

**BEFORE THE HEARINGS COMMISSIONERS AT TAUPO**

**IN THE MATTER** of Proposed Plan Change 36 to the Taupo District Plan -  
Request under Schedule 1 of the RMA to rezone Rural  
Land to Residential at Whareroa North by the Proprietors  
of Hauhungaroa No.6

**BETWEEN** **TAUPO DISTRICT COUNCIL**

**AND** **THE PROPRIETORS OF HAUHUNGAROA NO.6**

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**MEMORANDUM OF COUNSEL ON BEHALF OF APPLICANT IN  
OPPOSITION TO ADJOURNMENT OF PLAN CHANGE REQUEST AND  
DEFERRAL OF CURRENT TIMETABLE  
26 May 2020**

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Dr Joan Forret  
(Joan.Forret@harkness.co.nz)

MAY IT PLEASE THE HEARINGS PANEL

- 1 This memorandum is filed in response to the Council's memorandum seeking a postponement of the hearing and witness conferencing. Given the circumstances and importance of the issues I have adopted a rather direct approach.
- 2 We note that Ms Samuels has already advised all experts that witness conferencing is cancelled and she has advised the reason being non-payment of the latest invoice.
- 3 The latest invoice from TDC was dated and received by Ms Lewis for the Proponents on 30<sup>th</sup> April. It was forwarded to the Incorporation on 5<sup>th</sup> May once Ms Samuel was able to provide some information to support the invoice details (correspondence is **attached**) It was for the amount of \$67,863.33 (incl GST) and was due on 20<sup>th</sup> May. It is the **only** amount outstanding and has now been outstanding for only 6 days. Ms Connolly has today advised this sum will be paid no later than **30<sup>th</sup> May 2020**.
- 4 That invoice included costs from Simpson Grierson for legal advice not sought by the Proponents and as far as we are aware not sought by the Panel. Those legal costs of \$5,899.65 (incl GST) seemed to relate largely to the bridge ownership and access issues as well as regarding administrative and evidence preparation issues. The Simpson Grierson invoice was dated 25 March.
- 5 On 22<sup>nd</sup> May we received an email from Mr Carroll demanding payment of the April invoice or risk having the hearing deferred. That email arrived just 2 days after the due date and after the country has had unprecedented financial disruption (copy **attached**).
- 6 This is not the first time the Proponents have received unreasonable demands from Council in terms of payment of invoices. The Proponents have previously received correspondence from Council demanding immediate payment for an invoice over a month in advance. The **attached** letter and invoices demand payment in August for invoices dated 6<sup>th</sup> August 2019 which were due on 20<sup>th</sup> September 2019. Until more recently invoices arrived with no breakdown of costs or assessment against the original estimates. This month Ms Samuels advised she was too busy and Ms Lewis could do that breakdown herself if the Proponents needed it sooner than Ms Samuels could manage. We eventually received a revised estimate and cost breakdown on 8<sup>th</sup> May.
- 7 At least twice this month we have received emails from either Mr Bonis or Mr Carroll indicating that an application would be made to the Panel to delay the

hearing. The reasoning at that time was that the questions from the Panel to the Incorporation witnesses needed more time and also uncertainty around the bridge ownership. It appears that TDC officers have now focused on non-payment of the April invoice as the reason for the postponement.

#### *Costs*

- 8 The responses to the Panel's questions from Mr McKenzie and Ms Connolly touch on this issue. Given that their responses may not be read in time I will comment now.
- 9 The TD2050 was refreshed in 2018 and retained the Proponents' land as an area identified for residential growth in the Southern part of Lake Taupo. The TDP/SSSP invites applications by landowners to rezone the land. The Proponents prudently budgeted \$500,000 for the Plan Change process and anticipated they would work in good faith with Council officers to find resolutions that would allow the plan change to give best effect to the outcomes expected by SSSP and TD2050. They did not expect Council planning staff to oppose the plan change at every turn.
- 10 The Proponents also did not expect to be paying for TDC's legal advice in relation to the plan change. We are not aware that the Panel has requested legal submissions from Council or legal input other than in relation to the questions put to Mr Bonis regarding scope and clarification about the legal endorsement of the s 42A report.
- 11 The Proponents have invested profit from the previous development into the Station and the Station in turn is repaying that investment with funds for the Plan Change. The Station has been affected by drought and by the closure of saleyards and delays at the meatworks due to Covid19 restrictions. Ms Connolly's email requesting flexibility for payment of that account for those reasons is **attached**.
- 12 Paragraph 6 of the TDC memorandum suggests that effort and expense will make the plan change unviable. We cannot accept that argument which seems to be a theme throughout the TDC evidence. There is no obligation on the landowners to proceed with further stages of the development after the rezoning decision within any specific timeframe. As both economists appear to agree, the timing of the development will depend on the economic climate and the developers' own finances. The Proponent has never resiled from payment of the Council's invoices and has not now done so.

- 13 Postponing the hearing and process at this stage will just mean that the Proponents will have wasted a significant sum of money (\$67,098.69 incl GST alone already paid to TDC for processing the Plan Change request, excluding the current sum due) with inevitable duplication of costs to pick up the process. That is assuming the Proponents can proceed with any confidence that TDC will resume discussions in good faith.
- 14 As above Ms Connolly has advised that the outstanding invoice will be paid in full by the end of this week.

#### *The Bridge and Road*

- 15 The Proponents met with Mr Lewis from TDC and Tuwharetoa Trust Board representatives early this year to discuss how the bridge and road might be provided for. That was following initial concerns raised about its vesting. At that meeting the Trust Board representative (Ms Nepia) advised of the Board's support of the project and willingness to engage in alternative methods of ensuring access and maintenance. I am advised that concepts such as a licence to occupy and easements were discussed. The Trust Board was adamant that ownership of the streambed would not be relinquished. I also understand that meeting ended on a positive note with everyone agreeing they would work together towards confirming a way forward.
- 16 Since seeing the s 42A report where the bridge ownership and road were described as fundamental, "irresolvable problems" we contacted various experts to ensure that this could be resolved.
- 17 Initially TDC officers suggested the main issue was with accessing NZTA funding to enable maintenance. I spoke to the regional property manager at NZTA who was extremely surprised and indicated that this was something usually sorted out by agreement. She noted that the Crown usually entered into an agreement with iwi bodies. We were then advised by TDC's Ms Samuels that it was the "legal road" status that was the problem.
- 18 We then contacted Mr Grayson who is a specialist in Crown acquisitions and he also advised the normal course would be to arrange an agreement (called a Deed when it relates to land) but that it was also possible to apply for the structure to be declared a Maori Roadway. In his view the latter was not essential but it was an added option. He noted that Tuwharetoa has a number of roads and bridges that are authorized by Deed with the Crown and he had been involved in numerous discussions and had found the Trust Board to be very cooperative.

- 19 We can't believe that TDC is suggesting that there can be no future bridge or road over a stream or river that is vested in Tuwharetoa. That cuts out practically any such new crossing in the entire district. We also can't believe that TDC is unable to work (as a Treaty Partner) with Tuwharetoa and the Proponents to sort out an agreement that will work.
- 20 The Proponents, Tuwharetoa and Council's infrastructure officers (who have been helpful and practical to deal with to date) have agreed a meeting for tomorrow 27<sup>th</sup> May at 2pm to talk through the principles of such an agreement. Mr Winchester and Mr Bonis are invited to that meeting. It is hoped that discussion will give TDC officers more comfort. Our experts and Tuwharetoa are still intending to have that Zoom meeting although we understand that Council officers have been told they are not to attend.
- 21 The memorandum and other correspondence from TDC wants the detail of the agreement to be finalized before the rezoning. That is also a question posed by the Panel. In order to finalise the agreement, there would need to be detail about the design of the bridge, its exact location and footprint, arrangements for access etc. That is not detail that is available at this stage. It will depend on the further investigations in the preliminary stage and on the detailed design that is in the subdivision application. Ms Lewis explained that to Mr Bonis by email dated 22<sup>nd</sup> May (**attached**).
- 22 It would be unreasonable to expect the Proponents to undertake detailed design for either a road or a bridge before they have the certainty that the rezoning will be approved. That would never be expected in any other Plan Change application to rezone land.
- 23 The Council suggests that it is essential to have the vesting arrangements finalized before rezoning because of (essentially) the uncertainty. It is not unusual for there to be other processes in place before a structure can be vested in a local authority. It is common for significant infrastructure to be vested in councils and that happens only after the council is satisfied that the various Building Act 2004 and other statutory requirements are met. Those requirements are often not finalized until after the subdivision consents have been granted and they are generally not finalized at rezoning. It is very common for roading, wastewater and stormwater infrastructure (for example) to be the subject of detailed design as a consent condition. So the general approach to this bridge is not that different. It just requires a slightly different approach and discussion with an additional party who, in this case, has indicated support and willingness to cooperate from the outset.

### *Treaty of Waitangi*

- 24 Finally, I will note that the Proponents expected for their application to be assessed and processed in good faith and that the Council would fulfil its role under the Treaty. The Treaty principles are not just about consultation. They are also about partnership and good faith.
- 25 The Proponents don't expect more than anyone else but they do expect to be treated in good faith and as Treaty partners. They did not expect this application to be opposed by council staff, particularly when Council policy documents support it. They expected a solution-based approach that is normal with any council application, whether for a plan change or a resource consent.

### *Conclusion*

- 26 The Proponents have engaged professionals and tried to work with Council to progress this Plan Change. All of their bills have been paid within several days of the due date and they sought flexibility this month due to the unusual financial circumstances following Covid19.
- 27 The Proponents want to have their application heard and decided. They want the ability to progress their development when the economic climate is right knowing that the zoning is in place.
- 28 The Proponents want to be able to present their rebuttal evidence, which has already been partially prepared, and to answer the Panel's questions. Their experts remain available for conferencing.
- 29 We seek the following directions from the Panel:
- (a) that the Council experts recommence the conferencing discussions with the Joint Witness Statements being lodged along with rebuttal evidence from the Proponent given Council's actions in cancelling today's conferencing schedule;
  - (b) that all parties continue towards the schedule set out in the Panel's Minutes with a hearing commencing on Wednesday 17<sup>th</sup> June 2020;
  - (c) We understand that Ms Phillips, geotechnical engineer advising TDC, is relocating to the South Island this week. We seek directions that Ms Phillips can attend the hearing to answer any questions by Zoom or other electronic means;
  - (d) That Ms Sian Keith is excused from giving evidence at the hearing. Ms Keith can be available by Zoom for any questions from the Panel;

- (e) That any other experts (including TDC experts) are advised in advance of the hearing if they will not be required to attend as this will assist with removing unnecessary costs.

26<sup>th</sup> May 2020

A handwritten signature in blue ink, appearing to read 'Joan Forret', with a long horizontal stroke extending to the right.

Joan Forret

Counsel for the Proprietors of Hauhungaroa No.6 Incorporation.