

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

IN THE MATTER OF RESOURCE MANAGEMENT ACT 1991

**RE: WESTERN BAY OF PLENTY DISTRICT COUNCIL NOTICE OF A
REQUIREMENT FOR A DESIGNATION FOR THE PROPOSED
ŌMOKOROA ACTIVE RESERVE (RECREATION RESERVE) Under
SECTION 168-171 of the RESOURCE MANAGEMENT ACT 1991**

And

**RE: PROPOSED PLAN CHANGE 92 FOR ŌMOKOROA AND TE
PUKE ENABLING HOUSING SUPPLY AND OTHER SUPPORTING
MATTERS TO WESTERN BAY OF PLENTY DISTRICT PLAN**

**LEGAL SUBMISSIONS ON BEHALF OF SUBMITTER TDD LIMITED
TO PPC 92 and WBOPDC NOTICE OF REQUIREMENT**

DATED 7 SEPTEMBER 2023

Kate Barry Piceno
Legal Counsel
Mauao Law Chambers
9 Prince Ave
Mount Maunganui
Tauranga 3116
kate@kbplawyer.co.nz

INTRODUCTION

1. These legal submissions are on behalf of submitter TDD Ltd. Evidence was filed by Mr. Chris Taylor on behalf of TDD Ltd which has been circulated and pre-read by the Council Staff and Hearings Panel. Mr. Danby on behalf of Council has filed reply evidence dated 6 September 2023 responding to that evidence.
2. I will be presenting these submissions remotely to the hearings panel, as unfortunately I am away in Wellington and Christchurch this week.
3. Mr Taylor is appearing in person today to answer any questions that may arise regarding the evidence he prepared, along with Mr. Collier. Although Mr. Collier did not file written planning evidence, he can add the relationship with PPC 92, or background planning matters as Mr. Collier has acted for TDD Ltd since 2006 including on the landuse consent for the Ōmokoroa Storage Sheds. He is familiar with the site and consultation with Council to date regarding the NoR.
4. TDD Ltd owns 474 Ōmokoroa Road (Lot 1 DPS 61801) which is one of five properties affected by the notice of designation. The site is approximately 1 hectare, and located on the site is a storage shed facility (Ōmokoroa Storage Sheds), two dwellings and a greenhouse.
5. The resource consent granted in 2006 for Ōmokoroa Storage Sheds was for an 80-unit storage facility. As noted in the evidence of Mr. Taylor, the conditions of consent include that the consent will expire on 18 May 2026. The reason for this condition was its future urban zone and indicative residential use at that time. It was not related to a future use for Active Reserve. As noted in Council evidence, previously the Ōmokoroa Structure Plan identified other land for Active Reserve in Ōmokoroa, which was changed due to resource consents for that other land to be used for other urban purposes.
6. The TDD Ltd land has been zoned Future Urban for some time, as identified in the 2006 landuse consent decision.

PROPOSED PLAN CHANGE 92

7. These submissions also cover proposed Plan Change 92 (PPC 92) and TDD Ltd submission on it.
8. As part of PPC 92 the land is proposed to be zoned Residential, and this zoning is supported by TDD Ltd. In addition, as part of Plan Change 92 a proposed Structure Plan was developed by Council which includes the identification of the subject site as an Active Reserve (Figure 1 and Appendix 3).

9. This proposed structure plan in Plan Change 92 as notified should not predetermine the appropriateness of this designation.
10. Firstly, the identification of this land for “sports fields” was first shown in the Boffa Miskell Gully Concept Plan in 2016, so it is not linked to additional residential density resulting from PPC 92.
11. The Panels deliberations under Part 6 must consider the appropriateness of this designation for it to be confirmed, declined, or approved in part, but this should be considered independently by the Panel from PPC 92. Only if it is approved by the Panel, in whole or in part, should it then follow for the Panel to consider whether the area should be included in the PPC 92 Structure Plan.
12. As Mr. Danby reply evidence notes, a designation restricts anyone other than the requiring authority from carrying out work on the designated land that will prevent or hinder the project or work to which the designation relates, without first obtaining the requiring authority's permission (refer s176(b)).
13. Therefore, TDD Ltd may be faced with waiting 15 years as the full length of term of the designation for Council to acquire the land, with a strong likelihood Council will not provide approval to seek an extension of its landuse consent term to carry on its home-based business on the site.
14. There has been limited application by the Courts of Section 85 of the RMA, which is where compensation may be required, and a plan provision may be opposed on the basis that it would prevent reasonable use of land and places an unfair and unreasonable burden on the landowner.
15. It is unlikely Ltd will be able to require Council to purchase or compensate them from reasonable use of their land as they will still be able to live on the site (meeting its residential zone purpose). However, TDD Ltd has significant concerns that its application for resource consent for continuation of the self-storage business will be granted by Council as a strategic action to push them to sell the land to Council, and at a lower valuation price. There is an estimated 2021 capital valuation for the designated land of \$8,115,000 (Active Reserves – Ōmokoroa Stage 3 Page 31 of 31 April 2021-Appendix 6 which includes improvements on each site, and land value).
16. It is submitted that PPC 92 or a condition on the designation should include the rights of landowners to continue to operate their lawfully established business activities operating on the designated land titles until the land is required for development, including Council providing written approval as an affected party under s 176(b).
17. Mr. Danby’s and Mr. Hextall’s evidence does not cover the effects of the inclusion of the land in the PPC 92 structure plan in terms of plan rule that restricts activities that are not in accordance with the Structure Plan, which will be an additional plan rule requiring consent.

NOTICE OF REQUIREMENT("NoR")

18. The legal framework for Notices of Requirement for designations under the RMA is now well established, so I have not repeated this legal framework in these submissions.
19. For designations, the High Court case of *Basin Bridge* distinguished the Supreme Court case *King Salmon* on the basis that section 171 of the Act requires a different approach to that taken in the plan change context. This was because there is a "specific statutory direction to appropriately consider and apply" Part 2 in the wording of section 171(1). This approach has been subsequently adopted by the Environment Court in designation cases and therefore Part 2 and an "overall judgement" approach is appropriate for the Hearings Panel to apply.
20. Section 168A(3) replicates the exact wording of section 171(1) in requiring the territorial authority to "*subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to*" the relevant statutory planning documents. Accordingly, at present the 'overall judgment' approach remains valid (and is required) with respect to the consideration of NoR's under both sections 168A and 171.
21. The Hearings Panel needs to carefully consider the environmental effects (including positive and negative social effects) as part of its assessment of effects, to support the NOR pursuant to s168-171 of the RMA. Plan Change 92, and any notified structure plan in regard to this designation should not have any bearing on this NOR considerations, and the considerations under Part 6 in regard to consider of the appropriateness of this designation, to be confirmed, declined, or approved in part, should be considered first by the Panel.
22. Mr. Taylor's evidence discusses his lack of trust of Council given the way it has handled consultation to date with him over its desire to acquire the land for Active Reserve purposes. It is accepted that TDD Ltd is not obliged to agree to sell its land for a price it does not consider adequate, and that if the land is taken, the Council and/or TDD Ltd are entitled to have compensation fixed in the manner prescribed by Part V of the PWA.
23. It is also accepted that Council has a right to choose not to negotiate with Mr. Taylor or attempt to reach an agreement for acquisition of this land until 2026 or 2028.
24. However, it remains a significant point of concern for TDD Ltd that consultation and negotiations have not been carried out in good faith, when there is no legal certainty given to how and when the Taylors home and business will be affected by the lack of certainty of funding secured by Council to purchase the land.
25. It is submitted that this is a relevant matter for whether the designation for 10 hectares of land is currently fair or sound. These concerns raised in evidence by Mr. Taylor cannot be read down as only an issue that affects final compensation to be paid

and goes to the wider merits of the proposal included under Part 2 considerations of sustainable management.

26. The High Court case *Waitakere City Council v Brunel*¹ states “The rubric ‘fair, sound and reasonably necessary’ requires a proportionate approach on the part of the Environment Court which, if not adopted, will be the subject of intervention by this (High) Court”.
27. There is a strong interrelationship between the RMA and subsequent PWA processes. In my submission, consideration of the reasonableness and fairness in the interrelated timing of these processes is a key issue for the Panel to consider.
28. A key part to successfully delivering Ōmokoroa as a quality MDRS residential area is accepted as being linked to amenity improvements including the high-quality open space/public amenity network to be established with quality public spaces.
29. However, the active reserve designation is identified for sports fields, and is therefore a discreet and specific part of the wider open space/reserves network philosophy provided by the Boffa Miskell designed open space walkway corridors linked to residential amenity and the nearby Ōmokoroa Harbour.
30. With changing demographics and identified significant reduction in household size and high proportion of retirement villages and aging population in Ōmokoroa, it is expected that any designation for active reserves require a more targeted approach to active reserve and open space provision related to sports fields. The likely occupancy of apartments and MDRS housing within the Ōmokoroa area are likely to be at an overall lower level.
31. Currently, Omokoroa has a population of approximately 5000, with provision of 5.8 hectares of open active reserve space. As the assessment of reserves needed has been undertaken as a “qualitative “exercise rather than based on population, it is unclear at what point in time the expected population growth projections will trigger further need for additional public sports fields. There is no evidence on whether additional sports fields will be catered for at the new primary and secondary schools to be constructed next year to address short to medium demand by the community either.
32. Swimming pools, bowling greens and gym facilities are generally included as amenities within retirement villages. Schools with rolls of up to 1200 as targeted for Omokoroa also meet the funding criteria for such facilities within their own grounds. What is not clear in the evidence is whether these changes to the population demographic and provision of private recreational spaces have been considered, and if there will be sufficient demand for ratepayers to fund additional public facilities of this nature in Ōmokoroa.
33. Open space can take the form of pocket parks, recreational parks, walkway corridors, or other categories of publicly accessible open space. These types of open space areas

¹ (CIV-2006-4004-4504) dated 19 December 2006, Baragawanath J

will provide for communal open space (within a five minute walk) and will compensate for smaller individual provision of private open space that is associated with medium/higher density housing as proposed through PPC 92. This aspect of Council reserves plan for PPC 92 is fully supported by TDD Ltd.

34. Proximity to the Ōmokoroa Town commercial centre and associated Town Centre open space and commercial recreational and entertainment facilities will provide other additional recreational opportunities for the Community.
35. As noted above, both retirement village developments and other MDRS contain open space amenities for exclusive for use of the owners/occupiers. Mr. Osborne's evidence for Kainga Ora on PPC 92 states that "Apartment developments that do occur are likely to form part of wider master-planned developments with developers providing a range of housing options and typologies"². These types of developments generally provide a direct 'reserve type amenity provision', at a higher standard than likely to be provided through the public reserve network. This is providing for the open space reserve/recreational needs that otherwise would be provided by the Council in some form, at no cost to the ratepayers or Council. An open space area when located within the general boundary of a medium rise development is then maintained and managed by the private entity not by general ratepayers.
36. Based on changing demographics with a reduction in household size and an aging population this requires a more targeted approach both to housing, and related reserve and open space provision. It is submitted that Council's NOR designation lacks the evidence to support the extent of land proposed.
37. Mr. Hextall's evidence at para 35 states in response to TDD Ltd submission seeking a more detailed concept plan, costing and timing details to justify the NOR "The *concept plan is in draft at this stage to inform active reserve requirements and to provide a better understanding of the possible park development. Completion of the concept plan will be undertaken as a separate community consultation exercise.*"
38. With respect to Mr. Hextall, without this level of detail or feedback from the community as to what level of debt it is willing to fund regarding this active reserve development, the Council is in no position to know what extent of land it can justifiably purchase and develop as active reserve. Based on 2021 pricing in the report scheduled to cost of the land alone, and the stalling of acquisition negotiations as identified in Ms Badenhorst's evidence, it is already obvious Council does not have the current funding means to purchase the land now, let alone develop this land for aquatic or recreational centres, nor even sports fields with necessary facilities.
39. Justification of the active green space reserve area "for off setting of green house gases" is with respect, a tenuous connection to related positive effects. Similarly, to state this location was chosen (in comparison to other alternative site options) due to it providing an attractive entrance to Ōmokoroa is suggested to be contradictory to Council recent decision for its new industrial zone to be placed opposite on the other

² Osborne, economic EIC, para 51.

side of Ōmokoroa Road, with what appears as minimal consideration given to its detrimental effects and detracting of the visual gateway entrance to Ōmokoroa.

40.

41. There are air quality and odour effects from Industrial zone activities and related truck movements to populations health. The placement of open-air sports fields near the Ōmokoroa Industrial Zone is also a matter it would be expected the Council Section 42 A report would have considered as part of its selection of sites.

42. Related to the above is the opportunity for a partnership between the developer and Council in the provision of this kind of open space/reserve land which is not available when Council undertakes reserve development through a designation and PWA acquisition process such as this.

43. Kainga Ora economic evidence by Mr. Osborne raises significant concerns that the aspirations of Council for Ōmokoroa's urbanisation and population projections are not grounded with viable and feasible data related to market conditions and development constraints and costs. Without that level of development occurring the Council will not be able to fund or justify the sports fields designation to the size and scale referenced as needed for this population growth which is planned over a 30-50 year time period. It is highly likely the designated land will be purchased in a piece meal ad hoc basis over many years, and there is no transparency or certainty provided by Council for landowners about this. With no concept plan developed to indicate how the active reserve lands may be staged, and over how many years, there can be no confidence or certainty to affected landowners, or even to the wider community as to if or when these sports fields or other suggested potential facilities may be constructed.

CONCLUSION

44. TDD Ltd oppose the Council's NOR as notified. The proposed size and scale of the land notified under the designation for active reserve has not been assessed adequately through economic reports or predicted demographic population needs of the Ōmokoroa community.

45. The location of this site as being preferred over the other options is not accepted, but rather appears to be based on expedience due to Council's ownership of one title and its hope that Central Govt funding from MOE as a cost sharing may materialise in the future.

46. There is no evidence setting out whether or to what extent the Ministry of Education has entered any sharing of resources or services regarding its shared use by the future school. Further, the size of the MOE designation for the school, which was the former Gane property is of sufficient size to cater for a primary and secondary school, with land for open space and active use by the proposed schools. These schools are about to commence construction in 2024 and it is submitted that there should be no designation approved until these schools are completed and there is fuller

understanding of what sharing of facilities or land is needed by the schools in addition to its own designation and Ministry of Education funded facilities on its own school site.

47. The designed lands location opposite the existing Ōmokoroa Industrial Zone with increasing development of heavy industrial uses and truck movements is considered as incompatible or at least less than ideal with childrens playgrounds and open air sports fields.
48. About shared facilities, the usual situation with schools is that they receive reduced rates or financial /development contribution waivers or offsets if their school's recreational facilities or sports fields are open to the public, not the other way round.
49. The suggestions in the Planning report the Council may consider an Aquatic Centre or other facilities in the future is not supported by any economic analysis as to how this may be funded. Given the MOE policy is to no longer fund swimming pools with schools, it is highly unlikely to be funded by any shared arrangement with the Ministry.
50. Whilst TDD Ltd supports the general proposition put forward in Council evidence that Ōmokoroa will need more open space and recreational amenities for an increase in population, there is a lack of evidence provided with the NOR that identifies that the size of the land area designated, or length of time of 15 years for the designation, is justified or how it will be funded. There is a very real prospect this designation will remain a blight on TDD Ltd land for many years, with a reasonable likelihood that it won't proceed at all over the TDD Ltd land.
51. Without credible evidence to support the need for this extent of active reserve land or security of funding, Council may well decide the extent of land designated is no longer required. In the meantime, my clients will be unable to develop their land for residential development or invest in its existing business.
52. Until or unless such detail is provided, TDD Ltd seek the designation be declined or modified to remove its site from the land area designated. Alternatively the designation over TDD Ltd Land should only be granted for 5 years until 2028, by which time the Council should have developed a concept plan and taken steps to acquire the land. If not, the designation blight on the land can be removed so the land can be used for residential purposes or for continued business use by TDD Ltd.

Signed 

Kate Barry-Piceno

For TDD LTD submitter

7 Sept 2023