Before Commissioners
Delegated by Kapiti Coast District Council

In the matter of	proposed Plan Change 2 to the Kapiti Coast District Plan
And	Submissions and further submissions by Waikanae Land Company

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LEGAL SUBMISSIONS FOR WAIKANAE LAND COMPANY REGARDING THE VIRES OF THE PROPOSED NEW WĀHI TAPU LISTING

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INTRODUCTION

1. Waikanae Land Company (**WLC**) has filed a submission (S104) and further submission (S104.FS.1) on Plan Change 2 (**PC2**).

2. Both the submission and further submission concern land at Waikanae Beach that is proposed to be the subject of a new wāhi tapu listing, as depicted in Appendix E of PC2, reproduced for convenience below.

3. WLC opposes the new listing on legal and factual grounds. On the legal side, it contends that the listing is *ultra vires* Council's powers to promulgate an IPI. On the factual side, WLC contends the subject land is not Kārewarewa Urupā (which is the premise on which the listing is proposed). These submissions address the *vires* argument. The factual argument will be addressed separately once WLC has heard the evidence of Ātiawa ki Whakarongotai.

4. In outline, WLC's key submissions on the *vires* issue are:

   4.1 Council has a duty to implement the MDRS, and a discretion to accommodate a qualifying matter.

   4.2 The discretion to accommodate a qualifying matter is expressed for a confined purpose: making the MDRS less enabling of development. It cannot instead be used for the purpose of

changing the way other provisions (not the MDRS) apply, to make those other provisions less enabling.

4.3 That is exactly what the new wāhi tapu listing does. It imports provisions from the SASM chapter of the plan, which in practice makes the existing residential rules and standards in the Plan less enabling of development—as conceded by Council.[1]

4.4 This makes the new wāhi tapu listing ultra vires. The discretion to accommodate a qualifying matter in an IPI is confined to making the MDRS less enabling, and the inclusion of provisions which do more than that is beyond the discretionary power.

4.5 This is not solved by the reference in s 80E to related provisions that are "consequential on the MDRS" for two reasons:

(a) The section is explicit that the requirements of s 77I still have to be satisfied, i.e. the change must be one that makes the MDRS less enabling;

(b) In any event, the change here cannot be considered "consequential on the MDRS". Merely introducing the change at the same time as the MDRS does not make it consequential. To be "consequential on the MDRS" the change must be required in response to the Council's obligation to incorporate MDRS into the residential zone. But the proposal here does not respond to the MDRS, it responds to the existing residential zoning.

5. WLC submits it is within the Panel's power to recommend that the listing is removed for these legal reasons (irrespective of any other recommendation the Panel might make based on any assessment it makes regarding the factual merits of the listing). WLC seeks a recommendation of that sort.

6. Importantly, this does not prevent Council from discharging its obligations under s 6 of the RMA. Council retains the power to propose the new wāhi tapu listing using a 'regular' plan change process.

[1] Council notes that the land subject to the new wāhi tapu listing will not contribute to residential development capacity: Section 32 report at 162.

CONTEXT

7. The site of the proposed new wāhi tapu listing is an approximation of a historic 20 Acre Block (Ngarara West A 14B1). The boundary of the 20 Acre Block is shown with a dashed red line on exhibit 1 to Mr Rowe's evidence.

8. WLC once owned the whole 20 Acre Block, in addition to other adjoining land areas — as detailed in Mr Rowe's evidence.

9. The land that remains owned by WLC is Part Lot 1 DP 71625, held within record of title WN53B/939, a copy of which is attached for ease of reference. This comprises two parcels, straddling Barrett Drive: a 3,902m^2 parcel on the south-western side of Barrett Drive (known to WLC as **Stage 4B**), and the 31,000m^2 parcel on the north-eastern side of Barrett Drive (known to WLC as **Stage 6**). All of the undeveloped, residentially zoned land that is proposed to be listed Wāhanga Tahi is in these parcels.[2]

10. In June 2021, long before PC2 was notified, WLC lodged a resource consent application to subdivide its land into five new residential lots, one access lot and one balance lot.[3] The proposal gives rise to two matters currently before the Environment Court:

    10.1 An archaeological authority appeal: WLC has appealed a decision by Heritage New Zealand Pouhere Taonga to decline an archaeological authority for the project; and

    10.2 A consent application: WLC has direct-referred to the Court the application it made to Kāpiti Coast District Council for subdivision and land use consent for the project.

11. In the context of the latter, the Court has already heard WLC, Council and Ātiawa on the *vires* issue (as the new wāhi tapu listing has repercussions for the processing of the consent application, and the effect of the consent application if granted). A decision on that legal aspect was issued on 30 March 2023 and is attached to these submissions.

12. In short, the Court has held that the new listing is *ultra vires*.

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2 For completness, note the wahi tapu listing does not cover all of Stage 4B.

3 Exhibit 17. Legally, Stage 6 is being subdivided, because it will become a stand-alone legal allotment (whereas it is now held together with Stage 4B as a single allotment). However, Stage 6 is already physically separate from Stage 4B, and WLC's proposal treats Stage 6 simply as a 'balance' lot; i.e. the consent application proposes no new residential lots within Stage 6.

13. WLC submits that the Court's findings on that should be treated by this Panel as authoritative guidance. They are findings on the exact same subject matter that is being raised in these submissions, and are the result of a fully contested (and recent) hearing into the issues. There is no other caselaw (yet) on the interpretation of the relevant provisions, and it makes no difference that the Court examined the issue in the context of a consent application, and that you are examining the issue in the context of an IPI, as the question is the same in either case, i.e. *"is the new wāhi tapu listing ultra vires?"*

THE INTENSIFICATION DUTIES AND POWERS

14. The RMA was amended in 2021 by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act. The amendment sought to address housing unaffordability and supply, principally by setting more permissive land use regulations to enable intensification of development.[4] To this end, it imposed on territorial authorities express duties to bring specified density standards and policies into effect, and provided a streamlined planning process—without a right of appeal[5]—to enable a swift response to the issue of housing supply.

15. The MDRS are set out in Schedule 3A to the RMA. They include prescriptive requirements pitched at a level to encourage greater density than most (if not all) residential zones allow. For example:

    15.1 Subdivision for the purpose of construction and use of residential units must be a controlled activity.[6]

    15.2 Construction of new residential buildings must be a permitted activity, provided:[7]

        (a) There are no more than three residential units per site.[8]

        (b) Buildings are (generally) no more than 11 metres high, which in practice allows for 3-storey buildings.[9]

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4 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 2021 (83-1) (explanatory note) at 1–2.

5 RMA, sch 1, cl 107.

6 Schedule 3A, cl 3.

7 Clause 2.

8 Clause 10.

9 Clause 11.

(c) Buildings are set back a minimum of only 1m from side and rear boundaries.[10]

(d) Buildings cover no more than 50 per cent of the site area.[11]

16. Section 77G(1) requires that the general residential zones of specified territorial authorities (including tier 1) must incorporate the MDRS.[12]

17. Council is a tier 1 territorial authority.[13]

18. To incorporate the MDRS into the general residential zones, Council was required, on or before 20 August 2022, to publicly notify an IPI, prepared using the intensification streamlined planning process (**ISPP**).[14]

19. Under s 77G(6), Council was permitted to make the requirements set out in Schedule 3A (i.e. the MDRS) "less enabling of development than provided for in that schedule", but only "if authorised to do so under s 77I".

20. Section 77I relevantly states:

> [Council] **may make the MDRS … less enabling of development** in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
>
> (a) A matter of national importance that decision-makers are required to recognise and provide for under section 6…

21. Council is prohibited from using an IPI for any purpose other than the uses specified in s 80E,[15] and prohibited from using the ISPP other than to promulgate the IPI.[16]

22. Section 80E requires, relevantly, that the IPI:

22.1 must incorporate the MDRS;[17] and

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10 Clauses 12 and 13.

11 Clause 14.

12 Section 77G(1) and s 2, definition of "relevant residential zone".

13 Section 2, definition of "tier 1 territorial authority".

14 Sections 80F(1)(a), 80F(3)(a) and 77G(3).

15 Section 80G(1)(b).

16 Section 80G(2).

17 Section 80E(1)(a)(i).

22.2 may also amend or include related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS.[18]

23. "Related provisions" includes provisions that relate to qualifying matters identified in accordance with s 77I.[19]

WHAT PC2 PROPOSES

24. Council publicly notified PC2 on 18 August 2022. PC2 is Council's IPI, prepared using the ISPP.

25. PC2 includes the following amendments to provide for a qualifying matter, which together comprise the new wāhi tapu listing:

25.1 Amendment 18.1, which amends Schedule 9 – Sites and Areas of Significance to Māori, by adding 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

25.2 Amendment 19.5, which amends the Historical, Cultural, Infrastructure and Districtwide map series, as per the Appendix E diagram reproduced above.[20]

25.3 Amendment 20.11, which adds a new definition of "qualifying matter area" to the definitions chapter of the District Plan. The definition in amendment 20.11 includes that a qualifying matter area means a "place and area of significance to Māori listed in Schedule 9".

26. The effect of the Wāhanga Tahi rules on WLC's land is that:

26.1 Activities that were previously permitted activities are now restricted discretionary activities. This includes, for instance: land disturbance

18 Section 80E(1)(b)(iii).

19 Section 80E(2).

20 The reference in amendment 19.5 to amendment 17.1 appears to be in error, and should instead refer to amendment 18.1.

or earthworks in relation to gardening, cultivation, and planting or removing trees; and fencing not on the perimeter of the land.[21]

26.2 Activities that were previously permitted activities are now non-complying activities. This includes, for instance: undertaking earthworks to lay driveways, cabling, or building foundations; building a residential dwelling; and installing fenceposts other than on the perimeter of the land that do not comply with the relevant standards.[22]

27. In practice, this means no residential development could occur on the Wāhanga Tahi land in WLC's ownership.

DOES THE NEW WĀHI TAPU LISTING MAKE THE MDRS LESS ENABLING?

28. Under s 77I a qualifying matter can only be used to make the MDRS "less enabling of development"[23] — language which is duplicated in s 77G(6). Section 77I goes on to say the MDRS can only be made less enabling "to the extent necessary to accommodate" the qualifying matter. This language reinforces that there are limits to the discretion.

29. This clear statutory wording does not allow for an IPI to change other planning provisions (i.e. provisions other than the MDRS) so as to make those other provisions less enabling of development. In simple terms, the allowance is to dial back, water down or reduce the intensification that MDRS allows. If there are existing provisions in the plan controlling residential use—and of course, in the residential zone, there are—section 77I does not authorise Council to use qualifying matters to make those provisions "less enabling" too. If Council sees merit in changing those provisions, such as to address a s 6 matter, then Council can pursue that with a regular Schedule 1 plan change.

30. That the proposed new wāhi tapu listing fails to meet the requirements of s 77I is readily apparent from the Council's concession that the listing will be less enabling of development than the extant residential zone rules and standards allow. An obvious example is that it introduces non-complying activity status for building foundations in a residential zone, when such foundations were previously a permitted activity.

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21 SASM-R10.

22 SASM-R16 and SASM R-18.

23 As noted above, this is supported by the statutory language in s 77G(6).

31. The parliamentary record reinforces that this outcome falls well outside the intentions of s 77I. The purpose of the 2021 amendments, as set out in the explanatory note to the Bill, is to "rapidly accelerate the supply of housing where the demand for housing is high" and to "help to address some of the issues with housing choice and affordability that Aotearoa New Zealand currently faces". Accordingly, the Bill:[24]

> … requires territorial authorities in Aotearoa New Zealand's major cities to set more permissive land use regulations that will enable greater intensification in urban areas by bringing forward and strengthening the National Policy Statement on Urban Development.

32. The Bill did not leave it up to territorial authorities to decide what form this greater permissiveness would take, district-by-district. It set the MDRS as the model to be applied.

33. Parliament also recognised that existing plan-making processes would be too slow to unlock additional housing development capacity. To overcome this, the Bill implemented the ISPP—a modified version of the streamlined planning process—described in the Bill as "a quicker and less litigious plan-making process", designed to "enable housing intensification to occur faster, helping to alleviate some of the immediate housing shortages".[25]

34. Parliament equally recognised there "may be areas that have specific characteristics that make it inappropriate to apply the MDRS in full" (emphasis added). For these it allowed "qualifying matters" to be identified, matters where "there is a need to balance the heights, densities, and other standards of the MDRS against the need to manage those specific characteristics".[26] Parliament therefore gave the territorial authority the power to "amend the densities and heights required by the MDRS as appropriate".[27]

35. That fine-grained and context-specific approach is reflected in the statutory language limiting modifications to MDRS themselves, and only "to the extent necessary to accommodate" a qualifying matter.

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24 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 2021 (83-1) (explanatory note) at 1.

25 At 1–2.

26 At 4.

27 At 4.

36. The examples described in the Bill involve taking one or more of the matters that is the subject of a standard—height, density, number of units per site etc—and making them less enabling. So, if it is necessary to accommodate a qualifying matter, it may be that in place of three units per site, only two might be allowed; or instead of a 1m side yard, 2m might be required. The result, though, is the IPI leaves the residentially-zoned land able to be developed for residential use, albeit less intensively than if the MDRS applied in full. (This approach is on all fours with the findings of the Environment Court, attached, at [25].)

37. WLC submits the new wāhi tapu listing does not comply with this limited statutory allowance.

DOES THE NEW WĀHI TAPU LISTING SUPPORT THE MDRS, OR IS IT CONSEQUENTIAL ON THE MDRS?

38. Section 80E(1) defines an IPI as a change to a district plan or a variation to a proposed district plan that:

    38.1 must (under paragraph (a)) incorporate the MDRS; and

    38.2 may (under paragraph (b)) amend or include certain provisions, including "related provisions" that "support or are consequential on the MDRS".

39. Section 80E(2)(e) further defines "related provisions" as including provisions that "relate to" qualifying matters identified in accordance with s 77I.

40. The wording in s 80E(1)(b)(iii) only allows for related provisions that do not "support" the MDRS or are "consequential on" the MDRS. One or other of those requirements must be met.

41. The section provides guidance on what "related provisions" means in two ways:

    41.1 It provides a list of provision *types* in s 80E(1)(b)(iii): objectives, policies, rules, standards and zones; and

    41.2 It provides a list of provision *subjects* in s 80E(2), e.g. infrastructure, earthworks, qualifying matters etc.

    Both lists are expressly inclusive, so a related provision can be of a different *type* than is listed, and may address a different *subject* than is listed; but

regardless of its type or its subject, the section clearly states the related provision must "support" or be "consequential on" the MDRS.

42. "Support" is not the issue here, No-one is contending that the new wāhi tapu listing supports the MDRS. The issue is whether it is "consequential on the MDRS", which is less obvious.

43. Prior to notifying PC2, Council received legal advice that concluded it would "arguably be consequential" to an IPI to schedule a previously unscheduled wāhi tapu site in an area subject to the IPI.[28] The advice considered that an inability to notify new wāhi tapu sites would be an "illogical outcome" on the basis of Parliament's "clear intentions" that such sites would be qualifying matters.[29] Council appears to have adopted this advice.

44. With respect, this overlooks that there is a legal distinction between two questions that must be asked: Is the new wāhi tapu listing a qualifying matter? And, if so, is making provision for it "consequential on" the MDRS?

45. No-one is debating that a new wāhi tapu listing is a matter of the sort described in s 77I(a), namely a matter of national importance that is required to be recognised and provided for under section 6. So, if the merits are made out, it is a "qualifying matter". But that does not mean it is "consequential on" the MDRS.

46. WLC contends the new wāhi tapu listing cannot reasonably be said to be consequential on the MDRS, because it goes further than displacing the MDRS, i.e. it displaces the residential zoning itself. That is belied by the fact that Council seeks to prevent *any* practical development,[30] not merely mitigate the effects of increased density imposed by MDRS.

47. In other words, the new wāhi tapu listing is consequential on Council's aim to protect the land from the existing residential rules based on the alleged s 6 attributes of the land. None of that is a creation of the intensification requirements and the MDRS. Council has been aware since at least 2011–2012[31] that Ātiawa ki Whakarongotai considered the land wāhi tapu; and in

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28 Simpson Grierson advice (21 February 2022) at [55]. Note this legal advice is publicly available on the PC2 hearing website.

29 At [55].

30 See for example the Section 32 report at 161: "the site is sensitive to any form of development that involves the disturbance of land".

31 When it received Pataka Moore's first report referred to in the 2015 CIA of Ātiawa ki Whakarongotai.

the absence of the intensification legislation, Council's obligation to make planning provision for this, in accordance with s 6, would have been the same as it is now. Council has merely chosen the IPI as its preferred option to promulgate the listing.

48. Plainly, a decision to create the listing at the same time as implementing the MDRS is not itself sufficient to make the listing "consequential on" the MDRS.

49. Further, the explanatory notes from the Bill, quoted above, show that Parliament intended a far more limited form of 'consequence' than outright rejection of the intensification goal, much less drastically reducing existing development potential under existing residential rules.

50. Finally, Council appears to want to treat s 80E as if it is the source of the relevant statutory power. WLC disagrees. Section 80E contains no statement of an empowering nature, and it sits within sub-part 5A, the self-stated purpose of which is to set out the *process* for preparing an IPI.[32]

51. The obligation to prepare an IPI, by comparison, and the source of Council's relevant power with respect to qualifying matters is in ss 77G and 77I respectively.

52. Section 77G requires the MDRS to be incorporated in every relevant residential zone,[33] and requires Council to use an IPI for this purpose.[34] It is also s 77G that states Council "**may make the requirements in Schedule 3A** less enabling of development than provided for in that schedule…if authorised to do so under s 77I" (emphasis added).[35] Section 77I adopts materially the same wording, beginning with the statement that Council "**may make the MDRS**…less enabling of development" (emphasis added).

53. These are the key empowering provisions relevant to the new wāhi tapu listing, and they are consistent and clear that what can be made "less enabling" is the MDRS.

54. To the extent that s 80E provides any further guidance, it does not avoid this limitation, because it provides for "related provisions" specifically in reference to "qualifying matters identified in accordance with section

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32 Section 80D.

33 Section 77G(1).

34 Section 77G(3).

35 Section 77G(6).

77I".[36] The phrase "in accordance with" means that the requirements stipulated in s 77I must be satisfied. It is not enough that the qualifying matter is a matter of national importance under s 6 (as per s 77I(a)). Its operation within the IPI must also conform to the limitation in the opening words of s 77I: it can only be used to make the MDRS less enabling.

55. Again, WLC submits the correct approach to schedule a new wāhi tapu site was to adopt the ordinary plan change process. That avoids the supposed illogic of an inability to use the IPI and ISPP to promulgate the listing. Protection of a new or existing wāhi tapu site through the IPI and ISPP are limited to mitigating the effects of the MDRS on that qualifying matter. The IPI and ISPP are not mechanisms for disabling the underlying zoning from any development by scheduling new wāhi tapu sites. That itself would be an illogical outcome in the context of a streamlined process enacted for the clear purpose of accelerating intensification.

RESPONSE TO COUNCIL'S SUBMISSIONS

56. Council provides a series of other justifications for the new wāhi tapu listing, which are addressed briefly below.

Section 6(e) does not make the new wāhi tapu listing valid

57. There is a theme in Council's submissions that the new wāhi tapu listing must be valid because it accords with the obligation in s 6(e) to recognise and provide for the relationship of Māori with their wāhi tapu. For instance, Council suggests: [37]

    57.1 an IPI "can" provide for a qualifying matter in a way that is "able to fully respond to the section 6 requirement"; and

    57.2 the RMA does not "expressly prevent" triggering already existing provisions to provide for s 6 values; rather this is a logical consequence of s 6.

58. WLC submits this is misguided for four interrelated reasons.

59. First, whether the listing accords with s 6(e) is in fact disputed. Council may assert that the new wāhi tapu listing responds to s 6(e), but that assertion does not make it so. Whether the land is or is not part of Kārewewa Urupā

[36] Section 80E(2)(e).

[37] Council submissions at [4.34] and [4.39].

(and therefore gives rise to a relationship warranting recognition and protection under s 6(e)) is in dispute.

60. Second, Council's reliance on s 6(e) reveals that Council is fundamentally misguided about the nature of the vires challenge. The vires challenge is not about the *merits* of the new listing, but about whether the Council has the *statutory power* to make the listing.

61. Third, Council's approach invites the Panel to treat s 6(e) as if it is the source of Council's relevant power. It is not. Like the other provisions in Part 2, it provides guidance to persons "exercising functions and powers" under the RMA; but we must look elsewhere within the RMA to identify the actual source of the relevant power. In this instance the relevant power is the power to include a new qualifying matter in an IPI. That power arises out of ss 77G and 77I. As important as the Part 2 guidance is, it cannot be used to circumvent the explicit statutory limits of the power set out in those provisions.

62. Fourth, Council asserts that having identified the urupā it was obliged to protect it in accordance with s 6; but if this were the case, then Council's obligation arose in 2011–2012 (if not earlier) when the value of the site to Ātiawa ki Whakarongotai was formally made known to the Council. If Council had acted on the obligation within a reasonable time, a plan change to add the wāhi tapu listing could have been introduced and completed long before PC2. In any event, it is entirely open to Council to use a regular plan-change process under Schedule 1 for this, so the existence of Council's obligation to protect the urupā (if made out on the merits) would not in any event legitimise the use of the IPI for that purpose.

The Waitangi Tribunal report does not make the new wāhi tapu listing valid

63. Council places some emphasis on the Waitangi Tribunal's report as a justification for the new wāhi tapu listing.[38]

64. This has no relevance to the question currently before the Panel for the following reasons:

    64.1 As covered above, whether the relevant land is or is not part of Kārewarewa Urupā is in fact disputed. The findings of the Waitangi Tribunal do not resolve that dispute.

[38] Council submissions at [4.20], [4.25], [4.41] for example.

64.2 The Tribunal was in any event exercising a different jurisdiction and employing different procedures than apply here:

(a) The Tribunal's inquiry was concerned with the past, unlike this Panel which is predominantly concerned with the future.

(b) The Tribunal is solely concerned with claims against the Crown. It does not determine private individuals' rights and responsibilities, as will be the effect of the Panel's decision in this instance.

(c) The Tribunal's process excluded WLC—it had no opportunity to express a position or present evidence different from that of the claimants or the Crown.

(d) This Panel has no ability to test or evaluate any of the evidence that was put to the Tribunal (except to the limited extent such evidence is replicated and tested as part of these hearings).

64.3 Even if some weight could be given to the Tribunal's findings, those are findings entirely unrelated to the legal question presently before the Panel.

The section 32 analysis does not make the new wāhi tapu listing valid

65. Council also relies on a contention that the new wāhi tapu listing is supported by a s 32 analysis.[39]

66. First, in response, WLC says that if the new wāhi tapu listing exceeds Council's statutory power to make provision for a qualifying matter, then whether it is supported by a s 32 analysis (or not) is irrelevant. If the RMA does not empower Council to make the provision, no amount of s 32 analysis can save the provision. Any reliance Council seeks to place on the s 32 analysis suffers from the same issue as identified above in relation to s 6(e)—namely, its relevance (if any) goes to the *merits* of the provision, not whether the provision is within the scope of the statutory authority conferred on Council.

67. Second, a s 32 analysis for a qualifying matter must meet additional standards set out in s 77J:

[39] For example, at [4.42].

(3) The evaluation report must, in relation to the proposed amendment to accommodate a qualifying matter,—

(a) demonstrate why the territorial authority considers—

(i) that the area is subject to a qualifying matter; **and**

(ii) that the qualifying matter is incompatible with **the level of development permitted by the MDRS**…;

(b) assess the impact that **limiting development capacity, building height, or density (as relevant)** will have on the provision of development capacity; **and**

(c) assess the costs and broader impacts of imposing **those limits**.

(Emphasis added)

68. The passages emphasised above all support WLC's submission that a qualifying matter may only reduce the impact of the MDRS, and cannot go beyond that to reduce the underlying development allowances of the existing residential zone:

68.1 The first passage signals that the focus is on incompatibility between the qualifying matter and the level of development permitted by the MDRS, not the level of development provided for under the existing residential zoning.

68.2 The second two passages reinforce that the exercise expected of a s 32 analyst is to individually examine how limiting development capacity, building height or density will impact on overall development capacity, and the costs and broader impacts of imposing "those limits". It is patently not talking about limiting the application of the underlying residential zoning.

69. Third, the s 32 analysis in this instance is in any event, flawed:

69.1 The analysis proceeds on the basis that because of the Waitangi Tribunal's report, and because of s 6, Council "must" recognise and provide for the wāhi tapu.[40] Putting aside the improper weight this places on the Tribunal's Report (addressed above), this type of approach might be appropriate for an ordinary plan change, but an IPI is not an ordinary plan change. What an IPI "must" contain is addressed separately and explicitly in s 80E. That section unambiguously states that making provision for qualifying matters—including those arising out of s 6 considerations—is not mandatory, but discretionary.

[40] Section 32 report at 160-161.

69.2 The s 32 analysis oversteps the requirements of s 77J. Consistent with the type of analysis required by s 77J(3)(a)(ii) the s 32 report states "the level of development permitted by the MDRS is considered to be inappropriate".[41] However, preceding and following that passage are other passages that disclose the analyst is not focussed on the MDRS, but on development of any sort, including development that might arise under the extant provisions of the General Residential zone:

> As an urupā, the site is sensitive to **any form of development that involves the disturbance of land.**
>
> …
>
> It is therefore appropriate to provide restrictions **on development** in order to provide for the Kārewarewa Urupā as a qualifying matter.

70. For all these reasons, WLC submits that Council's s 32 analysis is of no relevance in determining whether by notifying the new wāhi tapu listing Council has exceeded its statutory power.

The way other existing qualifying matters operate does not make the new wāhi tapu listing valid

71. The Council rightly observes that PC2 includes many qualifying matters that pre-date the Amendment Act.[42] This includes the example of 43 listed wāhi tapu sites that pre-date the IPI.

72. WLC agrees it is within the statutory powers conferred on the Council to include these existing matters within PC2.

73. Further WLC agrees that the inclusion of these provisions does more than make the MDRS "less enabling". In every case these existing wāhi tapu listings trigger provisions beyond the underlying zoning. In WLC's terms, they make the existing zoning less enabling.

74. However, this does not mean (as Council asserts[43]) that the new wāhi tapu listing made under PC2 logically may do more than merely make the MDRS less enabling. There is a crucial distinction between <u>existing</u> and <u>new</u> qualifying matters. An existing qualifying matter is not brought into being by an IPI. It exists *already* in the District Plan. The IPI merely perpetuates its

41 Section 32 report at 161.

42 Council's submissions at [4.36]–[4.37].

43 At [4.38]

existing effect on the underlying zoning. In comparison, a new qualifying matter does not exist prior to the IPI. It is a creation of the IPI.

75. So, the practical issue of concern to Council—that WLC's position would require all existing wāhi tapu listings and other overlays to be re-visited—simply does not arise. Existing wāhi tapu listings and other existing overlays that have been perpetuated in the IPI as 'existing qualifying matters' are lawful in relation to their effect on underlying zoning, even though that effect goes beyond making MDRS less enabling. That is because:

    75.1 they were already having that effect under the existing District Plan —it is not a new effect; and

    75.2 such effect has resulted from a full Schedule 1 plan-making process.

76. The latter point is of great significance. A new qualifying matter is brought into being by an IPI, which is not a full Schedule 1 plan-making process. Significantly, the rights of an affected landowner in an IPI process are, in effect, halved by the absence of any right of appeal. Further the absence of that right of appeal may preclude them from seeking relief under s 85 if the impact on their land renders the land incapable of reasonable use; as a right of appeal is a prerequisite for the relevant s 85 application.[44]

77. As will be apparent from the above, WLC does not agree that the new wāhi tapu listing is in fact comparable to any existing qualifying matters; and while it may be legitimate for **existing** qualifying matters to 'disable' underlying zoning, that does not mean Council is empowered to create a comparable effect using the truncated ISPP.

Select committee changes did not expand the scope of the IPI purpose or qualifying matter powers

78. Council argues that clarifications to the scope of an IPI during the select committee process indicate the Amendment Act's purpose was broadened from that articulated at the Bill's introduction.[45]

79. That is incorrect. The select committee's clarification about the scope of an IPI was in response to various councils' submissions on the Bill. Councils were concerned that the terms of clause 80G of the Bill as introduced did not clearly allow councils to include in an IPI provisions that would enable appropriate incorporation of MDRS into existing district plan structures—for

44 Section 85(3)(b).

45 Council's submissions at [4.43]–[4.46].

instance, to re-write zone chapters or allow the retention of engineering or other standards. Some councils also indicated a desire to make use of the IPI and ISPP for full plan reviews, rather than just implementation of MDRS.[46]

80. The departmental report for the Bill responded to those concerns by explaining to the select committee:[47]

> Councils should be able to use the IPI to enable to amend or develop provisions (including objectives, policies, standards, rules and zones) **that are consequential or complementary to the MDRS and NPS-UD**. This includes provisions relating to district wide matters (i.e. subdivision, fences, earthworks, infrastructure, and hydraulic neutrality/stormwater management). Such provisions can have their own chapters in plans, others are covered in 'district wide' chapters, and therefore amendments to relevant content in district wide chapters should also be able to be included in the IPI.
>
> (Emphasis added)

81. The departmental report recommended the scope of an IPI be clarified such that it enabled "consequential and complementary changes to provisions including objectives, policies, rules, standards and zones" which, "for the avoidance of doubt", should include provisions relating to the matters now found in s 80E(2).[48] Notably, the report expressly rejected as inappropriate any amendment to enable the use of the ISPP for full plan reviews, because this would involve matters for which it would not be appropriate to have no appeal rights, giving the example of significant natural areas.[49] (Notably, this is consistent with the approach taken in the Environment Court's decision, attached, which approached the interpretive exercise very carefully in light of the absence of appeal rights in the ISPP – see [21].)

82. The select committee goes no further than implementing the departmental report recommendation. All it sought to do by introducing what is now s 80E was to ensure councils had the tools to incorporate MDRS in the manner best suited to their particular planning documents. It did not amend s 77I in any meaningful way to expand the scope of the power to accommodate qualifying matters.

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46 Departmental Report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill at [24].

47 At [25].

48 At [25]–[26].

49 At [25].

83. Moreover, the select committee was concerned that MDRS themselves had no objectives or purposes. Notably, the committee recommended their introduction, which resulted in the inclusion of policy 2 in cl 6 of sch 3A, namely the policy to:

> apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga).

84. Policy 2, together with unequivocal statements throughout the select committee report, shows the committee was clear about the purpose of the Bill, and the way in which qualifying matters were to operate. It did not expand the purpose of the Bill, and the clarification about the scope of an IPI does not expand the s 77I power to accommodate qualifying matters.

85. In summary, Council relies on various provisions to avoid an inconvenient result: none of the above outlined matters—whether s 6, s 80E, s 32 analyses and so on—provide Council with the necessary power to introduce a qualifying matter that (a) goes beyond the purpose of the IPI and (b) goes beyond making the MDRS less enabling of development.

CONCLUSION

86. For the above reasons, WLC submits the new wāhi tapu listing is beyond the Council's statutory powers to accommodate a qualifying matter.

87. Council cannot use a special planning process enacted specifically for one purpose for a different purpose altogether. This is re-zoning by stealth, and *ultra vires* the special powers conferred on Council to accelerate intensification.

88. If the Panel agrees with these submissions then, to the extent the listing goes beyond making the MDRS "less enabling of development", WLC submits the Panel ought to recommend its removal from PC2.

M J Slyfield / M van Alphen Fyfe
Counsel for Waikanae Land Company Ltd

RECORD OF TITLE
UNDER LAND TRANSFER ACT 2017
FREEHOLD

Search Copy

R.W. Muir
Registrar-General
of Land

Identifier	**WN53B/939**
Land Registration District	**Wellington**
Date Issued	24 July 1998

Prior References
WN42D/866

Estate	Fee Simple
Area	3.4957 hectares more or less
Legal Description	Part Lot 1 Deposited Plan 71625
Registered Owners	

Waikanae Land Company Limited

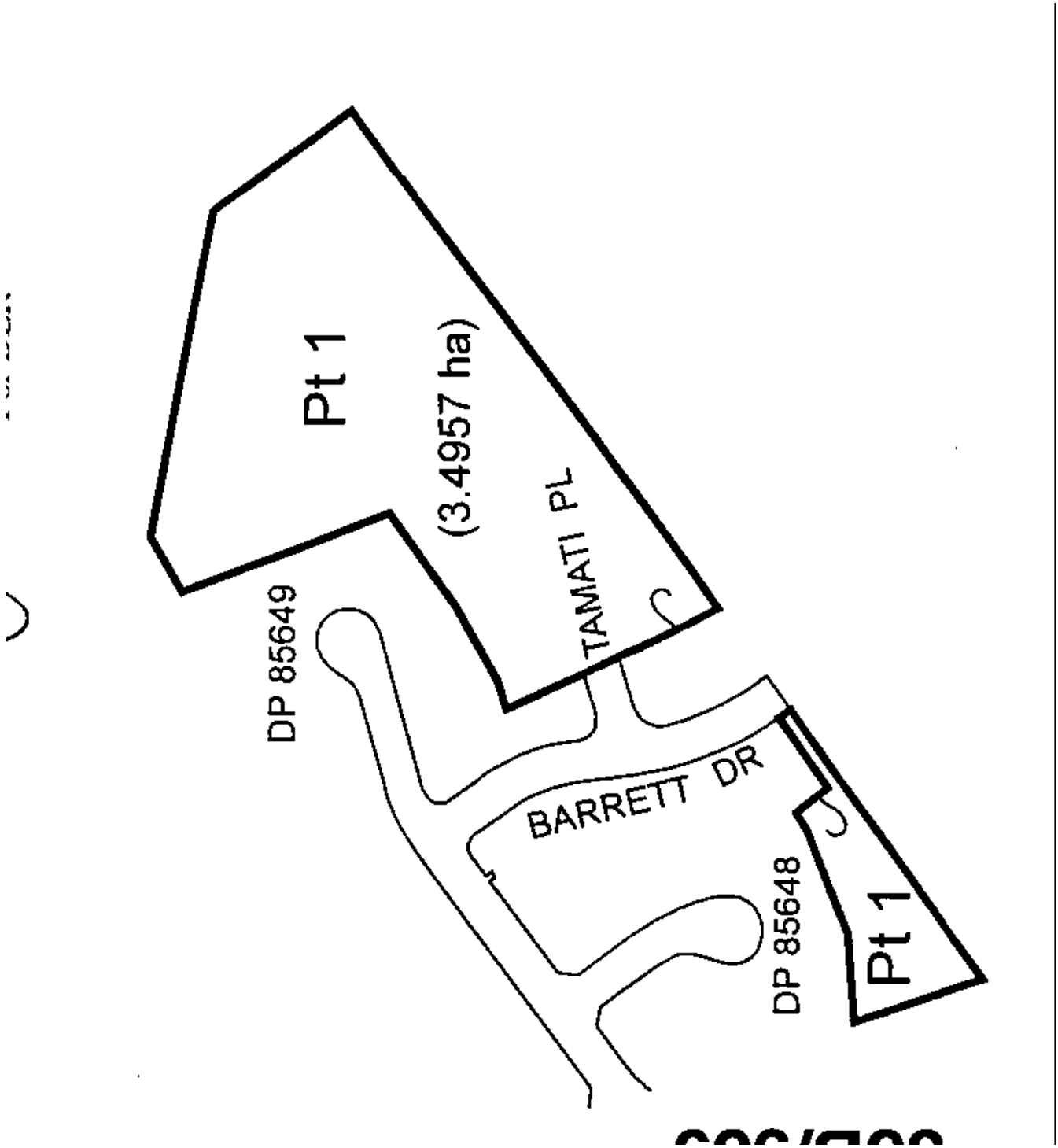
Interests

199341.2 Mortgage to Fitzherbert Rowe Solicitors Nominee Company Limited - 24.5.1978 at 9.59 am and varied by 283617.1 - 7.8.1979 at 11.41 (affects the part formerly in CT WN88/524)

458590.1 CERTIFICATE OF CHARGE UNDER SECTION 50 LAND TAX ACT 1976 - 19.11.1981 AT 1.30 PM (AFFECTS THE PART FORMERLY IN CT WN7A/1139)

617572.1 CERTIFICATE OF CHARGE UNDER SECTION 50 LAND TAX ACT 1976 - 9.4.1984 AT 11.30 AM (AFFECTS THE PART FORMERLY IN CT WN8B/524)

B253500.2 CAVEAT AGAINST THE PART IN CT WN7A/1139 BY ROSS GORDON GRIGOR - 11.9.1992 AT 9.23 AM


Pt 1
(3.4957 ha)
TAMATI PL
DP 85649
BARRETT DR
DP 85648
Pt 1

MEMORIALS CONTINUED

REJECTED 684421.2 Discharged as to all the land in CT 18A/507 - 19.4.1985 at 9.04am

REJECTED ALR 686216.2 Discharge as to all the land in certificate of title 18A/507 - 29.4.1985 at 1.36pm ALR

698722.1 Discharged as to the land in CT 18A/500 - 27.6.1985 at 1.42pm ALR.

701718.1 Discharged as to the Land in CT 20A/621 - 11.7.1985 at 11.08am ALR.

709643.1 Discharged as to the land in CT 18A/509 - 19.8.1985 at 10.20 am. ALR.

76P900.1 Discharged as to the land in C.T. 18A/506 - 25.3.1986 at 10.00am

805144.1 DISCHARGED AS TO THE LAND IN C.T 16D/1178 - 22.9.1986 AT 11.24 A.M. A.L.R.

831770.1 DISCHARGED AS TO THE LAND IN C.T 18A/534 - PRODUCED 9.2.1987 AT 11.37 A.M. AND ENTERED 13.3.1987 AT 9.00 A.M. A.L.R.

906725.2 Discharged as to the Land in CT 18A/503 - 9 SEP 1988 at 10.40am. ALR.

989148.1 Discharged as to the land in CT 18A/508 - 17.3.1989 at 2.45pm ALR

B.111844.1 DISCHARGED AS TO THE LAND IN C.T. 14D/997 - 2.10.1990 at 2.24pm ALR

[redacted]

B.125692.1 DISCHARGED AS TO THE LAND IN CT. 14D/997 - 23.10.1990 at 2.46pm ALR

B300653.4 Discharged as to part Lots 2, 3 and 4 and Lot 5 all on DP71625 - 20-7-1993 at 9.55am ALR

B317998.1 Discharged as to part Lot 99 DP 76435 - 9.11.1993 at 9.58am ALR

B317999.1 Discharged as to Lots 23, 24, 25 and 26 all on DP76975 - 9.11.1993 at 9.51am ALR

- Over page -

B323235.2 Discharged as to all the land in CST 43C/260 to 262 (inc) 264 to 265 (inc), 241 to 242 (inc) 43C/248 to 249 (inc) 251 to 253 (inc), 255 to 259 (inc) - 9.12.1993 at 1.35 pm

B334262.1 Discharged as to the land in CT 43C/243 - 22.2.1994 at 10.57 am

B 427979.1 Discharged as to the land in CT 43C/246 - 11.4.1995 at 1.23 pm

B438509.1 Discharged as to the land in CT 43C/250. 13.06.1995 at 3.10 pm

BS45477.1 Discharged as to the land in CT 43C/254 - 25.10.1996 at 9.22 am

B560977.2 Discharged as to the land in CT 43C/234 12-2.1997 at 3:25 p.m.

B612642.1 Discharged as to CT 43C/244 - 14.8.1997 at 12.03

for DLR

B615844.1 Discharged as to 43C/263 - 4.9.1997 at 11.25

SMatic for DLR

B691160.2 Discharged as to the Land in CT 53B/927 - 29-10-1998 at 3.25

B728269.2 Discharged as to the land in CT 160/1175 - 16.6.1999 at 8.30

IR

Reference No.:.....

CERTIFICATE OF CHARGE
(Under Section 220 Land and Income Tax Act 1954
or Section 50 Land Tax Act 1976)

I hereby certify that there are arrears of Land Tax payable in respect of the land described in the schedule hereto.

Dated at MASTERTON this 20th day of NOVEMBER 19 81

SCHEDULE

Taxpayer's name and address: WAIKANAE LAND COMPANY LIMITED
P O Box 490
WELLINGTON

LAND – All that parcel of land, containing

As per attached Schedule.

and being the whole of the land comprised in Certificate of Title Volume _____ Folio _____

WELLINGTON Land Registry

District Commissioner of Inland Revenue

Note: No disposition of any estate or interest in any land subject to a registered charge under the above mentioned section may be registered while such charge remains in force.

SCHEDULE

Re. WAIKANAE LAND COMPANY LIMITED

Area	Where situated	Description	Reference
663m^2	Block V Kaitawa Survey District	Being Lot 111 on DP 47126	18A/523
669m^2	" "	Being Lot 113 on DP 47126	18A/525
749m^2	" "	BeingLot 122 on DP 47126	18A/532
693m^2	" "	Being Lot 124 on DP 47126	18A/534
38.8068 ha * Refer attached amendment.	Block III of Kapiti Survey District and Blocks V & IX of Kaitawa Survey District	Block III of Kapiti Survey District & Blocks V & IX of Kaitawa Survey District and Ngarara West A14B2B3 pt	7A/1139
923m^2	Block V Kaitawa Survey District	Being Lot 1 on DP 42959	14D/997
828m^2	"	Being Lot 17 on DP 42959	14D/1012
813m^2	"	Being Lot 33 on DP 42961	14D/1032
709m^2	"	Being Lot 6 on DP 49723	20A/621
912m^2	"	Being Lot 7 on DP 49723	20A/622

SCHEDULE

Re. WAIKANAE LAND COMPANY LIMITED

Area	Where situated	Description	Reference
768m^2	Block V Kaitawa Survey District	Being Lot 1 on DP 49723	20A/616
770m^2	"	Being Lot 2 on DP 49723	20A/617
982m^2	"	Being Lot 3 on DP 49723	20A/618
715m^2	"	Being Lot 5 on DP 49723	20A/620
1021m^2	"	Being Lot 98 on DP 47126	18A/511
677m^2	"	Being Lot 100 on DP 47126	18A/513
661m^2	"	Being Lot 110 on DP 47126	18A/522
821m^2	"	Being Lot 93 on DP 47126	18A/507
823m^2	"	Being Lot 94 on DP 47126	18A/508
825m^2	"	Being Lot 96 on DP 47126	18A/509

SCHEDULE

IR 29E

Re WAIKANAE LAND COMPANY LIMITED

Area	Where situated	Description	Reference
801m^2	Block V Kaitawa Survey District	Being Lot 97 on DP 47126	18A/510
671m^2	"	Being Lot 88 on DP 47126	18A/502
1070m^2	"	Being Lot 89 on DP 47126	18A/503
997m^2	"	Being Lot 90 on DP 47126	18A/504
805m^2	"	Being Lot 92 on DP 47126	18A/506
653m^2	"	Being Lot 80 on DP 45393	16D/1174
626m^2	"	Being Lot 81 on DP 45393	16D/1175
712m^2	"	Being Lot 84 on DP 45393	16D/1178
612m^2	"	Being Lot 86 on DP 47126	18A/500

SCHEDULE

IR 29B

Re WAIKANAE LAND COMPANY LIMITED

Area	Where situated	Description	Reference
Balance Area	Block III Kapiti SD & Blocks V & IX of Kaitawa SD	Block III Kapiti SD & Blocks V & IX of Kaitawa SD & Part Ngarara West A14B2B3	Balance 7A/1139

No.559304.1 Discharged as to the land in C.T. 18A/502 - 25-5-1983 at 2.06 o'c

A.L.R.

No 568195.1 Discharged as to the land in C.T. 18A/532 - 8.4.1983 at 10.12am

A.L.R.

630457.1 Discharged as to the land in CT 14D/1012. 25-6-1984 at 11.06 am.

A.L.R.

658050.2 Discharged as to the land in CT: 18A/504 - 13/11/1984 at 10.20am

A.L.R.

667923.2 Discharged as to the land in CT: 16D/1174 - 30/1/1985 at 10.47am

A.L.R.

672160.1 Discharged as to the land in CT: 20A/622 - 19-2-1985 at 11.10 am

A.L.R.

673070.2 Released as to C.T. 18A/511 - 22.2.1985 at 10.07

A.L.R.

~~Discharged as to the land in CT~~ entered in error

MEMORIALS CONTINUED WITHIN

No. 480076.1 Discharged as to the land in CT 18A/522 - 18.3.1982 at 2.12pm

480413.1 Discharge as to the land in C.T. 20A/617 - 19.3.1982 at 2.34 p.m.

J. F. D. Patterson.
A.L.R.

481595.1 Discharge as to the land in C.T.20A/616 - 25.3.1982 at 2.15 p.m.

J. F. D. Patterson.
A.L.R.

481791.1 Discharge as to the land in C's.T.20A/618 and 620 - 26.3.1982 at 11.12 a.m.

J. F. D. Patterson.
A.L.R.

505237.2 Discharge as to the land in CT 18A/510 - 21.7.1982 at 11.49am

A.L.R.

522801.1 Discharge as to the land in C.T 18A/523 - 21.10.1982 at 10.24 am.

A.L.R.

544581.1 Discharge as to the land in C.T. 18A/525 - 4.3.1983 at 12.18

A.L.R.

549269.1 Discharge as to the land in C.T. 18A/513 - 30.3.1983 at 1.35PM

A.L.R.

458850.1

18A/523, 525, 532, 534

Nov 19 1981 1.30pm

F50000160948I

RECALL FILE LABEL

B737295.1 Discharged as to CT 420/877 3.8.1999 at 3.31. for RGL

B743992.1 Discharged as to CT 53B/922 - 10.9.1999 at 3.25 for RGL

B754375.2 Discharged as to CT 53B/933 -12.11.1999 at 3.17 for RGL

B757375.2 Discharged as to CT 53B/923 - 30.11.1999 at 10.16 for RGL

B833877.2 Discharged as to CT L20/872 – 9.5.2001 at 3.28 for RGL

617572.1