

**BEFORE THE KĀPITI COAST DISTRICT COUNCIL
TE URUHI TO KĀPITI ISLAND GATEWAY PROJECT**

Under the Resource Management Act 1991

In the matter of a resource consent application by Kāpiti Coast District Council under section 88 of the Act, to carry out the Te Uruhi to Kāpiti Island Gateway Project

OPENING SUBMISSIONS ON BEHALF OF THE APPLICANT

3 October 2022

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MAY IT PLEASE THE HEARING PANEL:

INTRODUCTION

1. Kāpiti Coast District Council (the **applicant**) seeks land use consent to construct and operate buildings – Te Uruhi – and carry out related works in Maclean Park, Paraparaumu Beach (the **Project**).¹
2. These legal submissions:
 - (a) summarise the applicant's case in a principal submission;
 - (b) set out the context and background to the Project, including an overview of the Project and the activities for which consent is sought;
 - (c) identify the statutory framework for the Panel's decision;
 - (d) describe how that framework applies in this case, with reference to:
 - (i) the evidence before the Panel regarding the positive and adverse environmental effects of the Project;
 - (ii) the proposed conditions of the consent;
 - (iii) the relevant planning instruments;
 - (iv) *"other matters"*;
 - (v) section 104D of the Resource Management Act 1991 (**RMA**) and non-complying activity status; and
 - (vi) Part 2 of the RMA; and
 - (e) introduce the witnesses giving evidence for the applicant.

PRINCIPAL SUBMISSION

3. The Project was gifted the name 'Te Uruhi' by iwi in acknowledgment of the deep connections of mana whenua to this location – a former pā site – and the wider area. Those connections are the Project's backbone and have been a driving force since it was first conceived.

¹ The applicant has already obtained the required regional consents for the Project from Greater Wellington Regional Council (**GWRC**). As set out in the planning evidence of Emma McLean, the regional consents granted include [36918] Land use – stream works (expires 3 December 2055), [37316] Coastal permit – general structure (expires 3 December 2055), [36919] Discharge permit – discharge to water (expires 3 December 2025), [37221] Land use – soil disturbance (expires 3 December 2025) and [37292] Water permit – surface water diversion (expires 3 December 2025). The consents were granted on 3 December 2020.

4. The applicant, together with its mana whenua partners Ātiawa ki Whakarongotai Charitable Trust (**Ātiawa**) and Te Rūnanga o Toa Rangatira (**Ngāti Toa**), and in conjunction with the Department of Conservation (**DOC**), have worked hard on the development of Te Uruhi for a number of years, guided by dedicated governance structures and an overarching Maclean Park Reserve Management Plan (**Management Plan**).
5. Te Uruhi is the result of this collaboration: a high-quality development that will celebrate tangata whenua and their deep connection with Kāpiti, while helping to protect the indigenous flora and fauna of the Island through a purpose-built biosecurity facility. At the same time, through its inviting 'gateway' visitor centre and iwi-designed Whakairo, Te Uruhi will promote the Kāpiti Coast as a tourist destination with a rich cultural history and unique natural landscape.
6. The Project's numerous and diverse benefits are explained in the evidence of the applicant's witnesses² and acknowledged in the section 42A report.³ The strong support of Ātiawa and Ngāti Toa underscores the significant opportunity this Project provides for local iwi. Other benefits relate to biosecurity, tourism, the local economy, and educational opportunities, and Te Uruhi will be accessible and resilient to natural hazards.
7. Put simply, this is an exciting and highly beneficial way for this public space to be used.
8. In contrast, while the land use consent has 'non-complying' activity status overall (due to two minor aspects of the proposal⁴), the Project has only modest adverse effects on the environment.
9. Unsurprisingly, therefore, Te Uruhi is well aligned with the relevant planning documents, and comfortably passes both 'gateways' for non-complying activities under section 104D of the RMA.
10. The applicant thanks the people who have taken the time to make submissions and acknowledges that change can be unsettling. The applicant accepts the expert evidence that upgrading the facilities in Maclean Park – while proposed for the benefit of all – will have some localised adverse effects, including on some submitters' views across Marine Parade and the

² Particularly the evidence of Alison Law, John Barrett, Naomi Solomon, Mark Ward, and Angus Hulme-Moir.

³ Section 42A report, prepared by Tom Anderson, dated 12 September 2022 at [162] and [164].

⁴ Namely the small-scale retail activity proposed at Te Uruhi and the signage on the buildings, which is located within the road reserve.

reserve. The applicant has taken expert advice on appropriate ways to mitigate those effects, and those measures are incorporated into the Project.

11. While the Project is not particularly contentious in RMA or planning terms, submitters' recent correspondence to the Panel has highlighted some broader controversy regarding the Project, which is understood to relate primarily to matters of funding and economic viability. These are not relevant matters for RMA decision-making; they are questions '*for the boardroom, not the courtroom*'.⁵
12. Instead, the focus of the Panel's evaluation will be the environmental effects of the Project, considered in the context of the relevant planning and policy documents including the District Plan, the Wellington Regional Policy Statement (**RPS**) and National Policy Statements. The expert witnesses for the applicant and consent authority are in broad agreement regarding all effects and planning matters⁶ including, importantly, that:
 - (a) the Project will have a number of important positive effects;⁷
 - (b) any adverse environmental effects will be at an acceptable level, taking into account the proposed conditions and mitigation measures;⁸
 - (c) the Project meets both limbs of the 'gateway' test for non-complying activities under section 104D of the RMA;⁹
 - (d) the Project is an appropriate development for the site, including in the context of the coastal environment;¹⁰ and
 - (e) when considering its positive and adverse effects in light of the applicable statutory provisions, the Project is acceptable and consent should be granted.¹¹
13. Although those expert opinions are essentially unchallenged (as no expert evidence has been filed on behalf of any submitters), the applicant is mindful that the Panel will wish to discuss the submitters' concerns with relevant

⁵ *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at p88, cited in *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 at [19].

⁶ Any differences of opinion are not material but are addressed below for completeness.

⁷ Evidence of Emma McLean at [106]-[107]; section 42A report at [162] and [164].

⁸ Evidence of Emma McLean at [13] and [152]; section 42A report at [86] [97], [103], [122], [133], [134], [143], [151], [157] and [163].

⁹ Evidence of Emma McLean at [155]. Although not explicit on the face of the section 42A report prepared by Tom Anderson, dated 12 September 2022, it understood that Mr Anderson also shares this view. In any case, as set out at [196] of the section 42A report, Mr Anderson recommends granting consent, including with reference to section 104D.

¹⁰ [103] of the section 42A report; evidence of Emma McLean at [13].

¹¹ [165] and [196] of the section 42A report; evidence of Emma McLean at [18].

witnesses at the hearing. As such, counsel signpost below the key issues arising from submissions and the available evidence on those matters.

14. On the information currently before the Panel, however, the grounds on which to grant consent for Te Uruhi are compelling, and the applicant respectfully invites the Panel to grant consent on the conditions proposed.

CONTEXT AND BACKGROUND TO THE PROJECT

Context

15. Kāpiti Island is an important conservation and tourism destination on the Kāpiti Coast. At present, there are no dedicated buildings or parking for the tours to Kāpiti Island. Instead, tours to the Island operate and launch from the beach at the Kāpiti Boating Club, and visitors generally use available parking around Paraparaumu Beach area. Biosecurity protocols are undertaken at the Kāpiti Island Nature Tours office on Marine Parade.
16. As described in the evidence of Ms Solomon (on behalf of Ngāti Toa) and Mr Barrett (on behalf of Ātiawa), there is currently a lack of mana whenua 'visibility' in the district. Iwi see Te Uruhi as an important opportunity for the customary and contemporary presence of mana whenua to be brought to the fore in this culturally significant place, and have therefore embraced working in partnership with the applicant to develop the Project.

Background

17. Te Uruhi is a long time in the making, having been mooted in 1991¹² and the subject of feasibility studies in 1992, 2013, and 2019. In December 2017, the Management Plan was adopted which listed "*Development of a 'Gateway' or Visitor Attraction Centre*" among the aims for Maclean Park, which paved the way for further discussions and planning.
18. The applicant is very grateful for the guidance of mana whenua and the wider community in developing the Project. The various initiatives and processes to this end are described in the evidence of Ms Law, and include convening two governance groups to oversee the Project's design and development (whose membership have comprised representatives of iwi, DOC, and Council), in addition to other fulsome processes for engaging with the community, iwi and other interested parties.

¹² Discussed at [5] of the evidence of John Barrett, who was involved in the 1991 proposal.

Activities for which land use consent is sought

19. The Project is well described in the application documents, the section 42A report, and the evidence of Ms Law and Ms McLean. The application is for a land use consent to enable all the elements of the Project described in the application, which include:
 - (a) two buildings: a discovery centre on the western side, providing display and exhibition space for the general public and those visiting the Island, a small office for staff, and the potential sale of tourism products, and a smaller biosecurity pod on the eastern side, consisting of two biosecurity inspection rooms to process passengers before they are loaded onto the boats, toilets for boat passengers and staff, a dirty goods store and a clean goods store;
 - (b) Whakairo elements to be installed on the building and around the site, to recognise and reflect the relationship of mana whenua to the Project site, including a carved Waharoa on the structure, a large Pouwhenua on the beach side of the visitor pod and a smaller Pouwhenua, which frame the western side of the new carpark and lead pedestrians from Maclean Park up to the buildings;
 - (c) a new carpark to the south-east of the buildings;
 - (d) new carparking in the southern part of Maclean Park and changes to the existing carpark outside of the Maclean Park boundary; and
 - (e) associated earthworks and structures.
20. The present application was notified on a limited basis under sections 95A and 95B of the RMA.
21. Three legal matters merit brief comment.
22. First, as Ms McLean points out in her evidence,¹³ since the application was lodged two additional District Plan rules triggered by the proposal have been identified. These relate to:
 - (a) lighting associated with the Project now being proposed to be less bright than the relevant permitted standard in the Plan, to reduce the

¹³ Evidence of Emma McLean at [33].

potential for any adverse effects on neighbours (triggering rule NOSZ-R11 as a restricted discretionary activity); and

(b) signage on the Te Uruhi gateway building, which technically is situated within the legal road (triggering rule SIGN-R17 as a non-complying activity).

23. The proposed signage and the requirement to light the elements of the Project are clearly identified in the application documents, but the specific rules triggering a consenting requirement are not. This does not create a barrier to the Panel granting consent for those activities, however, because section 104(5) enables a consent authority to *"grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for."*
24. Second, some submitters have raised concerns about the retail activity proposed as part of the Project, which is one reason for its overall non-complying activity status. The applicant has sought to clarify that the retail activity will be small-scale and limited to that necessary to support the recreational use of Te Uruhi and Maclean Park (including snacks, drinks, tourism goods and Island tour tickets). Counsel note, in case it helps give additional comfort to submitters, that the recreation reserve status of the Maclean Park land effectively limits any retail activity to that *"necessary to enable the public to obtain the benefit and enjoyment of the reserve or for the convenience of persons using the reserve."*¹⁴
25. Third, submitters have queried whether the application should have been notified to other affected persons or to the public more generally and, if so, whether the Panel has the power to grant consent in light of section 104(3)(d) of the RMA. There is no expert evidence (or credible other evidence) before the Panel of other persons who should have been notified.

STATUTORY FRAMEWORK

26. This section briefly outlines the statutory framework for the consent authority's consideration of the application, which will be well understood by the Panel.

¹⁴ Reserves Act 1977, section 54(1)(d).

27. Given the non-complying status overall of the activities for which consent is sought, the key RMA provisions for the Panel to apply are sections 104D, 104, 104B, 108 (and 108AA), and Part 2.

The 'gateway' test under section 104D

28. An initial consideration is whether the Project meets the requirements of section 104D (often referred to as the 'gateway' test), which states that a resource consent for a non-complying activity may only be granted if either:
- (a) the adverse effects of the activity on the environment will be minor; or
 - (b) the activity will not be contrary to the objectives and policies of the relevant plan.
29. If neither 'gateway' is satisfied, then the application must be refused. If either gateway is passed, as is the case here (for reasons discussed below), the Panel must proceed to consider the application under section 104.

Section 104

30. Section 104(1) relevantly provides that, when considering the applications for resource consent and any submissions, the Panel must, subject to Part 2, have regard to:
- (a) any actual and potential effects on the environment of allowing the activity;
 - (b) any relevant regulations and provisions of statutory planning documents; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Section 104B

31. Under section 104B, the consent authority may, after considering the application:
- (a) grant or refuse the application; and
 - (b) impose conditions under section 108.

Sections 108 and 108AA

32. Section 108 of the RMA gives broad powers to a consent authority to grant a resource consent on *"any condition that [it] considers appropriate"*. The need to consider positive undertakings on the part of the applicant (proffered through conditions) is implicit in section 108(2), which provides that conditions may be imposed requiring *"that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided"*.
33. Those powers are limited only by section 108AA, regulations, and section 108(10).¹⁵
34. Section 108AA requires that any condition imposed by the consent authority be either agreed to by the applicant, or directly connected to an adverse environmental effect, applicable rule or standard, or required for the efficient implementation of the consent.

Part 2

35. The Panel's decision-making under section 104 is *"subject to Part 2"*. As the Panel will be aware from the Court of Appeal's analysis and guidance in *Davidson*,¹⁶ the Panel must have regard to Part 2 where *"it is appropriate to do so"*.¹⁷ However, where the relevant plan provisions have clearly given effect to Part 2 and give a clear answer as to the outcome, there may be no need to do so as it *"would not add anything to the evaluative exercise."*¹⁸ In other words, in that scenario it would be inconsistent with the scheme of the RMA to override those plan provisions through recourse to Part 2.
36. However, it will be appropriate to have regard to Part 2 if, having reviewed the objectives and policies of the plan as a whole:¹⁹
 - (a) the plans have not provided a coherent set of policies that reflect clear environmental outcomes; or
 - (b) the decision-maker considers that the plans have not been competently prepared (ie in a manner that appropriately reflects Part 2).

¹⁵ Section 108(10) relates to financial contributions and is not relevant to this Project.

¹⁶ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 (*Davidson*).

¹⁷ *Davidson* at [47] and [75].

¹⁸ *Davidson* at [75], noting that *"absent such an assurance, or if in doubt, it will be appropriate and necessary to [consider Part 2]"*.

¹⁹ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [74]- [75].

EFFECTS ON THE ENVIRONMENT

Introduction

37. As noted above, the effects of the Project – both positive and adverse – are central to the Panel's consideration under section 104.
38. The effects of the Project are in turn central to assessing the relevant provisions of the planning instruments, as well as to the RMA's sustainable management purpose; the definition of that term also refers to "*avoiding, remedying, or mitigating any adverse effects of activities on the environment*".
39. The key categories of effects for consideration are as follows:
 - (a) positive effects;
 - (b) mana whenua and cultural effects;
 - (c) traffic and transport effects;
 - (d) landscape and natural character effects; and
 - (e) visual effects.
40. Those effects, and others addressed in submissions, evidence, and the section 42A report, are highlighted below.

Positive effects

41. As discussed in the evidence and section 42A report, the Project will have a range of benefits for the surrounding community and wider Kāpiti district.

Mana whenua and cultural benefits

42. The Project has been developed in partnership with Ngāti Toa and Ātiawa, and both iwi have expressed their strong support for the Project.²⁰
43. The Project site is significant as it is on the former pā site of Te Uruhi, and is situated opposite Kāpiti Island, which is a place of longstanding cultural and historical significance for Ngāti Toa and Ātiawa. As noted in the evidence of John Barrett:²¹

²⁰ Evidence of John Barrett at [9] and evidence of Naomi Solomon at [22]. See also the Cultural Values Assessment for Ngāti Toa and the Mana Whenua Assessment for Ātiawa.

²¹ Evidence of John Barrett at [21].

Nowhere else in the district is there a place where all three iwi, Ātiawa, Ngāti Toa, and Ngāti Raukawa, can recount their tribal stories, and nowhere is it more appropriate to do so than at this location on Paraparaumu Beach, directly in front of the island that features so prominently in those histories.

44. The Project is, therefore, an important visual representation of the relationship and connection of mana whenua to the site, and to Kāpiti Island.²² The Project will enable mana whenua to share their stories, history and tikanga with the local community and visitors to the Kāpiti district, supporting the expression of cultural values, which are currently limited.²³

Biosecurity benefits

45. One of the key benefits of the Project will be the provision of dedicated, fit-for-purpose biosecurity facilities.
46. Kāpiti Island is a nationally ranked nature reserve and national treasure.²⁴ In order to maintain and protect the pest-free status of the island, all visitors are required to go through biosecurity checks before departing for the island.
47. The current facilities are less than ideal in terms of best practice delivery of the biosecurity checks, and do not cater for increased visitation.²⁵ The Project will enable best practice biosecurity checks to be carried out, through dedicated facilities that enable checks to be done in an efficient and effective way, and which minimise the risk of contamination.²⁶
48. The Project will, therefore, ensure that biosecurity checks can be carried out comprehensively, particularly in the face of increasing demand, and will minimise the threat of pests to Kāpiti Island.

Economic and tourism benefits

49. The Project will have a positive economic impact on the Kāpiti district. Tourism and hospitality are an important part of the Kāpiti district, accounting for approximately 4% of the economy.²⁷

²² Evidence of Naomi Solomon at [16].

²³ Evidence of Naomi Solomon at [39].

²⁴ Evidence of Angus Hulme-Moir at [7].

²⁵ Evidence of Angus Hulme-Moir at [18].

²⁶ Evidence of Angus Hulme-Moir at [18].

²⁷ Evidence of Mark Ward at [10].

50. The Project will enhance many visitors' experience of the district by providing a high-quality departure point for trips to the Island and bringing together community, cultural values, and visitors.²⁸
51. This will have positive effects in terms of:²⁹
- (a) ensuring a high-quality visitor experience for visitors to Kāpiti Island, including by improving safety and accessibility;
 - (b) enabling increased visitor numbers for the current tour operation, and potentially the development of new tourism products;
 - (c) providing direct economic benefits to the Kāpiti district through additional expenditure, employment and incomes generated by the Project's construction; and
 - (d) providing indirect economic benefits to the Kāpiti district by encouraging visitors to experience local attractions and events, and to support community retail, accommodation and hospitality venues, alongside extended stays and repeat visitation.

Cultural effects

52. As explained in the evidence of Ms Solomon and Mr Barrett, detailed assessments were carried out on behalf of both Ngāti Toa and Ātiawa, both of which expressed support for the Project and made several recommendations. The key recommendations in both assessments related to the ongoing involvement of Ātiawa and Ngāti Toa in the Project, through its design, construction, and operation.
53. Those recommendations have been addressed through subsequent discussions between iwi and the applicant (including through governance group discussions) and have been incorporated in the proposed consent conditions through a suite of '*Mana Whenua / Governance Board*' conditions which formalise the ongoing role of iwi through the Governance Board.
54. As noted above, the Project has been developed in partnership with Ātiawa and Ngāti Toa and both iwi are supportive of the Project, as discussed in the evidence of Mr Barrett³⁰ and Ms Solomon.³¹

²⁸ Evidence of Mark Ward at [12].

²⁹ Evidence of Mark Ward at [21], [25], [28] and [30].

³⁰ Evidence of John Barrett at [9].

³¹ Evidence of Naomi Solomon at [12] and [22].

Traffic and transport effects

55. Several submitters raised concerns about traffic, including in relation to public parking, accuracy of traffic data, public safety, and campervans.³²
56. The potential effect of the Project on local traffic and parking has been carefully assessed, and there is a high degree of accord between the applicant's witness, Ms Taylor, and the Council's traffic engineering consultant, Mr Rodenburg (and the section 42A report).
57. Effectively the Project replaces (on a like-for-like basis³³) current carparks to be occupied by Te Uruhi and will not bring about any significant change in traffic congestion, the performance of the roundabout or local intersections,³⁴ or public safety.³⁵ Nor is any increase in campervan usage and associated issues anticipated as a result of the Project.³⁶
58. As such, the Project will not have any traffic effects of concern.³⁷

Landscape and natural character effects

59. Several submitters have raised concerns about the impact of the Project on the landscape and natural character of the Project site, and its appropriateness within the coastal environment.³⁸ These effects have been carefully assessed by Ms Cray for the applicant and the Council's landscape architect, Ms Williams, and various mitigation measures have been recommended and adopted.
60. The landscape and natural character effects of the Project have been assessed in relation to the Te Uruhi buildings site (which is currently a carpark partly screened by mature trees) and the 'southern carpark', the two main locations of activity.³⁹
61. The Te Uruhi buildings will replace an already developed area, consisting of a flat asphalt carpark, which is not an identified area of high natural character. The buildings meet the relevant criteria for building height and floor area within the Natural Open Space Zone.⁴⁰ As the section 42A report

³² As discussed at [81] of the section 42A report.

³³ Evidence of Megan Taylor at [24].

³⁴ Evidence of Megan Taylor at [37]-[38].

³⁵ Evidence of Megan Taylor at [50].

³⁶ Evidence of Megan Taylor at [35].

³⁷ Such effects will be "*no more than minor*"; section 42A report at [86].

³⁸ Evidence of Rebecca Cray at [81].

³⁹ Evidence of Rebecca Cray at [20].

⁴⁰ Evidence of Rebecca Cray at [20]; section 42A report at [102].

notes, the Project is intended to facilitate an existing activity that must necessarily take place on the coastal environment.⁴¹

62. The southern carpark will be established within what is currently a mown back dune environment,⁴² albeit with a higher degree of natural character than the site of Te Uruhi.⁴³
63. The experts agree that the Te Uruhi buildings will have low landscape and natural character effects, and that the southern carpark will have low to moderate landscape and natural character effects,⁴⁴ and that the effects from the Project on natural character and the coastal environment are acceptable.⁴⁵ Nonetheless, in light of the concerns raised by submitters, the Panel will no doubt wish to question the relevant witnesses.

Visual effects

64. Several submitters have raised concerns about the visual effects of the Project, including the visual impact of the building, loss of coastal views, additional traffic movements and perceived lack of detail on proposed lighting and signage.⁴⁶ These effects have been assessed by Ms Cray for the applicant and Ms Williams in advising the section 42A report author.
65. Considerable effort has been made to mitigate effects through proposed landscaping, and the effects of the Project are properly assessed considering those measures and the proposed lighting and signage conditions.⁴⁷
66. The visual effects of the southern carpark on 55, 56, 57 and 58 Marine Parade are assessed as low to moderate⁴⁸ and the visual effects of the Te Uruhi buildings on the Marine Parade, Manly Street, Kāpiti Road and Golf Road residences range from low / moderate, to moderate / high.⁴⁹
67. This assessment reflects that these properties currently have views across Marine Parade and the public land opposite to the coastal marine area, and the Project will be visible in that context.⁵⁰

⁴¹ Section 42A report at [102].

⁴² Evidence of Rebecca Cray at [20].

⁴³ Evidence of Rebecca Cray at [23].

⁴⁴ Section 42A report at [94]-[95]; evidence of Rebecca Cray at [34](a) and (e), and [35](a) and (c).

⁴⁵ Section 42A report at [97] and [103].

⁴⁶ Evidence of Rebecca Cray at [43].

⁴⁷ Evidence of Rebecca Cray at [36].

⁴⁸ Evidence of Rebecca Cray at [35](b).

⁴⁹ Evidence of Rebecca Cray at [34].

⁵⁰ Evidence of Rebecca Cray at [51].

68. As noted above, these effects are to a certain degree inevitable due to the Project's coastal location, even with buildings designed to be unobtrusive and "well nestled within the receiving landscape"⁵¹ as is the case here. The applicant recognises those effects and, although "there is no legal right to a view" under the RMA,⁵² it has worked hard to design a Project that will be sensitive to coastal character values and an attractive addition to the reserve, and that will mitigate visual effects on individual properties as much as possible.

Other effects

69. Other potential environmental effects identified in the Assessment of Environmental Effects (AEE) and section 42A report include effects on amenity, earthworks and infrastructure effects, natural hazard effects, contaminated land effects and effects on ecology and biodiversity. Based on technical advice contained in the application materials, these are not considered by either the applicant's or Council's expert witnesses to be of material concern. If the Panel has any questions arising from those materials or submissions, further information can be provided.

CONDITIONS

70. Since the previous condition set was filed⁵³ the two expert planning witnesses have conferenced and reached full agreement on an appropriate set of conditions to impose on the land use consent. An updated condition set, showing marked-up changes and annotations, is appended to the joint witness statement dated 29 September 2022 that has been circulated to the Panel and submitters. As stated at paragraph 9 of the joint witness statement, the planners:

agree the conditions adequately avoid, remedy, or mitigate any potential residual environmental effects from the proposal and have regard to the decision-making framework under section 104 and section 108AA under the Act.

71. There is only one minor change to the previous condition set, which is the addition of condition 6, reading as follows:

⁵¹ Section 5.2 (Visual Effects) of the Landscape and Visual Effects Assessment at page 16.

⁵² *Duggan v Auckland Council* [2017] NZHC 1540 at [69], citing *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [112]. See also *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [206].

⁵³ On 19 September 2022, appended to the evidence of Emma McLean.

6. Any signage approved under Condition 1, must not include any lightboxes, display any moving images, or any third-party advertising.

72. Condition 6 has been added to provide assurance, in response to a query raised by the Council's landscape architect, Ms Williams, about lighting.
73. A query was also raised during conferencing about the hours of operation for the visitor centre; in particular, how the applicant intends the lighting plan conditions (including condition 25(c)(iii), which restricts lighting levels during the hours of 10pm and 7am) to operate in practice alongside the applicant's proposed hours of operation for the visitor centre.
74. As noted in the evidence of Ms McLean, the District Plan permits lighting as a permitted activity in the Natural Open Space Zone subject to standards, including that "*Light levels for pedestrian/cycleways and carparks must be lit at a minimum of 10 lux*".⁵⁴ Furthermore, as discussed above, in response to concerns raised in relation to light spill and associated amenity effects, the applicant has proposed (in condition 25) lighting below that minimum, albeit still fit-for-purpose and appropriate for the setting.⁵⁵
75. If it assists to clarify matters, the applicant has no intention of Te Uruhi to be open to the public during those night-time hours; rather, those hours are likely to be from 7am to 6pm.
76. Considerable effort has gone into crafting the mitigation measures enshrined in the proposed conditions, and technical experts and mana whenua have all provided valuable input. The applicant's witnesses have reviewed the proposed conditions (including the 29 September version) and are comfortable that they are robust and appropriately address any actual or potential environmental effects.

RELEVANT PLANNING INSTRUMENTS

77. As indicated in Mr Anderson's section 42A report, Ms McLean's evidence and the joint witness statement, there is a high level of agreement between the planners on all planning matters, including effects, the relevant planning instruments and provisions, and conditions.
78. Both planners recommend that consent be granted.

⁵⁴ Evidence of Emma McLean at [66]; District Plan, NOSZ-R1(5).

⁵⁵ Evidence of Emma McLean at [68]-[69].

79. The Project is consistent with the objectives and policies of the relevant planning instruments (namely the RPS, NZCPS and NPS-UD),⁵⁶ as well as the relevant objectives and policies of the District Plan.⁵⁷
80. From a broader planning perspective, and in the context of the Natural Open Space Zone and General Residential Zone⁵⁸, in light of its modest size, unobtrusive design, and myriad benefits for the Kāpiti Coast and its communities, and noting the absence of any significant adverse effects, the Project is an appropriate development for the site at Paraparaumu Beach.

SECTION 104D

81. As set out above, section 104D enables the Panel to grant resource consent for non-complying activities if *either* the adverse effects of the activity on the environment will be no more than minor (limb 1) *or* the activity will not be contrary to the objectives and policies of the relevant plan or proposed plan (limb 2). In this case, the Project has been developed to meet (and does meet) both limbs of the section 104D 'gateway' test.

Section 104D – adverse effects on the environment (limb 1)

82. The adverse effects of the Project identified by experts (and submitters), and the ways in which they have been minimised through design and/or mitigated to acceptable levels, are summarised above. They are also addressed in depth in the section 42A report and Ms McLean's evidence, therefore these submissions do not traverse those effects in detail.
83. However, there are two points the applicant wishes to make in respect of limb 1 of the 'gateway' test.
84. The first relates to Mr Anderson's conclusion at paragraph 95 of the section 42A report that *"there is at least a minor adverse natural character effect on 55, 56, 57 and 58 Marine Parade"*. As an initial point, this comment is understood to refer to *"at least a minor adverse"* effect on natural character *as perceived from* those properties (as distinct from visual effects on those properties, which is a separate category).

⁵⁶ Evidence of Emma McLean at [14], [110]-[122], [123]-[124] and [127]. See also comments made in the section 42A report, prepared by Tom Anderson, dated 12 September 2022 at [138], [141]-[142] and [163].

⁵⁷ Evidence of Emma McLean at [15] and [128]-[143]. See also comments made in the section 42A report, prepared by Tom Anderson, dated 12 September 2022 at [134], [138] and [141]-[142].

⁵⁸ Most of the Project is located in the Natural Open Space Zone. Approximately 13m² of the proposed building is in the General Residential Zone; that part is located within the legal road: Page 19 of the AEE.

85. However, whether that finding relates to visual effects *on those properties* or effects on natural character *as perceived from those properties*, the key point is that specific effects do not necessarily detract from an overall 'no more than minor' finding. As explained by the Environment Court in *SKP*:⁵⁹

As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects",⁶⁰ not individual effects.

86. Seen in its proper context and setting, the Project is relatively small-scale and its adverse effects are not significant. Ms McLean relies on the advice of other experts in concluding that effects are no more than minor, and limb 1 is met.⁶¹
87. Indeed, the contrary approach would be out of step with the RMA's notification process which requires notification to "*affected persons*" (ie those who suffer a minor or more than minor adverse effect).⁶²

Section 104D – objectives and policies (limb 2)

88. The Project is also not contrary to the relevant objectives and policies of the District Plan or proposed Plan Changes.
89. There is no disagreement between the planners on this point, and there is no suggestion in the section 42A report that any of the relevant objectives or policies are not met.
90. However, even if there were such a suggestion, the Panel will be aware that the words "*contrary to*" are given a reasonably strict meaning by the courts:
- (a) The Environment Court in *Monowai Properties Ltd v Rodney District Council* considered the meaning of "*contrary to*" in the context of section 104D. In its analysis, the Court likened the definition of

⁵⁹ *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [49].

⁶⁰ The footnote from the *SKP* decision reads: "See for instance *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194 at [46] and subsequent paragraphs."

⁶¹ Counsel understands it is not necessarily the position of Mr Anderson that the Project indeed does fail limb 1 of the test, but to provide additional assurance to the Panel counsel felt it prudent to include these comments.

⁶² Section 95B requires that resource consent applications be notified to "affected persons". Under section 95E(1), "a person is an **affected person** if the consent authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor)." If any instance of a 'more than minor' adverse effect on an individual property owner automatically led to a failure of limb 1 of the 'gateway test', the purpose and effect of the limited notification process would be undermined.

*"contrary" to "being 'repugnant to' or opposed to', not simply that the proposal does not find support from them."*⁶³

(b) In *Pencarrow Hills Ltd v Hastings District Council*, the Environment Court added that *"It does not mean that simply because a proposal may not find direct support in the objectives and policies it will be contrary to them. Further, the objectives and policies are to be viewed in an overall sort of way."*⁶⁴

91. In short, mere inconsistency is not enough; the Project must be *"repugnant to"* the objectives and policies (a far cry from the case here).
92. In addition, the assessment must be against an assessment of the Plan as a whole. The Court of Appeal in *Davidson* considered the section 104D 'gateway' test as it had been applied by the Environment Court⁶⁵, noting *"On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole (...)"*⁶⁶
93. As Ms McLean concludes, *"Taking a broad perspective on how the application sits with regard to the objectives and policies of the relevant planning instruments, I consider the application to be consistent with these provisions."*⁶⁷

PART 2

94. In this case, the expert planners (Ms McLean and Mr Anderson) have not highlighted any aspects of the relevant planning provisions that may omit or fail to give effect to aspects of Part 2. Both consider that the plans lead to an obvious outcome for this application, which is to grant consent on the conditions proposed. As such, it is open to the Panel to find that direct consideration of Part 2 does not add materially to its evaluation.
95. However, it is important to note that the Project gains strong support from the provisions of Part 2. In particular, it will deliver widespread benefits while safeguarding important natural and cultural values of this site, and in doing so strongly promotes sustainable management of the relevant resources (in terms of section 5). It will also enhance public access to the coast (and to

⁶³ *Monowai Properties Ltd v Rodney District Council* EnvC Wellington A215/03, 12 December 2003 at [35].

⁶⁴ *Pencarrow Hills Ltd v Hastings District Council* EnvC Wellington W10/2005, 8 February 2005 at [31].

⁶⁵ *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

⁶⁶ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [14], citing [2016] NZEnvC 81 at [249].

⁶⁷ Evidence of Emma McLean at [154].

Kāpiti Island), which is a matter of national importance to be recognised and provided for by the Panel under section 6(d).

96. Perhaps most notably, however, the way in which the Project has been delivered is highly respectful of the relationship of tangata whenua with the former pā site of Te Uruhi, with Kāpiti Island, and with the surrounding areas, in keeping with section 6(e) of the RMA.

EVIDENCE TO BE PRESENTED

97. The witnesses for the applicant are as follows:

- (a) Alison Law, a Council officer, who provides an overview of the project;
- (b) John Barrett, giving evidence on behalf of Ātiawa;
- (c) Naomi Solomon, giving evidence on behalf of Ngāti Toa;
- (d) Mark Ward, a Council officer, in relation to economics and tourism;
- (e) Megan Taylor, a transportation engineer;
- (f) Rebecca Cray, in respect of landscape, visual, and natural character effects; and
- (g) Emma McLean, on planning and conditions.

98. As noted in counsel's memorandum dated 19 September 2022, the applicant's other witness – Angus Hulme-Moir of DOC is unavailable to attend the hearing, but can answer any questions the Panel may have.

3 October 2022

David Randal / Esther Bennett
Counsel for the applicant