

Proposed Horowhenua District Plan

Matters of Importance to Tangata Whenua Hearing: 8 April 2013

Reporting Officer Response – 14 May 2013

Response to Commissioner's Questions

Q: Commissioner Nixon expressed concerns in relation to Rule 19.6.13 Sites of Significance to Tangata Whenua and raised the question whether or not this rule was ultra vires?

Rule 19.6.13 currently reads:

"(a) No activity shall lead to the modification, demolition or removal of any site of significance to Maori where such site has been identified to Council prior to the time that any activity or development is proposed."

In responding to the concern expressed by Commissioner Nixon, I have on behalf of Council obtained legal advice on this matter. The memorandum prepared by Brookfields Lawyers is made available to the Hearing Panel to assist in preparing the decision for this hearing.

In summary, Council's legal advisers have considered the wording of the rule and are of the opinion that the rule, subject to one amendment would be intra vires. The amendment referred to is the proposed deletion of "lead to", as it is arguably uncertain, in that the direct consequences of an activity will not always be known and indirect consequences (which may extend over a considerable time period) possibly never known. The necessary amendment would result in the rule reading:

"(a) No activity shall ~~lead to the modification, demolition or removal of~~ modify, demolish, or remove any site of significance to Maori where such site has been identified to Council prior to the time that any activity or development is proposed."

Council's legal advisers have provided an alternatively worded rule to address the concern that due to the absence of any discretion to the Council to assess the merits of the sites identified, there is some potential for falsely or carelessly notifying the Council that sites are of significance to Maori. The alternative wording for this rule would read: (Note the above recommendation has been incorporated into the alternative rule wording below).

"(a) No activity shall modify, demolish, or remove any site of significance to Maori where such site has been identified to Council and recorded by the Council in a register of sites¹ prior to the time that any activity or development is proposed."

I note that this rule is repeated across the zones in the Proposed Plan (refer rules 15.6.29, 16.6.21, 17.6.23 and 20.6.20) and the legal advice received in relation to Rule 19.6.13 would also be relevant to these rules also.

In summary the wording of Rule 19.6.13 as notified in the Proposed Plan would make the rule ultra vires. Subject to a minor wording amendment the rule can be made intra vires and

¹ Some consideration may need to be given to this description. This wording has been chosen to avoid reference to a "schedule", which would commonly form part of the District Plan. Incorporation is not proposed in this case.

retain the intent of the rule. The legal advice has also suggested a further amendment to the rule to address a concern that the rule could be abused through sites being falsely or carelessly identified to Council.

I therefore recommend that Rule 19.6.13 be retained for the reasons set out in the Section 42A report and that the Hearing Panel consider amending the rule to read:

"(a) No activity shall ~~lead to the modification, demolition or removal of~~ modify, demolish, or remove any site of significance to Maori where such site has been identified to Council and recorded by the Council in a register of sites prior to the time that any activity or development is proposed."

Secondly I recommend that if Rule 19.6.13 is retained and amended that the equivalent rule in each of the other zones should also be amended as a consequential change and to ensure consistency across the Proposed Plan.

Response prepared by David McCorkindale

Dated: 14th May 2013