

Before the Hearing Panel
Appointed by the Gore District Council

Under the Resource Management Act 1991 (**RMA**)

In the matter of Submissions on the Proposed Gore District Plan

Legal submissions of Counsel on behalf of Gore District Council – Hearing 3

18 July 2024

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Introduction

- 1 These legal submissions are made on behalf of the Gore District Council (**Council**) in relation to Hearing 3 of the Gore Proposed District Plan (**PDP**).
- 2 These submissions address legal issues arising from:
 - (a) The mana whenua chapter and a proposed policy recommended on behalf of Hokonui Rūnanga Incorporated, requiring a variation or plan change;
 - (b) Evidence of Mr Ben Wilson for Clarke Fortune McDonald and Associates seeking a deferral of the decision on the minimum lot size for the General Rural Zone.
 - (c) The submissions by Counsel for Greenbriar Limited in relation to the New Vale Mine.

Statutory assessment to be undertaken by Panel

- 3 The statutory tests for changes to the PDP are set out in the opening legal submissions relating to Hearing 1. These are not repeated here, but noted as remaining relevant.
- 4 These submissions focus on legal issues considered to be raised by the submissions and evidence for this hearing.

Mana Whenua Chapter

- 5 This chapter responds to the important issues contained in the Act addressing the following:
 - (a) Section 6(e) and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;
 - (b) Section 6(f) and the protection of historic heritage from inappropriate subdivision, use, and development (noting "historic heritage" is defined as meaning the natural and physical resources contributing to cultural qualities, including sites of significance to Māori, including wāhi tapu);
 - (c) Having regard to section 7(a) relating to kaitiakitanga;
 - (d) Section 8 to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

- 6 It is a relevant legal principle when considering these issues to cite the decision in *Port of Tauranga Ltd v Bay of Plenty Regional Council*. The Environment Court there in relation to a resource consent determined that it was only the local iwi that can determine what is culturally significant within their rohe. The principles identified by the Court that are relevant here are:
- (a) Hapū are asserting their desire to be responsible kaitiaki within their rohe;
 - (b) A collaborative approach is highly desirable, recognising the strength of tangata whenua's view that they should determine how their involvement will best be incorporated.
- 7 GDC has attempted to follow this approach by providing for mana whenua to be actively involved in decision making in the development of the notified plan. As set out in evidence by the relevant experts for Hokonui Rūnanga Incorporated, the approach advocated to be adopted for the GDC district plan is Āpiti Hono Tātai Hono. Particularly as expressed by Ms Cain (in paragraphs 45 – 59 of evidence dated 8 July 2024) this is a difficult and new approach. The application of this new approach to translate into provisions appropriate in the district plan is not currently completely clear.
- 8 With this in mind it is noteworthy the planners for the GDC and Hokonui Rūnanga Incorporated have worked together on updated provisions (attached to Ms Beran's evidence). This is very helpful and I note Ms Courtney Bennett the s42A Officer will be able to comment about this.
- 9 One legal issue raised though is the proposed policy recommended by Ms Beran at page 24. This is proposed to read:

Policy SASM– PXX- Implementing the Āpiti Hono Tātai Hono Approach into the Plan:

(i) The Council will:

(A) Work with Hokonui Rūnanga Inc to:

(1) facilitate the continuation of cultural assessment work across the district

(2) Investigate opportunities to develop additional cultural landscape tools as part of the assessment work.

(B) (3) facilitate a plan change incorporating the outcomes of the assessments and investigations in (1) and (2),

(C) Use an Āpiti Hono Tātai Hono Approach for (A) above.

- 10 The legal issue is that this is a directive Policy requiring the Council to "facilitate" a plan change. Presumably this is intended to mean notify a plan change. This would require Council to essentially apply public funds to this work, but also presumably notify a plan change in the future. The content of this is not currently known and as the proposed policy states needs to be worked up. This does raise the following legal issues which are submitted on:
- (a) As currently drafted this seems in mandatory terms to fetter the Council's future decision required under clause 5 First Schedule RMA. This procedural obligation in the statute requires the Local Authority to have particular regard to a section 32 report before deciding whether to approve a plan change (or variation), and publicly notify this in a form approved by Council.
 - (b) This decision making (to notify a plan change) is not delegated to staff or the Hearing Panel and would ordinarily be a decision of the full Council.
 - (c) This means that the authority and statutory power to commit to a mandatory obligation such as this is currently submitted to be beyond the power of staff to commit to, or the Hearing Panel to purport to bind a future Council to. Such a mandatory policy is therefore inappropriate to be adopted by the Hearing Panel and beyond its power.
- 11 Potential remedies to this legal issue if the merits of it are favoured by the Hearing Panel are for the Panel to:
- (a) Not include such a policy in the plan but recommend it as a work programme to the Council in the decision report;
 - (b) More clearly articulate the process undertaken to date and anticipated in the future in relevant parts of the mana whenua chapter (such as s2.4) or in the Overview text to the SASM chapter. This matter could potentially be further considered by the Planners ahead of the SASM hearing should changes be required to a SASM policy; or
 - (c) Should the panel direct that a policy be included it could change the wording of the proposed policy to make this not an "obligation" on Council but a "desirable" policy to implement. This essentially has the same consequence as a recommendation to Council above, but it would be recorded transparently in the PDP. Wording changes to achieve this could be:

(i) The Council ~~should~~will:

(A) Work with Hokonui Rūnanga Inc to:

- (1) facilitate the continuation of cultural assessment work across the district
- (2) Investigate opportunities to develop additional cultural landscape tools as part of the assessment work.

(B) (3) ~~consider whether to prepare and notify~~ facilitate a plan change incorporating the outcomes of the assessments and investigations in (1) and (2),

(C) Use an Āpiti Hono Tātai Hono Approach for (A) above.

Evidence of Mr Wilson - 8 ha minimum allotment size in the GRUZ

- 12 In his planning evidence, Mr Ben Wilson for Clark Fortune McDonald and Associates addresses the justification for the 8 ha minimum allotment size in the GRUZ. In paragraphs 20–22 he provides the view that it is for the Council to justify the 8 ha minimum lot size and submitters do not have a duty to evaluate alternatives. He concludes at paragraph 22 that deliberation and decision-making on the proposed minimum allotment size should be deferred until "the notified rule is better supported with the necessary information".
- 13 The plan when notified was supported by the required assessment under section 32 RMA.
- 14 Any person can submit seeking a change to the notified minimum lot size in the GRUZ (as has happened here).
- 15 Where submitters do so section 32AA requires a further evaluation for changes proposed to the plan since the section 32 evaluation was completed (section 32AA(1)(a)). This must be undertaken at a level of detail that corresponds to the scale and significance of the changes promoted.
- 16 It is submitted that Mr Wilson is being inconsistent and unprincipled. In paragraph 18 and 19 he recommends an exception to the 8 ha minimum lot size for an existing residential dwelling and opines that a further assessment under section 32AA is not required because the section 32 assessment already carried out by the Council suffices to justify that exception. It is inconsistent to go on to say that the minimum lot size is not justified by the Council's section 32 assessment.

- 17 Where submitters seek changes to provisions then assessment of the benefits and costs of them commensurate with the scale and significance of the proposal needs to be provided to the Hearing Panel to evaluate. It is submitted that the evidence of Mr Wilson calling for a decision not to be made on the minimum lot size is not justified. This is because Council has done all it is required to under section 32 RMA prior to notifying the plan. It is now for the panel to evaluate the merits of that provision against other proposals put forward and justified by submitters.
- 18 In terms of the substance of this allegation this is unjustified too. The Rural zones are assessed in a dedicated section 32 report. This is a comprehensive report that covers the following (among other matters):
- (a) There is a full description of the proposed minimum lot size (8ha) and its key reasons, being to protect the general rural zone for primary production in conjunction with providing a rural lifestyle zone where rural lifestyle development is occurring (page 11).
 - (b) There is a discussion of the issues and in particular the 2 ha minimum lot size in the current plan that is enabling rural lifestyle proliferation (page 19 paragraph 4.1.1). This discussion draws on and cites the "Gore District Plan Review Planning for Growth" analysis that identified rural lots under 8 hectares tend to be for hobby farms. This study was identified as being consistent with the MfE section 32 report relating to the NPS-HPL.
 - (c) There is an assessment of the effectiveness of the operative district plan provisions (paragraph 4.3).
 - (d) There is a summary of relevant technical reports (paragraph 4.4).
 - (e) There is analysis of other councils' approaches towards minimum lot sizes under the best practice analysis (paragraph 4.5).
 - (f) There is an assessment of the scale and significance of the issue including identification of the main costs of an 8 ha minimum lot size (paragraph 5.1).
 - (g) There is a summary of consultation and feedback on the draft provisions (paragraph 6.3).
 - (h) There is an assessment of the zone structure being General Rural, Rural Lifestyle and Settlement, and their distinct purposes (paragraph 7.2).

- (i) There is a full assessment of the objectives, policies and rules proposed (paragraph 7.3).
 - (j) There is evaluation of the principal alternatives, being the status quo of a 2 ha minimum lot size and also creation of a rural production zone with a 40 ha minimum lot size, both of which were discounted (paragraph 9.3).
- 19 Overall it is submitted that the section 32 analysis is a very structured and appropriate assessment arriving at the proposed provisions. Criticism of this by Mr Wilson seeking a deferral of decisions is not warranted at all in my submission.

Submissions by Counsel for Greenbriar Limited in relation to the New Vale Mine

- 20 Counsel has received the legal submissions by Ms Irving and Ms Perkins in relation to the proposed zone for the New Vale Mine.
- 21 It is noted that the legal principles identified in those submissions are all reasonable and agreed with.
- 22 The Planner for Greenbriar Limited Ms Justice and the section 42A Officer Ms Skuse are aligned in their overall approach to this site which is helpful. The section 42A Officer Ms Skuse is currently working through the recommended changes to provisions from Ms Justice in her evidence relating to this site. It is intended that Ms Skuse will produce a supplementary section 42A report commenting on these changes sought for the Hearing Panel to consider at the hearing. This is being worked on now and it will be circulated as soon as it is available.

Dated this 18th day of July 2024



Michael Garbett
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