

TAUPŌ DISTRICT PLAN

Under: the Resource Management Act 1991

In the matter of: **Proposed Plan Change 36**

Whareroa North – Rezone land from rural environment to residential environment

REBUTTAL EVIDENCE (INFRASTRUCTURE – WHAREROA STREAM BRIDGE)

1. My full name is Denis Lewis. I am currently employed by Taupō District Council as the Infrastructure Manager. I have held this position since 2011. Prior to that I was employed as the Transportation Manager commencing in 2007. I have a New Zealand Certificate in Engineering (Civil) and have been a Registered Engineering Associate since 1989.
2. My experience regarding matters raised through Proposed Plan Change (PPC36) includes:
 - a. Review of the Whareroa North Plan Change Report, the Infrastructure Report KeySolutions Ltd.
 - b. I am familiar with the site and surrounds having visited the area on a number of occasions.
 - c. I have been working in the local government infrastructure sector for 35 years including as a design engineer, design manager, project/contract manager, road network manager, consultancy office manager, Engineer to Contract, Transportation Manager and more recently Infrastructure Manager.
 - d. I have meet with representatives of the proponents (Ms Joanne Lewis and Mr Mike Keys) on a number of occasions relating to this plan change, the most recent of which was a joint meeting with TMTB, TDC and Ms Lewis & Mr Keys on 4th March 2020.
3. I did not provide expert evidence to accompany the Section 42A Report.
4. I have read and agree with the evidence of Mr Swindells (Water), Mr Cordell (Wastewater) and Mr Hansson (Transport) where they have expressed concerns associated with securing an appropriate legal mechanism to secure both public access and service

connections across Whareroa Stream to any residential development enabled by the Plan Change at Whareroa North.

5. The purpose of this Rebuttal Evidence is to narrowly respond to the correspondence to the Tūwharetoa Maori Trust Board (TMTB) provided by Harkness Henry (dated 20 April), and the evidence of Ms Joanne Lewis (Planning) and Mr Mike Keys (Engineering) as it relates solely to the proposal now put to the Council and the Panel that:

[10] The Incorporation proposes an agreement between Tūwharetoa, TDC and the Incorporation whereby a bridge would be built by the Incorporation and owned by TDC while Tūwharetoa would retain legal ownership of the Streambed.

[11] In order to provide legal status for the bridge, MG (Michael Grayson, Grayson Clements Ltd) suggested that the road over the bridge could be declared a Maori Roadway. This would follow a joint application to the Maori Land Court by the Incorporation, TDC and Tūwharetoa.

Letter Harkness Henry dated 20 April 2020. (Attached)

6. I have read and I am familiar with the Environment Court's Code of Conduct 2014 for Expert Witnesses. For the purpose of this hearing, I agree to be bound by that Code of Conduct and have familiarized myself with the requirements as set out in the Code.

The Proposal and Infrastructure

7. It is understood the Plan Change seeks a Residential Environment zone north of Whareroa Village, across the Whareroa Stream and at the top of the plateau. The Plan Change seeks to provide for up to 160 dwellings, and associated servicing including roading.
8. The Incorporation has not provided many details on the proposed bridge or the ability to convey services to the proposed residential zone:
 - a. *"The bridge will be a single span with abutments clear of the 1% AEP stream flow". [9.17 Phadnis]*
 - b. Single lane each way [Photo montage viewpoint 2 Monzingo]
 - c. *"With respect to his section 1.5c regarding extending public access across the Whareroa Stream (and also Mr Swindell's and Mr Cordell's comments regarding the extension of services) discussions are taking place with the Tūwharetoa Maori Trust Board (TMTB) (as owners of the stream bed) and Council as to what an acceptable legal status of the bridge itself might be (i.e*

acceptable to TMTB, Council and the Owners). The laying down of a “Maori Roadway” is being explored and this is detailed in legal submissions”. [8.17 Keys].

- d. *“As referred to in the application documents (proposed new District Plan – Appendix 8 Whareroa North Outline Development Plan) a single span bridge is proposed with abutments clear of the stream bed, finished in visually recessive colours and with associated planting.” [5.27 Lewis].*
- e. *“As the evidence of Miss Connolly and Mr McKenzie reports, recent further discussions with TMTB has resulted in an agreed legal mechanism (involving a deed and the bridge crossing becoming maori roadway) to provide the necessary legal access. I note that the legal advice is that such a mechanism is currently in place for some Crown owned roading assets over Maori land and the accordingly the same arrangement can apply to the bridge asset to be owned by TDC”. [7.24 Lewis].*

The role of Council as asset manager in securing servicing and access in perpetuity

- 9. In my experience, both as an asset manager and acting as a consultant for developers the orthodox approach for Council to obtain legal rights / title in terms of public road access and servicing is by the road corridor being vested as road reserve at the time a survey plan, conforming with a subdivision consent, as submitted for the Council’s approval. This is signed by an authorised officer of Council in accordance with RMA1991 sec 223(3).
- 10. Council’s role in terms of the Local Government Act 2002 is to ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and in taking a sustainable development approach, a local authority should take into account the reasonably foreseeable needs of future generations
- 11. I am aware of other options for securing public road access such as the strata title approach where a strata title is issued for the road/bridge structure with the underlying land remaining in separate title. This approach ensures that legal rights/title of both access and services are secured and those rights and responsibilities are certain and in perpetuity. This approach was most recently used by Council for the legalisation of the bridge on the East Taupō Arterial over land owned by Contact Energy. The bridge was subsequently transferred to the Crown as State highway.

The proposed approach for Whareroa Stream

12. I acknowledge that Tūwharetoa Maori Trust Board (TMTB) have identified that they are unlikely to forego property ownership rights in relation to streambed.
13. The issue for the proponents then is to provide clarity as to how the Council's functions under the LGA2002 and RMA1991 are to be achieved in terms of the bridge access and associated servicing connection.

Issues in terms of process and implementation

14. I consider that there remains considerable uncertainty as to both process and implementation of such a mechanism.
15. In terms of **process** I understand from the Harkness Henry Letter (20 April, 2020) that the Proponents are suggesting a three stage process to occur after the Plan Change decision has been made [16]:
 - a. An Agreement (presumably in Principle) between Tūwharetoa, TDC and the Incorporation is to be established as to funding the bridge, owning and maintaining the bridge, and the rights of Tūwharetoa as landowner [10];
 - b. Deed to then be established between the parties, outlining access, maintenance and ownership of the bridge structure. The Deed would also set out ongoing obligations and details relating to security of service connections and prevention of the risk of contamination to the proposed rezoned land [14, 16].
 - c. The parties would then provide for a Joint Application to the Maori Land Court to have the road over the bridge declared as Maori Roadway [11,16].
16. As Infrastructure Manager for the Council I have several concerns with this process. Principally, the approach by the Incorporation would appear to bind the Council in terms of its Local Government Act role to an uncertain and yet to be costed solution. There are many practical and legal issues associated with the bridge and Maori roadway proposal, which involve considerable complexity. All of these matters would need to be resolved to the Council's satisfaction before the Council could make a decision under the other legislation to agree with the Incorporation's concept.
17. Under the process suggested by the Incorporation, it appears to be implicit that the Council would be bound to accept the concept if it approves the plan change, despite the numerous uncertainties that have been identified. In that event, the Council loses its

agency under the Local Government Act 2002 in terms of asset management. If the rezoning decision occurs prior to the steps above being agreed and undertaken, the Council is put in a very difficult position whereby its statutory decision-making under other legislation might be fettered or pre-determined. Simply, I am concerned that the process steps outlined, and their considerable uncertainty, would bind the Council to a solution that relies on reaching agreement with TMTB over a range of matters that ensures Council obtains the rights normally implicit in a conventional road vesting. This is in my opinion potentially unworkable, inefficient and ineffective.

18. I note that the access issue has been flagged to the Incorporation for at least the last seven years, and to receive a potential solution dated 20 April 2020 that is supported (in principle by TMTB) by two of the three parties involved in that potential solution does not give the Council a considered opportunity to respond.
19. In terms of **implementation** there are a number of matters that relate to the attachment and conveyance of services, control of the roadway, on-going maintenance, ownership, liability, and even whether the TMTB will allow those services to be attached. It is also uncertain whether TMTB may wish to charge an annual licencing fee, and how much this might be. As with the process matters above, given the uncertain nature of any Agreement, Deed or application to the Maori Land Court the Council has not had an opportunity to consider these matters with any degree of detail or clarity. Based on this uncertainty and potential risk for the Council, I would certainly not be comfortable with recommending that the Council commit to the Maori roadway concept at this stage, and could not comfortably do so in the future when such decisions fall to the Council under other legislation unless numerous issues of detail are addressed and agreed.
20. Aside from the provision of legal road access across the bridge/stream and the attachment and conveyance of Council services, there would also need to be certainty over the ability for other essential services (power, phone/data) to be conveyed over the bridge/roadway unencumbered and free of charge. Council should not be required to negotiate with TMTB for rights of access on behalf of other utility providers when in the normal course of events those rights were available in legal roads. Council would not agree to a situation where this access was subject to any specific conditions or an annual charge or fee to be paid to TMTB, or where those rights could be cancelled by TMTB. In particular, would the statutory rights of utility companies that apply to undertake works in roads apply to the Maori roadway or would there need to be separate arrangements with TMTB documented with utility companies?

21. **In conclusion**, based on the current lack of clarity I consider that this matter remains unresolved. The uncertainty of securing necessary legal arrangements is a fundamental problem in terms of ensuring supporting infrastructure to efficiently and effectively service the Plan Change area, particularly when such infrastructure is fundamental to the viability of the Plan Change. At present, given the lack of detail and the need to reach agreement about such matters, I could not recommend that the Council contemplate this concept as being a satisfactory solution let alone commit to it at this stage. Accordingly, I do not support the Plan Change as it leaves these necessary legal arrangements with Council, TMTB and the Maori Land Court to future chance.

Dated 15 May 2020

A handwritten signature in black ink on a light blue background. The signature is stylized and appears to be 'Denis Lewis'.

Denis Lewis

Taupō District Council Infrastructure Manager

20 April 2020

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Attention: Maria Nepia and Cher Mohi

Proposal for Maori Roadway and Deed

1. We act for the Proprietors of Hauhungaroa No.6 (**the Incorporation**). This letter follows our discussion with Cher Mohi at a Zoom meeting on Friday 17th April.
2. The Incorporation is the proponent of Proposed Plan Change 36 (**PPC36**) to the Taupo District Plan. PPC36 is a private plan change which seeks to rezone a 14.63 hectare area north of Whareroa Stream adjoining the existing Whareroa settlement. PPC36 seeks to rezone this subject land from Rural Environment to Residential.
3. Taupo District Council (**TDC**) has received submissions on PPC36. The TDC has appointed and delegated an independent panel of Commissioners in accordance with the Joint Management Agreement with the Tūwharetoa Māori Trust Board (**Tūwharetoa**). The panel will hear the submissions on PPC 36 and make decisions on those submissions. The hearing is scheduled to start on 13 May 2020.

Part Hauhungaroa 6A Block

4. Part of the land that is affected by PPC36 is the 18.9873 hectare parcel of General Land legally described as "Part Hauhungaroa No 6A Block" (**the 6A Block**). The Whareroa Streambed (**the Streambed**) adjoins the 6A Block (**LINZ title attached**).
5. Taupo District Council has raised the question of the legal status of the bridge proposed to cross the Streambed to serve as access to the proposed residential development (**the proposed development**). In particular, Council is concerned that the bridge structure may not be able to vest in Council because the bridge will cross land owned by Tuwharetoa (the Streambed).
6. Council officers are also concerned that lack of status as a council owned road could prevent Council from managing the road (for example controlling traffic speeds and movements on the bridge) and prevent access to NZTA funding for future maintenance.

Access and Bridge

7. We understand and appreciate that Tūwharetoa owns the Streambed and also supports the proposed development including the access road and bridge but is unlikely to agree to forego property ownership rights in relation to the streambed. We understand that Tūwharetoa has indicated willingness to agree to a licence or easement-type arrangement which would give the public lawful access over the



Streambed. The difficulty is that a licence doesn't provide legal security for TDC and an easement may not provide access to NZTA funding.

8. In order to provide TDC with some confidence around the legal mechanism that could apply to the bridge, the Incorporation sought legal advice from Michael Grayson (**MG**), of law firm Grayson Clements Limited who are Crown Accredited Agents and were closely involved with preparing the Deed of Settlement with Tuwharetoa which vested the ownership of the bed of Lake Taupo and its tributaries in the Tuwharetoa Trust.
9. The essence of the proposal discussed with Cher is set out below together with further legal context.

Proposal

10. The Incorporation proposes an agreement between Tuwharetoa, TDC and the Incorporation whereby a bridge would be built by the Incorporation and owned by TDC while Tūwharetoa would retain legal ownership of the Streambed.
11. In order to provide legal status for the bridge, MG suggested that the road over the bridge could be declared a Maori Roadway. This would follow a joint application to the Maori Land Court by the Incorporation, TDC and Tuwharetoa.
12. The advantage of the bridge having Maori Roadway status is:
 - (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.¹ The Court will, however not lay out a roadway connecting with any public road without the consent of the territorial authority for the district in which the connection would be effected.²
 - (b) The Local Government Act 1974 (**the LGA**) then allows for a local council to maintain, repair or improve any Maori Roadway laid out in the district.³
 - (c) The LGA also allows for a council to contribute towards the cost of maintaining, repairing, widening, or improving a Maori Roadway.⁴ Before exercising these powers however, consent must be obtained from the owners of the land comprising that roadway.⁵
 - (d) There is also a provision in the Land Transport Management Act 2003 (**the LTA**) 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.⁶ This provision should address TDC's concerns around future maintenance funding for the bridge.

Process going forward

13. The Incorporation proposes that alongside an application for bridge access being declared a Maori Roadway by the MLC, a Deed is entered into between Tūwharetoa and TDC.

¹ Te Ture Whenua Maori Act 1993, s 318(2).

² s 317(6).

³ Local Government Act 1974 s 324A (1)(a).

⁴ s 324A (1)(b).

⁵ S 324A (2)(a).

⁶ Land Transport Management Act 2003, s 22(2).




14. A Deed 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 will also cover details and security of services and utilities which will be attached to the bridge in order to service the subject land.
15. The Incorporation intends to ask the MLC to approve a land exchange between its farm holding and the area of SNA that will be protected and is currently within the 6A Block. It would be efficient for the parties to make a joint application to the MLC seeking all orders as part of a basket of changes that will support the Incorporation's development goals.
16. It is anticipated that the terms of the Deed and application to the MLC would take some time to finalise and that this will happen after the rezoning of the land is confirmed but before subdivision and development consents are given effect.

Desired Outcome

17. The hearing for PPC 36 is scheduled to begin on 13 May 2020 and the Council's planning report with recommendations is due this Wednesday 22 April. The Incorporation's briefs of expert evidence are due to be filed with the hearing panel on Wednesday 29 April. The evidence will also be available on the TDC website from then.
18. To address the concerns expressed by TDC around the issue of access to the proposed development, the Incorporation seeks an 'in principle' agreement, in writing, from Tūwharetoa. We would ideally provide that 'in principle' agreement to Council as soon as possible and as an annexure to the Incorporation's evidence.
19. The agreement would confirm that Tūwharetoa is willing to negotiate a Deed to provide bridge access to the proposed development and agrees in principle that a portion of stream bed, encompassing the bridge could be declared a Maori Roadway subject to MLC approval, with costs to be borne by the Incorporation.
20. Given the time pressures we would appreciate a response to this letter in the next few days if at all possible. A response confirming that you have considered this letter and support the proposals set out in paragraphs 9 - 18 above should be sufficient at this stage. We look forward to your response.
21. Please do not hesitate to contact us if you have any comments or queries.

Yours faithfully
Harkness Henry
SPECIALIST LAWYERS



JOAN FORRET

Partner
encl.

