**BEFORE THE INDEPENDENT HEARING PANEL**
**APPOINTED BY THE KĀPITI COAST DISTRICT COUNCIL**

**Under the** Resource Management Act 1991

**In the matter** of Plan Change 3 to the Operative Kāpiti Coast District Plan

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# LEGAL SUBMISSIONS ON BEHALF OF KĀPITI COAST DISTRICT COUNCIL

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SIMPSON GRIERSON

**Matt Conway**
T: +64-4-499 4599
matt.conway@simpsongrierson.com
PO Box 2402 Wellington

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## 1. Introduction

**1.1** These legal submissions are made on behalf of Kāpiti Coast District Council (**Council**), in respect of Plan Change 3 (**PC3**) to the Operative Kāpiti Coast District Plan (**ODP**).

**1.2** PC3 was notified on 18 September 2024 and aims to identify and protect Kārewarewa Urupā as a site and area of significance to Māori (**SASM**) within the ODP, consistent with the Council's obligations under sections 6(e) and 6(f) of the Resource Management Act 1991 (**RMA**).

**1.3** The key changes PC3 makes to the ODP include:

(a) the addition of Kārewarewa Urupā to Schedule 9 (Sites and Areas of Significance to Māori), including two entries reflecting different wāhanga classifications; and

(b) amendments to the ODP planning maps to properly identify the spatial extent of the Kārewarewa Urupā.

**1.4** These legal submissions:

(a) set out the background to PC3;

(b) outline the statutory and legal framework relevant to PC3;

(c) describe the amendments introduced through PC3 and their planning implications;

(d) address key issues raised in submissions, including scope, reasonable use, and process; and

(e) provide the Council's response to those issues in support of PC3.

## 2. Background to PC3

**2.1** The ODP regulates the subdivision, use and development of land in the Kāpiti Coast district. Included in the ODP are provisions that restrict and regulate activities in any area listed in Schedule 9 "Sites and Areas of Significance to Māori" (**Schedule 9**).

**2.2** On 18 August 2022, the Council publicly notified proposed plan change 2 (**PC2**) to its ODP.[1] PC2 was the Council's 'intensification planning instrument' (**IPI**), prepared in accordance with requirements introduced into the RMA by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**).[2] Those requirements included the incorporation of the Medium Density Residential Standards (**MDRS**) and related intensification policies and objectives. As an intensification-focused plan change, PC2 was subject to specific statutory constraints as to the scope of provisions that could lawfully be included.

**2.3** PC2 also proposed to add an area of land known as Kārewarewa urupā to Schedule 9 (**wāhi tapu listing**). As a result, from the time that PC2 was publicly notified, the ODP's more restrictive regime for areas listed in Schedule 9 applied to activities within the area defined by the wāhi tapu listing.[3] One of the activities the wāhi tapu listing affected was a subdivision and residential development proposed by the Waikanae Land Company Limited (**WLC**), as some of WLC's land fell within the wāhi tapu listing.

**2.4** The resource consent application for this development was directly referred to the Environment Court.[4] On a preliminary question of law arising under those proceedings, the Environment Court determined that the wāhi tapu listing exceeded the matters that the Council could lawfully include in

1 For the avoidance of doubt, references to the ODP are references to the ODP prior to PC2 becoming operative.

2 Broadly, the Amendment Act amended the RMA to require tier 1 territorial authorities to prepare and publicly notify an IPI, appoint an independent hearing panel to hear submissions on the IPI, and then make decisions on the hearing panel's recommendations. Recommendations that were accepted were incorporated into the district plan. Any rejected recommendations were referred to the Minister to make a final decision.

3 RMA, s 86B(3)(d): a rule in a proposed plan has legal effect if the rule protects historic heritage.

4 Instead of by the Council, which would otherwise be the consent authority at first instance.

PC2 (**Decision**).[5] On appeal by the Council, the High Court upheld that determination and quashed the wāhi tapu listing in PC2.

**2.5** Following the High Court's determination that the wāhi tapu listing could not be included in PC2, the Council initiated PC3 as a standalone plan change to address the identification and protection of Kārewarewa urupā through the ordinary plan-making framework included in Schedule 1 of the RMA. PC3 was notified on 18 September 2024, at which point the ODP's more restrictive regime for areas listed in Schedule 9 applied to activities within the area defined by the wāhi tapu listing.

## 3. RMA plan stop and exemption

**3.1** Section 80Q of the RMA, as amended by the Resource Management (Consenting and Other System Changes) Amendment Act 2025, requires councils to withdraw proposed plan changes (and other planning instruments) that have not yet reached a hearing, unless they are covered by an automatic exemption under s 80U or have been granted an exemption by the Minister for the Environment under s 80V.

**3.2** As the hearing for PC3 had not begun, PC3 became subject to these provisions.

**3.3** Pursuant to s 80V, on 23 October 2025 the Council applied to the Minister for an exemption to allow PC3 to continue through the plan change process (**exemption application**). The exemption application pursued s 80W(2)(h) as the primary criterion for exemption, being that it would enable work to be progressed that, for any other reason, the Minister considers appropriate. The Council advanced the following matters in support of the exemption application:

> 1. Granting this exemption will address a Crown-acknowledged breach of the Treaty of Waitangi which led to the desecration of an urupā. … [T]he Waitangi Tribunal has recommended the Crown's historic breach be

5 *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56.

remedied. Without Ministerial exemption, and the protection the plan change exemption enables, the urupā can be disturbed by subdivision, earthworks and development.

2. Although the site addressed by PC3 is not yet subject to a Treaty of Waitangi settlement Act or deed of settlement, the Waitangi Tribunal report identifies the historic Crown-acknowledged breach of the Treaty of Waitangi as a matter requiring urgent action via the protection of the urupā.

3. This plan change has progressed through the consultation phases and Council has appointed an independent hearings panel to hold a hearing and make recommendations to Council on the plan change. The 'Plan Stop' requirements have halted the progression of the hearing.

**3.4** Those matters were further supported by sections 5, 6 and 7 of the exemption application, which set out the reasons for why PC3 needed to progress, how PC3 aligned with Government priorities, and what consequences would ensue if an exemption was not granted.

**3.5** In summary, sections 5, 6 and 7 of the exemption application highlighted that:

(a) progression of PC3 addresses a recognised gap in the ODP, and gives effect to findings of the Waitangi Tribunal identifying Kārewarewa Urupā as requiring urgent protection;

(b) PC3 aligns with Government priorities by supporting Treaty partnership obligations, protecting nationally significant cultural heritage, and ensuring planning resources are directed to critical work during the RMA reform transition;

(c) if PC3 did not proceed, the urupā would remain without statutory protection under the RMA, exposing it to the risk of further disturbance, undermining confidence in Crown and Council commitments to mana whenua; and

(d) PC3 had already progressed through consultation and submission stages, with an independent hearings panel appointed, and

withdrawal of the plan change at that point would result in unnecessary duplication, delay, and loss of substantial effort already invested by the Council, mana whenua, submitters, and other participants.

**3.6** Following this application to the Minister, the plan change exemption has since been approved, allowing the Council to proceed with PC3.

## 4. Legal framework relating to plan changes

### *The Council's role of administering its district plan*

**4.1** The Council has a responsibility to prepare and administer its district plan.[6]

**4.2** The purpose of a district plan is to "assist territorial authorities to carry out their functions in order to achieve the purpose of [the RMA]".[7] The district plan sits within a "cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 [of the RMA] more generally".[8]

### *Relevance of Part 2 of the RMA*

**4.3** Any change to the district plan must be made in accordance with matters including part 2 of the RMA (sections 5–8), titled "Purpose and principles".[9]

**4.4** Section 5 identifies that the RMA's purpose "is to promote the sustainable management of natural and physical resources", which includes enabling people and communities to "provide for their social, economic, and cultural well-being".

**4.5** Section 5 is "given further elaboration" by the remaining part 2 provisions, section 6, 7 and 8.[10] All three of these sections start with the words: "In achieving the purpose of this Act, all persons exercising functions and

6 RMA, s 72–73.
7 RMA, s 72.
8 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 *[King Salmon]* at [30].
9 RMA, s 74(1)(b).
10 *King Salmon*, above n 10, at [25].

powers under it, in relation to managing the use, development and protection of natural and physical resources, shall…". They form "instructions to functionaries" which do "not make qualifications or exceptions" and are "a clear statement to inform those exercising their functions and powers".[11]

**4.6** Section 6 sets out seven matters of national importance that decision-makers "shall recognise and provide for". The following two matters of national importance are relevant here:

> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:

**4.7** Section 7 provides for certain matters that decision-makers "shall have particular regard to". Relevant here is section 7(a) "kaitiakitanga".

**4.8** Finally, section 8 provides that decision-makers "shall take into account" the principles of the Treaty of Waitangi.

**4.9** The directions in sections 6(e), 7(a) and 8 are "strong directions, to be borne in mind at every stage of the planning process".[12]

**4.10** Part 2 therefore provides the backdrop against which PC3 has been prepared and PC3's contents must be prepared in accordance with it.

***Further requirements to comply with when making a plan change***

**4.11** A plan change must also be made in accordance with the Council's functions under section 31.[13]

11 *Royal Forest & Bird Protection Society of New Zealand Inc v Manawatu-Wanganui Regional Council* PT A86/95, 26 September 1995 at 24.

12 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

13 RMA, s 74(1)(a).

**4.12** As expressed in section 31, the Council's functions are "for the purpose of giving effect to [the RMA]".[14] Those functions relevantly include:[15]

> **the establishment, implementation, and review of** objectives, policies, and **methods to achieve** integrated management of the effects of the use, development, or **protection of land and associated** natural and **physical resources of the district**.

**4.13** The Council's authority for exercising its RMA functions is therefore inextricably linked to the RMA's purpose.

**4.14** Also included in section 74 are obligations to prepare an evaluation report in accordance with section 32 (**section 32 evaluation**) and have particular regard to it.

***The requirement for a section 32 evaluation***

**4.15** A section 32 evaluation is a key safeguard to ensure the necessary RMA obligations and hierarchy are demonstrably adhered to in preparing a plan change. It requires the evaluation of the objectives of the proposal, and whether they are the most appropriate way to achieve the RMA's purpose.[16] It also requires the Council to further evaluate the proposed changes, and whether they are the most appropriate way to achieve the objectives of the proposal.[17] This analysis includes the identification of other reasonably practicable options and a comparative assessment of efficiency and effectiveness of the provisions.

## 5. The identification of Karewarewa urupā

**5.1** While preparing PC2, the Council had identified Kārewarewa Urupā as a wāhi tapu that was afforded no specific protection in the ODP. The PC3

14 RMA, s 31(1).
15 Section 31(1)(a).
16 RMA, s 32(1)(a).
17 RMA, s 32(1)(b).

section 32 evaluation report includes the following summary of the urupā's history:[18]

> In 1839, the historically important battle of Kuititanga occurred in the Waikanae district, and many of those who died in this battle were buried at the urupā... In 1919, the block of land containing the urupā was partitioned off from a larger block of Māori freehold land. The block of land was sold to the Waikanae Land Company in 1969, who successfully applied to the then Horowhenua County Council to have the Māori cemetery designation that covered the urupā removed from the District Scheme. Since this time approximately half of the land has been subject to residential urban development, around Te Ropata Place, Barrett Drive and Marewa Place

**5.2** Since 1969, the land has progressively been developed in stages. In 2000, kōiwi / bones were discovered during earthworks for another stage of WLC's development.

**5.3** The Council's identification of the site as a wāhi tapu, and its conclusion that the site required recognition and protection, was reached following consideration of the Waitangi Tribunal's 2020 Kārewarewa Urupā Report,[19] and following engagement on draft PC2.

**5.4** The 2020 Kārewarewa Urupā Report was prepared in response to a claim lodged by Te Ātiawa / Ngā Ātiawa ki Kāpiti, due to concerns that WLC intended to undertake a further stage of development on land that is part of Kārewarewa. The Waitangi Tribunal's conclusions were made in terms that are unequivocal (our emphasis):[20]

> There does seem to have been uncertainty at times about the name of the urupā located at Tamati Place. But there has always been certainty within the iwi of the existence of an urupā at the confluence of the rivers. The 20-acre block we are concerned with in this report has been consistently identified as a 'Māori cemetery' or 'urupā' in records since 1896.
> …
> **In our view, the traditional, historical, and archaeological evidence is clear that this block was an urupā. We have no doubts on that point.**

18 Section 32 evaluation at 7 and 24.
19 Waitangi Tribunal *The Kārewarewa Urupā Report* (Wai 2200, 2020).
20 At 7.

**5.5** Following the High Court's determination that the wāhi tapu listing could not be included in PC2, in August 2024, the Council provided a draft version of PC3 that included the wāhi tapu listing to the relevant iwi authorities in the Kāpiti Coast District – Te Ātiawa ki Whakarongotai, Ngā Hapū o Ōtaki and Te Rūnanga o Toa Rangatira. The covering email noted that:

(a) PC3 would provide for Kārewarewa urupā to be protected in the same manner as was provided for by PC2 prior to the Court's decision; and

(b) before notifying PC3, the Council was required to seek feedback from iwi authorities on a draft version of the plan change.

**5.6** The responses from each of the iwi authorities expressed strong and unified support for PC3. Collectively, the feedback highlighted the importance of recognising mana whenua values, protecting kōiwi and wāhi tapu, and strengthening the partnership between the Council and mana whenua.

***Council's consideration of options***

**5.7** The section 32 evaluation concludes "the existence of the urupā and the values associated with it are a matter [of national importance] that the Council must recognise and provide for under section 6(e)"[21] as well as section 6(f).[22] The evaluation relies on the sensitivity of the urupā to any form of development that involves the disturbance of land or the construction of buildings, and the significant adverse effects on the tangible and intangible cultural and heritage values associated with the site (including the potential to encounter or otherwise disturb kōiwi). The section 32 report further concludes:[23]

> the level of development permitted by the MDRS is considered to be inappropriate to occur at the urupā. It is therefore appropriate to provide restrictions on development in order to provide for the Kārewarewa Urupā as a qualifying matter. Schedule 9 of the District Plan describes appropriate levels of development in relation to various types of wāhi

21 Section 32 report at 60.
22 In accordance with s 77J(3).
23 Section 32 evaluation at 60.

tapu site. The descriptions associated with *wāhanga tahi* and *wāhanga rua* categories are most relevant to the types of land located at Kārewarewa Urupā.

**5.8** In accordance with the requirements of section 32, two other reasonably practicable options were evaluated:[24]

> **Option 2 – Status quo:** Do not recognise or provide for Kārewarewa Urupā as a wāhi tapu site. Subdivision, use, and development would continue to be enabled based on the application of the General Residential Zone provisions (which incorporate the MDRS).
>
> **Option 3 – Provide for lower density development provisions in the area (but do not identify Kārewarewa urupā as a wāhi tapu site):** Take Kārewarewa Urupā into account through providing for lower density development provisions at the site, rather than recognising it as a wāhi tapu site in Schedule 9. This could include:
>
> - Limiting the density of development within the area, including by reducing the number of permitted residential units per site, and reducing building coverage;
> - Limiting subdivision within the area by introducing minimum allotment size and shape requirements.

**5.9** The section 32 evaluation concludes that neither option would be consistent with the Council's section 6 obligations.

**5.10** In relation to Option 2, the section 32 evaluation concludes that it is not an appropriate method of achieving the objectives of the ODP and the purpose of the RMA.[25] In particular, the evaluation finds that Option 2:

(a) would fail to protect the cultural and heritage values of Kārewarewa Urupā from inappropriate subdivision, use, and development;

(b) would not recognise or provide for the relationship of Te Ātiawa ki Whakarongotai with their ancestral land and wāhi tapu or their role as kaitiaki; and

24 Section 32 evaluation at 43. A full evaluation of these options is set out in the s 32 evaluation 49-58.

25 Section 32 evaluation report, at 53.

(c) would disregard the established evidence as to the location and significance of the urupā, including that recorded in the Waitangi Tribunal and Independent Hearings Panel reports.

**5.11** The section 32 evaluation further identifies that Option 2 would perpetuate uncertainty about the site's status, adversely affecting current and future landowners and residents, would be inconsistent with relevant ODP objectives, would fail to give effect to applicable objectives and policies in the RPS, NZCPS, and NPS-UD, and would not enable the Council to meet its obligations under sections 6, 7, and 8 of the RMA.

**5.12** In relation to Option 3, the section 32 evaluation also concludes that the option is not an appropriate method of achieving the objectives of the ODP and the purpose of the RMA. While Option 3 acknowledges the existence of Kārewarewa Urupā, its shortcomings are largely the same as those expressed in relation to Option 2, with the additional concern that Option 3 would result in a confusing and inefficient regulatory and policy framework that does not support appropriate decision-making.

## 6. The wāhi tapu listing's components

**6.1** The wāhi tapu listing consists of the following amendments to the ODP:

(a) Amending Schedule 9 to include two new entries:

| District Plan ID | Name | Type | Iwi | Key access and view points | Wāhanga |
|---|---|---|---|---|---|
| WTSx1 | Kārewarewa | Urupā | Āti Awa | | Tahi |
| WTSx2 | Kārewarewa | Urupā | Āti Awa | | Rua |

(b) Amending the ODP's Historical, Cultural, Infrastructure and District-wide map series, so that it includes a map that identifies the spatial area of the wāhi tapu listing:[26]


*Figure 1: Map of wāhi tapu listing area*

**6.2** PC3 does not amend the operative SASM rules, which are applied by operation of the listing.

## 7. Regulatory effect of the wāhi tapu listing under the ODP

**7.1** The wāhi tapu listing's spatial area is situated principally within the General Residential Zone (**GRZ**) and the ODP enables a range of activities to be carried out in this zone. Existing provisions across the ODP restrict the ability to undertake such activities in a location that is listed in Schedule 9. Some (non-exhaustive) examples of this are as follows:

(a) the ODP contains objectives and policies in relation to areas listed in Schedule 9 (i.e. DO-O7 and SASM-P1);

(b) the ODP includes specific rules and activity classifications for activities in areas listed in Schedule 9;[27]

26 This map is at Appendix A of PC3.
27 For example, the rules in the SASM Chapter.

(c) some rules in the ODP include standards that must be complied with in relation to the Schedule 9 areas, and a failure to comply means that a more restrictive activity classification applies;[28] and

(d) in respect of earthworks, the earthworks chapter does not apply and instead the land disturbance rules under the Sites and Areas of Significance to Māori section of the Historical and Cultural Values Chapter will apply.[29]

**7.2** The wāhi tapu listing therefore triggers restrictions that regulate the range of activities that can occur on the urupā, by overriding some of the underlying provisions that would normally apply in the GRZ. These restrictions came into effect in relation to the urupā on 18 September 2024 when PC3 was notified.[30]

## 8. HNZPTA and RMA as differing mechanisms for protection of heritage

***Requirements under the Heritage New Zealand Pouhere Taonga Act 2014***

**8.1** The Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPTA**) establishes a standalone statutory regime for the protection, preservation, and conservation of historical and cultural heritage, including archaeological sites, in New Zealand.

**8.2** Archaeological sites are broadly defined in the HNZPTA, as follows:

> **archaeological site** means, subject to section 42(3),—
> (a) any place in New Zealand, including any building or structure (or part of a building or structure), that—
> (i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and
> (ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and
> (b) includes a site for which a declaration is made under section 43(1)

28 For example, SUB-DW-R10.
29 Refer to rules SASM-R1 to SASM-R6 and SASM-R10 to SASM-R14.
30 RMA, s 86B(3)(d) provides that "a rule in a proposed plan has immediate legal effect if the rule protects historic heritage". The wāhi tapu listing therefore had immediate legal effect.

**8.3** This definition applies to the wāhi tapu listing.

**8.4** A central feature of the HNZPTA is the absolute prohibition on modifying or destroying an archaeological site unless an authority has first been obtained from Heritage New Zealand Pouhere Taonga. Section 42(1) provides that "no person may modify or destroy an archaeological site if they know, or ought reasonably to have suspected, that the site is archaeological", unless an authority has been granted under the HNZPTA. Persons wishing to carry out works on an archaeological site can, via an application, obtain an authority from Heritage New Zealand Pouhere Taonga under section 44.

**8.5** The HNZPTA archaeological authority process acts independently to the RMA consent process. It applies to any site that fits the definition of "archaeological site", irrespective of whether the activity in question is permitted under the district plan or resource consent has been granted. In any case, an archaeological authority is required from Heritage New Zealand Pouhere Taonga when a project may modify or destroy an archaeological site.

**8.6** The grant or refusal of an archaeological authority is a decision made solely under the HNZPTA. The HNZPTA regime is focused on whether an activity will or may modify or destroy an archaeological site. It operates independently of land use planning considerations and is not displaced, substituted, or overridden by approvals under the RMA.

**8.7** In this case, the wāhi tapu listing is subject to the archaeological and historic heritage provisions in the HNZPTA, which means that any works to modify or destroy the wāhi tapu listing would require an archaeological authority under the HNZPTA, regardless of any ODP provisions.

***Requirements under the Resource Management Act 1991***

**8.8** By comparison, the RMA establishes a comprehensive framework for the sustainable management of natural and physical resources through regional and district plans and the resource consent process.

**8.9** Section 6(e) and (f) of the RMA provide that the protection of historic heritage from inappropriate subdivision, use and development, and the recognition and provision for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, are matters of national importance that must be recognised and provided for.

**8.10** Where land disturbance, subdivision, or development require a resource consent, the Council must consider the actual and potential effects on the environment when assessing the relevant resource consent application. In relation to a wāhi tapu, these effects will include effects on archaeological or heritage values.[31] Consent conditions may be imposed to avoid, remedy, or mitigate adverse effects, including requirements for archaeological assessments or accidental discovery protocols.

**8.11** However, the RMA does not authorise the modification or destruction of archaeological sites. Section 23 of the RMA expressly provides that compliance with the RMA does not remove the need to comply with other applicable legislation.

**8.12** Accordingly, the granting of a resource consent under the RMA does not remove the requirement to obtain an archaeological authority under the HNZPTA. A person may lawfully hold a resource consent yet still commit an offence if they modify or destroy an archaeological site without the requisite authority under the HNZPTA.

31 RMA, s 104.

## 9. Scope constraints in relation to submissions

**9.1** The Hearing Panel's jurisdiction is confined to submissions that are "on" the proposed plan change, as defined by clause 6 of Schedule 1 to the RMA.

**9.2** In *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, the High Court established a two-limb test for determining whether a submission is "on" a plan change. That test, as further addressed by the High Court in *Motor Machinists Limited v Palmerston North City Council* [2013] NZHC 1290, is as follows:

(a) **The submission must address a change to the status quo advanced by the plan change**. That requirement would be unlikely to be met if:

(i) The submission raises matters that should have been addressed in the section 32 evaluation report; or

(ii) The submission seeks a new management regime for a particular resource (such as a particular lot) when the plan change did not propose to alter the management regime in the operative plan; **and**

(b) **There must not be a real risk that persons potentially affected by the change have been denied an effective opportunity to participate in the plan change process**. A precautionary approach is required when receiving submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of a section 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals (which would not occur). To that extent, incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32

analysis is required to inform affected persons of the comparative merits of that change.

**9.3** Both of the above limbs must be met for a submission to be "on" a plan change.

**9.4** In relation to the first limb, the change to the status quo advanced by PC3 is confined to the identification of Kārewarewa Urupā by way of two entries in Schedule 9 and the ODP's maps, as set out in paragraph 6.1 above. As a result:

(a) Submissions supporting or opposing the identification of Kārewarewa Urupā as a SASM, or seeking an amendment to its spatial extent, would meet the first limb because they are directly addressing the change to the status quo advanced by the plan change.

(b) Submissions seeking changes to the rules that apply within the ODP's Wāhanga Tahi and/or Wāhanga Rua overlays may meet the first limb, depending on how they are expressed or (if accepted) how they are implemented. For example, a change to the SASM rules that only altered PC3's effect on Kārewarewa Urupā would likely meet the first limb, whereas a change that also altered the ODP's effect on other Wāhanga Tahi and/or Wāhanga Rua sites elsewhere in the district would likely not meet the first limb.

**9.5** In relation to the second limb:

(a) Submissions supporting or opposing the identification of Kārewarewa Urupā as a SASM, or seeking an amendment to its spatial extent, would meet the second limb because landowners, mana whenua, and the wider public had notice of the inclusion of the SASM, and have had the opportunity to participate either in support or in opposition. Granting this relief would not give rise

to a real risk that persons potentially affected by the change have been denied an effective opportunity to participate in the plan change process.

(b) Submissions seeking changes to the rules that apply within the ODP's Wāhanga Tahi and/or Wāhanga Rua overlays may meet the second limb, depending on how they are expressed or (if accepted) how they are implemented. For example, a change to the SASM rules that only altered PC3's effect on Kārewarewa Urupā would likely meet the second limb. However, a change that also altered the ODP's effect on other Wāhanga Tahi and/or Wāhanga Rua sites elsewhere in the district would likely not meet the second limb. This is because there is a real risk that a person who had received notice of the original plan change would conclude that it only related to Kārewarewa Urupā, and might reasonably have decided not to view the summary of decisions requested by submissions. Granting relief that affected a wider or different spatial area would create a real risk that persons potentially affected by the change have been denied an effective opportunity to participate in the plan change process

**9.6** Several submission points give rise to scope issues based on the test set out above. In particular:

(a) Victor Hewson (S1) seeks relief requiring the Council to implement an ongoing land management regime and provide compensation to affected landowners.

(b) Richard Birkinshaw (S2) proposes that the SASM is replaced with alternative zoning provisions and that a monument is established as a substitute form of cultural recognition.

(c) Laurence Petherick and Ors (S5) seek retention of General Residential zoning across the site, potential use of the land for a

school, consideration of rating impacts, acquisition cost implications, reinterment of remains elsewhere, and the erection of a monument.

**9.7** PC3 is confined to the identification and mapping of Kārewarewa Urupā within Schedule 9 and does not propose changes to zoning, introduce new regulatory or funding regimes, contemplate public works designations, or provide for compensation, rating outcomes, or land acquisition. Relief of that nature would require consideration of matters well beyond the change to the status quo advanced by PC3 and therefore fails the first limb of the *Clearwater* test. Granting such relief would also be likely to fail the second limb, as the PC3 process did not notify affected landowners or the wider public of any such alternative land use or regulatory outcomes.

**9.8** The submission of Brett Osborne (S9) also gives rise to some scope complexities by seeking the removal or amendment of SASM rules (including SASM-R3 and SASM-R11) in a manner that, if taken literally, would apply generally to Wāhanga Rua overlays beyond Kārewarewa Urupā. If the Panel were to accept that relief as sought, it would likely alter the regulatory treatment of all Wāhanga Rua sites across the district, and raise genuine fairness and participation concerns for landowners and mana whenua associated with other Wāhanga Rua sites. However, these matters could be resolved on the basis that any relief granted must be expressly confined to Kārewarewa Urupā.

## 10. Reasonable use

**10.1** Several submitters opposed PC3 on the basis that, generally, the proposed PC3 provisions render affected land incapable of reasonable use. In summary, those submitters contend that the inclusion of the Kārewarewa Urupā SASM overlay:

(a) prevents meaningful development involving land disturbance;

(b) substantially interferes with existing property rights; and

(c) results in land of limited or negligible value, without compensation from the Council.

**10.2** WLC opposes PC3 on the basis that, among other things, "Plan Change 3 will have a devastating impact on WLC's ability to have any reasonable use of the land as intended by the Residential Zoning." The submission also characterises PC3 as amounting to a taking of land without compensation.

**10.3** Brett Osborne (S9) raises related concerns in respect of the proposed Wāhanga Rua overlay, submitting that the removal of MDRS-enabled permitted activities and the imposition of additional controls on already modified residential land is unduly restrictive, and that an accidental discovery protocol would adequately manage residual risk.

**10.4** Other submitters, including Richard Grant Birkinshaw (S2), while not always expressly citing section 85, raise closely related concerns about the breadth and severity of the controls imposed. These include arguments that PC3 applies a "broad-brush" regulatory approach requiring resource consent for ordinary residential works, including subterranean activities.

**10.5** The appropriate response to these submission points will depend in large part on the merits of the SASM listing proposed by PC3 because, if the listing is confirmed, the protection of the SASM should naturally flow from the characteristics of the land. However, specific comments about section 85 and reasonable use are addressed below.

***Section 85 of the RMA***

**10.6** Under section 85(1) of the RMA, an interest in land is deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in the RMA.

**10.7** Subsections (2)-(4) provide an exception to this starting position. If the grounds for the exception are satisfied, the Environment Court can make

an order directing the local authority to either modify the provision in question or to acquire the land from the person, whichever of those options the local authority considers is appropriate. Before exercising that power, the Court must be satisfied that both limbs of section 85(3B) are met, namely that the plan provisions:[32]

(a) make the land incapable of reasonable use; and

(b) place an unfair and unreasonable burden on any person who has an interest in the land.

**10.8** Both limbs must be met before such an order can be made. They are to be measured objectively, and the threshold the applicant must meet is high.[33]

**10.9** While the specific powers in section 85 are only exercisable by the Court rather than by the Hearing Panel, the matters in section 85 are often (as here) raised in submissions on a plan change and the Panel is able to consider them in assessing the merits of the plan change and in deciding on the most appropriate provisions in terms of section 32. Each limb is addressed below to inform the Panel's consideration of these submissions.

***Limb (a): do the provisions make the land incapable of reasonable use?***

**10.10** Reasonable use is defined in section 85(6) in the following way:

> **reasonable use**, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.

**10.11** The effect of this definition is that activities that would cause significant effects on the environment or any person are not considered to be a reasonable use for the purposes of section 85(3B)(a).[34]

32 RMA, s 85(3B).

33 *Redmond Retail Limited v Ashburton District Council [2021] NZHC 2287 (Redmond) at [28] and Steven v Christchurch City Council [1998] NZRMA 289 (EnvC) (Steven) at [14].*

34 *Redmond* at [48] and s 85(6).

**10.12** There are settled principles from Environment Court case law about the assessment of whether a plan provision renders land incapable of reasonable use. Relatively recently, the High Court in *Redmond Retail Limited v Ashburton District Council* (***Redmond***) adopted many of those principles. We have summarised those principles below:

(a) The meaning of reasonable use must be discerned in light of the principles and purpose of the RMA.[35]

(b) The reasonable use need not be the landowner's preferred choice nor the best use of the land, but to be reasonable it must at least be viable.[36]

(c) The enquiry is fact-specific and context-specific.[37] Part of the context is the factual features of the site as well as the provisions of the District Plan.[38]

(d) Neither the need for a resource consent nor the availability of a consenting pathway is determinative of whether land is incapable of reasonable use. Where the potential use is not a permitted activity, a consenting pathway (as a controlled, restricted discretionary or discretionary activity) is a prerequisite for the land to be found to be capable of reasonable use. Non-complying activities are excluded.[39]

(e) In assessing reasonable use, the Court is not required to undertake a quasi-consent hearing exercise but is required to be satisfied that any potential use was feasible or viable.[40]

(f) A granular consideration of reasonable uses by reference to the objectives and policies of the District Plan, and matters of discretion, is unrealistic. In determining whether the provision of

35 *Redmond* at [72] and Legislation Act 2019, s 10.
36 *Redmond* at [49].
37 *Redmond* at [49].
38 *Redmond* at [50].
39 *Redmond* at [48].
40 *Redmond* at [54].

a plan makes any land incapable of reasonable use, the Environment Court cannot speculate about the form a future resource consent may take, or its content.[41]

(g) The test for whether the land is "incapable of reasonable use" is independent of the identity or characteristics of the landowner. In deciding whether the test is met, it is necessary to examine whether the land as a whole is incapable of reasonable use.[42]

(h) "Reasonable use" is not synonymous with optimum financial return.[43]

**10.13** More recently, the Environment Court in *Heritage Lifestyle Parks NZ Ltd v New Plymouth District Council*[44] confirmed that the principles articulated by the High Court in *Redmond* represent the settled approach to assessing claims under section 85 of the RMA and applied those principles without modification or refinement.

**10.14** The assessment under section 85(3B)(a) is forward-looking, particularly in the context of fresh provisions from a plan review process. A "reasonable use" should be self-evidently reasonable, and not fanciful or out of character with the surrounding environment by virtue of a site's location and inherent attributes, which, in this case, contain the SASM listing.

***Limb (b): do the provisions place an unfair or unreasonable burden on any person who has an interest in the land?***

**10.15** If the Environment Court finds that provisions render the land incapable of a reasonable use, it then needs to consider whether the provisions place and unfair or unreasonable burden on the owner of the land.

41 *Redmond* at [58] (which summarises a broader discussion on the topic).
42 See *Steven* cited with approval in *Redmond* at [67] – [69].
43 *Fore World Developments Ltd v Napier CC* EnvC W029/06 at [123] to [127].
44 [2026] NZEnvC 068. (***Heritage Lifestyle Parks***).

**10.16** The Environment Court in *Steven* discussed the meaning of the "unfair and unreasonable burden" test in detail. It found that those words are to be given their normal objective interpretations.[45] The Court also found the following factors relevant to that test:[46]

(a) the natural and physical resources in the case;

(b) whether no reasonable use can be made of the land (first test);

(c) part 2 of the RMA, which underpins everything else in the RMA;

(d) part 3 of the RMA and the inference from section 9 that real property rights prima facie meets the purpose and principles of the Act;

(e) the relevant provisions of the plan concerned;

(f) the rebuttable presumption that the proposed plan is effective and efficient; and

(g) the personal circumstances of the applicant considered objectively.

**10.17** The recent decision in *Heritage Lifestyle Parks* adopts that framework, with the Court proceeding on the basis that reasonable use of the land remained available and it was not persuaded that the plan provisions imposed an unfair or unreasonable burden, notwithstanding constraints on development potential and a more restrictive regulatory framework that existed due to the existence of a SASM.[47] In that context, the Court rejected reliance on the inability to pursue a preferred or more intensive use and did not accept that regulatory uncertainty or perceived hardship was determinative, instead assessing the burden objectively by reference to the relevant plan provisions and the statutory purposes they served.

45 *Steven* at [40].
46 Ibid at [34].
47 See paragraphs [244] - [252].

***Application of these tests to PC3***

*Permitted activity pathways are available at Kārewarewa Urupā*

**10.18** Turning to PC3 and the way it would apply within the ODP, the SASM Chapter provides for a range of permitted activities. In particular:

(a) Land subject to the Wāhanga Tahi overlay is subject to permitted activity rules enabling low-intensity activities and limited land disturbance, subject to appropriate cultural and archaeological safeguards; and

(b) Land subject to the Wāhanga Rua overlay is subject to permitted activity rules that are materially less restrictive, reflecting its modified condition and lower sensitivity. Those rules provide for a wider range of activities, including land disturbance, earthworks, alterations and additions to existing buildings, fencing, replacement buildings, relocation of buildings, and planting or removal of trees.

**10.19** Additionally, activities that are not specifically listed as a controlled, restricted discretionary, discretionary or non-complying activity in the SASM rules are permitted by default provided they comply with the relevant permitted activity standards.[48]

*Resource consent pathways are available as restricted discretionary and discretionary activities*

**10.20** Where activities are not permitted, the SASM framework expressly provides for restricted discretionary and discretionary consenting pathways. In particular, SASM-R10 and SASM-R11 preserve development potential by enabling effects-based assessment of proposals that exceed

48 See SASM-R1.

permitted activity thresholds on both Wāhanga Tahi and Wāhanga Rua, without defaulting to prohibited or non-complying activity status.

**10.21** As reflected in the principles outlined earlier, the requirement to obtain resource consent for specified activities does not render land incapable of reasonable use; rather, it reflects an orthodox regulatory response to land subject to identified historic and cultural values. Nor do the ODP objectives and policies create an absolute barrier to the activities that might be the subject of a resource consent. Instead, they contemplate that activities may proceed through appropriate consenting pathways, with effects on Māori cultural and heritage values carefully assessed and managed.

**10.22** Objective DO-O1 recognises the need to work in partnership with mana whenua and to maintain kaitiakitanga, while DO-O3 expressly contemplates development occurring within the district in a managed and integrated way, including in areas subject to qualifying matters such as wāhi tapu. Objective DO-O7 seeks to protect historic heritage while providing for appropriate use and development in areas with historic heritage values.

**10.23** Those objectives are given effect through SASM-P1, which directs that wāhi tapu will be protected from inappropriate activities that may affect the physical features and non-physical values of the place or area.

**10.24** The SASM framework therefore regulates the manner and intensity of development, rather than precluding reasonable use of the land. It follows that PC3 and the ODP provisions do not render the land subject to the Kārewarewa Urupā overlay incapable of reasonable use.

**10.25** Turning to the second part of section 85(3B), the restricted discretionary and discretionary activity rules do not represent an unfair and unreasonable burden on those whose land is affected by the inclusion of Kārewarewa Urupā in PC3. These types of rule frameworks are an orthodox regulatory response to land that has a special feature that requires careful management.

**10.26** If the Panel finds that the land subject to PC3 holds the values that were recognised in the Waitangi Tribunal's 2020 Kārewarewa Urupā Report (see paragraphs 5.3-5.4 above), the protection of those values is appropriate, particularly in light of the relevant ODP objectives and policies that implement the section 6 requirement to recognise and provide for:

> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.

**10.27** While the ODP provisions may limit what affected landowners may wish to undertake on their land, that does not mean the provisions are unfair or unreasonable. First, there is no need for a resource consent to be obtained to continue with the existing use at locations – particularly for properties subject to the Wāhanga Rua overlay. Secondly, there are a range of possible activities that could be the subject of a resource consent application, and it would be appropriate and proportionate for those to be tested through a consent process.

## 11. Other issues raised by submitters

***Failure of Council to appropriately follow RMA processes***

**11.1** WLC submits that the Council has failed to appropriately follow RMA processes in the following respects:

(a) inadequate and non-objective consultation with the landowner;

(b) an inadequate section 32 evaluation that failed to consider all relevant facts; and

(c) premature plan-making given related Environment Court proceedings.

**11.2** WLC contends that these deficiencies led the Council to an incorrect conclusion that the subject land is Kārewarewa Urupā.

**11.3** I have not identified any failure by the Council to follow the requirements of the RMA in progressing PC3. PC3 was initiated following a High Court decision which confirmed that identification of Kārewarewa Urupā could not lawfully occur through PC2 and instead required a standalone plan change under Schedule 1 of the RMA. PC3 was publicly notified, submissions were called for and received, and the Council prepared a section 32 evaluation addressing the objectives of PC3, alternative options, and their efficiency and effectiveness.

**11.4** The RMA does not impose an obligation on a territorial authority to reach agreement with landowners, nor does disagreement with the Council's conclusions demonstrate a failure of process. The fact that evidence is contested does not invalidate the statutory process that has been followed. The existence of Court proceedings does not preclude the Council from progressing a plan change within its statutory functions.

***No compensation for affected landowners***

**11.5** Victor Hewson (S1) submits that PC3 interferes with existing property rights, renders land of limited value, and fails to provide for compensation, purchase, or ongoing management by Council. WLC similarly characterises PC3 as amounting to a de facto taking of land without compensation. The submissions are inextricably linked to the matters relating to the reasonable use of land discussed earlier in these submissions.

**11.6** In response, I note that:

(a) the RMA does not provide a general right to compensation arising from planning controls, including heritage or cultural overlays; and

(b) as outlined earlier, PC3 does not prohibit all use of the land. Rather, it regulates the manner and intensity of development to

recognise and protect a site of significance to Māori, consistent with sections 6(e) and 6(f) of the RMA. The availability of permitted activities and consenting pathways goes against any suggestion that the land is incapable of reasonable use and that compensation should follow.

***Legitimate expectation from previous Council action***

**11.7** WLC submits that the Council's historical actions give rise to a legitimate expectation that the land would remain available for residential development, and that PC3 is inconsistent with that expectation.

**11.8** That submission does not reflect the forward-looking nature of district plans and the RMA's requirement that they be reviewed regularly and updated as needed. Past zoning decisions or the absence of particular controls do not create an assurance that land use regulation will remain unchanged. The doctrine of legitimate expectation does not operate to prevent a local authority from exercising its statutory functions under the RMA in response to new information, evolving policy settings, or findings of recognised significance.

**Dated**: 22 May 2026

M G Conway

Counsel for the Kāpiti Coast District Council