

IN THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I TE KOOTI TAIAO O AOTEAROA
TĀMAKI MAKĀURAU

ENV-2018-AKL-000078

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

A N D

IN THE MATTER of direct referral of an application for resource consents
for the necessary infrastructure and related activities
associated with holding the America's Cup in Auckland

BETWEEN **PANUKU DEVELOPMENT AUCKLAND**

Applicant

A N D **AUCKLAND COUNCIL**

Regulatory Authority

**MEMORANDUM OF COUNSEL ON BEHALF OF MANA WHENUA IN OPPOSITION IN
RESPONSE TO THE COURT'S MINUTE ON ARRANGEMENTS FOR THE HEARING**

Dated 5 September 2018

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MAY IT PLEASE THE COURT

1. This Memorandum of Counsel is filed on behalf of Mana Whenua in opposition, in response to the Court's Minute on Arrangements for the Hearing, dated 31 August 2018 ("the Court's Minute"). Parties were invited to respond to the Court's Minute.
2. Counsel addresses the following aspects of the Court's Minute:
 - (a) Inter Mana Whenua issues;¹
 - (b) Consultation;²
 - (c) Adverse cultural effect identification and mitigation;³ and
 - (d) Relevant objectives and policies.⁴

Inter Mana Whenua Issues

3. Mana Whenua in opposition respectfully agree with the Court's assessment of inter Mana Whenua claims.⁵

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 Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.

4. The evidence put before the Court on behalf of Mana Whenua in opposition has clearly focussed on its issues with the application. It is unnatural for Mana Whenua not to outline the nature of their interests because it is that history and

¹ Minute of the Environment Court regarding Arrangements for the Hearing (31 August 2018) at [9(b)].

² At [9(a)].

³ At [9(c)].

⁴ At [9(d)].

⁵ At [11].

those connections to the whenua and the environment that give rise to the values that they provide evidence about.

5. There will no doubt be strong views by individual iwi about the nature and extent of interests claimed by the respective Mana Whenua groups, but if necessary, issues relating to claims of “primary mana whenua rights” that are not accepted by our clients will be dealt with by way of submission as opposed to cross-examination. To avoid doubt, that is on the basis of the Court’s clear direction and not because of any acceptance of claims of predominant interests and/or exclusivity, which has no basis in tikanga.⁶

Consultation

6. The Court’s minute outlines:⁷

In relation to consultation, counsel will no doubt be aware that the legal position of consultation about applications for resource consent is reasonably clear: that is, there is no specific requirement to consult, and faults in or even lack of consultation does not preclude the grant of consent. Whatever may be the issues in the relationship between the applicant and/or the respondent and iwi, this hearing is not the suitable occasion for attempting to solve those issues.

7. Respectfully, Mana Whenua in opposition do not take issue with this statement as a general proposition.
8. However, as noted in *McGuire v Hastings District Council*, context is everything.⁸ The matters raised in the original submissions, section 274 notices and in evidence by Mana Whenua in opposition in regards to engagement/consultation are not about ‘relationship issues’, rather they are raised in light of the legislative and policy framework upon which this application is to be assessed.
9. In the Tāmaki Makaurau context, consultation with mana whenua is a highly relevant consideration, particularly given that:

⁶ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 105.

⁷ Minute of the Environment Court regarding Arrangements for the Hearing (31 August 2018) at [10].

⁸ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [9].

- (a) The Auckland Unitary Plan (“AUP”) contains specific objectives and policies among other things, to recognise and provide for Te Tiriti principles such as active participation, protection and partnership;⁹
 - (b) The Applicant proposes to develop and interfere with an area that is of extremely high spiritual, ancestral, cultural, customary and historical importance to Mana Whenua in opposition as per the the Ngā Mana Whenua Tāmaki Makaurau Collective Redress Deed (“Collective Redress Deed”);¹⁰
 - (c) The Collective Redress Deed provides that cultural redress for the area that Panuku proposes to develop in, will be provided for in separate Crown negotiations with the 13 iwi/hapū of Tāmaki Makaurau.¹¹
10. The relevant policy framework provides that Mana Whenua are to be afforded an opportunity to participate in matters that relate to their ancestral land, water, sites or other taonga and that related values are protected. For instance:
- (a) In recognition of Te Tiriti principles, the AUP provides that Mana Whenua will be afforded the opportunity to participate in the sustainable management of their rohe in a way that provides for timely, effective and meaningful engagement;¹²
 - (b) The AUP also provides that Mana Whenua will be able to identify their values associated with their ancestral land, water, site and other taonga and that any AEE for an activity that may affect Mana Whenua values includes an appropriate assessment of adverse effects on those values;¹³
 - (c) The Hauraki Gulf Act directs that managing the life supporting capacity of this area includes providing for the cultural and spiritual relationship of Mana Whenua with the Gulf and its islands;¹⁴

⁹ Auckland Unitary Plan at [B6.2.1] and [B6.5].

¹⁰ Ngā Mana Whenua Tāmaki Makaurau Collective Redress Deed at [10.1.1].

¹¹ At [10.1.2].

¹² Auckland Unitary Plan at [B6.2.2(1)(c)].

¹³ Auckland Unitary Plan at [B6.3.2(1)-(3)].

¹⁴ Hauraki Gulf Act 2000, s 7(2)(a)(i).

- (d) The Hauraki Gulf Act identifies the objectives of the management of the Gulf as including the protection of cultural associations of people as a management objective;¹⁵
 - (e) The New Zealand Coastal Policy Statement provides for the recognition of the traditional and continuing relationship between Mana Whenua and their coastal environments;¹⁶
 - (f) Consultation is recognised as being important for Part 2, RMA,¹⁷ In particular, to enable compliance as to providing for cultural well-being, kaitiakitanga, the relationship of Mana Whenua in opposition with their ancestral lands, water, sites and other taonga, protecting customary rights and Te Tiriti principles.¹⁸
11. Mana Whenua in opposition have a unique relationship with their ancestral land, water, sites and other taonga and iwi specific values.¹⁹ Whilst the requirements at [10](a)-(b) above speak for themselves, it is difficult to see how other requirements such as those listed at [10](c)-(f) can be satisfied without undertaking meaningful engagement with Mana Whenua to ascertain their respective values and ancestral relationships.
12. In light of the above, Counsel submits that the lack of consultation alleged is within the scope of this hearing as it is material to whether cultural values have been properly identified, enabling the proposed development to satisfy the relevant legal and policy requirements.²⁰

¹⁵ Hauraki Gulf Act 2000, s 8. The AUP gives effect to this section at [B8.5.1].

¹⁶ New Zealand Coastal Policy Statement, Policy 2.

¹⁷ Resource Management Act 1991, Part 2, also see *Te Runanga o Ngai Te Rangi Trust v Bay of Plenty Regional Council* [2001] NZEnvC 402 at [260], although consultation is not mandatory, it is difficult to see how the applicant could have addressed...issues without doing so. In fact, as consultation has continued in the case, the applicant's proposals in this regard have also become more consistent with that identified in the Coastal Policy Statement and the outcome sought in Part 2 of the Act.

¹⁸ Resource Management Act 1991, ss 5-8.

¹⁹ Auckland Unitary Plan at [B6.2.2(1)(e)].

²⁰ In the Memorandum of Counsel on Behalf of Panuku in Response to Court's Minute on Arrangements for the Hearing (3 September 2018) at [7], the applicant notes that from its review of the evidence it appears there remain issues between the parties in terms of consistency of the proposal with the relevant objectives and policies, and matters of detail relating to conditions 5-5F. The section 128 review condition and the condition sought by mana whenua in opposition in relation to the wish of mana whenua to establish a cultural

Adverse Cultural Effect Identification and Mitigation

13. The Court's Minute sets out that:²¹

In relation to cultural effects, the matters identified in the evidence appear to be described in broad terms relating more to the two preceding matters of consultation and mana whenua than to specific physical or metaphysical (or otherwise intangible) effects on the environment. This may be a perception caused by the lack of cultural values assessment on behalf of iwi opposing the proposal. This may be a perception caused by the lack of cultural values assessment on behalf of iwi opposing the proposal. We will be interested to hear whether the issues raised and discussed in the assessments made on behalf of other iwi (who are in support of the proposal) go any way towards assisting the Court in understanding the issues for the iwi who are in opposition to the proposal.

14. In response, the evidence filed by all Mana Whenua (in support and in opposition) raise important cultural values for example:

- (a) Kaitiakitanga;²²
- (b) Mauri;
- (c) Protection of wāhi tapu; and
- (d) Kōrero tūturu.²³

15. These values do not specifically relate to matters of consultation nor do they relate exclusively to matters of Mana Whenua.

centre in central Auckland. The applicant says that these matters are to be addressed in the rebuttal evidence on behalf of the applicant.

²¹ Minute of the Environment Court regarding Arrangements for the Hearing (31 August 2018) at [12].

²² *Cultural Values Assessment for America's Cup 36 – Wynyard and Hobson Planning Application, Te Kawerau Iwi Tribal Authority* (August 2018), at 4 and 13.

²³ *Cultural Values Assessment: AC36 Consent Application (Te Waitematā) Ngāti Paoa* (24 August 2018) at 35.

16. The characterisation of these values is that they are intangible and are the very values that Mana Whenua in opposition argue have not been adequately considered and will be impacted by the proposal.
17. Whilst it is unfortunate that the Cultural Values Assessment (“the CVA”) being prepared by Mana Whenua in opposition will not be before the Court, there is ample evidence provided by Mana Whenua in opposition about the relevant cultural values.
18. Whilst this will be further developed in legal submissions, in light of the fact that the CVA is not before the Court, it may be necessary for the Court to address any residual concerns about the effects on the environment directly with the witnesses.
19. Mana Whenua in opposition will, of course, take into account the evidence filed by Mana Whenua in support, however, it is for each Mana Whenua group to present its own values and world views, including as they relate to the effects. That is consistent with tikanga and the principle of rangatiratanga.

Relevant objectives and policies

20. The Court’s Minute identifies that:²⁴

*Matters of consistency of the proposal with the relevant objectives and policies and the appropriateness or otherwise of the conditions of consent are squarely within the role of this Court in this proceeding and, given the helpful evidence, should be capable of being addressed. Our review of the matters listed in paragraph 4.6 of Mr Faithfull’s evidence and his opinion in paragraph 4.7 appear to confirm this. On that basis, it is likely to be most helpful to our decision-making if those planning issues are the focus of submissions and cross-examination, recognising that **if adverse effects cannot be appropriately avoided, remedied or mitigated by lawful conditions, there may be question marks over consent being granted.** [Emphasis added]*

²⁴ Minute of the Environment Court regarding Arrangements for the Hearing (31 August 2018) at [13].

21. Respectfully, Mana Whenua in opposition agree with the highlighted extract. Moreover, cultural values are directly material to whether the proposal is consistent with the relevant objectives and policies and the appropriateness of the conditions of consent and to the extent appropriate Counsel will be addressing these matters in cross examination and submissions. To this end, Counsel will liaise with Counsel for Auckland Council and confirm the extent of the witnesses that Counsel wish to cross examine by noon on Thursday 6 September, as requested by the Court.²⁵
22. Counsel will of course take into account the requests by the Court for Counsel to be focussed in the delivery of cross examination.

Dated 5 September 2018



Aidan Warren

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²⁵ Further Minute to the Parties Concerning Hearing Arrangements for the Hearing (4 September 2018) at [5].