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To	Matt Bonis, Planz Consultants	**15 May 2020**
From	James Winchester	
Subject	Legal issues for Council rebuttal - PPC36 Whareroa North, Taupō	

1. This memorandum addresses a number of identified legal issues arising from the proponent's evidence and associated material regarding proposed Private Plan Change 36 Whareroa North (**PPC 36**) to the Taupō District Plan. The proponent's evidence was provided in response to the report prepared on behalf of the Taupō District Council under section 42A of the Resource Management Act 1991 (**RMA**).

2. The memorandum also seeks to provide legal input to be used to address some of the questions which have been posed to the section 42A report authors by the PPC36 Hearings Panel on 1 May 2020, and provide general guidance on the correct approach to questions of scope that might arise in terms of the Panel's ability to grant relief or make changes to the plan change request.

3. In particular, the commissioners have asked for a summary of case law regarding their ability to modify the plan change request under clause 29(4) of the First Schedule to the Resource Management Act 1991 (**RMA**), and whether any modifications that might be proposed as part of the approval of the request need to have a basis in a submission.

4. Our advice on these issues is set out below, with detailed analysis in Appendices A (scope and jurisdiction) and B (Maori roadway and bridge issues).

Executive summary

Scope and jurisdiction

5. It is our opinion that the Council must, once a request is accepted under clause 25(2)(b), proceed to assess the merits of a request[1]. This process is set out in clause 29, which directs the Council to assess a request in accordance with Part 1 of the First Schedule, unless that process is specifically modified by other parts of clause 29.

6. Part 1 of Schedule 1 includes clause 10 which, in the present context, provides that a Council may alter or modify a request based on submissions received (or make consequential changes arising out of submissions). We do not consider that clause 29(1) changes or modifies the effect of clause 10 such that a council is entitled, by virtue of clause 29(4), to make any changes or modifications to a plan change request that it sees fit. Accordingly, any substantive alterations or modifications to a plan change request (if it is to be approved) must have a basis in a submission.

7. This does not however fetter the Council's overall discretion to decline a request under clause 29(4).

8. The Court's power to alter a plan change under appeal is also limited by the terms of the proposed change, and the content of submissions filed. Whether an amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content

[1] The only exception to this is provided in clause 23(6) which appears to enable the Council to decide not to approve the plan change request if information requests have been refused, and the Council considers it has insufficient information to approve the request.

of the submissions. This approach requires that the whole relief package detailed in submissions to be considered.

9. As an exception to the need for a submission to provide jurisdiction, depending on the specific facts and circumstances, the Council may make changes to the formatting, style or terminology of a plan change request to enhance its clarity, provided any changes are not substantive and do not alter its meaning or effect.

10. In addition, it also appears that if an applicant volunteers or proposes changes to its plan change request that are within the scope of the request, are intended to mitigate effects, and would not cause prejudice to other parties or the public interest, then those changes may be considered by the Council or the Environment Court on appeal.

Maori roadway and bridge issues

11. The concept of a Maori roadway has been introduced relatively late in the piece by the plan change proponents. There remains a substantial amount of detail that would need to be addressed in order for there to be clear understanding and certainty about the viability of the concept. We have relied upon the letter from Harkness Henry to Tūwharetoa Maori Trust Board (**TMTB**) dated 20 April 2020 and associated e-mail correspondence as the basis for assessment of the legal issues that would arise.

12. It is a legal mechanism which is potentially applicable, but would require the Council's agreement before an order could be made by the Maori Land Court under the Te Ture Whenua Maori Act 1993 (**TTWMA**). The Maori Land Court would be precluded from making an order unless the Council agreed.

13. The Council's agreement to a Maori roadway would involve the exercise of decision-making powers under the TTWMA and is not a matter that can or should be directed or determined through the RMA process. This means that the plan change, if approved, cannot include a mechanism which would bind the Council to agree to a Maori roadway or other arrangements regarding road and bridge access.

14. The proposal from the proponents is at a relatively high level, but incorporates some significant complexities and uncertainties that would need to be carefully considered before it could be a viable concept. These issues include:

    (a) the proposal for the bridge to be owned by the Council is at odds with the ownership of the Streambed and roadway remaining with TMTB, suggesting that the bridge should be under the ownership of the TMTB;
    (b) whether some form of rental or income would be sought from the Council by TMTB in respect of the bridge and roadway over the Streambed;
    (c) the need for control by the Council over the management and administration of the roadway regarding matters such as the scope of public access rights and operational matters such as the setting of speed limits;
    (d) the possibility of the Council seeking vesting of the roadway as legal road to resolve uncertainties regarding access, maintenance and operation;
    (e) the details of the bridge construction, including design and engineering standards, given that the Council is intended to accept ownership of the asset;
    (f) access rights for maintenance of the bridge and roadway surface, including the desirability of there being no need for consent to be sought from TMTB for repairs and maintenance nor there being any fee or charge for such purposes;
    (g) the need for clarity around resource consents which may be required for the bridge and roadway over the Streambed;

(h) the assumption of risks and liabilities for damage, erosion, remedial obligations, and contamination risks;
(i) the terms of access for other essential services including 3 waters, phone/data, and power;
(j) timing issues regarding any application to the Maori Land Court and its relationship to bridge construction and initial subdivision consents.

15. There may well be other matters that emerge when the preferences of the three parties to the proposed agreement are better understood.

16. Given that the ability for road access and provision of essential services would be fundamental to PPC36 and the subsequent intended development, whether it is appropriate for PPC36 to be approved and effectively be subject to an agreement being reached in the future on such fundamental matters is likely to be an important consideration for the Hearings Panel.

APPENDIX A – LEGAL PRINCIPLES RELATING TO SCOPE AND JURISDICTION

The process of accepting or declining a request

17. This advice is based on the fact that a request for a plan change has in this instance been *accepted* by the Council under clause 25 of the First Schedule to the RMA, rather than *adopted*. With regard to the procedure to be adopted in considering the accepted request, this is set out in clause 29 of Schedule 1. The relevant parts of Clause 29 provide:

> "*(1)* ***Except as provided in subclauses (1A) to (9)****, Part 1, with all necessary modifications, shall apply to any plan or change requested under this Part and accepted under clause 25(2)(b).*
>
> *…*
>
> *(4)* *After considering a plan or change****, the local authority may decline, approve, or approve with modifications, the plan or change, and shall give reasons for its decision.***
>
> *…*
>
> *(6)* *The person who made the request, and any person who made submissions on the plan or change, may appeal the decision of the local authority to the Environment Court…*". [our emphasis]

18. The request shall be considered in accordance with clause 10 of Schedule 1 (unless, as a result of clause 29(1), the process under Part I of Schedule 1 of the RMA is modified). Clause 10 provides that:

> "*(1)* *A local authority must give a* ***decision*** *on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.*
>
> *(2)* ***The decision-***
>
> *(a)* ***must include the reasons for accepting or rejecting the submissions*** *and, for that purpose, may address the submissions by grouping them according to-*
>
> *(i)* *the provisions of the proposed statement or plan to which they relate; or*
>
> *(ii)* *the matters to which they relate; and*
>
> *(b)* ***may include****-*
>
> *(i)* ***matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions****; and*
>
> *(ii)* ***any other matter relevant*** *to the proposed statement or plan arising from the submissions.*
>
> *(3)* *To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.*
>
> *(4)* *The local authority must-*
>
> *(a)* *give its decision no later than 2 years after notifying the proposed policy statement or plan under clause 5; and*
>
> *(b)* *publicly notify the decision within the same time.*
>
> *(5)* *On and from the date the decision is publicly notified, the proposed policy statement or plan is amended in accordance with the decision"*. [our emphasis]

19. Unless clause 29 can be interpreted as having modified the process under Part I of Schedule 1, the Council is required to follow these procedures when processing and considering the request.

Ability of the Council to amend or modify a plan change request under clause 29(4)

20. Consideration of the Council's ability to amend or modify a plan change request first requires clarification of the distinction between the Council's powers under clause 29(4) and clause 10 of Schedule 1 of the RMA. The commissioners have queried the extent of the powers: clause 29(4) as a potentially wide power to decline, approve or modify; and clause 10 as a power to "alter", but limited to those matters raised from submissions.

21. A related issue which has been identified, and which arises out of the opening submissions of counsel for Highfield, is if a Council has an overall discretion to decline a request under clause 29(4), is there also a power to modify or approve a request in part (in the absence of any submissions), if the Council was satisfied that the modified or "reduced" plan change better met the RMA's purpose than the provisions it proposes to replace? This raises the question as to whether the powers of these two clauses are sufficiently different that the effect of clauses 29(1) and (4) could apply to exclude or modify the application of clause 10.

22. Clause 29(4) provides as follows:

> "*After considering a plan or change, the local authority may decline, approve, or **approve with modifications,** the plan or change, and shall give reasons for its decision.*" [our emphasis]

23. In our view, the words "*approve with modifications*" do not provide the Council with discretion to make such amendments as it sees fit, such as a part approval, unless this is based on relief sought in submissions. It is our opinion that to "*approve with modifications*" only authorises substantive amendments that are within the scope of submissions received on the request. This position has also been confirmed in case law relating to private plan change requests. There are however limited exceptions to this position which are discussed later in this advice.

24. Our preferred interpretation requires that clause 29(4) be read in conjunction with clause 10(2) of Schedule 1, and does not override or modify its clear wording. This interpretation is also supported by clause 29(9), which provides that a local authority may initiate a variation to a request for a private plan change under clause 16A of Schedule 1 of the RMA.

25. We do not consider that the clause 29(4) power is so markedly different that it overrides clause 10(2), or that it is a "necessary modification" to read clause 29(4) as excluding the need for modifications to a plan change request to be based on submissions. Although analysis under each clause does not necessarily involve the same jurisdictional considerations on the merits, the two cannot be seen as mutually exclusive.

Case law on scope and jurisdiction – private plan changes

26. The Environment Court's decision in *GUS Properties Limited v Marlborough District Council* (W075/94) provides further authority for our interpretation of clause 29 of the Schedule 1. In that case, a private plan change request was approved by the Council with modifications. Among other things, the appellant (who opposed the plan change) argued that the modifications were not within the scope of the relief sought in submissions on the request.

27. The Court in *GUS Properties* held that, with one exception, the modifications were within the scope of submissions. In respect of the modification that was not, the Court ordered that the relevant part of the original request be reinstated.

28. There is additional case law which has addressed this issue and supports our interpretation. In *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (W053/93) (partially reported at (1993) 2 NZRMA 497), the appellant challenged amendments the Council had made to a privately-promoted plan change. The Tribunal classified the various challenged amendments into the following five groups:

    (a) amendments sought in written submissions;

    (b) amendments that respond to groups of written submissions;

    (c) amendments that address cases presented at the hearing of submissions;

    (d) amendments to wording not altering meaning or effect; and

    (e) other amendments not in groups (a) – (d).

29. Item (e) was held to be beyond the Council's jurisdiction. This limits the scope of what Council can amend in a private plan change to those listed in (a) – (d). The Courts have therefore confirmed the importance of limiting Council modifications to what is within the scope of submissions.

30. In our view, item (d) in *Foodstuffs* recognises what is effectively an exception from the requirement for changes to have a foundation in a submission. The Council may make changes to the formatting, style or terminology of a plan change request to enhance its clarity, provided any changes are not substantive and do not alter its meaning or effect. What amendments will fall within item (d) will in our view be a question of fact and degree. In *Foodstuffs*, the Court stated:

> "*The amendments that we classified in group 4 were not responses to submissions on the proposed plan change,* ***but were amendments to the language of the change that we have found did not alter its meaning or effect****. Some of those alterations were from the language of the Town and Country Planning Act 1977 to that of the Resource Management Act 1991. Others of the alterations were made so that the new provisions, if adopted,* ***would fit better the style of the district plan in which they would be part****; and* ***others were consequential on other amendments****.*
>
> *We consider that the plan change should have been prepared so that it used the language of the Resource Management Act, and fitted the style of the transitional district plan, before it was notified. However, at the time the change was prepared the Resource Management Act had only recently come into force, and it may be that its full implications had not been understood.*
>
> *Although not covered by the terms of clause 16(2), it must have been intended that alterations consequential on other amendments, that do not themselves independently alter the meaning or effect of the change, could be made by decision on submissions without the local authority having to repeat the process of consultation and participation.*
>
> *We have reviewed again the amendments that we classified in group 4. We find that they do not alter its meaning or effect in substance, and that they were not a weapon*

> *to ignore the rights of the respondent's citizens. We do not accept the submissions that the respondent exceeded its authority in making them*". [our emphasis]

31. We note however that the High Court in *General Distributors v Waipa District Council* (2008) 15 ELRNZ 59, has urged caution about such changes. This case also involved a private plan change request and suggests the adoption of a conservative approach to the question of jurisdiction to make substantive changes to a plan change. At paragraph 63 of the decision, Wylie J observed:

> "*In my view councils, and the Environment Court on appeal,* ***should be cautious in making amendments to plan changes which have not been sought by any submitter****, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change.* ***I doubt that that conclusion should be too readily reached***". [our emphasis]

32. The High Court's primary findings are set out at paragraphs 61, 62 and 63 of the *General Distributors* decision, where the Court rejects the proposition that "connection with", being "signalled", or being "consistent" with the tenor of the plan change provide jurisdiction for substantive changes. The General Distributors decision is clear authority for the provision that submissions need to provide the basis for specific changes which are being sought to a plan change request.

33. In our view, the question of whether changes have a "connection" with the plan change request is a subsidiary issue to the question of jurisdiction, and is essentially the same as the fairness/natural justice consideration in the *Oyster Bay Developments Limited v Marlborough District Council* (C081/09) case (discussed below).

34. Following *General Distributors*, what is within the scope of submissions has been further considered and clarified by the Environment Court in *Oyster Bay*, where the Court considered its scope to alter a plan change. In that case, the council had accepted a private plan change request, notified the change, and then notified the submissions to allow further submissions. Following a hearing, the council declined the applicant's request for a plan change under clause 29(4).

35. At the Court hearing, the applicant volunteered several alterations to the plan change to address the deficiencies identified by the council. Most of the changes proposed were intended to reduce the scale and effects of the plan change request.

36. To identify the appropriate elements for the Court when deciding whether an amendment to a change in a planning instrument is within or beyond jurisdiction, the Court referred to and applied the reasoning in *General Distributors*.

37. The Court's test essentially incorporates two elements, jurisdiction and fairness. The relevant elements were summarised at paragraph 22 of the *Oyster Bay* decision:

> "*[a] The* ***terms of the proposed change*** *and the* ***content of submissions*** *filed* ***delimit the Environment Court's jurisdiction*** *[64];*
>
> *[b] Whether an amendment goes beyond what* ***is reasonably and fairly raised in submissions on the plan change*** *will usually be* ***a question of degree to be judged by the terms of the plan change and of the content of the submissions*** *[58];*

*[c] That should be approached in a **realistic workable fashion** rather than from the perspective of legal nicety, and requires that **the whole relief package detailed in submissions be considered** [59] [60].*" [our emphasis]

38. Six alterations to the plan change originally requested by the applicant were questioned by the council in *Oyster Bay*. The council contended that:

> "*[a] none of those alterations to the plan change had been raised in any submission or further submission;*
>
> *[b] nor had any of them been notified to the public, nor even to submitters;*
>
> *[c] nor had any of them been considered by the Council;*
>
> *[d] nor had any of them been made the subject of the appeal to the Court;*
>
> *and submitted that the Court is limited to considering the plan change as originally requested, not as it would be altered in the ways described.*" [paragraph 25]

39. The Court held that the amendments proposed by the applicant qualified in terms of the Court's jurisdiction to entertain amendments to a plan change declared by the High Court in *General Distributors*; or as minor corrections that would prejudice no one. For example:

> "*We judge that this alteration would not broaden the plan change beyond the limits of what was originally requested and what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.*" [paragraph 29]

40. It appears from our analysis of the case that the Court in *Oyster Bay* was careful to identify the issues/concerns that were identified in submissions in order to provide a basis for considering the changes which were proposed (see paragraphs 28, 32, 35 and 39). The only exception to this is the category of changes which relates to "*minor corrections which would prejudice no one*" (see paragraph 46). This latter category closely reflects the Council's own power in clause 16(2) of the First Schedule to rectify minor errors without further formality, and in our view could include changes to the formatting, terminology and style of the request that are not substantive and do not alter its meaning or effect.

41. In a further limited exception from the requirement for changes to a request to have a foundation in a submission, the Court in *Oyster Bay* also appeared to recognise that if an applicant volunteers or proposes changes to its plan change request that are within the scope of the request, are intended to mitigate effects, and would not cause prejudice to other parties or the public interest, then those changes can be considered by the Council or the Environment Court on appeal. In our view volunteered changes are probably not the same as the class of changes allowed through clause 16(2), in that they could potentially be substantive.

42. Having concluded that it had jurisdiction to consider all of the changes proposed by the applicant, the Court in *Oyster Bay* nevertheless determined that the modified request should be declined on its merits. In that respect, *Oyster Bay* demonstrates that if the Council intends to decline the plan change in whole, it has an inherent jurisdiction to do so irrespective of the content or scope of submissions, by considering and applying the

relevant statutory tests and considerations as set out in *Long Bay*[2]. The *Long Bay* criteria have since been updated and are now known as the *Colonial Vineyards*[3] criteria.

Inherent jurisdiction to approve or decline

43. Further to the point addressed above, a question arises as to whether there is an inherent jurisdiction to approve a request *in part* under clause 29 of Schedule 1 of the RMA, and the legal grounds to do so. It is our view that at this "late" stage of the process there is not an inherent jurisdiction to approve a request in part, unless it is a modification as a result of submissions.

44. We consider that by this point in the process (i.e. where the assessment is almost concluded, save for appeals) the Council should have resolved most of the concerns it has with the request and make a decision on the entire application, as opposed to a "part approval".

45. In that respect, we observe that the Council would have had opportunities to seek that the request be amended through requests for further information and/or with the agreement of the applicant under clauses 23 and 24 of the First Schedule, and possibly through the submission process. There is also the possibility of the person requesting the change volunteering amendments to the plan change, either in response to submissions or in order to address effects.

46. Irrespective of the opportunities to bring about changes or modifications to a plan change request, it is clear that the Council retains an inherent jurisdiction to decline a plan change request (subject to the statutory tests which we outline below). Due to the process which plan change requests must traverse, any issues or concerns should have been carefully considered and analysed by the time that the Council makes its decision on the merits.

Section 32 and the Colonial Vineyards criteria

47. Section 32 of the RMA is a statutory test of the merits of provisions of a proposed plan or plan change. It does not however provide an independent jurisdictional basis which permits a Council to rectify or modify plan changes under clause 29(4) of the First Schedule in order to ensure that the relevant provisions then meet the requirements of the RMA.

48. A section 32 analysis must be made of the proposed provisions, or of any provisions/relief raised in submissions. It is not however a requirement of a Council's section 32 analysis to go further and speculate or suggest other possible provisions or modifications not raised in submissions which might ensure that the proposed plan change is justified in terms of section 32 (and then might rely on the decision maker to incorporate those modifications).

49. If a proposed plan change does not meet the requirements of section 32, then the Council's options are either to decline the request, or initiate a variation under clause 29(9) with the agreement of the person who made the request.

50. There are also the wider statutory considerations set out in the *Colonial Vineyards* case, with the most relevant likely to be the need for a plan change to give effect to superior planning documents. These may well carry significant weight and/or be determinative, depending upon the specific facts and circumstances of a plan change request.

[2] *Long Bay-Okura Great Park Society Incorporated & Others v North Shore City Council* (EnvC A078/08)
[3] *Colonial Vineyards Ltd v Marlborough DC* [2014] NZEnvC 55

Comparison with resource consent applications

51. The Council's powers with regard to decision making on proposed plans and plan change requests can, to a certain extent, be distinguished from the Council's powers to make decisions on resource consent applications. When making decisions under Schedule 1 of the RMA, in seeking to approve a plan change with modifications, the Council has jurisdiction to grant relief and/or make changes which primarily rest on the existence of a submission and the scope of relief sought in that submission.

52. By comparison, when making decisions to approve resource consent applications, the Council has an inherent discretion to impose conditions or make amendments to a proposal, irrespective of whether such conditions or amendments are requested by or arise from submissions on an application.

Other options for amending a request for a private plan change

53. The ability of the Council to amend a private plan change is determined by the stage the plan change has reached.

54. If the Council wishes to amend a private plan change request after it has been notified and the submission period has closed, pursuant to clause 29(9) of Schedule 1 of the RMA it may initiate a variation to the change under clause 16A of Schedule 1 (with the agreement of the person who made the request), or limit any amendments to those that are within the scope of submissions on the request if it is inclined to approve the request.

55. The Council could also consider notifying its own variation to a Proposed Plan or its own change to an Operative Plan under the First Schedule.

Council options to amend or modify a plan change request

56. In summary, the Council has the following options available to amend or modify a private plan change request:

    (a) modifying the private plan change prior to notification with the agreement of the applicant (clauses 23 and 24);

    (b) accepting or rejecting a request *in part* under clause 25;

    (c) lodging a submission on the private plan change;

    (d) initiating a variation to the private plan change under clause 16A of the First Schedule of the RMA, with the agreement of the applicant;

    (e) approving the private plan change with modifications that arise from or are within the scope of submissions;

    (f) declining the private plan change (thereby giving the applicant the option of appealing to the Environment Court or lodging a new plan change request); or

    (g) notifying its own plan change.

APPENDIX B – MAORI ROADWAY AND BRIDGE ISSUES

Road access/bridge issues

57. The proponents of PPC36 have advanced a proposal which addresses the Council's requests for information regarding the proposed bridge and road access to the plan change area, which would be necessary to enable subdivision to occur.

58. The proposal is outlined in a letter from Harkness Henry to the TMTB dated 20 April 2020, and both the letter and associated e-mail correspondence between Harkness Henry, TMTB representatives, and one of the proponent's expert witnesses (Mr Keys) has been furnished to the Council.

59. TMTB is the owner of the Whareroa Streambed which separates the existing Whareroa settlement from the PPC36 area. The stream would need to be crossed by a bridge and some form of satisfactory legal access and provision for services would be necessary in order to enable the subdivision and development of the PPC36 area.

60. The Harkness Henry letter outlines a concept whereby TMTB would retain ownership of the Whareroa streambed, the proponents would build a bridge which would then become vested in the Council, and the road over the bridge could be declared a Maori roadway under the TTWMA.

61. An integral and necessary part of the concept involves a tripartite agreement (**Deed**) between the proponents, TMTB and the Council to record the rights and interests of the parties and which would form the basis of a joint application to the Maori Land Court for Maori roadway status.

62. The letter provides very little additional detail as to the specific rights and interests that are proposed in the Deed, other than specifying a range of matters in paragraph 14 that would need to be included in the Deed. Paragraph 16 of the letter also notes that it would take some time for the terms of the Deed and an application for Maori roadway status to be finalised and that this would happen after the rezoning of the land is confirmed.

63. There is an immediate issue apparent from the letter in that the Council, through the Hearings Panel, is being asked to approve the plan change request and rezone the PPC36 land when it is quite possible that agreement will not be reached on the terms of a Deed and an application to the Maori Land Court for Maori roadway to be declared.

64. There are also a range of other legal issues and uncertainties which are not addressed in the letter which we discuss below.

Need for agreement to be reached

65. The Harkness Henry letter correctly identifies that it is necessary for the Council, as owner and controller of public roads to which the proposed Maori roadway would connect, to consent to an application to the Maori Land Court. This is set out in section 317(6) of TTWMA. In the absence of such consent and agreement, the Maori Land Court is precluded from laying out Maori roadways.

66. The Harkness Henry letter and associated e-mail correspondence from TMTB appear to assume that PPC36 can be approved without such agreement being reached and documented. It also appears implicit that there is an expectation that the Council will confirm that the Maori roadway concept is acceptable for the purposes of approving

PPC36 and that it would thereafter be bound to enter into a Deed recording agreement on relevant matters in due course.

Council decision on Maori roadway not a matter for PPC36

67. It is apparent that any Council decision to agree to Maori roadway status would be made having regard to the Council's functions and responsibilities under the Local Government Act 2002 (and the roading powers outlined in the Local Government Act 1974), and in terms of TTWMA.

68. These decisions are not decisions made under the RMA and are beyond the scope of decision-making powers under the RMA., Put another way, the Hearings Panel acting under delegated authority from the Council has no power to bind, or make a determination or direction about, the Council's acceptance or otherwise of Maori roadway status as part of PPC36. It is not a RMA issue and would be beyond the scope of the delegated authority for the Council's statutory powers and discretions under other legislation to be fettered.

69. The consequence of this is that a decision to approve PPC36 would leave its ability to be realised dependent upon separate decisions of the Council under other legislation. This may be a matter which is relevant to an assessment of PPC36 under the *Colonial Vineyards* criteria compared to the *status quo* of rural zoning.

70. For the reasons set out below, based on the matters set out in the Harkness Henry letter, we have reservations as to whether matters important to the Council could be satisfied such that it could agree to a Maori roadway status.

Ownership, control, access and responsibility issues

71. The Harkness Henry letter states that the bridge would be owned by the Council and the streambed would be owned by TMTB. It is not clear who would own or control the road, although paragraph 12(a) of the letter cites section 318(2) of TTWMA regarding the legal effect of laying out a Maori roadway. It is noted that section 318(4) of TTWMA states that the laying out of the roadway shall not affect the ownership of the land comprised in the roadway.

72. This would effectively result in TMTB ownership of the road and streambed, and Council ownership of the structure. This position, particularly in terms of bridge ownership, is likely to be inconsistent with the statutory position regarding ownership of the underlying land and roadway. Logically, the position under TTWMA suggests that the bridge should also be in the ownership of TMTB.

Clarity as to ownership and control

73. If the streambed becomes Maori roadway, the underlying status of it and its ownership will remain the same, but it will confer rights on all persons *as if it were* a public road[4]. Section 318(2) of the TTWMA provides however that the Court may define or limit persons or classes of persons entitled to use it, or may define or restrict rights. Therefore, if the Maori roadway was to appropriately operate in the same manner as a legal road, the Council will need to make sure that it has sole control over the management and administration of the roadway and that there are no limitations specified in the Deed or the Court order.

[4] Section 318(1) of TTWMA

74. From the Council's perspective, in order for the Maori roadway concept to be viable and effective, it may need to be made entirely clear that the road was able to function without limitation on access by persons or classes of persons. In those circumstances, the Council may wish to seek a guarantee of full public access over the bridge and roadway in perpetuity as if it was legal road vested in the Council, to ensure that it has sole control over the management and administration of the roadway and that there are no limitations on persons or classes of persons entitled to use it.

75. In addition, there is a possibility that the TMTB would seek some form of rental or to impose an annual charge for the bridge and roadway crossing the Streambed, and for this to be paid by the Council. This would need to be clarified and it is possible that the Council would not consider such a regime to be acceptable.

76. Therefore, the Council would need to be satisfied that these matters were defined or that rights specified in the Deed or the Court order were not restricted. This would need to include matters such as control and management of the roadway to do things such as setting speed limits.

Vesting of roadway

77. Considering the foregoing issues around ownership and control of the roadway, section 320 of TTWMA provides for a Maori roadway to be declared road by the Governor-General and vested in the Council (this does not require the consent of the landowner). This position would seem to be more logical given the intention for the Council to own the bridge structure, but it appears that TMTB would not agree to that because of the potential impact on ownership of the streambed. Indeed, despite section 320, TMTB may require that the Council agrees to never apply for vesting under section 320. This may well be untenable for the Council.

Access and maintenance, construction standards

78. Paragraph 14 of the Harkness Henry letter states that a Deed would need to provide for access, maintenance and ownership of the bridge structure, giving certainty to all parties. We agree. Given the matters set out above, this may be very difficult to resolve to the satisfaction of the parties and particularly the Council. For example, putting to one side the statutory hurdles and issues identified in terms of TTWMA, there is no detail of the bridge construction or standards that would provide the Council with any certainty as to what it was intended to own, manage and maintain.

79. In addition, paragraph 10(b) of the Harkness Henry letter identifies that the Council is authorised under section 324A(1)(b) of the Local Government Act 1974 to contribute to the cost of maintaining, repairing, widening or improving a Maori roadway. It also notes that consent from the owners of the land comprising that roadway would be required. We assume that the Council would want to ensure that it was clear that it did not need the approval of TMTB every time it needed to repair or maintain the bridge or roadway, nor pay a fee or charge to TMTB for such purposes. It may be that the Council would want to seek a blanket consent be incorporated into the Deed, to avoid the need for TMTB consent every time the Council wants to undertake repair or maintenance work.

80. The Harkness Henry letter correctly identifies that section 22 of Land Transport Management Act 2003 provides for NZTA potentially funding activities relating to a Maori roadway as if it was a local road. This power may address possible concerns from the Council about availability of funding for future maintenance, provided NZTA was amenable to approving payments for such purposes.

Resource consents

81. We have assumed that resource consents would be required from Environment Waikato to allow a bridge to be constructed across the stream. The responsibility for seeking those consents and the possibility of uncertainty of outcomes should also be addressed in a Deed.

Liabilities

82. Paragraph 14 of the Harkness Henry letter infers that TMTB and the proponents may seek that the Council be responsible for 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. The Council would need to carefully consider whether it wished to accept such burdens given the uncertainties about ownership and maintenance.

Access for other services

83. Aside from the provision of legal road access across the bridge/stream, there would also need to be certainty over the ability for other essential services (power, phone/data, water and wastewater) to be conveyed over the bridge/roadway free of charge. There are statutory rights under various legislation for these types of services to locate in legal roads but Maori roadway status does not incorporate these rights, and therefore these matters would also need to be covered in a Deed. Paragraph 14 of the Harkness Henry letter identifies this, but provides no indication as to whether such rights would be granted and on what terms.

84. In terms of Council owned infrastructure and services such as water supply, wastewater and stormwater, the Council would need to consider whether it was willing to agree to a situation where access along the Maori roadway might be subject to an annual charge or fee to be paid to TMTB, or where those rights could be cancelled by TMTB.

85. In addition, the Deed should address the rights of utility companies to have access to the Maori roadway, ideally in a manner which replicates their statutory rights to access legal roads.

Timing issues

86. There are a range of relatively complex legal issues that would need to be covered in a Deed. A more mechanical issue that would require careful consideration would relate to the timing of seeking an order from the Maori Land Court. For example, in order for the Council to be comfortable with and be in a position to agree to a joint application, the following matters might need to be considered and provided for:

    (a) EW resource consent granted and suitable in its terms?
    (b) bridge details known and/or bridge constructed to an acceptable standard?
    (c) timing of Maori Land Court application in advance of or as part of subdivision consent for first stage?