is self-explanatory, appropriately addresses his clients’ concerns.

Conclusion

12. The Parties respectfully ask the Court to endorse the amendments to the conditions described above, as set out in the **Annexure** to this memorandum.

DATED the 7th day of September 2018



Matthew Allan / Claire Adams
Counsel for Auckland Council



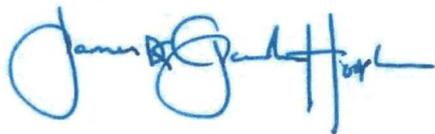
Derek Nolan QC, Bill Loutit and Kate
Stubbing
Counsel for Panuku Development
Auckland



Robert Enright
Counsel for Mana Whenua in support,
including Ngāti Pāoa Iwi Trust



Aidan Warren
Counsel for Mana Whenua in opposition



James Gardner-Hopkins
Counsel for Ngāti Pāoa Trust Board

ANNEXURE

Proposed Amendments to Conditions (amendments in red)

Mana Whenua Engagement

5. Prior to the Commencement of Consent, the consent holder shall invite the mana whenua listed below in c) to establish a ~~existing Auckland Council Mana Whenua Kaitiaki~~ Forum (~~ACMWKF~~) to:
- a) Assist the consent holder in the preparation of an America's Cup Kaitiaki Engagement Plan (ACEP) (Conditions 5A-5F) consistent with relevant customary practices and in accordance with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), especially the principles of consultation, active participation and partnership; and
 - b) Fulfil the obligations set out in the America's Cup Kaitiaki Engagement Plan on behalf of mana whenua.
 - c)
 1. Ngāi Tai ki Tāmaki
 2. Ngāti Maru
 3. Ngāti Tamaoho
 4. Ngāti Te Ata Waiohua
 5. Ngaati Whanaunga
 6. Ngāti Tamaterā
 7. Ngāti Whātua Ōrākei
 8. Te Ākitai Waiohua
 9. Te Patukirikiri
 10. Te Kawerau ā Maki
 11. Ngāti Pāoa
 12. Ngāti Whātua o Kaipara
 13. Te Rūnanga o Ngāti Whātua
 14. Ngāti Wai
 15. Ngāti Manuhiri
 16. Ngāti Rehua Ngāti Wai ki Aotea
 17. Te Uri o Hau
 18. Te Ahiwaru Waiohua
 19. Waikato-Tainui.

The consent holder shall facilitate and fund the additional resourcing of the ~~ACMWKF~~ Forum to meet all its fair and reasonable costs associated with any work streams required for the ~~ACMWKF~~ Forum to fulfil its role in respect of this condition.

Advice Note 1: *It is acknowledged that Te Tiriti o Waitangi/The Treaty of Waitangi underpins the relationship between Mana Whenua and the Crown. Inherent in this are (amongst other things) the principles of partnership, reciprocity, active protection and equity. Importantly, the principle of partnership is endorsed by the concept of good faith. Those principles are acknowledged in the Local Government Act 2002.*

Advice Note 2: *The Consent Holder acknowledges that the Waitematā is of extremely high spiritual, ancestral, cultural, customary and historical importance to Mana Whenua*

Advice Note 3: *The Consent Holder records its commitment to implementing this condition in good faith, and to using the services of an independent mediator, as necessary.*

- 5A. The consent holder shall prepare an **America's Cup Kaitiaki Engagement Plan** (ACKEP) for the Project with the assistance of the **ACMWKEForum**. Within ten (10) working days of the Commencement of Consent or prior, the consent holder shall provide a copy of the ACKEP to the Team Leader Compliance Monitoring – Central.
- 5B. The purpose of the ACKEP is to assist mana whenua to express tikanga, fulfil their role as kaitiaki, and establish the engagement process before, during and after the completion of construction activities for implementation throughout the project. It shall be formulated through:
- a) Providing the framework for a collaborative approach between the consent holder and mana whenua to address the matters which impact cultural values / interest, before, during and after the completion of the construction activities; and
 - b) Identifying how the consent holder and the **ACMWKEForum** will ensure that effective relationships are provided for throughout the Event.
- 5C. The objectives of the ACKEP are to:
- a) Acknowledge the cultural and spiritual importance of the Waitemata and its surrounds to mana whenua;
 - b) Acknowledge mana whenua as kaitiaki;
 - c) Recognise the importance of engagement and identification of key mana whenua values, areas of interest and matters concern in relation to the Project;
 - d) Provide mana whenua with an opportunity to be actively involved with the formulation and implementation of the ACKEP; and
 - e) Facilitate engagement between the consent holder and mana whenua in relation to the activities authorised by this consent, and to assist mana whenua to fulfil their role as kaitiaki.
- 5D. As a minimum, the ACKEP shall include details of the following matters:
- a) How mana whenua who have historic associations with the Project area and its surrounding waters have been involved in the formulation of the ACKEP and are to be involved in its implementation;
 - b) The process for involvement of mana whenua in the preparation and implementation of the engineering design, construction management, and operational plans as they relate to:
 - (i) Managing water quality during the construction and operation of the Infrastructure;
 - (ii) Managing underwater noise during construction so as to protect marine animals;
 - (iii) Protecting the waters of the area from biosecurity risks;

- (iv) Providing cultural markers within the Infrastructure to recognise the historic associations of mana whenua with the area and the significance of the land and seascapes of Waitematā to mana whenua; and
 - (v) Enabling use of the Infrastructure for cultural activities.
- c) In giving effect to Condition 5D_b), involvement by mana whenua in preparation and implementation of the following management plans:
- (i) Management Plan for Dredging and Placement of Mudcrete in the CMA (MPDPM);
 - (ii) Erosion and Sediment Control Plan (ESCP);
 - (iii) Remediation Action Plan (RAP);
 - (iv) Groundwater Monitoring and Contingency Plan (GWMCP);
 - (v) Construction Noise and Vibration Management Plan (CNVMP);
 - (vi) Biosecurity Management Plan (BMP);
 - (vii) Inner Viaduct Harbour Environmental Management Plan (IVHEMP);
 - (viii) Industrial and Trade Activities Hazardous Substances and Environmental Management Plans (ITA HSEMPs);
 - (ix) Industrial and Trade Activities Emergency Spill Response Plans (ITA ESRPs); and
 - (x) Event Management Plan (EMP).
- d) Accidental discovery protocols;
- e) Procedures for the cultural induction of construction workers and Event staff;
- f) Timing, frequency, location and methods of cultural monitoring procedures and protocols during construction activities to demonstrate achievement of the objective(s) for the ACKEP;
- g) Ongoing mana whenua engagement procedures following the completion of construction; and
- h) The process by which amendments can be made to the ACKEP.
- 5E. The Consent Holder shall operate in accordance with the ACKEP.
- 5F. The role of the Forum in terms of this consent shall continue for the duration of the 10-year period of the consent, and until the requirements of Conditions of 6 to 7C have been complied with.

Review Condition

12. Pursuant to section 128 of the RMA, the conditions of the consent may be reviewed by the Council (at the consent holder's cost):
- a) At any time during the construction period in relation to activities and structures that are subject to the provisions in sections 15 and 16 of the RMA and where the best practicable option may be necessary to remove or reduce any adverse effect on the environment;

- b) At any time during the construction period, and thereafter in the month of November annually for 10 years, and thereafter at 5 yearly intervals, in relation to altering any monitoring requirements as a result of monitoring results and/or in response to changes to the environment, and/or changes in engineering and/or scientific knowledge; and
- c) Within six (6) months from the date the Team Leader Compliance Monitoring – Central is notified of completion of the final stage of construction work (in accordance with Condition 44), and thereafter in the month of November annually for 10 years, and thereafter at 5 yearly intervals, to deal with any adverse effect(s) on the environment which may arise from the exercise of the consent, or which may be identified following:
 - (i) the granting of a customary marine title or protected customary right or the vesting of ownership over any part of the foreshore or seabed encompassing the Project area; or
 - (ii) the outcome of any Treaty negotiations involving the Waitematā Harbour; and
- d) Within three (3) months of the completion of each Event to enable reconsideration of adequacy and appropriateness of all conditions governing the operation of the Event.