BEFORE THE HEARINGS COMMISSIONERS
AT TAUPO

IN THE MATTER	of Proposed Plan Change 36 to the Taupo District Plan - Request under Schedule 1 of the RMA to rezone Rural Land to Residential at Whareroa North by The Proprietors of Hauhungaroa No.6
TO	**TAUPO DISTRICT COUNCIL**
PROPONENT	**THE PROPRIETORS OF HAUHUNGAROA NO.6**

LEGAL SUBMISSIONS FOR THE PROPONENT

Harkness Henry
SPECIALIST LAWYERS

www.harknesshenry.co.nz

Phone (07) 838 2399
Fax (07) 839 4043
Address Level 8, KPMG Centre,
85 Alexandra Street, Hamilton 3204
Mail Private Bag 3077, Hamilton 3240,
New Zealand, DX GP 20015

Counsel Acting:
Dr Joan Forret
(Joan.Forret@harkness.co.nz)

May it please the Hearing Panel:

Introduction

1. These submissions are in support of Private Plan Change 36 ("Plan Change") application by The Proprietors of Hauhungaroa No.6 ("the Proponent"). We have endeavoured to avoid repeating at length the information that is either within the expert evidence for the Proponent or Taupo District Council ("TDC or Council") or in the s 42A report. Instead the focus is on the legal issues that have arisen as a result of the Plan Change process. Notwithstanding this, the s 42A report and expert evidence is discussed to the extent they relate to the legal matters.

Legal Issues

2. We do not dispute the case law and processes discussed at [4.1] of the s42A report which are relevant to the assessment of a plan change or the framework set out in legal submissions for the Council. Rather it is the conclusions that the s 42A report and planning evidence comes to which are disputed.

Part II

3. We disagree with TDC's legal submissions that the purpose of the Resource Management Act 1991 ("RMA") in Part 2 is less relevant to this Plan Change.[1] We accept that the Act's "purpose" has already been considered within the Waikato Regional Policy Statement ("RPS") and Taupo District Plan ("TDP") objectives and policies, which are not being changed. However, that guiding purpose, and the rest of Part 2, remains fundamental to the duties and powers of local government when carrying out its functions. In our submission that includes the lens through which those plan provisions are interpreted and applied.

4. It is possible to interpret and apply many objectives and policies by looking at their words without considering the intent of Part 2 in a wider sense. In our submission that is not the intent of the legislation because to do so ignores the role of that part in the regional and district planning processes that have gone before. We urge this Panel to assess the various objectives and policies, particularly the ones that are disputed between Mr Bonis, Ms Foley and Ms

[1] Legal submissions for TDC at paragraph 6.

Lewis, and consider how they may be interpreted in the context of this plan change so as to achieve the purpose of the RMA.

Section 6(e)

5. TDC's legal submissions state that s 6(e) of the Plan Change is not relevant because the plan change area is not considered to have any cultural values to the beneficial owners.[2] For reasons which are outlined below, we disagree with that submission. In summary however, s 6(e) states that all persons exercising functions and powers under the RMA must recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Mr McKenzie's evidence describes the ancestral connection that shareholders of the Proponent have with the land in the plan change area and it is not for counsel to determine that the land has no cultural value to the beneficial owners.

6. Mr McKenzie has clearly explained that the land to be developed has for a long time been identified by its beneficial owners as being the means by which they can provide for their ongoing social, economic and cultural wellbeing.

7. We also refer to the decision in *Puwera Maori Ancestral Land Unincorporated Group v Whangarei District Council*[3] where the Environment Court had to consider the balance between ecological and Maori values in relation to conditions on a subdivision consent. That case involved land that had been transferred from maori freehold land into general title in an effort to provide for economic wellbeing of the whanau. The resource consent included conditions that would effectively prevent further development of that land in order to protect regenerating indigenous vegetation. The fact similarities with the Incorporation's land and aspirations at Whareroa is striking, including that the *Puwera* land was subject to an ecological overlay. The Court accepted the applicant's evidence that she and her whanau had a continuing ancestral connection with the land and that the general provisions of the Act, including Part 2, meant there was no justification for the conditions on stock control and weed management.[4]

8. We acknowledge that the *Puwera* decision involved a resource consent and was decided before the *RJ Davidson Family Trust* cases but it confirms that the

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[2] Legal Submissions for TDC at [29].

[3] *Puwera Maori Ancestral Land Unincorporated Group v Whangarei District Council* [2016] NZEnvC94.

[4] *Puwera Maori Ancestral Land Unincorporated Group v Whangarei District Council* paragraphs 39, 40 and 69.

Part 2 duties may apply when considering impacts on land in general title and can extend to considering the balance between competing maori and ecological values.

Section 7

9. The s 42A report states that the Plan Change represents the principle of kaitiakitanga or guardianship by the Proponent and that the project, which was planned to be enabled by the Plan Change, has had a "long gestation, and represents a substantial level of self-determination and economic aspiration for the Trust."[5] This observation is accurate, but it is incomplete. Kaitiakitanga is a principle which should be considered when an authority exercises powers and functions under the RMA. In the context of a private plan change, this inherently means considering the implications of a decision to accept or reject a plan change in relation to the principle of kaitiakitanga.

10. Section 7(a) of the RMA requires a decision-maker to have particular regard to Maori views regarding the way in which the land is to be used.[6] In *Puwera* the Court was concerned that if certain conditions were imposed, Council in time might seek to protect the ecological values of the land, thereby preventing the future development of land which could provide for the owners and whanau on an economic basis.[7] It is submitted that the kaitiaki aspirations of the Proponent should be taken into consideration during this Plan Change process and how adoption of the Plan Change would allow the Proponent to exercise its kaitiaki role over the remaining land in its ownership and control. It is not enough for TDC to purport that the Plan Change proposal alone represents the principle of kaitikitanga.

11. Kaitiakitanga also applies to the way the rest of the land is dealt with, that is the land not subject to development. The Proponents consider that there are different ways to manage and protect the land that has been identified as SNA other than through QEII covenants or vesting land in Council as reserve. They have proposed to use a mechanism of Maori Reservations as identified in the Te Ture Whenua Maori Act 1993 as an option. This is not the only legal option to protect and manage land owned by Maori but it is **a** mechanism that would allow for ongoing exercise of kaitiakitanga without land being lost to local

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[5] At [255], pg 58, s 42A report
[6] *Takamore Trustees v Kapiti Coast District Council* [2003] NZLR 496 at [87].
[7] At [40].

government control. New Zealand has a long enough history of annexing private land out of the control of maori landowners. This doesn't have to be another opportunity for that to happen. The Proponents have already effectively lost the opportunity to develop the land within the area identified as SNA, in exactly the way that concerned the Court in *Puwera*. That doesn't mean that TDC should get the ownership of more than it needs in order to provide for the necessary infrastructure and access.

12. To be absolutely clear, we are NOT saying that tangata whenua matters in Part 2 operate to "trump" other values: they do not and that is accepted. However tangata whenua values in sections 6, 7 and 8 remain very relevant as considerations when balancing the competing values that have been identified during this Plan Change process and should not be dismissed as being satisfied by virtue of the application itself.

Section 8

13. We also submit that TDC has fallen short of its obligation to take into account the principles of the Treaty during this plan change process. We particularly identify the principles of partnership and good faith. The principle of partnership itself embraces the concepts of utmost good faith and fair dealing.[8] Section 8 of the RMA is relevant in this context.

14. The s 42A report states that there has been no impediment under s 8 to the approval of the Plan Change.[9] This evaluation is based on the fact that the Proponents undertook consultation with the relevant tangata whenua and the relevant authority (Tuwharetoa) in a manner that is consistent with the requirements of s 8.[10] We are not aware that TDC has undertaken any consultation in its capacity as consent authority.

15. Legal submissions for TDC also address s 8 and state that the obligations of the Crown are not imposed on local authorities.[11] That is accepted in respect of obligations of the Crown to right past wrongs, for example through Treaty claims.[12] It does not absolve local authorities from their duties to take into account the principles of the Treaty when considering the Plan Change in terms

[8] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [171].
[9] At [254] pg 58. s 42A report.
[10] At [252], pg 58, s 42A report.
[11] Legal submissions for TDC paragraph 31.
[12] *Ngati Rangi Trust v Manawatu-Wanganui RC* EnvC A067/04 at [91].

of s 32 or s 74 or when interpreting and applying the provisions in the relevant planning framework.

16. The principles of the Treaty are not confined to consultation, but extend to principles such as partnership and good faith as outlined above. It is submitted that TDC has failed to take into account the principles of the Treaty by not acting as a true treaty partner to both the Proponent and Tuwharetoa during this plan change process. This can be illustrated in a number of ways:

    (a) The hierarchy of planning documents constituting the RPS, TDP and the SSSP all contemplate a process that will involve the owners of this land at Whareroa undertaking a private plan change process to rezone the land for urban development. The benefits of the SSSP talk about Council leading growth by identifying growth areas and leaving the "market" to determine when the land should be re-zoned and developed, rather than "*Council attempting to determine when more land is necessary*". The SSSP notes that it should be updated to reflect emerging and changing patterns of growth and development. That happened in 2018 and Whareroa was retained as a growth area in TD2050.

        Instead of working with the Proponents to sort out any issues relevant to achieve the SSSP's outcomes, Council has actively opposed the plan change at every step. In effect Council has acted as a submitter in opposition, calling evidence and presenting legal submissions in support of that evidence.

        At paragraph 27 of TDC's legal submissions there is reference to *"Council's position"* when summarising the approach of the s 42A report regarding s 8 matters. With respect "Council's position" is the best identified by the provisions in the district plan and the structure plan and the growth strategy. Those documents have gone through a public process and are the settled position of Council. The decision of this Panel will constitute the position of Council. The legal submissions support the views of the s 42A report author which is an entirely different matter.

        The Proponents have done what the SSSP anticipates: they put together an application to rezone the land so that when they have the resources to proceed they can do so with the land appropriately zoned. They expected to rely on the provisions of the SSSP and that the Council would act in good faith and partnership to support that application with constructive feedback and communication; they have been disappointed.

(b) the s 42A report states that there are fundamental, irresolvable problems associated with securing access over the Whareroa Stream.[13] These problems are said to be, in large part, due to the fact that Tuwharetoa owns the Whareroa streambed. Despite this claim, the Tuwharetoa Trust Board (also a Treaty partner) has been clear and consistent in its position on the matter since 2008.[14] The Trust Board remains willing to reach an agreement whereby public access will be secured over the Whareroa Stream without ceding legal ownership of the Streambed. The Proponents have always believed that the bridge and infrastructure access over the stream is something that can be agreed in cooperation with Council and the Trust Board. This is not new territory. This is not the first or only road crossing a stream that is in maori ownership and Mr Mckenzie's EIC attaching the Deed of Settlement with Tuwharetoa is an example of a type of agreement with the Crown whereby all of the same rights as sought by TDC are secured for the state highways. Mr Key's rebuttal evidence attaches an aspirations document that was prepared following a tripartite meeting ten days ago to record the basis for an agreement regarding the bridge and related infrastructure. It is submitted there was nothing new in the positions expressed by either the Proponents or the Trust Board and no reason to suggest that the outcomes sought are unachievable, even without the status of a Maori Roadway, provided there is a willingness to work in partnership and good faith;

(c) Partnership and good faith also involves consultation and communication. This Plan Change application has been adversarial with little feedback to the Proponents outside of the evidence exchange and formal joint witness conferencing processes. The history attached to this process is not one of partnership or good faith.

17. We do not suggest that this Plan Change application should be granted because the Proponents are Maori or because they have a kaitiaki relationship with the land or because of any duty under s 8. We do submit that those matters are relevant to the context of the Plan Change and to the interpretation of the various plan provisions in the RPS and TDP that apply.

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[13] At [12.4], pg 7, s 42A report.

[14] Note the letter of support from Tuwharetoa Maori Trust Board provided to Ms Samuel in 2008 and attached as part of Appendix B.

Bridge Access

18. The problem of securing public access over the Whareroa Stream is identified as a major reason, if not the fundamental reason, for rejecting the Plan Change. The s 42A report also states that access elements are outside the scope of the Plan Change[15], however the EIC of Ms Lewis demonstrates that access elements have always been considered by the Plan Change.[16]

19. The title of the bed of the Whareroa Stream is held by the Tuwharetoa Maori Trust Board ("the Trust Board or Tuwharetoa"). Understandably, the Trust Board has always maintained that it would not forego ownership rights of the streambed.

20. TDC raised the issue that it would need appropriate legal rights in terms of owning and maintaining the bridge structure and for the public to be able to use. There was further concern by TDC as to whether NZTA funding could be obtained for such a structure.

21. To address the concerns of TDC, the Proponent sought legal advice from Michael Grayson of law firm Grayson Clements Limited ("GCL"). GCL is a Crown Accredited Agent and was closely involved with preparing the Deed of Settlement with Tuwharetoa which vested the ownership of the bed of Lake Taupo and its tributaries in Tuwharetoa.

22. Following that advice, the Proponent proposed an Agreement/Deed between Tuwharetoa, TDC and the Proponent whereby a bridge would be built by the Proponent and owned by TDC, while Tuwharetoa would retain legal ownership of the streambed.

23. In order to secure public access over the bridge, Mr Grayson suggested that the road over the bridge could be declared a Maori Roadway. This would follow a joint application to the Maori Land Court ("MLC") by the Proponent , TDC and Tuwharetoa. To be clear, our understanding is that the Maori Roadway status is an additional mechanism to provide legal security to the Council but it is not essential in order to secure a viable and enforceable vesting of ownership in the bridge to Council.

24. The advantage of the bridge having Maori Roadway status would be:

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[15] At [34] and [58][d][i], pg 10 and pg 18, s 42A report.

[16] At [7.3] – [7.6], pg 31 -32, Evidence-in-Chief of Joanne Lewis.

(a) The laying out of a Maori Roadway over any land will confer on all persons the same rights of user as if it were a public road under the Te Ture Whenua Maori Act 1993 ("TTWMA");[17]

(b) The Local Government Act 1974 ("LGA") allows for a local council to maintain, repair or improve any Maori Roadway laid out in the district;[18]

(c) The LGA allows for a council to contribute towards the cost of maintaining, repairing, or improving a Maori Roadway;[19]

(d) There is a provision in the Land Transport Management Act 2003 which allows for the NZTA to approve payments to a territorial authority in respect of a Maori Roadway, as if the roadway were a local road.

25. The Proponent has proposed that a Deed be entered into between the Trust Board, TDC and the Proponent once the detailed design and location of the bridge is known. In the meantime, the parties are now working to confirm the aspirations or framework of principles for that Deed so that there is certainty about the agreed outcomes. As outlined in the rebuttal evidence of Mr Keys, all three parties at Zoom confirmed a willingness to find a solution.[20] This led to the production of a high-level "Aspirations" document which could serve to form the framework for a more substantial agreement in future. It was agreed that the document would be drafted by the Proponent, and the document was provided to TDC on and the Trust Board on 29 May 2020.

26. The Deed itself would consider all the issues of importance to the parties and provide for access, maintenance and ownership of the bridge structure, giving certainty to all parties. The Deed would also include terms to deal with any damage or erosion effects on the streambed together with remedial obligations and mechanisms to prevent the risk of contamination from the road, construction activities or any other cause. It would also cover details and security of service and utilities which will be attached to the bridge in order to service the subject land.

27. The final terms of the Deed and any subsequent application to the MLC can only happen after the rezoning of the land is confirmed and will require a survey of the land to be affected and details of the bridge design and access. That will happen after the preliminary stage investigations and before subdivision consents are applied for.

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[17] Te Ture Whenua Maori Act 1993, s 318(2).
[18] Local Government Act 1974, s 324A(1)(a).
[19] s 324A(2)(b).
[20] See rebuttal evidence of Mike Keys, [8.4] – [8.7].

28. Assuming that the Council, the Proponents and the Trust Board remain willing to work together in good faith to legally document the (in our submission) perfectly reasonable aspirations in the recent document, there appears to be no legal impediment regarding future access to the site.

29. We draw the Panel's attention to a further information attachments 5A and 5B for 3 October 2018, on the TDC web page for the Plan Change. Those documents relate to the Land Improvement Agreement ("LIA") that was signed between Waikato Valley Authority and the Proprietors in relation to the areas marked on document 5B. The 1980 LIA still applies on the Whareroa Station land and is evidence of the way in which Maori Land can be bound to require ongoing actions including in relation to ecological matters. We note that the offsetting proposals and land identified as available for that purpose is close to some of the land in the LIA, which is now enforceable by WRC. It would not be difficult to ensure that offset planting is protected in perpetuity along similar lines to the LIA.

Planning Documents relied upon

30. The planning JWS usefully summarises the approaches of the 3 planners in relation to the cascade of planning documents. In our submission the RPS can be interpreted to support the alternative views but only if little regard is had to the provisions of Part 2. Part 2 is the lens through which the RPS and TDC objectives and policies should be viewed and will be relevant when any balancing of competing values is required.

31. How can it be sustainable management to go through a growth strategy planning process, develop a structure plan with community input and then update that growth strategy document, only to essentially ignore it when considering plan change designed to implement its outcomes?

32. How can it be enabling people and communities to provide for their social economic and cultural wellbeing by requiring landowners to justify the growth area when it has been so clearly identified for that purpose in so many current and former planning documents?

33. Since the end of Covid19 restrictions Ms Connolly has been able to access her office and find numerous hard copy documents relevant to the history of this site. We attach the consent from Taumarunui County Council dated 1987 granting consent to the Proprietors for the stream crossing. That document is attached as **Appendix A** and would have been provided in evidence from Ms

Connolly in different circumstances. We acknowledge that consent has long ago lapsed but it demonstrates the Proponent's long term and consistent struggle to have this land secured for development. The Panel may be interested to note the conditions to that consent which provided for the same sort of considerations that would apply today.

34. These landowners have acted in reliance on the planning documents of the day when they made their long-term plans for economic security and growth. At every step since the 1970s until today the Incorporation has worked towards completing this development. They have participated in numerous hearings, made submissions and invested significant sums of money into infrastructure and professional advice. It cannot be sustainable management as intended by Part 2 to now say that this is an inappropriate site that will result in sprawl that is contrary to consolidated urban development as per RPS policy 6.1 and development principles in 6A. This site has been almost consistently identified for development since the 1970s and will consolidate the existing development at Whareroa.

35. Ms Lewis identifies RPS policy 6.11 (titled *Implementing Taupo District* 2050) as having more weight in this instance given the history of the site and specific nature of the policy. There is a structure plan that includes Whareroa North and that structure plan implements TD2050. That is a specific provision that should not be ignored in favour of more general policies that favour urban consolidation (6A *General Development Principles*). To give more weight to policy 6.11 is also to recognise the sustainable management outcomes advanced by the Proponents: namely providing for the social, economic and cultural wellbeing of the Proponents; the s 6e relationship of Maori with their ancestral lands; and kaitiakitanga as contemplated in s 7. All parties are agreed that Part 2 underpins the intentions of the existing objectives and policies that will govern the new plan provisions for Whareroa and in our submission that must affect how competing values are balanced and weighted.

36. It is also relevant that this site is not a suburb of Taupo or of Turangi or of anywhere. Section 3e.6.3 of the TDP recognises the 20 year history attaching to Whareroa and in our submission contemplates an extension of the low density residential development evident in the existing village that will allow for sustained growth of predominantly holiday home accommodation.

37. Certainly it is possible to look at all the words in Policies 6.11 and 11.2.2 (as articulated in the planning JWS) and find arguments to show that this Plan Change is not consistent because of the meaning of "*in*" or "*functional*

necessity"[21] but is that what was intended by any of the Council planners or the submitters or the consultants that have previously contributed to TD2050 and to the SSSP? If so there has been a remarkable waste of time and effort and money from a great number of different people who collectively contributed to those documents and that's without even considering the investment from the Proponents.

38. This Plan Change is anticipated by the TDP, it implements the SSSP and which implements TD2050 as contemplated and named in Policy 6.11 of the RPS. All of the experts (other than the planners and perhaps the economists) seem to be agreed that adverse effects of development can be avoided, remedied or mitigated including with offset mitigation. The experts are not all agreed on the timing for some of the investigations that are needed but there is agreement that various potential adverse effects can be managed using a variety of normal means as well as a few less usual but still lawful options. The normal means include the types of mitigation and avoidance mechanisms that commonly apply in resource consent conditions. The less usual options address the tangata whenua matters arising from land tenure. In our submission there are no adverse effects or uncertainties that would preclude rezoning to residential.

Section 32 Analysis

39. Legal submissions for TDC address the issue of certainty and tests under s 32.[22]

40. Section 32(1)(b) states:

(1) An evaluation report required under this Act must

…

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions.

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[21] RPS Method 11.2.2(g) as discussed in the planning JWS

[22] TDC legal submissions paragraphs 20-24.

41. The threshold test under s 32 is referred to as the “most appropriate” test, owing to the wording of s 32(1)(b). The fundamental provision however is s 32(3) as it prescribes how the examination under s 32(1)(b) must be undertaken.

42. When discussing the s 32(3) test, the Environment Court in *Port Otago Limited v Otago Regional Council* referred to s 32(3) and stated that amending proposals, such as a private plan change, should be assessed both against the relevant (un-amended) objective in the instrument itself under consideration, and against the objectives and other provisions of the amending proposal itself.[23] The Environment Court did go on to say that this may cause confusion where two sets of objectives and other provisions may work with or against each other.[24] In this situation there is no confusion between sets of objectives because there are no changes to existing objectives or policies. Instead we are giving effect to the growth management policies that achieve existing RPS policies and TDP objectives. Logically that must mean that rezoning at Whareroa is the most appropriate option in terms of s 32.

43. TDP Objectives 3e.2.1 and 3e.2.2 (and the corresponding polices) direct that urban development should be located only within “identified urban growth areas” which have been subject to structure planning and re-zoning for that purpose. Whareroa North has been identified as an urban growth area. As above the planning JWS and EIC of Ms Lewis addresses the TDP policy framework and how in her view, the Plan Change gives effect to these. From the outset TDC has challenged the economic viability of the Plan Change including the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal as required by s 32.[25] This was originally evidenced by the Council’s resistance to accepting the Plan Change for assessment and the subsequent engagement of Property Economics to undertake a high-level economic assessment of the Plan Change. This in turn led to the Proponent engaging Mr Counsell of NERA to provide a peer review assessment of the PE Report.

44. The conclusions reached by the experts for TDC and the Proponent are contrasting. Put simply, Mr Osborne for TDC believes that the proposal is likely to result in an inefficient outcome, creating unnecessary costs to the

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[23] *Port Otago Limited v Otago Regional Council* [2018] NZEnvC 183 at [52].
[24] At [52].
[25] Resource Management Act 1991, s 32(2)(a)

community.[26] In contrast, Mr Counsell for the Proponent finds that there is likely to be a net benefit that results from the Whareroa development.[27]

45. The Environment Court has considered whether an assessment of costs and benefits requires a cost-benefit analysis in economic terms. In *Contact Energy Limited v Waikato Regional Council*[28] the High Court noted that while a marginal cost-benefit analysis was useful in a s 32 evaluation, a wider exercise of judgment was needed when determining whether or not a provision was the most appropriate method of achieving the objectives of the plan and the purpose of the Act.[29]

46. In *Carter Holt Harvey Limited v Waikato RC* the Environment Court confirmed that, in relation to economic considerations under s 32 generally, the Act includes economic considerations as just one of the threads contributing to sustainable management.[30] The Court further stated that if economic evidence is to be useful, there needs to be clear and ideally agreed identification of the issues to be addressed and the methodologies to be applied when addressing those issues.[31] Because of the different variables that underlay economic analysis, economic evidence has its limitations in the sense that a slight change to any of the variables could give rise to dramatically different results.[32]

47. It is submitted that in accordance with these comments, conclusions drawn on economic evidence should recognise that economic costs and benefits and economic efficiency are but one of the competing considerations in a s 32 analysis. Where those conclusions differ it is appropriate to consider them in the context of Part 2 with consideration of the Proponents' desires as kaitiaki of the land of the planning history that applies. Mr Counsell's evidence concludes that there are benefits to the district overall from the rezoning and that decisions on costs should be made by the Proponents as the party that will bear those costs.[33] That is an approach that is consistent with the SSSP itself.[34]

48. The s 42A report also assesses "the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the

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[26] At [3.26], Rebuttal Evidence of Phillip Osborne.
[27] At [25], pg 5, Evidence-in-Chief of Kevin Counsell.
[28] *Contact Energy Limited v Waikato Regional Council* (2007) ERLNZ 128 (HC)
[29] At [51].
[30] *Carter Holt Harvey Ltd v Waikato RC* [2011] NZEnvC 380 at [181].
[31] At [199].
[32] At [200].
[33] Counsell rebuttal evidence paragraphs 31 – 32.
[34] SSSP key benefits at page 8.

provisions".[35] The absence of surety over the legal mechanism to ensure public access over Whareroa stream, geotechnical hazards due to insufficient geotechnical investigations and the extent of full impacts and management approach to landscape and ecology are presented as risks in the s 42A report.

49. Access over the Whareroa stream has been addressed in these submissions and the expert and rebuttal evidence of Mr Phadnis, Mr Wedding, Ms Monzingo and the other experts looks to address the other risks outlined. We note that section 32(2)(c) should only be considered if there is insufficient or uncertain information about the subject matter of the provisions of the Plan Change. It is submitted that the material presented to TDC in respect of the Plan Change does not represent insufficient or uncertain information. All of the potential risks have been identified and management mechanisms to deal with those risks are identified. The provisions proposed in Appendix 8 attached to Ms Lewis' rebuttal evidence demonstrate how those risks will be managed to bring potential adverse effects to a level consistent with sustainable management. In our submission some of that detail is now at a level that is more consistent with conditions to subdivision consents. However, the Proponents acknowledge that the effects will need to be managed at some stage and support including provisions in Appendix 8 that can provide more certainty to the Panel when deciding this application.

50. The Environment Court has also stated that "when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk"."[36] Given the information contained in the original application, the further information provided and the expert evidence, TDC should be satisfied that there is sufficient information to consider the Plan Change. This statement is made not only because of the quantity of the further information provided, but because of the amount of detail contained in the information that has been presented by the Applicant during the course of the Plan Change. In his rebuttal evidence Mr Bonis acknowledged that there has been a substantial amount of additional information and analysis provided by the Proponent in evidence.[37] There is inevitably some "risk" involved in adopting the Plan Change, but none more so than other rezoning

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[35] Resource Management Act 1991, s 32(2)(c).
[36] *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 at [68].
[37] At [46]. pg 9, Rebuttal Evidence of Matt Bonis.

which involves subsequent resource consents to be granted before development can occur.

Submitter Evidence

Waikato Regional Council

51. Ms Foley's evidence on behalf of WRC[38] states that she is unable to determine if the Plan Change appropriately gives effect to the Waikato Regional Policy Statement (**WRPS**) due to the lack of certainty on substantive matters.[39] The landscape and ecology JWSs record that there is general agreement on the nature of adverse effects that will arise and the mechanisms available to address those effects. The geotechnical experts agree that all hazard risks have been identified. There do not seem to be any potential adverse effects that cannot be appropriately managed. Thus the WRC position seems to come down to a challenge to this site as an appropriate location for urban growth. With respect that is something that was determined by TDC following a consultative process that developed the TD2050 growth strategy. The RPS has a policy that recognises TD2050 and requires the district's growth to occur by way of a TD2050 structure plan and plan change process. Whareroa North is a named growth area within TD2050. It seems rather circular to now seek to rely on other RPS provisions as a way of opposing this identified growth area. If that approach is adopted for all of the growth areas identified in TD2050 there would be no point to policy 6.11 because WRC would effectively be directing where and when that growth should occur.

Heritage New Zealand

52. The HNZ submission raised concerns regarding certainty as to the potential for archaeological significance on the site. Those concerns have been addressed with the further report from Ms Keith and some tweaks to Appendix 8.

Other Submitters

53. There was no expert evidence from any other submitter and the matters raised by submitters in Whareroa have been addressed in the evidence for the Proponents.

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[38] Here called WRC's submission.
[39] At [2], Evidence of Ms Marie-Louise Foley, 6 May 2020.

Financial Burden

54. The Panel is aware of the significant costs of this process for the Proponents. When the history of the land is taken into account those costs cumulatively cover over 50 years.

55. The TDC evidence says that more information and certainty is needed before this Plan Change can be confirmed. In our submission it is time to say enough. It is entirely reasonable that the Proponents should have the confidence that the zoning is in place before sinking more money into costly geotechnical, ecological and landscape assessments. Given the opposition from the Councils in this process, how likely is it that the Proponents would have been successful in getting the necessary resource consents for vegetation clearance without the rezoning? All the same objectives and policies would apply but they would be without any support from SSSP or Policy 6.11. It is fair and reasonable and the rezoning is first confirmed and in our submission there is sufficient certainty for the Panel to make that decision.

Evidence.

56. The Panel has indicated that Ms Keith, and Mr Kelly do not need to appear. They are both available by phone if there are additional questions for them.

57. The other witnesses for the Proponents are available to appear.

Dated 9th June 2020

Joan Forret

Counsel for the Proponents: The Proprietors of Hauhungaroa No.6 Incorporated

Appendix A

TAUMARUNUI COUNTY COUNCIL TELEPHONE 8188
PRIVATE BAG TAUMARUNUI

Our Ref: 616/10/1/PA87 Date: 12.10.87 Inquiries to: Mrs N. Prowse

The Proprietors of Hauhungaroa No. 6
C/- Messrs Phillips & Powell
Solicitors
27 Maniapoto Street
OTOROHANGA

Your Ref:

Dear Sir

RE: NOTIFIED APPLICATION - WHAREROA STREAM RIVER CROSSING

At its meeting held on the 10th October 1987, Council resolved:

"That pursuant to Section 72 of the Town & Country Planning Act 1977, consent be granted to the Proprietors of Hauhungaroa No. 6 to construct a crossing over the Whareroa Stream generally in the location shown as alternative "A" on the Plan 4975-01 submitted with the application subject to the following condition:

That prior to construction, engineering plans and specifications for the streamway crossing and approach roads be submitted to the County Engineer for approval. The County Engineer shall have regard to the comments of W.V.A. and Dept of Conservation when considering these plans. The design and construction shall be subject to the following specific standards:

1. That the Taumarunui County Council Local Government Subdivisional Standard requirements shall apply to all works. All work shall be to the approval and satisfaction of the County Engineer subject to the following conditions:

   (a) That the developer secure all necessary water rights and stream crossing approvals for the crossing of the Whareroa Stream from the Waikato Valley Authority at no cost to council.

   (b) That stormwater reticulation and disposal system shall be provided for the disposal of all stormwater arising from the roadways or footpaths and the developer shall secure the necessary water rights for the disposal facilities which shall be secured in Council ownership at no cost to the Council.

2. That the vegetation shall only be cleared to the limits of embankment fill batters (allowing also for intercept drains), and to the top of cut batters except that any large trees adjacent to it which may affect the batter stability shall also be carefully removed to 500mm above ground level.

3. That the construction of the crossing structure shall be carried out in such a manner that any adverse impact on the stream be avoided.

   The foundations shall as far as is practicable be constructed clear of the channel, and the waterway shall not be obstructed in any way during construction of the super structure.

4. That the road carriageway shall be bitumen sealed, with kerb both sides. Berms shall fall towards the kerb. Horizontal alignment shall be selected so as to minimise the height and extent of cut and fill batters.

5. That prior to commencement of earthworks on the northern side, trenches or bunds shall be constructed clear of the embankment fill batters to trap any run off or eroded material from the batters, until such time as protection is established as in (7) below.

6. That where material which is not stable at the design slope is exposed in the road cut, then the batter slope shall be flattened as necessary, or the material supported by a properly engineered retaining wall.

7. That a satisfactory cover of approved vegetation shall be established on all fill slopes, or protection from erosion provided by other approved means.

8. That the works shall be constructed only by suitable experienced contractors.

9. That all earthworks operations shall be continuously supervised by a registered engineer, or his appointed representative, and all other works shall be closely supervised by him to such an extent necessary to ensure that the other conditions of this approval are adhered to at all times.

   The reasons for this decision is that Council considered the crossing could be designed and constructed in such a manner as to adequately protect the environment and to avoid any adverse effects on the amenities of the area.

   Detailed engineering design will still be subject to any further engineering approvals."

CARRIED

You are reminded of your right to appeal against this decision, or any part thereof, to the Planning Tribunal within one month of receiving this notice.

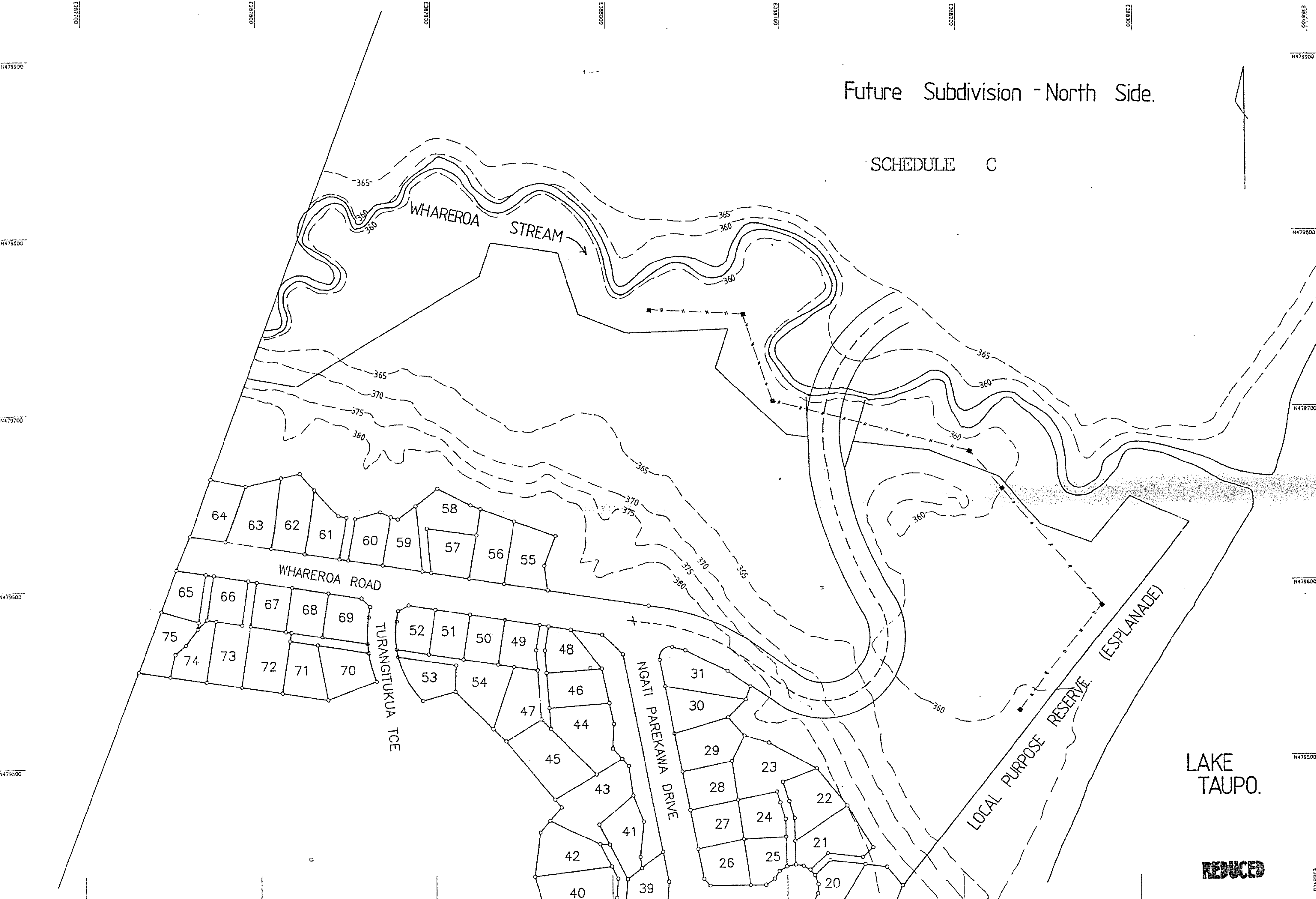
Yours faithfully

S.A. HUNTER
COUNTY MANAGER

per;

[signature]

NB:CP



PREPARED BY BLANCE & ASSOCIATES
REGISTERED SURVEYORS & LAND DEVELOPMENT CONSULTANTS
TAUMARUNUI

SCHEME PLAN OF RIVER FLAT
WHAREROA VILLAGE SUBDIVISION

PREPARED FOR THE PROPRIETORS OF HAUHUNGAROA NO. 6.

DRAWN	CHECKED	SCALES	SHEET
I.B.B		1:1000	33

Appendix B

LEWIS CONSULTANCY LIMITED

PLANNING AND RESOURCE MANAGEMENT

PRINCIPAL
JOANNE LEWIS
BRP (HONS), M.PHIL, MNZPI

18th July 200

Chief Executive Officer
Taupo District Council
Private Bag
TAUPO Attention: Hilary Samuel

Dear Hilary

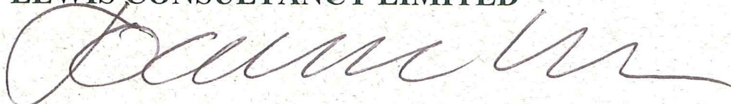
WHAREROA

Following our application in mid 2007, I am pleased to now confirm that the Tuwharetoa Maori Trust Board has provided approval for the construction of a bridge over the Whareroa Stream. A copy of the approval is attached. As you will be aware a crossing of the stream is critical for any future growth to the immediate north of Whareroa as envisaged in your Council's Growth Management Strategy, TD2050. With the landowner approval now to hand we are now able to proceed with some confidence in terms of the structure plan work.

In terms of the project stages previously advised, you will recall that in late October last year (following a meeting with yourself and Council's consultants earlier that month) feedback was provided on the work undertaken up until that time. I have attached for your consideration, a <u>draft</u> revised programme which is self-explanatory. In particular you will see that it is proposed to provide you with a completed "Constraints" document and revised objectives document (both arising from your earlier feedback) early next month. Please consider what timeframe you require to provide feedback on that work. It is further suggested that a date in mid September be set aside to workshop alternative structure plan concepts. Once you have liaised with your team regarding availability we can fix dates accordingly.

We are pleased to be able to put this project back on track and look forward to working towards completion of the statutory work during the 2009 year.

Yours faithfully
LEWIS CONSULTANCY LIMITED



Joanne Lewis

PO BOX 1563, TAUPO PHONE/FAX 07 378 2416
EMAIL: JOANNE@LEWISCONSULTANCY.CO.NZ

TUWHARETOA MAORI TRUST BOARD

2 July 2008

Tena koe

Re: Application for Approval for Whareroa Bridge Construction

Thank you for your application for approval to construct the Whareroa Bridge on the bed of the Whareroa Stream. The Tūwharetoa Maori Trust Board considered your request and can provide approval for this construction to go ahead, pending all relevant resource consents. This approval was based on minutes received from the Poukura Marae Meeting providing their consent.

The resolution was as follows;

That the application for the construction of the Whareroa Bridge over the Whareroa Stream be approved with a strong recommendation that a cultural impact assessment be completed by the Incorporation.

Moved: Paranapa Otimi

Seconded: Judy Harris

Motion Carried

As noted above, the Board has recommended a cultural impact assessment being completed on the area to ensure that all potential issues of concern to the hapu (if any) are addressed. When this is completed the Board would appreciate some feedback on this work.

The Tūwharetoa Maori Trust Board would also appreciate regular updates on the construction timetables and works, particularly in regards to any environmental impacts that this work may have on our lands.

We look forward to keeping the communication lines open and wish you well for your work.

Nga Mihi

Paranapa Otimi

Deputy Chair

Tūwharetoa Maori Trust Board

The Secretary, Tuwharetoa Maori Trust Board, P.O. Box 87, Turangi 3353, New Zealand
Phone: TURANGI 0064-7-386 8832 • Fax: TURANGI 0064-7-386 8235 • Website: www.tuwharetoa.co.nz

WHAREROA STRUCTURE PLAN / PRIVATE PLAN CHANGE PROCESS
PROJECT OUTLINE/PROGRESS
(As at 18th July 2008)

	TASK	PROGRESS
1	**Scoping and Project Planning**	Completed
2	**Stakeholder Identification and Initial Consultation**	Completed
3	**Research and Analysis**	Completed
		Completed
4	**Constraints and Opportunities Analysis**	• TDC feedback on draft provided 24/10/07 • Propose revised Objectives and Constraints documents (including mapping exercise) forwarded to Council early August 2008
5	**Generation of Alternatives Workshop (with Council's advisors)** **Completion of Alternative Structure Plan Options**	• Propose workshop with Council officers and advisors mid September 2008 • Alternatives completed mid October 2008
6	**Evaluation of Alternatives (includes consultation)**	• Propose consultation on structure plan alternatives (to include over Labour Weekend 2008), and evaluation of alternatives completed mid December 2008
7	**Draft Structure Plan and Draft Plan Change Request**	• Propose draft structure plan and plan change request completed early March 2009 then to Council for feedback.
8	**Private Plan Change Application and Resource Consent/s Applications Lodged with Local Authorities**	• Private Plan Change and Resource Consent applications lodged April/May 2009

DRAFT