

**IN THE MATTER** of the Resource Management Act  
1991

**AND**

**IN THE MATTER** of an application to Kapiti Coast  
District Council for non-complying  
resource consent for a proposed 53 lot  
subdivision<sup>1</sup> (including earthworks and  
infrastructure) at Otaihanga, Kapiti  
Coast.

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**OPENING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT**

**Dated: 3<sup>rd</sup> August 2022.**

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Bartlett Law  
Level 9, Equinox House  
111 The Terrace, PO Box 10852, Wellington  
Tel: (04) 472 5579  
Fax: (04) 471 0589  
Solicitor Acting: Penelope Ryder-Lewis  
E: [prl@btlaw.co.nz](mailto:prl@btlaw.co.nz)

Counsel: P D Tancock  
Harbour Chambers  
Level 2, Solnet House  
70 The Terrace, PO Box 10-242  
Wellington  
Tel: (04) 499 2684  
E: [phernne.tancock@legalchambers.co.nz](mailto:phernne.tancock@legalchambers.co.nz)

## MAY IT PLEASE THE PANEL:

### 1. INTRODUCTION

- 1.1 These opening submissions are prepared on behalf of M R Mansell, R P Mansell and A J Mansell (the **Applicant**) who has applied for resource consent to subdivide their family farm at 48 and 58 Tieko Street, 141,139 and 147 and 155 Otaihanga Road into 46 residential lots. The development is known as Otaihanga Estate (the **Project**).
- 1.2 Kapiti District has experienced significant uptake and demand for housing in the district, partially due to the limited supply of greenfield development.<sup>2</sup> The Project will assist in meeting this demand by providing attractive residential lots for purchasers to develop (46 lots) and 45<sup>3</sup> new household units in a rural setting, that can be accommodated by existing infrastructure and is located in close proximity to Paraparaumu.<sup>4</sup> Otaihanga Estate is a modest but much needed contribution to Kapiti's housing supply.<sup>5</sup>
- 1.3 The Project has been carefully designed to respond to its environment. It involves legal protection and restoration of four natural wetlands on site, legal protection of Kānuka Stands and key Remnant Dune formations (no build areas) and significant landscape planting with indigenous species.
- 1.4 While the Project will result inevitably result in a change from the existing uneconomic farmland to a mix of rural-residential and residential, there is no requirement that the Applicant preserve the landscape in a static way.

### 2. PROJECT DESCRIPTION

- 2.1 The Project involves the subdivision of a 18 ha<sup>6</sup> (western) portion of the Applicant's family farm that has been severed by the Kapiti Expressway. The subdivision of this area involves earthworks, construction of roads, installation of services and the identification of a notional building area on

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<sup>2</sup> Mr Foy, Evidence at paragraph 6.5.

<sup>3</sup> Lot 33 has an existing dwelling that will remain.

<sup>4</sup> Mr Foy, Evidence at paragraph 6.3.

<sup>5</sup> AEE.

<sup>6</sup> The original application was for 17 ha but additional land has been included as a result of Waka Kotahi offering back land no longer required for the Expressway.

the larger life-style lots. The proposed Otaihanga Estate subdivision will create a total of 53 lots with 46 of those being residential lots.

### **The Northern Area**

- 2.2 Twenty-two rural life-style lots are proposed in the northern area of the site (Lots 1 – 22) ranging in size from 2095m<sup>2</sup> (Lot 17) to 2.78 ha (Lot 5), with Lots 1 – 19 accessed via an extension to Tieko Street, with the new portion of the extended road and cul-de-sac to vest in KCDC as legal road. Lots 20 – 22 are accessed via the southern area access road. The Applicant has worked closely with Wildlands, following the introduction of the NPS-FW to identify and protect four natural wetlands that meet the NPS-FW criteria. The natural wetlands will be subject to pest and weed management, have a 10m buffer planted with indigenous vegetation, and will be fenced.
- 2.3 The entire development is hydraulically neutral and care has been taken to ensure that the earthworks and stormwater in this area do not impact on the natural wetlands. Stormwater in this area is to swales. Further clusters of landscape and amenity planting and fencing controls are proposed throughout the development to assist in retaining the rural character of the site.
- 2.4 The Northern and Southern areas of the development are joined by Lot 104, which is a recreational track or shared path, which provides pedestrian route through the development. This track follows in part the route of a dray track of importance to mana whenua, the identity of local iwi will be reflected through the development via road names and interpretative signage relating to the dray track.

### **The Southern Area**

- 2.5 The Southern area consists of 24 residential lots ranging in size between 490m<sup>2</sup> (lot 32) and 7130m<sup>2</sup> (lot 29) and is accessed via a new entrance and road off Otaihanga Road. This road will vest in KCDC and has a footpath on the northern side, with berm planting in low growing indigenous species, and pinch-points aimed at calming traffic and softening the visual impact of the development. Lots in this area are subject to amended setback for front and side yards, and a number of detailed fencing covenants – to provide for high level of amenity, retain rural character and preserve the openness of the site. As described by Mr

Martell, the Applicant's stormwater expert, stormwater in the Southern Area is via a constructed wetland in Lot 200 to store stormwater and planting to filter out potential contaminants before it is released into the KCDC stormwater system. Lots adjacent to Lot 200 also provide a 10m strip of indigenous planting to add to the amenity and naturalness of the constructed wetland. At the end of the cul-de-sac is a proposed community park 3245m<sup>2</sup> (Lot 105), which connects via a dedicated path to Lot 104 (the Recreational track).

- 2.6 Both the Northern and Southern areas of the development feature a number of "no build areas" and building setbacks which are aimed at protecting and preserving the natural character of the remnant dune formations on site as much as possible. These have been developed in conjunction with the Applicant's and Council's landscape expert to help mitigate visual effects. Earthworks and buildings are prohibited in these areas. Care has been taken to reduce the earthworks on site. These are subject to a full suite of regional and proposed district consent conditions; winter work provisions and sediment and erosion effects are managed by an Erosion Sediment Control Plan (ESCP).
- 2.7 The existing mature kānuka tree stands on site will be retained, enhanced and legally protected<sup>7</sup> and will be subject to pest plant management and underplanting, as per the recommendation of Mr Goldwater the Applicant's ecologist. Prior to earthworks commencing pest control will be undertaken on the site, and lizards (grass skinks) relocated<sup>8</sup> to a legally protected and dedicated 1 ha lizard habitat area which forms part of the northern most natural wetland.
- 2.8 The Applicant has offered to retain the existing shelterbelts bordering 44 Tieko Street and Lot 19, which currently provide privacy to those properties (unless this is not possible due to construction of the new road or the safety/health of the existing trees). In the event removal is necessary, this will avoid nesting season and these areas will be replanted with suitable fast growing indigenous screening species – in discussion with those neighbours. A condition<sup>9</sup> has been offered to this effect.

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<sup>7</sup> The applicant has applied for consent to trim or modify the mature kānuka trees within 100m from a waterbody (the natural wetlands) as there is a possibility this is required to ensure the health of these trees/stands – this is a precautionary measure only.

<sup>8</sup> Relocation of lizards will be the subject of a Wildlife Permit

<sup>9</sup> Applicants proposed revised conditions – Annexure A to Mr Hansen's supplementary evidence.

- 2.9 The Applicant's geotechnical expert has confirmed that the site has low liquefaction risk, and the land is suitable for residential use. Mr Martell the Applicant's stormwater expert will describe how the development has been designed to be hydraulically neutral.
- 2.10 The Project is well serviced and there is capacity for the development to connect into Council's existing infrastructure. A pressure sewerage system and water system will service the development and connect to KCDC's reticulation system.

### **Approach to consultation**

- 2.11 The Applicant consulted extensively with Te Atiawa ki Whakaronotai Charitable Trust, mana whenua of the site who support the proposal, and further shaped the proposal in response to matters raised by Greater Wellington Regional Council and District Council Officers and has engaged with a number of submitters (Waka Kotahi, Earle, Keane & Rice and the Custodial Trustees) and six owners of neighbouring properties who have provided their approval to the development.<sup>10</sup>
- 2.12 The Applicant's willingness to collaborate and incorporate these parties' views into the application (where possible) resulted in the changes described in Mr Hansen's evidence. This has included the offer of further pest control, reduction of the number of lots in the southern area (by three), further landscape planting and extension of no build areas, agreed conditions in relation to the management of Lot 200 (constructed wetland) and a slight realignment of the recreational track and dedicated path from the community park along the access road to Lots 20 and 21.
- 2.13 These amendments have improved the quality of the proposal before you, and resulted in a high degree of agreement between Council Officers and the Applicant that the Project is suitable for its environment and consent should be granted.

### **Other approvals**

- 2.14 Due to the delays in processing this application, the Applicant has secured Regional consents from GWRC and Bulk earthworks approval from Heritage New Zealand Pouhere Taonga. As noted in the Officer's

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<sup>10</sup> Van der Bas and Corich 181 Otaihanga Road, Mansell 183 and 189 Otaihanga Road, MacKay 65 Tieko Street, Lattey 177 Otaihanga Road, Brocklebank 183 Otaihanga Road.

Report,<sup>11</sup> the impact of the Project on the four natural wetlands onsite under NPS-FW has been considered and consented by GWRC.

### 3. OFFICER'S REPORT

- 3.1 The Council has recommended that the consent be granted with conditions. Taking a bundling approach the activity status for the Project is non-complying under s104D RMA. The Council and the Applicant are in agreement that both gateway tests are met.<sup>12</sup>
- 3.2 Ms Rydon and Mr Hansen differ slightly in their conclusions on effects. Mr Hansen's concludes that it is "*no more than minor on lizards*" and "*less than minor or negligible for other effects,*" while Ms Rydon finds that "*with the inclusion of appropriate conditions the adverse effects can be mitigated to be minor*".<sup>13</sup> Either view allows consent to be granted and there is a high level of agreement as to the conclusions reached on effects and suitable conditions.

### 4. ASSESSMENT OF EFFECTS

#### Effects of the proposal

- 4.1 The geotechnical, cultural, archaeological, hydrological, stormwater, hazard, infrastructure, construction, ecology, visual/ landscape, economic, traffic, urban design and planning effects of the proposal have been assessed in detail in the AEE. Additional matters raised by the Council and submitters have been considered by the Applicant's experts in their evidence and will be covered in those experts' presentations to the Panel.
- 4.2 Rather than repeat those assessments, I note in summary these conclude that the Project is appropriate and confirm that the development will have less than minor effects on the environment and that any adverse effects can be appropriately mitigated by the recommended conditions.
- 4.3 Following a second round of landscape conferencing, the landscape experts are also in agreement that the effects of the revised Project are acceptable from an amenity and rural character perspective.

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<sup>11</sup> Officers Report paragraph 220.

<sup>12</sup> Officer's Report at paragraph 271.

<sup>13</sup> Officer's Report at paragraph 271.

- 4.4 Other than a handful of discrete traffic issues, the Applicant's assessment of effects has been accepted and adopted by Council.

**Positive effects**

- 4.5 The benefits of the Project have been accepted by Council and have not been contested by submitters, these are:
- (a) Sustainable management of a natural and physical resource – the use of land is no longer viable for farming;
  - (b) Cultural effects including recognition and signage of the dray track and working in partnership with mana whenua in respect of street names and planting for the Project;
  - (c) Improvement and legal protection of mature Kānuka Groves and four natural wetlands on site;
  - (d) Pest and weed control on site;
  - (e) Protection of remnant dunes and considerable planting of indigenous vegetation;
  - (f) Development in a location well serviced by existing infrastructure;
  - (g) Community benefits in terms of the loop recreation track, easy access to open space, and community park; and
  - (h) Economic benefits including providing sites for 45 future residences, with the money spent developing the site making a modest yet positive contribution to the district's economy and helping with the housing crisis.

**5. PROPOSED CONDITIONS**

- 5.1 A comprehensive set of suggested draft conditions has been prepared by Ms Rydon and Mr Hansen, with input from the experts to mitigate the effects of the development. This includes:
- (a) Development of an Ecological Management Plan (EMP) to address pest control, weed management and restoration ecological planting of the wetlands and Kānuka groves and buffers.
  - (b) A lizard Management Plan – to meet the Wildlife Act requirements for Lizard relocation and establishment of the skink habitat.
  - (c) A Landscape Management Plan detailing visual mitigation planting for the site;

- (d) Prohibitions on earthworks and structures in the no-build areas;
- (e) A comprehensive list of consent notices and corresponding conditions addressing building and yard setbacks, wetland protection, protected vegetation;
- (f) A Construction Management Plan (CMP);
- (g) A construction traffic management plan (CTMP);
- (h) Sediment Erosion Management Plan to control effects of earthworks;
- (i) Conditions requiring fencing covenants; and
- (j) Conditions providing for stormwater and infrastructure.

5.2 Agreement has been reached on all but a few conditions. The conditions reflect consultation with a number of parties.<sup>14</sup> These will be tabled and discussed by Mr Hansen, but it is the Applicant's position that these should form the basis of any final version of consent conditions, if the Panel is minded to grant consent.

## 6. UNRESOLVED ISSUES

6.1 The outstanding issues relate to matters raised by the Roding team. Council has accepted many of the findings of the Traffic Assessment Report. At the commencement of the hearing the (relatively discrete) unresolved issues are:

- (a) The trimming of vegetation adjacent to Otaihanga Road;
- (b) The form and purpose of the shared path/recreation track, including whether it should be lit
- (c) Whether the Tieko Street Improvements Package is required to mitigate an effect of the development, and can be the subject of a condition.
- (d) Whether the changes to the proposal sought by Council in (b) and (c) are within scope of the consent applied for.
- (e) Whether proposed planting of the berm and pinch points can be safely accommodated.

6.2 The balance of these submissions will focus on legal issues associated with the remaining areas of disagreement (and those related conditions).

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<sup>14</sup> GWRC (where there are dual responsibilities under Three Waters), Heritage New Zealand, KCDC, Te Atiawa ki Whakarongotai Trust, Waka Kotahi, and submitters (Keane, Custodial Trustees and Earle).



### Scope and limits of conditions

6.3 Relevant to these issues are the legal limits on the scope of conditions that can be imposed on a resource consent. Specifically, conditions must:

- (a) Be imposed for a planning purpose;
- (b) Fairly and reasonably relate to the proposed activities; and
- (c) Not be so unreasonable that no reasonable consent authority could have imposed them (*Cable Bay Wine Ltd v Auckland Council* [2021] NZHC 2596 at [88]).

6.4 These requirements have now been codified and strengthened in s 108AA of the RMA, which was introduced in 2017 and applies to this consent. Section 108AA says that a condition cannot be imposed unless:

- (a) The applicant agrees to it; or
- (b) The condition is directly connected to either an adverse effect of the activity on the environment or an applicable rule; or
- (c) The condition relates to administrative matters essential for the efficient implementation of the consent.

### Trimming of Roadside Vegetation

6.5 The Officer's Report<sup>15</sup> raises a "jurisdictional" issue with the wording of a condition proposed by the Applicant regarding the trimming of roadside vegetation, due to alleged involvement of a third party. Mr Taylor<sup>16</sup> has confirmed that the vegetation to be removed to achieve the required sightlines sits entirely within Legal Road Reserve and is not on private property. Ms Fraser has confirmed this vegetation is already a safety issue. There is therefore no jurisdictional issue with the proposed condition infringing on third party rights, because the vegetation is on road reserve.

6.6 Under s353 of the Local Government Act 1974 the Council has a legal obligation to take sufficient precautions for the general safety on local roads, this includes trimming vegetation where trees overhand a road or obstruct a view along a road, and can do so as a permitted activity under the Plan.

### The form of the shared path/recreational track

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<sup>15</sup> Officer's Report paragraph 112 and 113.

<sup>16</sup> Mr Taylor, BOE at paragraph [104]. As shown on Sheet 19 Scheme Plan 22208 SCH Rev Q.

- 6.7 The original resource consent application proposed a recreational track in Lot 104 to be vested in the Council as a local purpose reserve (walkway/cycleway/bridleway) to provide access through the development to form a walking loop. This was included as part of the development following a request from the Council's Parks Manager during pre-application consultation.
- 6.8 Mr Trotter's evidence now proposes conditions 63 and 67 that will have the effect of converting this recreational path into a roading asset that he says must meet the additional standards for a commuter connector link.<sup>17</sup>
- 6.9 The Applicant is concerned about the additional adverse effects this would generate. The path forms part of the route of an old dray track which is an important heritage feature to Te Atiawa ki Whakarongotai Trust, who have expressed a desire to keep this route as natural as possible and would like to see the dray track recognised as part of the development. Mr Ra Higgot on behalf of the Trust has put it this way:<sup>18</sup>

*'So the importance of the Dray Track remaining is important to our iwi history. All steps need to be taken to restore it in some way. It binds the Track to our tupuna and those that Whakapapa to them. We need to retain as much of our early local history as we can when the opportunity arises.*

*This is such an example. Let's not lose it by having it buried under a road!! [...] The dray track must be kept as natural as possible and formed to its original track [...] We would not like to see any lighting installed as this would take away its importance as an old dray track.'*

- 6.10 The landscape experts agree that from a visual effects and natural character perspective this path should be kept as natural as possible and remain unlit.
- 6.11 This route was amended slightly, the width and gradient adjusted following discussions with Mr Trotter in February, in a way that remains sympathetic to the Trust's wishes. The Applicant has proposed to seal the section of

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<sup>17</sup> Officer's Report paragraph 189.

<sup>18</sup> Ra Higgot, Dray Track Report, dated 29 January 2022 for Te Atiawa Whakarongotai Charitable Trust Taiao Unit.

the path closest to Lots 20 - 22.<sup>19</sup> Mr Trotter's evidence does not take into account these changes.

- 6.12 The conditions sought by Mr Trotter indicate a slavish adherence to the standards for the urban environment, without any consideration of the proposed use and purpose of the path or the topographic feasibility of creating the connector route, or the effect that doing so will have on the receiving environment.
- 6.13 Ms Fraser in her evidence states it will serve a small residential community (probably a handful of residents) and as such it is appropriate that daytime use only should be encouraged. An alternative pavement and "commuter" cyclist route exists along Otaihangā Road for serious cyclists and those with impaired mobility.<sup>20</sup> Ms Fraser has confirmed the path as proposed by the Applicant will be safe for shared use of pedestrians and cyclists and she has no concerns for the safety of those users.<sup>21</sup> She does not consider it necessary to further amend the gradient or surface of the path.
- 6.14 Mr Greenshields has undertaken a comprehensive CPTED assessment of the shared path and has confirmed that the path is acceptable and appropriate. Mr Greenshields agrees and Mr Taylor<sup>22</sup> note that there are many examples of shared paths in rural parts of Kapiti that do not meet these standards. Overall, it is the Applicant's strong view that what it has designed, and the conditions that it has proposed are appropriate, and importantly result in a far better outcome than those suggested by Council.

### **SUP/ Recreational Track Lighting**

- 6.15 Mr Greenshields has also assessed the issue of lighting. In his view, Council's assessment of the standards fails to recognise the caveat "when used in the right context".<sup>23</sup> Mr Greenshields concludes that the use of lighting in this situation would give the false impression that the path was safe for night time use. Based on his CPTED analysis he has concluded that lighting the shared use path would be inappropriate. This is sentiment shared by a number of submitters, who have requested that the path not be lit to better protect the night sky.<sup>24</sup>

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<sup>19</sup> As shown on drawing 2208 Sch1 sheet 15 Revision Q.

<sup>20</sup> Ms Frasers evidence at paragraph 3.1(g) – (i).

<sup>21</sup> Ms Frasers evidence at paragraph page 38(f).

<sup>22</sup> Mr Greenshields evidence at paragraph 7.2 and 7.9.

<sup>23</sup> Ibid at paragraph 7.16.

<sup>24</sup> Andrews, Morris and McMurray submissions all raise concerns about light pollution.

- 6.16 The change from a recreational track to a roading -connector route sought by Council would result in a path very different in scale of effects and intensity, from what the Applicant has sought consent for and would be out of scope.<sup>25</sup> In particular the earthworks associated with creating a connector route that meets the necessary standards would result in far greater effects. This is at odds with the environmental design outcomes sought for the development, including the Applicant's efforts to retain the topography, acknowledge the dray track and natural form of this area. As such the form and conditions offered by the Applicant should be preferred.

### **Berm/Pinch Point-Planting**

- 6.17 A minor disagreement exists in respect of pinch-point planting and vegetative berm planting in the Southern Area, between the footpath and the road proposed as a result of the landscape conferencing. Ms Fraser has assessed this as being appropriate and can be safely accommodated onsite. The Applicant has proposed a suitable low growing species list for this area.

### **The Tieko Street Improvement Package**

- 6.18 There is also disagreement around the Tieko Street Improvement Package. It is the Applicant's view that these works:
- (a) Do not form part of the resource consent application;
  - (b) Are not required to mitigate an effect of the development; and
  - (c) Cannot be imposed as a condition of consent.
- 6.19 The Applicant had been in negotiations over the last year with Council Officers as part of a Development Agreement under s207 LGA. These works sit outside the resource consent process and have not been volunteered by the Applicant as a condition of consent. The Applicant participated in those discussions in good faith. These works were discussed in lieu of payment of roading contributions, and the Applicant is very disappointed by the approach now being taken by the roading team on this issue.

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<sup>25</sup> Officer's Report, Paragraph 189 suggests that, 'Proposed lot 104 therefore needs to meet the required standards as the ownership of assets is not necessarily based on the description of what is being vested,' in the Applicant's view misses the point – there is an issue here as to the extent that the Council's conditions increase the effects envelope of what has been applied for.

### **Does not form part of the resource consent application**

- 6.20 The Applicant has not sought resource consent for the Tieko Street works. These are not included in the resource consent application, because they were not needed to respond to an effect. To this extent they are outside the scope of the application.<sup>26</sup> In point 6 of the RFI dated 28 September, the Council asked:

*'Can the Applicant please confirm how the costs of the works to Tieko Street and the intersection with Otiahanga Road are to be secured if we grant consent?'*

- 6.21 The Applicants response was as follows;<sup>27</sup>

*'...The Tieko Street works and a negotiation of a Development Agreement sit outside the consent process, and is working to a different timeframe...'*

- 6.22 Council requested "specific details" of these works as part of the 2<sup>nd</sup> RFI. The Applicant was compelled to provide the scope of works being discussed with Officers in the context of Development Agreement. The Applicant's response to the RFI included confirmation that these were being provided for "completeness only", and "are not in response to any effect that the development causes".

### **Not required to mitigate an effect of the development**

- 6.23 The works are not required to "mitigate" an effect of the development. Ms Fraser has provided detailed evidence on this issue. She has assessed the traffic effects of the additional 19 lots on Tieko Street to be:

- (a) An additional 19 dwellings on Tieko Street are expected to generate collectively 152 to 190 vehicles per day with up to 23 additional vehicle movements during the peak hours of activity.
- (b) This is the equivalent of an additional vehicle movement on Tieko Street and through the intersection every two minutes at the busiest times, far less outside peak hours.
- (c) This is a small increase in traffic when considered with existing levels of traffic that can be appropriately accommodated on

<sup>26</sup> Ms Fraser's Traffic Assessment Report at page 6 notes, 'Discussions are underway with Council regarding safety improvements being made to Tieko Street to address existing maintenance issues and deficiencies and future users of the Street.'

<sup>27</sup> Email Mr Hansen to Ms Rydon dated 17 September 2021 – FIR Response 15 September 2021.

Tieko Street, in line with levels of service considered acceptable in NZS4404:2010.

- (d) From a safety perspective there is already a need for a footpath for cyclist and pedestrian use, but the development does not trigger the need for them as they are already overdue.
- (e) The effects of construction traffic on Tieko Street is low, estimated to be 375 truck movements for deliveries only and can be appropriately managed via the Construction Traffic Management Plan condition proposed.

6.24 Ms Fraser has confirmed that there is an existing need to undertake maintenance and upgrade activities on Tieko Street to address:

- (i) Damage to the seal where the road is not wide enough for two vehicles to pass and there are no kerbs;
- (ii) Vegetation clearance to protect sight lines;
- (iii) Lack of footpath given the existing residential nature of the northern side of Tieko Street; and
- (iv) Lack of street lighting.

6.25 The minor effects of the proposed subdivision do not trigger the need for the works or change what would be required – that are not needed in response to an effect of the development.

6.26 Overall Ms Fraser considers the traffic effects caused by the additional 19 lots will not result in an incremental change in the safety or functioning of Tieko Street, are well within the permitted baseline, and that the level of additional traffic activity and any associated effects have been considered acceptable and not needing mitigation.<sup>28</sup> Overall the Project will result in less than minor changes to the safety and efficiency for existing road users.<sup>29</sup>

#### **Mr Trotter's evidence**

6.27 Mr Trotter<sup>30</sup> incorrectly describes the Tieko Street improvement package as "mitigation" and refers to "mitigation works" without identifying the effect that needs to be mitigated.<sup>31</sup> This view appears to arise from a misinterpretation of the Traffic Assessment Report as considering the safety improvements to Tieko Street, (which Mr Trotter describes) "*as being*

<sup>28</sup> Ms Fraser Evidence page 37.

<sup>29</sup> Ms Fraser Evidence paragraph 12.16.

<sup>30</sup> Officer's Report paragraph 117.

<sup>31</sup> Mr Trotter evidence, paragraph 6.5, 6.7, 6.8 and section 7.1 – 7.2.

*critical to mitigate effects of the proposed subdivision*"). Ms Fraser does not say that – she says the opposite.

- 6.28 Mr Trotter says the increase in traffic is unacceptable due to increased vehicle/ cyclist movements, but does not elaborate further.
- 6.29 Ms Fraser's expert's evidence is that this condition 62, 64 and 67 is being proposed by Council to address existing safety and maintenance deficiencies in Tieko Street. Therefore, these conditions are not directly connected or responding to an adverse effect of the subdivision activity on the environment, are not for a valid purpose. In my submission the Panel is entitled to rely upon the considered and detailed evidence provided by Ms Fraser.

**Effects are within the permitted baseline – can be disregarded**

- 6.30 Vehicle movements generated by the subdivision will comply with the permitted activity standards of no more than 100 vehicle movements per day, per lot.<sup>32</sup> The Applicant's experts agree with the Officer's Report recommendation<sup>33</sup> that the vehicle movements will comply with the permitted activity standards and should be disregarded.<sup>34</sup>
- 6.31 These traffic effects, including those on Tieko Street, therefore fall within the permitted baseline and the Panel is able to disregard these effects when assessing the application in accordance with s 104(2) of the RMA.
- 6.32 As the Court of Appeal explained in *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424(CA) at [64], the purpose of the permitted baseline is to "isolate", and make irrelevant, effects of activities on the environment that are permitted by a district plan or have already been consented to.
- 6.33 The application of the permitted baseline is discretionary. Whether to exercise that discretion or not depends on matters such as whether the permitted activities are fanciful or not.<sup>35</sup>

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<sup>32</sup> Rule 11E.1.2

<sup>33</sup> Officer's Report paragraph [70].

<sup>34</sup> Officer's Report paragraph [70], while the Officer does not note this, it does appear based on the assessment of vehicle movements in the table at paragraph 45 of the Officer's Report, that this is also the case for construction traffic as rule 11E.1.2 is assessed as 'compliance with permitted 100 vehicle movements per day both during construction and upon completion.'

<sup>35</sup> *Rodney District Council v Eyres Eco-Park Ltd* NZRMA 1 (HC) at [37].

- 6.34 Here it is not fanciful to suggest that the extra vehicle movements (calculated by Ms Fraser in terms of actual effect based on traffic counts) per day generated by the 19 lot Northern Area of the proposed subdivision accessed from Tieko Street, (collectively contributing an additional 152 to 190 vmpd) - could already occur given the number of residences on Tieko Street. Construction traffic also falls within the permitted levels, being estimated to total 375 truck movements, which is 40 – 50 truck movements *per week* over a 6 - 8 week period.<sup>36</sup> These are effects at a very low end of the scale.
- 6.35 As Ms Fraser explains in her evidence,<sup>37</sup> the anticipated level of traffic activity is equivalent to the permitted traffic movements provided in the plan for the two lots currently owned by the Applicant on Tieko Street having on site activities that could generate traffic within the permitted range as of right, without consent.<sup>38</sup>
- 6.36 Compliance with the permitted activity rules demonstrates that the traffic effects are at a level which the community and Council have decided are acceptable and can be safely accommodated on rural roads without mitigation.
- 6.37 Mr Trotter is seeking a condition to mitigate traffic below permitted activity levels, which triggers a disproportionate amount of mitigation works.<sup>39</sup> The Panel is being invited to impose conditions that are far more stringent than the permitted baseline for rural activities in the area.

### **Council obligation to maintain local roads**

- 6.38 Ms Fraser is of the view that these works are required to address existing maintenance and safety deficiencies that Council has neglected, and should be done regardless of the proposed subdivision – they are not caused by it.<sup>40</sup><sup>41</sup> As noted by Ms Fraser, the maintenance issue which Mr Trotter refers to as a *"less than ideal situation,"*<sup>42</sup> already exists.

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<sup>36</sup> Ms Fraser Evidence at paragraph [12.2].

<sup>37</sup> Ms Fraser Evidence paragraph 8.7

<sup>38</sup> Ms Fraser evidence at paragraph [12.4].

<sup>39</sup> Mr Trotter Evidence at paragraph 6.8. *'It is my opinion that the potential increase in traffic per day per lot, along this road is not acceptable.'*

<sup>40</sup> Ms Fraser Evidence paragraph 3.1 (d).

<sup>41</sup> Mr Trotter Evidence paragraph 6.8.

<sup>42</sup> Mr Trotter evidence at paragraph 7.1



- 6.39 Frustration by Council's failure to undertake these improvements has also been the subject of detailed submission. Surprisingly, the correct approach appears to be acknowledged by Mr Trotter in response to Mr Palmer's submission, where he acknowledges that *"Operational matters of road repair and routine maintenance sit outside the consenting process."*<sup>43</sup>
- 6.40 The Council has ownership and control of all roads in the district, except for State highways and government roads.<sup>44</sup> It is required to take all sufficient precautions for the general safety of the public and traffic on or near any road.<sup>45</sup> That includes the obligation to maintain those roads in a safe way – the responsibility to maintain Tieko Street lies with Council not the Applicant.

#### **Council's obligation to consult on changes to local roads**

- 6.41 Mr Trotter has previously indicated to the Applicant that the proposed Tieko Street works package would have to go through the Local Government Act 1974 consultation process.<sup>46</sup>
- 6.42 If there are changes to the roading configuration of the existing Tieko Street section then those property owners affected will need to be consulted on pursuant to Council's Policy,<sup>47</sup> by Council *prior to* Council reaching a decision on the proposed changes and the outcome of that consultation cannot be predetermined.
- 6.43 For example, although the Applicant has proposed some improvements to Tieko Street by way of a Development Agreement with the Council, this is just one option for how the existing maintenance and safety deficiencies might be addressed. The Applicant's transport expert, Ms Fraser, has noted alternative treatments that may be available.<sup>48</sup> If the Council is minded to improve Tieko Street then it will likely need to consult on these options with the owners of properties affected by them, noting that consultation to date with Tieko Street residents has been inconclusive.<sup>49</sup>

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<sup>43</sup> See for example Mr Tisley's submission.

<sup>44</sup> LGA 1974, s 316, 317.

<sup>45</sup> under s 353 of the Local Government Act 1974.

<sup>46</sup> Notes from Otaihangā Meeting on 9 November 2021, section 4.

<sup>47</sup> The Council is required to establish a Significance and Engagement Policy that describes the level of engagement and consultation that is required for its decisions. The Council's Significance and Engagement Policy 2021 applies when it is making decisions about strategic assets including roading.

<sup>48</sup> Ms Fraser Evidence at page 37.

<sup>49</sup> Ms Fraser Evidence at [8.9]).

- 6.44 Council's consultation process will result in delay in respect of both the timeframe and uncertainty as to the outcome as to the final form of the design. Unfairly impacting on the Applicants ability to give effect to the consent and making the extent of any works to be provided subject to the views of third parties. In the Applicant's view, these are additional factors that make Council's suggested conditions 62, 64 and 67 inappropriate.
- 6.45 The Applicant's strong view is that any improvements to Tieko Street would need to be undertaken by Council, possibly in conjunction with the Applicant pursuant to a negotiated Development Agreement, as it does not properly form part of this consent. The Applicant had sought to work with Council in good faith to design a package of works (in that context) and is disappointed by the approach taken by the roading team.

#### **Case law**

- 6.46 These sorts of issues are not uncommon. A similar issue was before the Environment Court in *Transit New Zealand v Southland District Council* [2008] NZRMA 379 (EnvC). This decision provides useful guidance as to the correct approach. (**copy provided**).
- 6.47 Transit requested that conditions be imposed on a subdivision consent requiring the upgrade of an existing unsafe intersection that would be used to access the subdivision. The Court declined to impose such a condition, on the basis that it was proposed to overcome an existing deficiency with the roading infrastructure rather than to address an effect of the subdivision. This was said to be an ulterior purpose, not a valid resource management/planning purpose, at [55]:
- "Furthermore, seeking such a condition in this instance for what can only be described as an ulterior purpose to effect improvements to remedy an existing deficiency in the State Highway is contrary to the rationale of the *Newbury* decision".
- 6.48 The Court closely compared the level of effects of the subdivision versus the permitted baseline, and noted at [67] that permitted activities would result in the same level of traffic effects without Transit being able to extract the upgrade costs from a developer:
- "The evidence gave rise to a significant concern by us that this was an attempt to extract significant roading improvements to overcome existing network deficiencies from developers. Having regard to the fact that permitted activities would result in the same level of effect without compensation to Transit, we

conclude it is in principle, wrong to extract full costs for such improvement from just one developer”.

- 6.49 The Council's approach to the Tieko Street Improvement Package and the proposed condition raises the same problem. It is proposed to cover (and burden the Applicant with the substantial cost of fixing) existing deficiencies in the Tieko Street layout, rather than to address traffic effects from the proposed subdivision. As explained above, the traffic effects are within the permitted baseline and therefore can be disregarded.

## **7. MATTERS RAISED BY SUBMITTERS**

- 7.1 The key issues for submitters opposed to the application raised most comprehensively by Ms Blackwell's evidence is whether the proposal is appropriate for the rural-residential zone – in terms of rural character/amenity effects and whether the proposal meets the threshold test in s104D RMA.
- 7.2 The Applicants experts have carefully considered and responded in detail to the factual matters raised by submitters in the written submissions. These have been incorporated into the revised conditions where appropriate.

### **Amenity concerns**

- 7.3 Many submitters raised amenity effects. While the application will inevitably result in a change of outlook enjoyed by many submitters, Mr Compton-Moen has assessed these to be low (minor).<sup>50</sup> The Applicant is under no obligation to retain the land in its current state, or retain shelter belt planting (that as Ms Rydon quite rightly observes could be removed as of right) to preserve their neighbours pastoral views, or amenity, privacy or rural outlook provided by the Applicant's farm that they currently value. The RMA is not static in this regard.
- 7.4 Despite this, the Applicant has worked hard to mitigate effects on the neighbours and the result achieves a good balance between developing more housing and preserving the rural character of the area. It is still very much a low density development and will provide future residents with a high (albeit, altered) level of rural-residential amenity and a level of amenity reflective of other development in the vicinity. As noted by Mr Foy,

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<sup>50</sup> Mr Compton – Moen, Evidence at paragraph 12.6.

this area is in a transitional phase and is expected to become increasingly urban in character over time as a result of KCDC implementing National Directives under NPS-DC.<sup>51</sup>

### **Response to Ms Blackwell's evidence/44 Tieko Street owners**

- 7.5 The Applicant has consulted with the owners of 44 Tieko Street, and has volunteered a very generous additional condition to mitigate their perceived concerns relating to the shelter belt trees. The Trust has now adopted a position which seeks greater restrictions on the consent application than the permitted baseline.
- 7.6 Ms Blackwell's opinion is that the proposed subdivision is contrary to objectives and policies that she considers to be relevant, and therefore that it does not pass the s 104D gateway test. This is not a legally correct approach to the s 104D gateway test.
- 7.7 In assessing whether the proposed activity is not contrary to the overall objectives and policies, a "broad judgment is to be made" and this judgment "requires more than just isolating out one or two policies that the activity might be contrary to". The question is whether the proposal is contrary to the objectives and policies as a whole.<sup>52</sup> In other words, a holistic view of the objectives and policies of the relevant plan must be taken under s104(1)(b).<sup>53</sup>
- 7.8 The correct holistic approach is taken in Mr Hansen's AEE and the Officer's Report which concludes that the proposal is not contrary to the relevant objectives and policies of the applicable planning instruments and therefore that the second gateway (s104D(1)(b)) is met.

### **Evaluation of witnesses**

#### *Lay witnesses*

- 7.9 The Panel will hear from a number of lay witness submitters over the course of the hearing. In respect of lay witnesses, the Panel should carefully consider the weight to attribute to those views, particularly where they differ from the technical evidence produced by independent and

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<sup>51</sup> Mr Foy Evidence paragraph 6.2.

<sup>52</sup> *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* W025/02, 16 July 2002 at [728] and [735].

<sup>53</sup> (*Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 21 at [242]).

experienced experts.<sup>54</sup> Some submitters express unfounded perceptions and fears, or claimed inaccuracies. The Applicant has been very thorough in its consideration of these concerns and the Panel is entitled to rely upon the information set out in the AEE as being accurate.

- 7.10 One example of “unfounded suspicion” is the view that only some neighbours were notified of the proposal and an accompanying allegation that the Applicant and family were seeking consent for this land “under the radar”. This is untrue. From the outset the Applicant requested that the application be publicly notified and it was in all the relevant local media. Confusion has arisen from the fact that the Council wrote a “notification decision” and sent it directly selectively to some neighbours personally, and not to others, which in the Applicant’s view was totally inappropriate in ss95A(3) (i) situation, where the applicant requests public notification, the statutory direction in s95A(2)(a) provides that the Council must publicly notify the application i.e. this is mandatory. There is no statutory provision for Council to write a notification decision (this is not a decision being made under s 95D)– that decision has no statutory basis or purpose.
- 7.11 In this case Councils actions have been counterproductive, causing unnecessary angst amongst neighbours who felt they had been unfairly excluded by Council and resulted in submitters and other neighbours viewing the Applicant negatively.

#### *Expert witnesses*

- 7.12 It will also hear from expert witnesses whose opinions differ from the Applicant’s experts. Overall, the Panel must make a value judgement on whose evidence is most preferred, based on a value judgement as to who is most correct.<sup>55</sup> In doing that it should consider whether the expert is providing evidence within their area of expertise, whether there is sound and reasonable basis for the reaching the conclusions they have expressed (for example is that view substantiated by other expert evidence?). As parties alleging adverse effects, they carry the burden of proof to establish that effect so the Panel will need to determine whether they have done so.<sup>56</sup>

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<sup>54</sup> *Stokes v Christchurch City Council* [1999] NZRMA 409 (EnvC) at 426.

<sup>55</sup> *Stokes v Christchurch City Council* [1999] NZRMA 409 (EnvC) at 426.

<sup>56</sup> *New Zealand Magic Millions v Wrightson’s Bloodstock* [1990] 1NZLR 731 (HC).

## **8. WITNESSES TO BE CALLED ON BEHALF OF THE APPLICANT**

8.1 The Applicant will call the following witnesses:

- (a) Mr Richard Mansell (the Applicant);
- (b) Mr Nick Taylor (Infrastructure);
- (c) Mr Cameron Wylie (Geotechnical);
- (d) Mr Derek Foy (Economics);
- (e) Ms Harriet Fraser (Traffic);
- (f) Mr Christopher Greenshields (Urban Design/ CTPED);
- (g) Mr David Compton- Moen (Landscape/ Visual);
- (h) Mr Nick Goldwater (Ecology);
- (i) Mr Craig Martell (Stormwater/ Flood Hazard);
- (j) Mr Chris Hansen (Planning).

## **9. CONCLUSION**

9.1 The Project will provide 45 new housing lots, a community park, a recreation track and associated roading in a desirable setting and location while appropriately mitigating any potential adverse effects, including roading, landscape, ecological and visual/ character effects.

9.2 The Project includes smaller lots in the Southern Area of the development. While this more urban part of the Project does not have the typical characteristics typically envisaged in the Rural-residential Zone, it is not out of context in the wider environment - these lots are still comparably low density and retain a rural feel. While the Project will result in some change to the Otaihangā environment, as discussed by Mr Foy the Project is consistent with those objectives and policies under the Proposed District Plan and plan changes required by NPS-UD.

- 9.3 The Applicant considers that the effects of the application are acceptable and respectfully requests that the Panel grant consent, subject to the conditions offered by Mr Hansen.

A handwritten signature in black ink, appearing to be 'P D Tancock', with a long horizontal stroke extending to the right.

**P D Tancock**

**Counsel for the Applicant**

Dated: 3<sup>rd</sup> August 2022.

