BEFORE THE MARLBOROUGH DISTRICT COUNCIL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	Plan Change 21 Waikawa Bay – Mooring Management Areas and Marina Zone to the Marlborough Sounds Resource Management Plan

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SUPPLEMENTARY STATEMENT OF EVIDENCE OF BUDDY MIKAERE

QUALIFICATIONS AND EXPERIENCE

1. My name is Buddy Mikaere and I am providing this supplementary statement on behalf of Port Marlborough New Zealand Ltd ("the Applicant"). My qualifications and experience were set out in my evidence in chief.

EXECUTIVE SUMMARY

2. This supplementary evidence responds to issues raised in the oral and written submissions put forward by Te Ati Awa submitters on 30th November and 1st December 2010.

3. My view is that those submissions fell into four broad categories of concern:

   - Consultation
   - Section 6(e) matters
   - Section 7(a) kaitiakitanga matters
   - Treaty of Waitangi issues

4. I deal with each of these matters below, however my conclusions remain unchanged to that reached in my evidence in chief i.e. "in terms of the matters that I was asked to address in assessing Plan Change 21 my conclusion is that none of the cultural issues raised are of sufficient moment to warrant the application being declined and accordingly there is no reason why the application should not be granted".

CONSULTATION

5. In my evidence in chief I traversed the consultation undertaken by the applicant with Te Atiawa Manawhenua Ki Te Tau Ihu Trust (“Te Atiawa”).

6. I compared the consultation exercise with what in my experience has been good RMA practise in accordance with previous Environment Court precedent. I also took into account the difficulties experienced in establishing a consultation process with the submitters, particularly a reluctance on the part of Te Atiawa to engage. I do not think PMNZL can be criticised for the attempts that it has made to consult with Te Atiawa.

7. Despite the difficulty experienced in engaging with Te Atiawa, I nevertheless found that a comprehensive list of matters of concern to Te Atiawa had been identified by the applicant and these had been or could be adequately addressed by way of avoidance, remedial and mitigation proposals. In other words, none of the matters that were able to be identified as being of concern to Te Atiawa before the hearing would, in my opinion, be sufficient to warrant declining the application.

8. Identification of issues has always been in my opinion one of the main drivers of the consultation process. However to be truly effective consultation needs to be a two way process and where such an exchange does not occur then it is incumbent on the party attempting to consult to make the best fist of what it has or is able to achieve in this respect.

9. In this respect I note that an applicant invitation to consult on issues remains “live” and the mitigation and proposals advanced by the applicant make provision for a forum in which on-going consultation or engagement between the parties can take place.

10. I take real issue with Ms Grey’s statements on inadequate consultation and (paragraph 33) that Te Atiawa’s matters raised in pre-circulated evidence had been dismissed without any explanation. She went on to

say that “This attitude has created a culture of distrust which will require significant efforts to overcome”.

11. Clearly she is unaware of the efforts made to caucus with the three principal Te Ati Awa witnesses being Messrs Ohia and Taylor as well as Ms Gemmell. Meetings with these witnesses however were not possible because of time constraints on them.

12. In listening to the submissions and evidence made to the Committee on consultation I heard nothing that would lead me to amend the conclusion in my evidence in chief that “any criticism of that consultation cannot be sustained given that all the issues that one would expect to find associated with a Plan Change of this nature have been identified, have been considered, and modifications made where appropriate”.

13. In my opinion the submissions have also served to reinforce my earlier finding that it is not so much the consultation process that is the problem but rather the outcome. As I state in the Cultural Impact Assessment (Appendix1) “consultation is always subjective and the particular perspective of the participating parties often limits judgements on its efficacy. There is, for example, a view that consultation means reaching a position acceptable to all parties or a decision in accord with one party’s view. While the former is the ideal consultation outcome it is rarely achieved but that does not mean the consultation itself has been inadequate.”

14. In addition, I struggle with the concept that a party who refuses to engage despite repeated opportunity to do so, can then turn around and assert that they have somehow not been consulted or as Mr Taylor described it in his evidence, that consultation has been “inadequate”.

15. This point is encapsulated in the Environment Court summary as found in Appendix 2[1]: “While those consulted cannot be forced to state their views, they cannot complain, if having had both time and opportunity, they for any reason fail to avail themselves of the opportunity”.

[1] Land Air Water Association and Others v Waikato Regional Council A11/2001.

16. Other precedent also supports my view. In *Beadle & Wihongi v Minister of Corrections & Northland Regional Council* (A74/02. 8 April 2002) the Environment Court focused on the possible outcomes of consultation. It held that while a fair and meaningful process should be followed, consultation does not require the parties to negotiate or agree, and it does not give tangata whenua a right of veto over the project.

17. The Court went on to say (at paragraph 549) that: "Those consulting need to impart enough about the proposal that those consulted are able to respond with appropriate and accurate information on the potential effects on affected Māori, so that it may be considered by the decision maker. The consulting party, while entitled to have a working plan in mind, has to keep its mind open and be ready to change or even start afresh. However, although consultation involves meaningful discussion, it does not require agreement, and does not necessarily involve negotiation toward an agreement. As counsel for the Minister[2] submitted the principle does not give a right to veto any proposal."

18. In summary it is eminently clear to me that the consultation issue can be firmly set aside in this particular instance.

SECTION 6(e) MATTERS

19. Much of the submitter evidence was delivered with much passion and emotion and was of a nature that underlined the Te Ati Awa relationship with Waikawa Bay and its surrounds i.e. directed towards the intent of section 6(e).

20. However these were all matters that the applicant had already acknowledged as being of high importance and which were the motivation

[2] Minister of Corrections

behind the attempts to consult with Te Ati Awa and to attempt to make provision for that relationship within the context of the Plan Change 21 application.

21. To imply that these matters were not taken into account or ignored is not correct and is simply disingenuous.

22. For example Ms Grey said that the applicant's assessment of cultural impact was seriously deficient. I make two points in response. Firstly there were no new cultural issues raised in the submitter evidence i.e. in a broad context all matters that were raised by Te Atiawa were known and had been considered. Secondly as Ms Grey should know the initial offer was for Te Ati Awa to nominate a suitable person to prepare the Cultural Impact Assessment at PMNZL's cost but this offer was not taken up. Since that time, and following my engagement to prepare the CIA, PMNZL has on at least two subsequent occasions offered to fund Te Atiawa's own preparation of a CIA, with no input from PMNZL. These offers have also not been taken up.

23. In my opinion, having listened carefully to the evidence called by Te Atiawa, nothing arose during the course of their presentation that could properly form the foundation for a conclusion that there are s6(e) values associated with the proposed marina extension areas to the extent that any development in these areas could not proceed.

SECTION 7(a) MATTERS

24. Similarly with kaitiakitanga section 7(a) matters. While there was much assertion about the kaitiaki role of the submitters, how that role was given expression was not articulated.

25. As set out in my response to questions from the Commissioners, it seems to me that the exercise of kaitiakitanga requires more than just assertion. It requires having a plan and actual physical activity such as removing rubbish from the foreshore, active monitoring of shellfish stocks, riparian

planting to improve water quality, proper response measures to clean up fuel spills, provision of pump out facilities etc.

26. The best response to the kaitiaki issues would flow from a co-operative working relationship between the parties - but as I pointed out in my evidence in chief this has not been possible to date. However, even if the Plan Change should not proceed, in my opinion, doing nothing is not an option in kaitiaki terms. In the absence of a planned approach and any physical intervention the present situation can only deteriorate.

27. I listened very carefully to the evidence and submissions on the kaitiakitanga issue, those of Mr Bentham Ohia in particular.

28. There is no challenge to matauranga Maori in respect of kaitiaki responsibilities as asserted by him – instead the challenge is how to incorporate that knowledge into the proposal but at that point we revert to the difficulties with consultation and the non-engagement which have made incorporation impossible without a relationship change.

29. I see no reason to amend the pragmatic conclusion I expressed in my evidence in chief perspective on this issue which in summary was that "giving kaitiakitanga physical expression requires the active engagement of both parties. It is unreasonable to say that there is a failure to recognise section 7(a) matters if one party is not participating in the formulation of appropriate kaitiaki measures".

30. In reference to kaitiakitanga matters, Ms Grey said that the value of the remaining part of the kaimoana resource in Waikawa Bay is immeasurable and that the applicant has no answers to the adverse effect of removing traditional food gathering grounds. I consider her assertion is a gross overstatement of the value of the kaimoana resource in the areas in question.

31. I also point to kaitiaki related proposals advanced by the applicant to undertake additional studies in the Waikawa Stream delta and to look at water quality improvement measures through riparian planting and sediment control. These were all matters discussed early in the piece and regardless of whether the plan change proceeded or not, <u>could</u> have been

taken up as a kaitiaki measure if meaningful engagement had been achieved.

32. It is not so much a question of not addressing kaitiakitanga matters but more a wilful refusal to consider working together to address them. As stated earlier in this section of my evidence; in my view doing nothing is not an option and while being critical of the applicant position I heard nothing in the submitter's evidence to say how they would address these matters except by complaining about them.

33. I consider that the processes that would follow from this plan change and any applications for consent would create a strong basis for Te Atiawa and the applicant to develop a meaningful and effective kaitiaki partnership/relationship for the area.

MAURI

34. I also noted reference was made to mauri and how if the Plan Change 21 application is approved, mauri will be negatively affected by subsequent activities.

35. The first point to note is that there is no standard perspective on mauri because it is a subjective intangible concept and largely personal to the individual. It also contains elements of spiritual or religious belief. In this respect the RMA is bereft of guidance as to how mauri matters should be addressed.

36. In my experience, development proposals that are seeking to respond to the mauri issues can only have recourse to tangible mitigation i.e. an intangible response is not possible.

37. The second point to note is that the starting point for assessing mauri impact is what can be described as the pristine state. In the pristine state the mauri of an area or a resource is unaffected.

38. On this basis it is clear that the mauri of Waikawa Bay is already compromised. It is equally clear that restoration to the pristine mauri state is not an option because that would mean that both applicant <u>and</u> submitters remove themselves entirely.

39. My suggestion is that in these circumstances an incremental approach needs to be taken. Any development proposal needs to be able to demonstrate that its environmental impact at worst maintains the currently existing status quo and at best represents an enhancement of the overall health and quality of the bay, i.e. the mauri is not further negatively affected and is in fact incrementally improved.

40. As an example any improvements to water quality within Waikawa Bay must represent an incremental improvement to the mauri.

41. In this instance it is further suggested that working co-operatively on kaitiaki proposals and giving them effect represents the incremental mauri approach that I am advocating.

42. I see no reason why the mauri of the bay cannot be improved in tandem with extensions to the existing marina.

TREATY CLAIM

43. Many submissions touched on the recent Treaty settlement agreement reached between the Crown and Te Atiawa in February 2009 where it was implied that by proceeding with the Plan Change proposal the applicant would be in breach of that agreement.

44. It appears to me that the Plan Change proposal has to operate within the parameters of the RMA and that until that legislation is amended – other arrangements reached between Te Ati Awa and the Crown remain outside the scope of this proposal and cannot be taken into account.

45. In any event I cannot see anything associated with this proposal that would necessarily undermine the outcome of the Treaty Settlement.

CONCLUSION

46. Having heard the evidence and submissions on behalf of Te Atiawa, I can do no better than reiterate the conclusions I reached in my evidence in chief. That view was that the cultural issues and concerns raised in opposing submissions are largely matters capable of resolution but for proper resolution the intransigent approach taken by the submitters is a major hurdle to overcome.

47. I was encouraged by the fact that some submissions looked to seek a co-operative approach but equally disappointed that when the opportunity for negotiation and resolution was provided by the applicant, it was not taken up by the submitters.

48. My belief is that it is incumbent on the Applicant to ensure that its proposals are fair and reasonable - which I believe they are - and that in pursuit of the Plan Change and any subsequent activities that it acts with integrity and in a way that fairly balances the needs and wants of the community it serves.

49. In terms of the matters that I was asked to address in assessing Plan Change 21 my conclusion is that none of the matters raised in submissions or during the course of the hearing are sufficient to warrant the application being declined and accordingly there is no reason why the application should not be granted.

Buddy Mikaere

December 2010