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Ref: CAR123/1 10b1

Opotiki District Council
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**Re: Submission by beachfront owners on joint request by the Crown and Te Whānau a Apanui to transfer Whanarua Recreation Reserve via a Treaty settlement**

**Introduction**

1. I am counsel for the beachfront owners at Whanarua Bay. This is in association of some 15 members.

   I refer to earlier correspondence between 19 August 2020 to 9 December 2020 addressed to the chief executive officer of the Opotiki District Council (ODC) and responded to by Gerard McCormick.

2. All owners are concerned at the proposal. Many want to express that concern through individual submissions which they will file. This submission does not replace those individual submissions, but draws together some of the common threads and makes four principal points:
   2.1. no one supports the proposal as currently framed;
   2.2. the ODC is not bound by the proposal, which is highly significant to beachfront owners;
   2.3. all beachfront owners seek legal vehicular access guaranteed through an easement; and
   2.4. there is a fear that the ODC is just "going through the motions" in this consultation process.

**None of the owners support the proposal as currently framed**

3. Understandably there is a range of views within the owners as to the proposal to vest the Whanarua Recreation Reserve. These range from outright opposition to conditional support. None of the owners supports the proposal as currently framed by the Crown and Te Whānau a Apanui.

**The ODC is not bound by the proposal**

4. The Crown's stated policy is: "Land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority offers it for use."[1] The Crown has framed this policy to the owners in the following way: "land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority agrees that it may be used."[2] There is a subtle difference. Because, as the owners understand it, the ODC has not offered the Whanarua Recreation Reserve for use in the Treaty settlement, the Crown and Te Whānau a Apanui have jointly requested the ODC consent to their proposal to transfer lands currently owned by the ODC.

5. Councillors should be aware that:
   5.1. the ODC is not obliged to agree to the proposal – you may reject the proposal; and

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1 See *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future, A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) at 62.

2 Letter of Warren Fraser, Te Arawhiti, to Mark Stringfellow, 18 February 2019. Copy attached.

5.2. the ODC may agree to the proposal subject to conditions of your own making.

6. There are good reasons why you should either decline the proposal or at the very least require certain conditions. To do so would be entirely reasonable. The reasons why are set out in the individual submissions from owners and some are also set out below.

7. The Crown must be open-minded to any conditions or changes you make. Indeed, the Crown's policy is that the most suitable method for vesting any property is to be determined on a case-by-case basis.[3]

8. You should also be aware that the Crown's policy is that "third parties", that is the beachfront owners, do not have a seat at the "negotiation table", whereas Te Whānau a Apanui do.[4] While there have been some discussions between the Crown and respresentatives of the beachfront owners, I am instructed that those discussions have stalled – seemingly while the Crown awaits the ODC response to the Statement of Proposal. Accordingly, beachfront owners now rely on the decision of Council.

**All beachfront owners insist on legal vehicular access guaranteed through an easement**

9. All beachfront owners insist that legal access to their properties and to the sea be sorted once and for all.

10. The history of the Whanarua subdivision is addressed fully in other submissions. It is clear that the subdivision plan (DP4651)[5] of 1958 marked out guaranteed legal access via a roadway crossing the Whanarua Stream and running to the seaward side of the beachfront properties. In addition, various reserves were marked that also guaranteed, not just public access to the sea, but access for the beachfront owners to their properties. From 1962 onwards people purchased lots on that understanding.[6] The fact that the roadway was never formalised as a roadway is no fault of the owners. The Maori Land Court has identified that an error occured in 1965 when the roadway and reserve lots were mistakenly vested in Romio Wirepa with other unsold lots.[7] That mistake has only been corrected in part: the reserves were later set aside legally as reserves and vested in the ODC. Following litigation in the High Court and Māori Land Court, the beachfront owners have negotiated an easement with the owners of lot 75. But that solution, essentially proposed by the Māori Land Court, depends on owners gaining access to lot 75 via lot 66. That is why for the past 20 years the owners have asked for an easement over lot 66 from the ODC to finalise legal access to their properties.

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3 See *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future,* at 62: "Negotiations are between the Crown and the claimant group concerned. Other parties such as local authorities, private individuals or special interest groups may have a strong interest in the outcomes of the negotiations, but this does not give them a 'seat at the table".

4 See *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future, A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) at 62.

5 Council staff will have a copy of this plan. It is attached to the certificate of title for lots 66, 68-71 and 80.

6 A decision of the Maori Land Court sets out the facts concerning the subdivision and notes that purchasing of lots commenced in 1962: *Re Lots 67, 74 & 75 Block III Te Kaha SD DP 4651* (2002) 79 Ōpōtiki MB 189 (79 OPO 189).

7 See *Re Lots 67, 74 & 75 Block III Te Kaha SD DP 4651* (2002) 79 Ōpōtiki MB 189 (79 OPO 189).

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11. Furthermore, I note that people who purchased properties more recently purchased on the basis of LIM reports from the ODC. These stated that:
    11.1. legal access was gained via the ODC's recretional reserve;
    11.2. the ODC considered access by way of passenger cars to be acceptable; and
    11.3. vehicles carting and/or towing large, heavy materials required contact with the ODC's Manager of Parks and Reserves.

12. As such, property owners purchased beachfront sections on the understanding, from the ODC, that they would be allowed to drive cars over lot 66 to gain access to their properties.

13. This issue needs to be sorted finally once and for all. It has been unresolved for decades.

14. All beachfront owners are united in their request that the ODC grant them (and the owners of lot 75) an easement over lot 66 that guarantees to them legal vehicular access to their properties. In all the circumstances of the history of the subdivision of Whanarua Bay, that request is entirely reasonable.

15. It may be thought that the proposed vesting of the reserves subject to the Reserves Act is sufficient. That is not so. The Reserves Act does not guarantee anyone vehicular access. In terms of recreation reserves, it provides that the "public shall have the freedom of entry and access to the reserve".[8] Understandably, the owners point to the proposal to grant the ODC an easement over the land at the Waihau Bay Ramp Site that is also proposed to vest in Te Whānau a Apanui. They understand (from communications with staff) the reason for the easement there is because the Reserves Act alone cannot guarantee vehicular access. If an easement can be granted in Waihau Bay, the same can be done in Whanarua Bay.

16. There appear to be two options open to the ODC to make the easement over lot 66 happen:
    16.1. To agree to the easement now and to ensure it is recorded on title *before* any title to lot 66 transfers (if title to lot 66 is to transfer); or
    16.2. To agree to the proposal that lot 66 transfer *subject to* the requirement that an easement is granted to the beachfront owners (and the owners of lot 75) before title transfers through any Treaty settlement.

17. Easements can be granted over reserves subject to the Reserves Act.[9]

18. Finally I note that there have been suggestions recently that there is a wāhi tapu somewhere on lot 66. My instructions on this are:
    18.1. There is a marked wāhi tapu area on the rocky headland on lot 80 at the bottom of the driveway coming down from SH 35. This is very close to lot 75.

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8 Reserves Act 1977, s 17(2)(a).

9 Reserves Act 1977, s 48.

18.2. There is no evidence of a wāhi tapu on lot 66. Until very recently, no owner has ever heard mention of there being a wāhi tapu on lot 66. This is mostly a steep sloping bank and car park.

18.3. Evidence was given in the High Court on behalf of the Wi Repa Family Trust in 2002 concerning the wāhi tapu that is fenced off. That evidence specifically addressed the location of the wāhi tapu. The evidence referred to the presence of wāhi tapu on lots 80 and 75. No mention was made (whatsoever) of there being any wāhi tapu on lot 66. If there was a wāhi tapu on lot 66, one would have expected it to have been mentioned in this evidence.

**Fear ODC is "going through the motions"**

19. The owners had taken some comfort in the ODC's current reserves management plan that identifies the following management strategy for the Whanarua Recreation Reserve:

> *"options to formalise right of way over lot 66 for all Whanarua Bay house owners will be explored by Council and implemented where practicable"*

20. It has, however, concerned the owners that the ODC seems to have prioritised this Joint Request consultation proposal ahead of consultation on the ODC's proposed Easement and Access policy. The wider background here – about which councillors may be unaware – is that:
    20.1. In 2002 the ODC agreed to grant an easement.
    20.2. The terms of a draft easement were later negotiated between staff and the owners, who engaged solicitors to review the proposed easement.
    20.3. More recently the ODC councillors resolved they must first have an Easement and Access policy before finalising the easement.
    20.4. The owners asked the Crown to pause its Treaty settlement until the ODC had completed that policy.
    20.5. The Crown has declined to do so.
    20.6. The ODC has not yet consulted on a draft Easement and Access policy, but has now sought submissions on the proposed Joint Request transfer of land away from ODC ownership.

21. My clients have a genuine fear that the ODC is simply "going through the motions" in this consultation process so that the land will be divested from ODC ownership meaning the ODC will not have to finalise an easement for the owners.

22. The beachfront owners ask that councillors give careful consideration to their submissions. Further that councillors ensure that their concerns are addressed and that the longstanding issue with lot 66 is addressed to ensure unrestricted legal access to the beachfront properties.

Yours faithfully

Murray McKechnie
10 March 2021

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Level 3, Justice Centre
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18 February 2019

Mark Stringfellow

*By email:* mdstring@outlook.com

Tēnā koe

**Request for information under the Official Information Act 1982**

I refer to your 28 January request for the following information under the Official Information Act 1982:

(a) Could you please advise whether the Crown has ever transferred any land adjoining the mean high water mark to Maori in any Treaty settlement?;

(b) Does the Crown have any policy on the transfer of land adjoining the mean high water mark to Maori in Treaty settlements? If so, what is that policy?;

(c) Does the Crown have any policy on the transfer of land vested, not in the Crown, but in local authorities as redress in Treaty Settlements? If so, what is that policy?; and

(d) Does the Crown have a policy that Treaty settlements should avoid adverse effects on existing property rights? If so, what is that policy?

In response to parts (a) and (b) of your request, the Crown has transferred land adjoining mean high water springs to iwi through Treaty settlements and there is no specific policy relating to the transfer of such lands. It is our experience that iwi often seek the return of Crown-owned coastal land through Treaty settlements as it is often of high cultural significance.

In response to part (c) of your request, land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority agrees that it may be used.

In response to part (d) of your request, the Crown's policy is that any existing third-party rights, such as rights of way or leases, are unaffected by the transfer or vesting of land in Treaty settlements.

For further information about Crown policy on treaty settlements, you can refer to *Healing the past, building a future: a guide to Treaty of Waitangi Claims and Negotiations with the Crown,* available online at www.govt.nz/organisations/treaty-settlements-ropu.

If you have any questions relating to the information provided in this response, please contact Rosie Batt, Negotiations Lead, Treaty Settlements Rōpū, on 027 216 6275 or rosie.batt@tearawhiti.govt.nz.

Under section 28(3) of the Official Information Act 1982 you may, if you wish, contact the Ombudsman seeking an investigation and a review of our decision to provide this information. Information about how to do this is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Nāku noa, nā

Warren Fraser
Regional Director – Te Rāwhiti
Treaty Settlements Rōpū, Te Arawhiti