

**BEFORE THE INDEPENDENT HEARINGS PANEL APPOINTED BY THE
WESTERN BAY OF PLENTY DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act
1991 (**RMA**)

AND

IN THE MATTER of a Notice of Requirement by
Western Bay of Plenty District
Council for Active Reserve,
Ōmokoroa

**LEGAL SUBMISSIONS ON BEHALF OF
WESTERN BAY OF PLENTY DISTRICT COUNCIL
(AS REQUIRING AUTHORITY)**

Dated: 7 September 2023

CooneyLeesMorgan

ANZ Centre
Level 3, 247 Cameron Road
PO Box 143
TAURANGA 3140
Tel: (07) 578 2099
Fax: (07) 578 1433
Supervising Partner: Mary Hill
Solicitors: Kate Stubbing / Jemma
Hollis
kstubbing@clmlaw.co.nz
jhollis@clmlaw.co.nz

MAY IT PLEASE THE COMMISSIONERS

INTRODUCTION

1. Council is seeking a designation to allow the future establishment of an Active Reserve at 452 – 476 Ōmokoroa Road and 7 Prole Road, Ōmokoroa (the **Site**). The Active Reserve will include facilities such as outdoor playing fields, clubrooms and changing facilities, playgrounds, potentially indoor sports facilities (an aquatic centre and / or indoor sports centre), and associated access and parking, across an area of approximately 10ha.
2. The Ōmokoroa Peninsula has experienced rapid urban growth as it transforms from a village to a town. The wider area has been identified for urban development for some time and has had a “Future Urban” zoning. Ōmokoroa is home to almost 5000¹ residents, with the Stage 3 urban development planning (Plan Change 92) expected to increase the population of Ōmokoroa by a further 7 – 8000 residents over the next 30 years.²
3. Quality planning of new urban areas involves more than just providing land and infrastructure for housing. The SmartGrowth principle of “live, learn, work and play” seeks to ensure new urban areas provide employment opportunities and social / community infrastructure alongside houses to support new communities and reduce car dependency. By enabling the development of an Active Reserve to host sports and recreation activities, this Notice of Requirement (**NOR**) seeks to support existing and future urban growth in Ōmokoroa as well as the wider Western Bay sub region.
4. The Notice of Requirement is being heard alongside Plan Change 92. The NOR and Plan Change 92 processes are separate, and are subject to different statutory considerations.
5. The issue for the Commissioners to determine is whether the Council has satisfied the tests in section 168A(3) of the Resource Management Act 1991 (**RMA**) such that the designation can be confirmed, subject to the proposed conditions. The evidence to be presented on behalf of the

¹ Census estimate 2022, section 32 report - Plan Change 92 Ōmokoroa and Te Puke Enabling Housing Supply and Other Supporting Matters at 10.

² Section 32 report at 10.

requiring authority addresses these requirements, and concludes that these statutory requirements have clearly been met.

6. The requiring authority seeks a decision confirming the NOR subject to the proposed conditions.

SUBMISSIONS

7. The NOR was publicly notified on 20 August 2022. A total of six submissions were received.
8. Two submissions in support were received³, with one being conditional on the addition of archaeological discovery conditions, which the requiring authority has accepted. In the letter tabled for the Panel, Heritage New Zealand Pouhere Taonga seeks the addition of wording to draft condition 4, which the requiring authority supports. This is shown as condition 6 in Attachment 1 to the reply evidence of the Reporting Planning (Mr Danby).
9. Four submissions in opposition were received from landowners who are directly affected by the NOR. Issues raised by these submitters include:
 - (a) concerns regarding the continuation of existing land uses and the limited suitable alternative sites;
 - (b) concerns regarding the loss of property, businesses, and matters relating to the land acquisition process including compensation; and
 - (c) whether all land within the Site is required for reserve purposes.
10. One submitter (Annette Giles) raised concerns regarding Council's duties, including references to the Imperial Laws Application Act 1988, the Crimes Act 1961, and the Public Works Act 1981 (**PWA**).⁴ These matters are irrelevant to a notice of requirement process under the RMA (acknowledging that the PWA will be relevant to any future land acquisition process).
11. Only one other submitter has filed written evidence. Mr Chris Taylor (director of TDD Limited) explained his concerns relating to the land

³ Ōmokoroa Country Club and Heritage New Zealand Pouhere Taonga.

⁴ Submission of Annette Giles, dated 15 September 2022.

acquisition process (including meetings, valuations, current use of the site as a storage business and consent expiry issues), the need for a confirmed and approved masterplan for the site, and the actual and potential effects on them not having been assessed.

12. The matters relevant to this NOR that have been raised by the submitters are addressed in these submissions. Matters that are outside the scope of the NOR process are discussed further below.

STATUTORY CONSIDERATIONS

13. Under section 168A of the RMA, Council (as requiring authority) gave notice to Council of a NOR for the proposed Ōmokoroa Active Reserve within its district.

14. When considering this NOR and the submissions, the Panel is directed to have regard to the matters in section 168A(3) of the RMA, and must decide whether to confirm the requirement, modify the requirement, impose conditions on the requirement, or withdraw the requirement.⁵

15. Section 168A(3) commences:

When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to...

16. The matters the Panel is directed to “have particular regard to” are:
 - (a) any relevant provisions of a national policy statement, regional and district planning instruments, including Plan Change 92 (section 168A(3)(a));
 - (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work (section 168A(3)(b));
 - (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought (section 168A(3)(c)); and

⁵ S 168A(4) RMA.

- (d) any other matter the Panel considers reasonably necessary in order to make a decision on the requirement (section 168A(3)(d)).
17. These matters in section 168A(3) (a) to (d) are not tests that must be met. Rather, they are matters which must be had regard to when considering “*the effects on the environment of allowing the requirement*”, and are subject to Part 2 of the RMA.
18. We consider each of these matters in the following order:
- (a) whether the designation is reasonably necessary;
 - (b) whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
 - (c) the relevant planning documents;
 - (d) the effects on the environment; and
 - (e) Part 2 of the RMA.

REASONABLY NECESSARY

19. The question is whether a designation is ‘reasonably necessary’ for achieving the objectives of the public work for which the designation is sought.⁶
20. Mr Hextall describes the designation as reasonably necessary to create an Active Reserve to provide for the social and cultural wellbeing of current and future occupants of Ōmokoroa.⁷
21. Mr Canham’s evidence describes the current shortfall of active reserve in the Western Bay sub region. He confirms that the Active Reserve is required to cater for the future population of Ōmokoroa as well as current residents of the immediate and wider Western Bay area.⁸
22. One submitter has questioned the requirement for the size of the land area proposed for the Active Reserve.⁹ Mr Canham’s evidence describes how the proposed size of the Active Reserve is necessary to ensure the Active

⁶ *Beadle v Minister of Corrections* ENC Wellington A74/02, 8 April 2002 at [841].

⁷ Evidence of Jeff Hextall at [80].

⁸ Evidence of Geoff Canham at [11].

⁹ TDD submission at 2.

Reserve functions effectively and as intended, in line with Council's levels of service and community expectations.¹⁰

23. The indicative layout of the Active Reserve is in concept form at the moment, with the ultimate design and layout to be determined following a community consultation process.¹¹ Importantly, the Site is capable of accommodating senior and junior playing fields, hard courts, a bowling green, changing sheds, clubrooms, playgrounds, an indoor sports venue, an aquatic centre, and supporting infrastructure (lights, access / car parking and servicing).
24. Mr Canham confirms that Council is being proactive in planning for the future needs with this green infrastructure.¹² In our submission the full extent of the Site is reasonably necessary and is the most appropriate planning means to achieve the Council's objectives. The Reporting Planner agrees with this conclusion.¹³

CONSIDERATION OF ALTERNATIVES

25. As can be seen from the evidence, the requirement for a large active reserve and its location in the Ōmokoroa Future Urban Zone has been subject to on-going public consultation for some time through the structure plan and other processes.
26. A comprehensive assessment of alternative Active Reserve sites was undertaken by Council with seven locations considered for the Active Reserve.¹⁴ The consideration involved assessment of factors such as shape of the site, soil condition, slope, acquisition cost, and location and alignment with surrounding land uses and transport corridors.¹⁵ The assessment concluded that, for reasons of location, topography, and acquisition cost, the Site was the most suitable for an Active Reserve.
27. When considering the adequacy of an assessment of alternative sites, routes and methods, the question is whether the requiring authority's investigation of alternatives was sufficient to satisfy itself of the alternatives

¹⁰ At [57].

¹¹ Evidence of Jeff Hextall at [24].

¹² Evidence of Geoff Canham at paragraph 12.

¹³ Section 42A Report, section 11.

¹⁴ Evidence of Geoff Canham, Appendix B.

¹⁵ At 8.

proposed, and that it has not acted arbitrarily in its alternatives assessment.¹⁶

28. Mr Hextall confirms his view that a comprehensive assessment of alternative sites, routes and methods was undertaken by the requiring authority, with the proposed site being the most appropriate location. The Reporting Planner (Mr Danby) agrees that there has been adequate consideration of alternatives in terms of section 168A(3)(b).¹⁷

RELEVANT PLANNING INSTRUMENTS

29. Mr Hextall and the Reporting Planner agree that the NOR is consistent with the relevant planning instruments, being the National Policy Statement on Urban Development, the Bay of Plenty Regional Policy Statement (including Change 6), and the Western Bay of Plenty District Plan, including Plan Change 92.¹⁸

EFFECTS ON THE ENVIRONMENT

30. The potential effects have been assessed in the NOR, the section 42A report, and in the evidence of Mr Hextall. These are summarised in the following paragraphs.
31. Some intermittent adverse noise effects may arise from the operation of the Active Reserve, however these are not expected to be unreasonable or out of character with surrounding land uses, including the future residential environment.
32. Increased traffic movements have the potential to create safety and amenity issues, however the central and walkable reserve location combined with appropriate traffic design will minimise any traffic effects.
33. New buildings and earthworks required to create the Active Reserve may have some impact on the visual landscape, and this can be addressed through comprehensive landscape design once the site layout is finalised.
34. Like many properties in Ōmokoroa, part of the Site has historically been used for horticultural activities. Any required contaminated land

¹⁶ *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84 at [61].

¹⁷ Section 42A report, at [10.2].

¹⁸ At [56]. Section 42A report, section 9.

remediation will be undertaken through the NES-Contaminated Land¹⁹ and Regional Council consenting processes.

35. The Ōmokoroa Peninsula is of high cultural significance to tangata whenua, including Pirirakau and Ngāti Taka. There are no identified archaeological areas within the Sites, and no tangata whenua submissions were received on the notified NOR. However, the requiring authority will continue to work in collaboration with tangata whenua in developing the plan for the Active Reserve.
36. A number of submitters have raised issues in terms of:
- (a) effects on existing land uses, specifically uncertainty for the continuation and viability of business operations (childcare centre and storage business);²⁰ and
 - (b) social and economic effects on landowners. The effects are not specified, although read with the remainder of the submitter's evidence we anticipate this relates to potential economic effects associated with the impact of the notice on business operations.²¹
37. Where there are potential adverse effects of a designation on existing land use, the Environment Court has taken the approach of weighing the necessity of a designation against these matters. For example, in *Watkins v Transit New Zealand* the safety imperatives of a designation for road safety improvements was determined to far outweigh the potential adverse effects of the designation on amenity, landscape, and in terms of the existing farming operations.²²
38. The Court has also found the community's social, economic and cultural wellbeing and health are better served by open space and recreation facilities as opposed to a consented retirement village. Whilst the retirement village did provide community benefit this was of a smaller scale than that provided by the open space.²³

¹⁹ National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011

²⁰ Submissions of TDD Ltd, Mornay and Rachel Jacobs for Maxlee Holdings Ltd, and David and Patricia Cummings on behalf of Rascal Holdings Ltd.

²¹ Evidence of Chris Taylor at [22].

²² *Watkins v Transit New Zealand* ENC Auckland A054/2003, 16 April 2003.

²³ *Villages of NZ (Mt Wellington) Ltd v Auckland City Council* ENC Auckland A023/09, 20 March 2009 at [100].

39. Existing businesses within the Site do provide community benefit, particularly in terms of the childcare operation. In our submission, based on the case law, greater weight should be placed on the wider benefit to the community arising from the provision of Active Reserve facilities, than on the smaller benefit to the community of existing activities in the Site and the private interests of landowners.
40. Significant positive effects will result from the creation of the Active Reserve. This key community infrastructure will enable the community to provide for their social well-being and health, in an appropriate location to serve an area that has been identified for significant residential population growth.

PART 2 OF THE RMA

41. Mr Hextall and the Reporting Planner agree that the NOR achieves the RMA's purpose of sustainable management, having particular regard to matters in sections 6, 7 and 8. The NOR will enable the social, cultural, economic and health and safety needs of people, communities and future generations to be met through the provision of public active open space.

IRRELEVANT MATTERS

42. As noted earlier, a number of submitters have raised issues that are outside the scope of the NOR process. This includes matters relating to consultation, the loss of property, businesses, and the land acquisition process.
43. In his evidence, Mr Taylor on behalf of TDD Limited has sought to criticise the requiring authority for its approach to the land acquisition process. Issues raised with the process and the timing of the requiring authority taking steps under the PWA in relation to the acquisition of the affected properties are not relevant to the NOR process.
44. However, to provide context for the Panel, the evidence of Annelie Badenhorst describes the pre-PWA process consultation and engagement with landowners to date. In the most recent correspondence, the requiring authority advised that active acquisition of land would occur between 2026

and 2028, and that earlier acquisition of properties will be considered on a case by case basis.²⁴

45. The requiring authority has allocated budget to commence the acquisition process as early as 2024.²⁵ The most recent correspondence invited landowners to meet to continue discussions. The requiring authority is committed to continuing discussions in good faith and Ms Badenhorst acknowledges the need to proactively address landowner concerns through engagement.²⁶

COUNCIL SECTION 42A REPORT AND CONDITIONS

46. The Reporting Planner's report is comprehensive and clear. Mr Danby recommended that the NOR be confirmed, subject to the proposed conditions. An updated version of conditions was set out in Attachment 1 to the reply evidence of Mr Danby.
47. In his evidence Mr Hextall confirms that he agrees with the findings and recommendations in the section 42A report. Mr Hextall considers the draft conditions to be appropriate, and supports the additional wording proposed to the Outline Plan condition.

CONCLUSION

48. The NOR is reasonably necessary to enable the development of the Active Reserve to support urbanisation of Ōmokoroa and to address the reserve shortfall for community needs. The requiring authority seeks confirmation by the Panel of the NOR subject to the proposed conditions.


²⁴ Annex B, evidence of Annelie Badenhorst.

²⁵ Depending on timing on confirmation of the NoR. Evidence of Annelie Badenhorst at [17].

²⁶ Evidence of Annelie Badenhorst at paragraph 12(c).

49. The requiring authority will call the following witnesses:
- (a) Annelie Badenhorst (Council Legal Officer leading the acquisition strategy) to provide a summary of the consultation to date with affected landowners in relation to future acquisition;
 - (b) Geoff Canham (Parks and Recreation Specialist) who discusses the need for the Active Reserve in the preferred location, and at the proposed size, and the site selection process; and
 - (c) Jeff Hextall (Consultant Planner) who addresses the planning considerations and proposed conditions.

Dated: 7 September 2023

A handwritten signature in blue ink, appearing to be 'K Stubbing' or 'J Hollis', written in a cursive style.

Kate Stubbing / Jemma Hollis
Counsel for the Applicant