

4 March 2021

To

Ōpōtiki District Council

**ŌPŌTIKI 3122**

**Submission to the Ōpōtiki District Council (“Council”) regarding their Statement of Proposal in response to the joint request by Te Arawhiti and Te Whanau a Apanui.**

My name is Warrick Macdonald, and I am a trustee of the Callum Brae Trust which owns a beachfront property at Whanarua Bay. This property is described as Lot 9 D P 4651 BLK III Te Kaha Survey District and is comprised and record of title GS1A/489 (“The Property”).

In this submission I am responding to the Statement of Proposal as it relates to Whanarua Bay.

***I. Background***

Our family’s first connection with Whanarua Bay was in 1966 when my parents honeymooned around the East Cape. They fell in love with the place. Approximately 5 years ago we had the opportunity to purchase the Property, which Dad did so through the Callum Brae Trust.

While the title to the property technically has direct road access, the contour of the property means that it is not practical to have access directly from the road. During the whole time we have known the property, and, as we understand it, ever since the subdivision creating the title to our property was completed, practical access to the property through the vehicle access has been obtained through Lot 66, a recreation reserve vested in Council (“Lot 66”). There is no other practical way to obtain physical access to the property.

Our understanding to the history of our property is as follows:

- a) Romio Wirepa owned the property. We understand the land was not subject to any ownership disputes or claims. Title was held as European land – that is to say, it was not subject to the jurisdiction of the Maori Land Court. Mr Wirepa was the sole registered proprietor of the land.
- b) Mr Wirepa completed a subdivision on the property, and subsequently sold sections produced from that subdivision to a variety of buyers, many of whom had previously had informal or leasehold arrangements to occupy the land at market rate. These properties have often been held by several generations; we were lucky enough to be able to acquire a property from one of these early buyers
- c) As part of the subdivision – and presumably as a condition of the subdivision imposed by the Council or its predecessor – reserves, including Lot 66, were vested in the Council for the benefit of the whole community.
- d) Access to the waterfront sections was originally intended to be from the Western end of the bay via several crossings of the Whanarua Stream. During the subdivision process, right-of-way easements were registered over some, but not all, of the titles at this end of the bay. All the easements should have been registered at the creation of the subdivision, and Council should have ensured the easements were registered at this time.

- e) After completing the development, local Hapu closed the western end access with a fence and locked gate.

## **II. Access over Lot 66**

- a) Following the closure of the stream access, an alternative access was proposed by the affected beachfront property owners through the reserve land of Lot 66. A road was subsequently built with at least the knowledge, and probably the approval, of the Ōpōtiki County Engineer. It is not suggested that the access way is or should be maintained by Council; however, Council has either acquiesced in the access way being constructed and utilised for practical access to these properties, or has in fact endorsed the use of Lot 66 for this purpose, as indicated in Council land information memoranda.
- b) The access way, built over 40 years ago through Lot 66, has proven to be an excellent solution to access problem for the bay front properties.
- c) At least two Chief Executives of the Ōpōtiki District Council have viewed the lot 66 access road as a solution to the access problem.
- d) It is also noted on our properties' LIM report from the Ōpōtiki District Council that our property is accessed through the road on Lot 66. This fact around access was one of the key elements in my father's purchasing decision.
- e) We suggest that there is an argument that our property benefits from an equitable or a prescriptive easement over the Lot 66.
- f) Alternatively, given the reliance that we and other landowners have placed on council's agreement for the use of the access way over Lot 66 over an extended period of time, we believe that Council can be estopped from transferring Lot 66 out of its ownership without first formalising the easement. A failure to do so will result in a significant claim for damages for the loss which the property owners will undoubtedly suffer as a result.
- g) When we purchased the property, Central Government could not use council land for Treaty Settlements. The Property was secure. The best of our knowledge, and that of our legal advisers, the law has not changed in that unless Council decides to revoke the reserve status of the land, it will still not be available to the Crown to be utilised for other purposes, such as Treaty settlements.
- h) An easement over Lot 66 for the road providing access to the waterfront properties has never been registered on the title, despite ongoing requests to the council for the last 20 years from the local beachfront property owners, and years of promises from politicians advising that they would look into it.

**(See Appendix 1 – Letters from Ōpōtiki District Council CEOs and letter from Simpson Grierson with Council Resolution)**

## **III. Concerns**

### **a) Landlocked land and Urupā**

- i. If the council gifts Lot 66 reserve to Te Whanau a Apanui without first securing an appropriate right-of-way easement on the title in favour of the bay front properties, this will leave the property owners in the bay vulnerable to access lockouts. Council should resolve this access issue as promised in the past, to avoid the potential for a very divisive and unnecessary rift to develop in the community.

- ii. We, along with the other owners of land at the bay and many other local residents, currently access the beach at the Western end of Whanarua Bay over another recreation reserve shown as Lot 80 on the subdivision plan (“Lot 80”). It has always been this way. Lot 80 has also provided locals, including ourselves, the necessary access for launching our boats with tractors and trailers. If the council gifts the Lot 80 reserve to Te Whanau a Apanui, free and unrestricted access to the beach for launching boats may be lost.

**b) Within Lot 80 reserve there is an Urupā.** We recognise this is tapu and should be separated out and returned to Te Whanau a Apanui. We understand the Urupa is located on the head land in the middle of the bay as currently sign posted and fenced. Council must manage this new title process to ensure access for the property owners in the Bay is maintained, as the access road passes near the existing signage and fence.  
***Council is obligated to work in the best interests of the whole community***

- i. Council appears to not be considering the whole community for who they are representing through this decision-making process. The Local Government Act 2002 states that the purpose of the Act is
  - a. to enable democratic decision-making and action by, and on behalf of, communities; and
  - b. to promote the social, economic, environmental, and cultural well-being of communities, in the present and in the future
- ii. I have absolutely no difficulty in Council supporting the growth and cultural well-being of the local hapu and iwi. However, in doing so, I suggest that Council also has a duty to promote the social, environmental, and cultural well-being of the current landowners. The two are not mutually exclusive – council simply must protect the property rights of the bay front owners before the disposing of any land starts.
- iii. The Reserves Act 1977 (“Reserves Act”) stipulates, in section 17, that public access to every recreation reserve is fundamental; is to be enjoyed by the public. It is noted that there is a statutory procedure to be complied with if the classification of a reserve under the Reserves Act is to be changed, or if a reserve is to be revoked. I understand that this process would need to be completed should council decide it wishes to revoke the classification.
- iv. There is scope within the Reserves Act to look after all parties without gifting away the land. For instance, under the Reserves Act local hapu or iwi members could be appointed to an administering body, along with other community members, to manage the reserves on behalf of or jointly with the Council.

**c) *Council is proposing the taking away of property rights and as a result Council could leave itself vulnerable to claims for compensation for losses.***

Those losses may be substantial. I have outlined the suggestion that the bay front owners may already enjoy an equitable easement over Lot 66 and part of Lot 80, and that Council may be estopped from disposing of the land without securing those easements in favour of the bay front owners.

Council should not underestimate the level of feeling held by the bay front owners to protect their property rights, or the resources available to them to take legal steps to protect those rights.

- i. *Points to note around the current vehicular access over Lots 66 and 80***
  - o The current arrangement has been in place for over 40 years.

- ODC, as land owners has known about the access way from the beginning, and has never raised any issue with its use.
- *Council, as registered proprietor of the reserve, and administering body of the reserve under the Reserves Act 1977, has never objected to either the creation of this access or its use.* The access way is a sealed road approximately 150 metres long and approximately 4 metres wide with traffic lights at the top and bottom. Council are well aware of the use of the access way, and have made reference to it in Land Information Memoranda relating to properties in the same situation as ours, stating, 'this is how the properties are accessed'.

#### IV. My Submission

**1. First Proposal: Ōpōtiki District Council proposes that seven parcels of land at Whanarua are transferred from Ōpōtiki District Council to Te Whanau a Apanui**

I disagree for the following reason:

- a) The council should retain ownership and management of reserves that are regularly used by the public for public enjoyment and amenity. In this instance Lot 66 and Lot 80 (excluding the urupa) ownership should be maintained by the Council and the reserves should be managed in the best interests of the whole community. The reserves were created as part of the subdivision process and vested in the ODC for the betterment of the whole community. Reserves are a community asset.
- 2. Second Proposal: Ōpōtiki District Council proposes that Lot 80 Urupā and all of Lot 71 would be vested in Te Whanau a Apanui unencumbered, without any reserve status and without any public access requirements.**

I agree but on the following basis:

- a) *Subject to the Ōpōtiki District Council defining the Urupā area as currently sign posted and fenced, and a separate title being issued - a separate title should be vested in The Whanau a Apanui unencumbered.*
- b) Agree with Lot 71 being vested unencumbered to Te Whanau a Apanui.

**3. Third Proposal: Ōpōtiki District Council proposes that the Recreation Reserve Lot 66 (the roadway down into the Bay) and the remainder of Lot 80 (as well as some other smaller lots) are vested in Te Whanau a Apanui and reclassified as Historic Reserves. The (walking) public rights of access would be as per the Act as is currently the case.**

I disagree for the following reasons:

- a) As noted above in the first proposal - These reserves are a community asset and ownership should be maintained by the council for the whole community. When the land was transferred to the Council as part of the subdivision process, the council made an undertaking the land would be used as public reserves.
- b) With the Urupā on Lot 80 being separated and protected as suggested above there is no reason the status of the reserves on lots 66 and the balance of Lot 80 to be changed.

Given how the reserves are currently used and intend to be used by the community into the future the current reserve status of 'recreational reserve' should remain.

- c) The recreational reserves of both Lot 66 and Lot 80 are currently used by vehicles to access the properties in the bay (Lot 66) and to launch boats using tractors and trailers over the beach (Lot 80). Removing vehicle access would deny the community of the fantastic amenity that has always been enjoyed in the bay.
- d) Also as previously noted – If Lot 66 is closed to vehicles, there is simply no way to access the beach front properties at the western end of the bay.
- e) The order of proceedings is critical. If the council intends to provide easements over Lot 66 and 80, then they need to be put in place before any land transfers take place. The Council cannot put easements onto property it no longer owns. The council currently states that it is in the process of reviewing its easement policies – however if this review and new policies come after the transfers take place, this will be of no use what so ever in resolving the access issues that currently exist. All easements must be established while the properties are in the ownership of the council.

**4. Fourth Proposal: Opotiki District Council proposes that Te Whanau a Apanui would be the sole administering body for the reserves.**

We disagree for the following reasons:

Te Whanau a Apanui have a duty to look after Te Whanau a Apanui interests. Their mandate is to act in the interests of "Te Whanau a Apanui Iwi and its hapu, individually and collectively." The reserves on the other hand have many stake holders within the greater community whose interests must also be looked after. In the first instance the council should be tasked with looking after the reserves in the best interests of all the community. Another option within the Reserves Act is to set up a community group that administers the reserves and has representation from the different segments of the community. Having one stake holder party having sole administration rights has the ability for decisions to be weighted in favour of the sole party, which can be to the detriment of the other stakeholders, and again has the potential to create a rift through the community.

## **V. Summary**

For the most part, the relationship between the local Hapu and the residents has been one of mutual respect. If the proposals go ahead as currently outlined without vehicular access easements being put in place for Lot 66 and Lot 80, it could create an incredibly divisive situation in the bay. ***The Council is creating a problem that if not resolved has the potential to escalate and destroy this community.***

The council has a mandate to act in the best interests of the whole community. As the proposal currently stands this is simply not the case. If through this process, the council takes away property rights they will leave themselves vulnerable to compensate property owners for those losses. Every

I trust Councillors appreciate the potential issues and costs that are likely to land with the council if they do not protect these rights.

This land came into council ownership through the subdivision process (it was not taken) and was designated to be a recreational reserve for the whole community. Those reserves that are regularly used by the public should remain in council ownership for the whole community. We do not understand what the council is trying to achieve by changing the reserve classification. (With the exception of the Urupā located within Lot 80).

The management of the reserves must be administered through either the council or a community board for the good of the whole community.

Before any decisions are made with regards to the 4 proposals outlined in the statement of proposal, the council must first address the easement issues for the existing property owners. To press on regardless, without first addressing the existing issues, has the potential to create an incredible divisive outcome in the community.

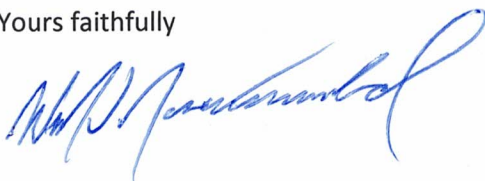
***Consider all the alternatives***

The Council should consider all the alternatives, to ensure the best solutions are found for all. The parcels of land in the current proposal have a number of substantial issues that if not resolved well have the potential to create a rift through the community. As an alternative other land could be used as part of the settlement agreement. For example – included in the Council Reserves Management Plan is a reserve known as “Motuaruhe 6B1, parcel 6904386, Tokatea, and consists of 1.7345 hectares of land. It is part of the original Motuaruhe Block. Has Council considered these types of reserve land as options in lieu of Lots 66 and 80.

(See Appendix 2 for an aerial map of the reserve).

Opotiki District Council must make the right decisions now to ensure there is a positive future for all moving forward.

Yours faithfully



Warrick Macdonald

Trustee of the Callum Brae Trust

20 Nov 2006

20 November 2006

File: 11.2.5

Whanarua Beachfront Property Owners Group  
c/o W A Mills  
11 Mersea Place  
**TAURANGA**

Dear Tony,

**Re Whanarua Bay Right of Way Application**

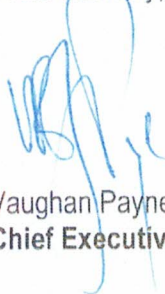
Thank you for meeting with our Parks Manager, Mike Houghton and I the 25<sup>th</sup> October and your follow up correspondence dated November 4<sup>th</sup>.

We reply as follows;

1. Council will not oppose the Whanarua Beachfront Property Owners Group's (the 'Group') endeavors to seek a right of way over Lot 75 for the benefit of the 'lower bach owners' ie those adjoining Lot 75
2. The draft Reserve Management Plan will include provision for the continued vehicle access through Lot 66 (recreation reserve owned by the Opotiki District Council) for the 'lower bach owners'. While we can not predetermine the outcome of the final version of the plan, which will be subject to public consultation, we consider that the continued use of this access in this way contributes to a favourable resolution of the access issue. As discussed, this would be subject to the Group undertaking all necessary maintenance of the vehicle access.
3. We would also seek to discuss further with you the option of providing some public carparking adjacent to your property and State Highway 35.

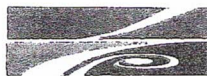
Thank you for your efforts to date in seeking to resolve access issues at Whanarua Bay.

Yours faithfully,



Vaughan Payne  
**Chief Executive Officer**

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Opotiki District Council

Our Ref: R3/15  
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March 28, 2002

Mr Tony Mills  
RD 2  
KATIKATI

Dear Sir

**WHANARUA BAY ACCESS**

It has long been accepted by Council that there is a need for some property owners to use the track through recreation reserve (Lot 66) to obtain access to their properties. These properties have legal access from state highway 35 but this is impractical and therefore their only practical access is through Lot 66.

You have indicated there is some small amount of unease that practical access through Lot 66 may be denied by Council at some time in the future. As Chief Executive I can assure you that there has never been any consideration by Council to restrict property owners access through Lot 66. Council appreciates this is as a result of a Maori Trustee mistake in the 1950's. Until this matter is resolved I cannot see Council ever restricting the use of the track subject to the following qualification:

- Physical capability and safety of the track
- Reserve management plan prepared pursuant to the Reserves Act
- Any Council decision concerning the area at Whanarua Bay

I hope this letter goes some way toward reassuring you about the use of Lot 66 track in the future.

As an aside I will finish with Council on 1 April 2002. Mr John Rollo will be the Acting Chief Executive until a permanent appointment is made.

Yours sincerely

  
PJ Guerin  
CHIEF EXECUTIVE  
PJG:dman



L 66

10 July 2002

Appendix 1



for Opatiki District Council

RECEIVED  
11 JUL 2002

10 July 2002

Partner Reference  
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and  
To

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Lower Albert Street  
AUCKLAND

By Fax: 353 7801

**Whanarua Bay**

To date, much of the discussions between the parties have focused on the status of Lot 75. However, as all parties appear to have acknowledged at various times in previous correspondence, the present Court proceedings brought by your respective clients will not necessarily resolve all outstanding issues relating to Whanarua Bay.

In particular, the Council recognises that the issue of regularisation of access through Lot 66 and to Lot 80 still needs to be resolved. This issue will need to be addressed whatever the outcome of the various Maori Land Court and High Court proceedings over Lot 75. Therefore, despite the fact that those proceedings are not yet concluded, the Council believes that it may now be useful to initiate the development of a new management and control regime for the two recreation reserves, which includes formalisation of the access through Lot 66.

The Council takes the view that the most appropriate mechanism for this is to commence the preparation of a reserve management plan for Lots 66 and 80, and at the same time to establish a right of way easement across part of Lot 66. Accordingly, at a meeting on 25 June 2002, the Council passed a resolution which reads as follows:

*'That Council commence preparing a Reserve Management Plan for Lot 66 and 80 under the Reserves Act 1977 and in doing so initiate a programme of consultation with the Maori owners and the Whanarua Bay property owners and the wider Whanarua Bay community generally and that as part of this process the*

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*Council work towards establishing appropriate access easements across Lot 66 to be in favour of the Whanarua Bay property owners, the Maori owners and the Council, subject also to appropriate arrangements for maintenance and access management to the satisfaction of the Council."*

We note that an easement for a right of way across a reserve may be created under section 48 of the Reserves Act. Such an easement will create legal rights of access across the accessway which runs through Lot 66. It will be able to be registered on relevant certificates of title, yet without compromising the recreation reserve status of Lot 66. There is a statutory notification and submissions procedure required to be undertaken under the Act, and the Minister of Conservation will also need to be involved. The Council envisages the easement process being undertaken in conjunction with the reserve management plan process, to ensure consistency and integration of the access issue with some of the wider issues relating to Whanarua Bay.

The statutory processes under the Reserves Act will provide formal opportunities for participation by interested members of the public. Nevertheless, given the history of the various issues in Whanarua Bay, the Council is keen to consult fully with your respective clients prior to commencing the formal notification procedures, so that most of the issues relating to the future management of these reserves can hopefully be agreed to and supported by all interested parties.

The Council's Environment and Planning Manager will write to your respective clients shortly, to invite them to a meeting where these matters can be discussed.

Yours faithfully  
SIMPSON GRIERSON



Erick Child  
Associate

Appendix 2

Motuaruhe 6B1, Parcel 6904386, Tokatea



*State Highway 35 (Te Kaha)*