BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

IN THE MATTER	of the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010)
AND	
IN THE MATTER	of TOPIC 081 Rezoning and Precincts (Geographical Areas)

SUBMISSIONS OF COUNSEL FOR TE KAWERAU IWI TRIBUAL AUTHORITY (KAWERAU) ON TOPIC 081 (SUBMITTER 4321)

RIVERHEAD 2 PRECINCT

Dated 05 April 2016

INTRODUCTION

1 Te Kawerau a Maki is the northern-most member of the Tainui confederate. It settled Treaty claims with the Crown in Sept 2014. That was 30 years after the *Report on the Manukau Claim* (WAI8), issued July 1984. The Waitangi Tribunal, in its cover letter, noted the 'myth' about Maori development:

> There is a myth that Maori values will unnecessarily impede progress. Maori values are no more inimical to progress than Western values. The Maoris are not seeking to entrench the past but to build on it. Their society is not static. They are developers too. Their plea is not to stop progress but to make better progress and to progress together. It is not that they would opt out of development in New Zealand. It is rather they need to know they have a proper place in it.
>
> They need that assurance. The Tainui tribal authorities are actively promoting policies to improve the economic and social performance of their people and engender a better respect for the laws and institutions of the country. The profound question is whether they can succeed given the enormous denigration their people have had to suffer and which influences their view of our current society in every way. The issue is not whether they can succeed, for they must. The issue is how we can help them succeed, for that question affects us all. It affects the hope implicit in the Treaty, of our forebears that together we can build a better nation.

2 Expressed in more modern language, Section 8 of the Te Kawerau a Maki Claims Settlement Act 2015 states:

> s8, Clause (9): "The Crown acknowledges that the cumulative effect of the Crown purchasing, public works takings, and private purchasing **has left Te Kawerau ā Maki virtually landless**. The Crown's failure to ensure that Te Kawerau ā Maki were left with sufficient land for their present and future needs was a breach of the Treaty of Waitangi and its principles. This **hindered the social, economic, and cultural development** of Te Kawerau ā Maki as a tribe, and undermined the ability of Te Kawerau ā Maki to protect and manage their taonga and their wāhi tapu and to maintain spiritual connections to their lands. The Crown further acknowledges that this has severely impacted on the well-being of Te Kawerau ā Maki today." [Emphasis added]

3 The *Motonui–Waitara* Report (Wai 6) noted that the Treaty could be adapted to meet new circumstances and that the Treaty *'was not intended to fossilise the status quo, but to provide a direction for future growth and development ... as the foundation for a developing social contract*'. The Treaty was *'capable of ... adaptation to meet new and changing circumstances ...*'. Similarly, in *Muriwhenua Fishing* the Tribunal stated *'As a property right, it was not limited to the business as it was, or the places that*

existed, but had every facility to expand'.

4 The underlying theme is empowerment and appropriate development. Riverhead 2 is Kawerau's opportunity for economic sovereignty. It is the key means for Kawerau to address "..*social, economic and cultural development*.." It Is analogous to The Base for Waikato-Tainui. This was the "jewel in the settlement crown for Tainui.."[1] It was within Waikato-Tainui's rohe, despite not being cultural redress land or land of high cultural significance. Riverhead 2 (like The Base) has importance by reason of the Crown-Kawerau settlement. For this reason, Kawerau challenges Council's starting premise for the PAUP Riverhead 2 Precinct. David Hookway's evidence is that:

> "[1.3] The purpose of the precinct is to protect the development potential of the land as at the time of settlement with the Crown, particularly in regards the ability to develop housing for Maori." [EIC]

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[1] *Waikato-Tainui Te Kauhanganui Inc v Hamilton City Council* CIV2009-419-1712, Allan J, 3 June 2010 (HC) referring to The Base:

"[88] At this point it is appropriate to say something about the status of The Base. ... Although the land upon which The Base is situated was not Maori land as such, the property formed part of the historic settlement achieved with the Crown in 1995. The background history is set out in the preamble to the Waikato Claim Settlements Act 1995. Mr Wetere describes The Base and its importance as an asset that is able to further the goals and policies of Tainui by providing a **future income stream for the tribe. Profits from The Base are returned to marae and to Tainui members** by way of educational grants and as distributions made **for cultural and health purposes**. **... It is the jewel in the settlement crown for Tainui.** Anything which tends to reduce the value of The Base and therefore the plaintiff's ability to care for tribal members from the income The Base produces, is of the gravest concern to the plaintiff. For these reasons, the interests of the plaintiff in its capacity as a significant landholder affected by Variation 21, and its iwi authorities are closely related, and indeed are largely inseparable. ... [90]... It **does not matter that The Base was not formerly land of exceptional significance to Tainui** ... **Much of the Waikato was formerly Tainui land in a general sense, but The Base has now become an area of particular importance to the plaintiff by reason of the terms of the Raupatu settlement.** In other words, there is a direct nexus of significant importance between the plaintiff and The Base: see in a somewhat different context the observations of Holland J in *The Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* HC Wellington M655/86, 31 March 1987 at 8-9." [Emphasis added]

5 This underlying PAUP premise was not s8 RMA-compliant and breached Treaty principles under the Act. The right of development is reflected in case law.[2] Council has now stepped away from this precinct limitation but this false premise tainted Mr Hookway's planning assessment. His starting point tainted his finishing point on density (originally +/- 30 dwellings for Maori or hapu housing for sub-precinct B, leading to acceptance of 4HA site sizes[3]). This might seem 'reasonable' or a 'good outcome' if compared to the notified PAUP position. However the density limitation based on Maori or hapu housing was never an acceptable outcome. In s8 RMA terms, it was a false analogy or 'apples with oranges' comparison.

6 As will be outlined by Peter Reaburn, the key issue now in dispute is lot density: the extent to which sub-precinct B can be subdivided. Sub-precinct B is only 11% of the entire land area. And the ability to subdivide down to 1HA lot average can be undertaken without adverse effects. Indeed there is scope for ecological wins, with SEAs identified by Kawerau to be protected in perpetuity during staging of subdivision. As noted by Mr Reaburn in EIC:

> "[4.6]..(b) Objective 1 seeks that natural resources rather than built forms predominate. I do not consider that to be a reasonable objective for all of a 3282 ha of land..it is necessary..to make appropriate provision on this land to contribute to the social and economic development of TKITA..a small part only (11%) of that land is sought to be utilised for low

[2] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [27] the High Court outlined a list of "central principles" of the Treaty including: (a) Partnership - The Treaty has the basic object of two peoples living together in one country; (b) Mutual obligations to act reasonably and in good faith - This includes good faith consultation between the parties; (c) Active protection - an obligation to actively protect Māori interests. There is no single or authoritative list of the principles of the Treaty of Waitangi for decision makers to consider. The High Court adopted the list referred to in Laws NZ, Treaty of Waitangi at [12] and paraphrased a list of "central principles". This includes the right of development: *Motonui–Waitara* Report (supra).

[3] Council memorandum dated 04 April 2016 at [3]: "..the majority of the precinct provisions appear capable of agreement between the parties, however, **the main point of disagreement is the proposed density of development in the precinct**. The submitter proposes an average site size of one hectare. The Council officers and experts consider a minimum site size of four hectares to be appropriate, given the proposed underlying Rural Production zoning. Further information, in particular relating to landscape matters, is sought from the submitter before any lower density could be supported by the Council. This has not yet been received."

density residential settlement. In that area there will be a balance created between built form and natural resources..”

7 Council opposes 1HA averaging and seeks a 4HA minimum lot size. Council is opposed to a Countryside Living approach, in favour of (what it claims) is a “Rural” approach. However the only written expert evidence to support Council’s position is the planning evidence of Mr David Hookway. In contrast, Kawerau submits that the legislative intention will best be achieved through the sub-precinct provisions recommended by Peter Reaburn. These are most appropriate from an RMA perspective, and provide for the s6(e), 7(a) and 8 RMA values, as reflected in PAUP RPS provisions.[4]

8 Of most importance to today’s hearing, the overwhelming weight of expert evidence supports intensification to a 1Ha average basis. This is the position recommended by Mr Reaburn, supported by landscape, ecological and traffic evidence. The only non-planning expert evidence before you has been provided by Kawerau. Kawerau opposes any attempt by Council to produce additional evidence from experts other than Mr Hookway. This would prejudice Kawerau, and it is far too late in the process.

9 As might be expected, the theme of “development” of commercial redress land is repeated in PAUP RPS provisions. There is a “limited supply” of Treaty Settlement land. Treaty Settlement land is intended for appropriate Mana Whenua development. That development should contribute to the social and economic wellbeing of Mana Whenua.[5]

10 The limited supply of Treaty Settlement land, in comparison to other Rural Production land, and legislative provenance as redress for 175 years of Treaty breaches, are both

[4] On *King Salmon* principles: “[27] Under s 8 decision-makers are required to “take into account” the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.”

[5] Peter Reaburn, EIC at 1.2 citing Chapter B, 5.1.3.c

unusual planning qualities for the subject site. The site is also one of Auckland's largest planning units, with Kawerau proposing 1Ha averaging across only 11% of it's total land area. These qualities combine with key landscape qualities outlined by Bridget Gilbert in EIC at [39]. These include:

> "[39]..(f) the importance of the site in shaping the landscape character of the surrounding areas as a consequence of its elevation, scale and proximity"

11 These constitute good planning reasons to treat Riverhead 2 as unusual and meriting bespoke treatment.[6] But the PAUP provides other reasons:

> PAUP RPS 5.1, Policy 7 notes: Engage with Mana Whenua **on a case-by-case basis to discuss options for the future use and development** of Treaty settlement land, including:
>
> b. following the signing of a Deed of Settlement, **assessing whether existing zoning meets iwi aspirations**
>
> c. after the relevant Claims Settlement legislation has passed, **working with iwi to develop site specific plan changes to fulfil iwi aspirations** and meet the objectives and policies of the Unitary Plan. [Emphasis added]

12 These are positive verbs ("engage", "assess", "working with"). Active engagement is envisaged. This reflects a Treaty partnership arrangement. It also reflects case law on well-being and duties under ss6(e), 7(a) and 8 RMA.

13 As noted, Riverhead 2 is the "jewel in the settlement crown" for commercial redress. For reasons explained in Peter Reaburn's evidence, it meets the relevant RMA and LGATAPA tests for appropriate intensification.

14 Reference to Council "working with iwi" implies sharing resources to achieve an outcome. But Kawerau has invested significant resources to prepare and present a cogent and professional case for rezoning through precinct provisions. Kawerau engaged a senior and well regarded team of experts to achieve appropriate levels of development under a rezoning and sub-precinct approach. Cato Bolam was engaged

[6] To the extent this is relevant to the PAUP process

in early 2013 and a feasibility study provided to Council for shifting the RUB. Importantly, because this is a recurrent theme in Council's dealings with Kawerau, it was rejected by Council in s32 analysis but with a message that Council would consider additional intensity:

> "..While inclusion of this area in the RUB is not supported for reasons including, compact urban form, environmental issues, capacity, integrity of a defendable RUB boundary, there is potential for alternative ways of providing an appropriate level of development on the land as part of a commitment to on-going dialogue." [cited in Peter Reaburn, EIC at [4.9]]

15 This mixed message has been given by Council repeatedly, most recently in Mr Hookway's primary and rebuttal evidence, both of which refer to the need for more information, but without genuine specifics. That Council has not received political support to alter its position[7] is not a good planning reason to reject Kawerau's relief.

16 Kawerau's detailed proposals have been rejected, with the thinnest of justifications, but always with the promise of more consideration. Council's position of "non-engagement" or "part-engagement" is reflected in David Hookway's EIC and rebuttal, Council's 081 legal submissions, Council's failure (until +/-4 weeks ago) to engage experts to review Kawerau's landscape, traffic and ecological evidence; Council's failure to file written EIC or rebuttal from specialist experts, to allow Kawerau a fighting chance to respond; and most recently, in the memorandum filed by Council yesterday referring to unspecified additional landscape, traffic and stormwater information.

17 Given the procedural hurdles, Kawerau submits that the time for a decision is now. Kawerau has provided supporting evidence, by an overwhelming margin, to justify the sub-precinct approach. Council has recently (in the last 4 weeks) engaged specialist reviews however it has not filed any written evidence from these experts and it is now too late (and it would be prejudicial) for their evidence to be considered. Council is

[7] Council's memorandum dated 04 April 2016 at [4]: "Councillors have not considered the appropriateness of any change in Council position from that indicated at the hearing on 3 March 2016. Therefore, before Council officers can agree to amendments to the proposed precinct provisions, it will need to seek approval from the relevant Council Committee."

solely reliant on David Hookway's evidence, and should stand or fall on the strength of that evidence, discussed below.

COUNCIL EVIDENCE

18 The only evidence filed by Council is provided by David Hookway. Kawerau has a number of concerns with Mr Hookway's evidence. This includes:

19 Mr Hookway does not assess s8 RMA and Treaty principles in either his EIC or rebuttal. He does not assess how s6(e) might impact the appropriateness of Kawerau's sub-precinct approach. This is a fatal flaw in his evidence because Mr Hookway has failed to assess matters of national importance central to the outcome in this case.[8]

20 There is no mention of s8 RMA in EIC or rebuttal at all.[9] Nor of s6(e) RMA. There is no reference to the relevant RPS PAUP provisions that refer to Treaty Settlement land, stated by Mr Rebuttal in EIC to be of key planning importance. This is despite the obvious point that Kawerau's land is Treaty Settlement land, a point discussed in detail by Peter Reaburn in EIC. Mr Hookway had the opportunity to correct this oversight in rebuttal. He did not.

21 Mr Hookway refers uncritically to the purpose of the Riverhead 2 precinct land. As noted by him:

> "[1.3] The purpose of the precinct is to protect the development potential of the land as at the time of settlement with the Crown, particularly in regards the ability to develop housing for Maori." [EIC]

22 There is no assessment by Mr Hookway of the appropriateness of this descriptor. By reference to the settlement legislation, it is wrong in law, because it is commercial redress land. The "time of settlement with the Crown" was not later than Sept 2014 (arguably earlier), when Parliament passed the settlement legislation. The purpose of

[8] At [8.1] of EIC he adopts John Duguid's discussion of the statutory framework in Topic 080. This is not sufficient when the central planning issue is weight to be attributed to s8 RMA principles.
[9] At [11.2] EIC he notes the land "has been given to local iwi as commercial redress" as part of a Treaty settlement (similar wording is used at [13.2] EIC). This is purely descriptive and does not constitute a planning analysis of competing Part 2 RMA factors.

the precinct should therefore have been re-evaluated by Mr Hookway, in light of its' status as commercial redress land. Instead, it has been treated as a "holding pattern":

> "[3.4] As outlined in my primary statement of evidence on this precinct, the precinct provisions were intended to protect the development potential of this land, in particular the ability to develop housing for Maori, and in that sense can be described as 'holding' provisions.." [David Hookway, Rebuttal]

- There is therefore no analysis of Council's duty under s8 to enable a 'right of development'.

23 The primary thrust of Mr Hookway's evidence is that "more information" is required. Council's latest memorandum, dated 04 April 2016, notes the need for further landscape, stormwater, transport information and consultation. No specifics are given in the Memorandum. For example, the Memorandum states:

> "Further input is required from Auckland Transport and Council's stormwater team."

But Kawerau simply doesn't know what "further input" is required, and it is too late to raise unspecified concerns, unsupported by any evidence, as a reason to reject Kawerau's relief sought.

24 Another issue raised in Council's memorandum is:

> "[4](d) The consistency between the proposed precinct provisions, as promoted by the submitter, and the underlying Rural Production zone, in light of the Panel's Interim Guidance dated 31 July 2015."

The point raised is question-begging or circular. Peter Reaburn has recommended a sub-precinct approach to address consistency with the underlying zone. In contrast, Kawerau submits that it has provided substantial evidence, by an overwhelming margin, to justify the sub-precinct approach in relation to all of these areas. Kawerau provided detailed evidence with its primary submission including identification of additional SEAs. Despite this being a matter of national importance under s6(c) RMA, and a potentially important offset benefit, the value of proposed SEAs was not investigated by Council, until very recently.

25 The landscape, transport and infrastructure issues have been addressed, and there is only the evidence of Bridget Gilbert (as to landscape) and Don McKenzie (as to traffic)

before you on this. For the record, the landscape information requested was an email from Melean Absolum sent on Friday 01 April 2016 to Peter Reaburn / Bridget Gilbert.[10] Despite the short notice, Peter Reaburn and Bridget Gilbert prepared revised Precinct provisions and these were served on Council and filed with the IHP yesterday (4 April 2016). Remarkably, those provisions seem largely non-contentious now apart from the density issue.

26 As to any residual concerns on consultation,[11] the PAUP process is a public process. The provisions of the RMA enable submitters to seek rezoning of land, even if it is not owned or controlled by them. There are significant numbers of submissions to the PAUP (including by Council) that relate to extensive areas of urban land in Auckland. The further submission process allows input from all interested parties who were in opposition to or supportive of the relief sought by Kawerau. No other party has indicated an interest in any involvement despite the PAUP public processes involved. No scope or consultation issues can be said to arise.

27 Kawerau seeks the relief outlined in the latest track change version of the Riverhead 2 sub-precinct provisions, dated 04 April 2016. Attending at this hearing today are:

- Te Warena Taua, ONZM, as Chair of Kawerau, Trustee and kaumatua;
- Edward Ashby, representative for Kawerau;
- Bridget Gilbert, landscape expert;
- Jessica Reaburn, ecological expert;
- Don McKenzie, traffic expert;
- Peter Reaburn, planning expert.

Dated this 05th day of April 2016

[redacted]

Counsel for Te Kawerau Iwi Tribal Authority Inc

[10] No criticism is made of Ms Absolum, or any of other specialist experts, only recently engaged by Council.
[11] Council's memorandum dated 04 April 2016 refers to "Concern about the lack of local community consultation and input."