

Private Bag 1001, Dargaville

Phone 439 7059

**Not for Publication until after Commencement of Meeting**

**Notice Of Extraordinary Meeting Of Council**

**Date** 10.00 am on Wednesday 9 November 2011

**Venue** Council Chambers, Station Road, Dargaville

**Timetable**

**9.45 am Morning Tea**

**10.00 am Extraordinary Council Meeting**

This Extraordinary meeting is to be followed by a Council Workshop.

**Extraordinary Meeting Of Kaipara District Council to be held Kaipara District  
Council Chambers, Station Road, Dargaville On Wednesday 9 November 2011  
at 10.00 am**

**Recommendations contained in the order paper and reports are NOT Council  
decisions but are provided as advice on which the debate can begin.  
Please refer to Council minutes for Resolutions.**

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**Extraordinary Meeting Order Paper: 9 November 2011****1 Opening : Mayor Tiller****1.1 Present****1.2 In Attendance****1.3 Apologies**

Councillors Larsen, Sutherland and Wade have tendered their apologies.

**Recommended**

*That the apologies of Councillors Larsen, Sutherland and Wade be received.*

**2 Declaration of Conflicts of Interest****2.1 Declaration of Conflicts of Interest****General Manager Policy and Governance 1902.0**

Councillors and Managers will be asked to give consideration as to whether or not they have a potential conflict of interest in respect of the items before Council.

**P1 2.2 Proposed Kaipara District Plan Decisions Version: Council Appeal of Rule 17.10.2****General Manager Policy and Governance 3807.06.04**

A report from the General Manager Policy and Governance dated 8 November 2011 is attached.

Rule 17.10.2 controls earthworks around heritage sites across Kaipara District. The current wording of Rule 17.10.2 could be interpreted to mean that any earthworks around the fringes of the Kaipara or Mangawhai Harbours will require a resource consent. This is an unintended outcome and considered a large burden on the community. Council has legal advice that suggests that the best means to re-draft this rule is for Council to appeal the decision on this rule, as Council has submitted on this rule. Alternatively, Council could undertake a variation to the Proposed District Plan. The appeal process is considered a more effective remedy in this situation.

The purpose of this agenda item is to seek Council's approval to lodge an appeal with the Environment Court on Rule 17.10.2. If Council agrees, then the appeal needs to be lodged forthwith as the 30 working day appeal period finishes on approximately 16 November 2011.

Once the appeal is lodged, the re-drafting of the rule can be achieved by a Consent Order. The other submitters to this rule may join Council's appeal. This has the potential to complicate the resolution of the appeal. Through the negotiation process the suggested wording of Rule 17.10.2 may be altered. Having a Councillor as part of the negotiation process, and with delegated authority from Council to settle with the other parties and the Court will ensure completion of the process in a timely manner.

This report has been discussed with the Planning Portfolio Holder, Councillor John Blackwell, who supports the recommendations.

### **Recommended**

*That Council lodges an appeal with the Environment Court to Rule 17.10.2 of the Decisions version of the Proposed District Plan requesting that the rule be changed to:*

<b>Rule</b>	<b>Parameter</b>	<b>Heritage Activity Performance Standard</b>
<b>7.10.2</b>	<b>Earthworks within 20m of a site containing a Category A Resource or Feature identified in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2</b>	<p><i>Any activity involving earthworks within 20m of any Category A heritage resource or feature listed in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2 is permitted if:</i></p> <p>a) <i>Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless in the case of a Category A heritage resource or feature listed in Appendix 17.1 the Site Management Protocol (Rule 17.9.1) and in the case of both sites in Appendix 17.1 and 17.2, the Accidental Discovery Protocol (Rule 17.9.2) are followed; and</i></p> <p>b) <i>It complies with the relevant Rules and Performance Standards in Part B.</i></p> <p><i>Note 1: In addition to the Standards above, any works that would modify, damage or destroy an archaeological site require approval from the New Zealand Historic Places Trust in accordance with the Historic Places Act 1993.</i></p>

*; and*

*That Council nominates a Councillor and delegates to that Councillor the authority to negotiate with the Court and other parties to achieve resolution of this matter through a Consent Order.*

**Reason for the recommendations**

The current wording of Rule 17.10.2 places an unintended burden on the community around both the Kaipara and Mangawhai Harbours. Due to the constraints of the Resource Management Act processes, there are limited means by which a rule in the Proposed District Plan Decisions version can be changed. As Council is a submitter to this rule, lodging an appeal is considered the best remedy to correct the drafting of this rule and the recommendations are to facilitate this outcome.

### 3 Public Excluded Council Items: 9 November 2011

#### **Recommended**

*That the public be excluded from the following part of the proceedings of this meeting.*

*The general subject matter of each matter to be considered while the public is excluded, the reasons for passing this resolution in relation to each matter and the specific grounds under Section 48 (1) of the Local Government Official Information and Meetings Act, 1987 for the passing of this resolution are as follows:*

<i>Subject matter to be considered:</i>	<i>Ground(s) under Section 48 (1) for the passing this resolution:</i>
<i>Appointment of Chief Executive</i>	<i>Section 48 (1)(a), Section 7, Section 7(2)(i) Section 7(2)(b)(ii)</i>
<i>Mangawhai EcoCare Project: Public Excluded Minutes and Discussions</i>	<i>Section 48 (1)(a), Section 7, Section 7(2)(b)(ii), Section 7(2)(g)</i>

#### **Reason for passing this resolution in relation to each matter**

This resolution is made in reliance of Section 48 (1)(a) of the Local Authority Official Information and Meetings Act and the particular interest or interests protected by Section 7 of that Act Section 7 of the Official Information Act 1982, which would be prejudiced by the holding of the whole or the relevant part of the proceedings of the meeting in public.

**Section 7 (2)(i)** enable any local authority holding the information to carry on, without prejudice or disadvantage negotiations (including commercial and industrial negotiations).

**Section 7 (2)(b)(ii)** would be unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.

**Section 7 (2)(g)** maintain legal professional privilege.

## **Open Council Meeting: 9 November 2011**

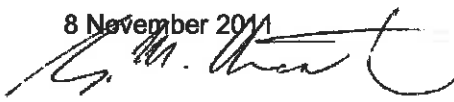
### **Recommended**

*That the resolutions made whilst in Public Excluded, be confirmed.*

### **Closure**

**Kaipara District Council**

**Dargaville**

**File Number:** 3807.06.04  
**Report To:** Council  
**Meeting Date:** 9 November 2011  
**From:** General Manager Governance and Policy  
**Subject:** **Proposed Kaipara District Plan Decisions Version: Council Appeal of Rule 17.10.2**  
**Date of Report:** 8 November 2011  
**Signed By:** 

Glennis Christie

**Conclusion**

Rule 17.10.2 controls earthworks around heritage sites across Kaipara District. The current wording of Rule 17.10.2 could be interpreted to mean that any earthworks around the fringes of the Kaipara or Mangawhai Harbours will require a resource consent. This is an unintended outcome and considered a large burden on the community. Council has legal advice that suggests that the best means to re-draft this rule is for Council to appeal the decision on this rule, as Council has submitted on this rule. Alternatively, Council could undertake a variation to the Proposed District Plan. The appeal process is considered a more effective remedy in this situation.

The purpose of this agenda item is to seek Council's approval to lodge an appeal with the Environment Court on Rule 17.10.2. If Council agrees, then the appeal needs to be lodged forthwith as the 30 working day appeal period finishes on approximately 16 November 2011.

Once the appeal is lodged, the re-drafting of the rule can be achieved by a Consent Order. The other submitters to this rule may join Council's appeal. This has the potential to complicate the resolution of the appeal. Through the negotiation process the suggested wording of Rule 17.10.2 may be altered. Having a Councillor as part of the negotiation process, and with delegated authority from Council to settle with the other parties and the Court will ensure completion of the process in a timely manner.

This report has been discussed with the Planning Portfolio Holder, Councillor John Blackwell, who supports the recommendations.

**Recommendation**

*That Council lodges an appeal with the Environment Court to Rule 17.10.2 of the Decisions version of the Proposed District Plan requesting that the rule be changed to:*

<b>Rule</b>	<b>Parameter</b>	<b>Heritage Activity Performance Standard</b>
<b>17.10.2</b>	<b>Earthworks within 20m of a site containing a Category A Resource or Feature identified in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2</b>	<b>Any activity involving earthworks within 20m of any Category A heritage resource or feature listed in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2 is permitted if:</b>

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M&amp;C PDP Council appeal Rule 17.10.2 08112011 rpt

		<p>a) <i>Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless in the case of a Category A heritage resource or feature listed in Appendix 17.1 the Site Management Protocol (Rule 17.9.1) and in the case of both sites in Appendix 17.1 and 17.2, the Accidental Discovery Protocol (Rule 17.9.2) are followed; and</i></p> <p>b) <i>It complies with the relevant Rules and Performance Standards in Part B.</i></p> <p><i>Note 1: In addition to the Standards above, any works that would modify, damage or destroy an archaeological site require approval from the New Zealand Historic Places Trust in accordance with the Historic Places Act 1993.</i></p>
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*That Council nominates a Councillor and delegates to that Councillor the authority to negotiate with the Court and other parties to achieve resolution of this matter through a Consent Order.*

#### **Reason for the recommendations**

The current wording of Rule 17.10.2 places an unintended burden on the community around both the Kaipara and Mangawhai Harbours. Due to the constraints of the Resource Management Act processes, there are limited means by which a rule in the Proposed District Plan Decisions version can be changed. As Council is a submitter to this rule, lodging an appeal is considered the best remedy to correct the drafting of this rule and the recommendations are to facilitate this outcome.

#### **Reason for Report**

For Council to consider lodging an appeal to correct the wording of a rule that currently places an unintended limit on earthworks around the Kaipara and Mangawhai Harbours.

#### **Background**

Chapter 17 is the Heritage Chapter of the Decisions version of the Proposed Kaipara District Plan. There are two appendices within this Chapter covering the two types of heritage sites, known and unknown. Appendix 17.1 is a schedule of Heritage Resources, which is a list of *known* heritage sites across Kaipara District. Appendix 17.2 is a list of Areas of Significance to Maori and Nohoanga Sites across Kaipara District. These are a mixture of known and *unknown* sites. These sites and areas are an outcome of the Treaty Settlement process for both Te Roroa and Te Uri o Hau. The Area of Significance is a Statutory Acknowledgement from the Crown that Te Uri o Hau has a long association with and historical significance to both Harbours.

All of the sites and areas within both Heritage Appendices 17.1 and 17.2 have been mapped in the District Plan maps and have provisions attached.

Rule 17.10.2 is an earthworks provision for sites in Appendix 17.1 and for areas of significance to Maori within Appendix 17.2. The rule in the Proposed Plan is as follows:

Rule	Parameter	Heritage Activity Performance Standard
17.10.2	Earthworks on a site containing a Category A Resource or Feature or an Area of Significance to Maori	<p>Any activity on a site listed in Appendix 17.1 is permitted if:</p> <p>a) The activity does not involve earthworks within 20m of any heritage resource listed in Appendix 17.1; and</p> <p>b) Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless the Site Management Protocol (Rule 17.9.1) and Accidental Discovery Protocol (Rule 17.9.2) are followed; and</p> <p>c) It complies with the relevant Rules and Performance Standards in Part B.</p>

**Council's Submission (submitter #118, submission point #40)**

Council's submission point on Rule 17.10.2 raised concern over reference to an area of significance to Maori. Council considered 'an area' to be too wide, when it is based on an area that has historical association with Maori, not necessarily containing physical features that require protection. Council sought two aspects of relief:

- That the words 'an area' be deleted from the rule and replaced by 'a site' to clarify the scope of the rule
- That an advice note be included explaining that a site of significance to Maori could include a physical feature such as middens, kumara pits or a pa site.

A copy of the extract of Council's submission is provided in Attachment 1.

There are three other submissions and four further submissions made to Rule 17.10.2, some in support and some in opposition. These submissions also seek amendments to the rule, either making it more or less restrictive. These submitters and a summary of their requests are contained in the Decision Report, see Attachment 2.

Council's submission was accepted in part. The relevant extract from the Decision Report is provided in Attachment 2. It is noted that the Hearing Panel delegated the deliberation of Council's submission to the Chair, Mr Les Simmons. Mr Simmons instructed Beca to accept or accept in part Council's submission point on Rule 17.10.2, to be consistent with the wording of an Addendum to the Hearing Report for Chapter 17 Heritage. A copy of that Hearing Report Addendum is provided in Attachment 3. The Addendum to Chapter 17 Heritage Hearing Report recommended that

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Rule 17.10.2 covers **sites** of significance to Maori, rather than **areas** of significance. The intent was to focus the earthworks controls to sites, rather than a blanket control over the whole area.

### Decisions Version of Rule 17.10.2

However, the word **area** was not replaced with the word **site** in the Decision version of Rule 17.10.2. This was because of the difficulty of applying an earthworks rule to **sites** that are currently *unknown*. The sites within Heritage Appendix 17.1 are known and mapped, therefore the earthworks control rule is considered reasonably to apply. However, the sites within Heritage Appendix 17.2 are currently unknown.

The Decisions version of Rule 17.10.2 is as follows:

Rule	Parameter	Heritage Activity Performance Standard
17.10.2	Earthworks on a site containing a Category A Resource or Feature <u>identified in Appendix 17.1</u> or an Area of Significance to Maori <u>identified in Appendix 17.2</u>	<p>Any activity on a site listed in Appendix 17.1 is permitted if:</p> <ul style="list-style-type: none"> <li>a) The activity does not involve earthworks within 20m of any <u>Category A</u> heritage resource <u>or feature</u> listed in Appendix 17.1 <u>or Area of Significance to Maori identified in Appendix 17.2</u>; and</li> <li>b) Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless the Site Management Protocol (Rule 17.9.1) and Accidental Discovery Protocol (Rule 17.9.2) are followed; and</li> <li>c) It complies with the relevant Rules and Performance Standards in Part B.</li> </ul> <p><u>Note 1: In addition to the Standards above, any works that would modify, damage or destroy an archaeological site require approval from the New Zealand Historic Places Trust in accordance with the Historic Places Act 1993.</u></p>

This wording is considered to potentially result in an interpretation that no earthworks can be undertaken around the fringes of either the Kaipara or Mangawhai Harbour without a resource consent. This is considered to place an unfair burden on the communities around both Harbours.

### Suggested Amended Wording for Rule 17.10.2

A more appropriate wording for this rule is as follows:

Rule	Parameter	Heritage Activity Performance Standard
17.10.2	<p><b>Earthworks <u>within 20m of a site containing a Category A Resource or Feature identified in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2</u></b></p>	<p>Any activity <u>involving earthworks within 20m of any Category A heritage resource or feature listed in Appendix 17.1 or within an Area of Significance to Maori identified in Appendix 17.2</u> is permitted if:</p> <p>a) Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless <u>in the case of a Category A heritage resource or feature listed in Appendix 17.1</u> the Site Management Protocol (Rule 17.9.1) and <u>in the case of both sites in Appendix 17.1 and 17.2, the Accidental Discovery Protocol (Rule 17.9.2)</u> are followed; and</p> <p>b) It complies with the relevant Rules and Performance Standards in Part B.</p> <p><u>Note 1: In addition to the Standards above, any works that would modify, damage or destroy an archaeological site require approval from the New Zealand Historic Places Trust in accordance with the Historic Places Act 1993.</u></p>

It is considered that the amendments above are changes that would better reflect the intent of the rule, and to better reflect Council's intention in respect of their submission point (118/40). It is considered that the amendments suggested are within the scope of Council's original submission.

Other parties may join Council's appeal under section 274 of the Resource Management Act. This may complicate the resolution of the appeal. However, Council is entitled to settle its issues by consent order and may withdraw its appeal unless section 274 parties seek to pursue the matter to a hearing itself.

Through the negotiation process the suggested wording of Rule 17.10.2 may be altered. Having a Councillor as part of the negotiation process, and with delegated authority from Council to settle with the other parties and the Court will ensure completion of the process in a timely manner.

#### Degree of Significance

This is not significant in terms of Council's Policy on Significance.

### **Consideration of the Four Well-beings (Community Views)**

The proposed amendments will better reflect the original intention and balance the needs of different sectors of the community.

### **Policy Impacts**

This does not affect Council policy.

### **Financial Considerations**

There will be additional costs involved should Council lodge an appeal with the Environment Court. The lodgement fee is in the order of \$500.00 to \$600.00. However, a variation process will be vastly more expensive in both time and money.

### **Legal Considerations/Delegation**

A legal opinion has been provided that concludes that an appeal is a legally viable remedy to amend Rule 17.10.2. Please see Attachment 4.

Ref	Plan Ref.	Explanation	Amendment Sought by Submission
40.	Chapter 17 – Heritage	Rule 17.10.2 – Amend parameter to remove reference to an area of significance to Maori. These are wide areas as these are areas of historical association with Maori but do not necessarily contain physical features that require protection. Rework so it is clear we want to protect physical features.	Rework 17.10.2 Parameter to read:  "Earthworks on a site containing a Category A Resource or Feature or an area of significance to Maori."  Add note of explanation:  Note 1: A site of significance to Maori could include a physical feature such as (but not limited to) middens, kumara pits or a pa site  Amend Section 20.9 to clearly indicate that the intention of the Plan was to make activities identified in an adopted Reserve Management Plan take precedence over other Rules (e.g. the underlying zoning).
41.	Chapter 20 Reserve Management Units	While the Rules in Table 20.10.1 and 20.10.2 indicate the precedence of this Chapter over other provisions of the Plan this is not clear in the Rules explanation in 20.9	A designation that was approved in 2002 was never included in the Operative Plan. The designation is for Broadcast Communications Ltd for a "Broadcasting, telecommunications (including radio and microwave communications) and ancillary and associated purposes" facility. The legal description of the site is Section 14 Block III Tangihua Survey District.
42.	Chapter 21 Designations	Add a new designation to Appendix 21.1 Schedule of Designations.  Add the new designation to Map Series Two – Map 6	
<b>Map Errors</b>			
43.	Mapping of D8 on Map 16	Designation is being shown over Lot 2 when it should be over Lot 1.	Amend D8 to be shown on Lot 1.
44.	Appendix A: Growth Areas Mangawhai	Mangawhai spelt incorrectly in legend.  Colour for the Greater Growth Area should be changed as it needs to be differentiated from the other Growth Area Maps. (In other words, the greater growth area of Mangawhai, which corresponds to the growth area catchment, should be distinguishable from the 'growth areas' hub which is shown on other maps).	Rework legend as follows:  Mangawhai Mangawhai Structure Plan Policy Areas providing for Residential, Business or Industrial growth.  Change the shading for the Greater Growth area catchment to be different from other growth area maps.

Submission Point	Submitter Name	Hearing Paper	Page	Decision
FS492/1	Mangawhai Historical Society	17	21	Be Rejected
FS482/1	New Zealand Archaeological Association	17	21	Be Rejected

#### 4.17.2 Reasons for Decision

1. The Panel considers Category B items need to be included in a schedule but notes that there are no rules for these items, as discussed in more detail in Section 4.7.2 of this report.
2. The Panel notes that Other Methods such as incentives and education provide a more positive mechanism to achieve the outcomes being sought from the Plan.

#### 4.17.3 Changes required to Chapter 17 as a result of Decision

No changes required.

#### 4.17.4 Consequential Amendments.

No consequential amendments required.

#### 4.18 [PAN 17.18] – Rule 17.10.2

Several submissions were received on Rule 17.10.2 Earthworks on a Category A Resource or Features or an Area of Significance to Maori. Submissions seek the following:

1. Include archaeological sites in the Parameter of the Rule.
2. Remove permitted activity threshold for earthworks on recorded archaeological sites and require avoidance of earthworks on archaeological sites or that Site Management Protocol is followed.
3. Clarify whether the rule applies to Appendix 17.2: Nohoanga Areas and Areas of Significance to Maori
4. Restrict earthworks within 20m of any heritage resources in Appendix 17.1 and 17.2.
5. Include a note to clarify a site of significance to Maori.

## 4.18.1 Decision

That submissions:

Submission Point	Submitter Name	Hearing Report	Page	Decision
413/67	New Zealand Historic Places Trust	17	23	Be Accepted in Part
FS485/1	Stevens, Owen	17	23	Be Accepted in Part
FS492/1	Mangawhai Historical Society	17	23	Be Accepted in Part
FS482/1	New Zealand Archaeological Association	17	23	Be Accepted in Part
25/4	Martin, Stephen	17	23	Be Accepted in Part
FS511/2	Farmers of New Zealand Inc., Kalpara Citizens and Ratepayers Association Inc., Poua Topu A Trust	17	23	Be Accepted in Part
118/40	Kalpara District Council	17	23	Be Accepted in Part
FS486/8	New Zealand Historic Places Trust	17	23	Be Accepted in Part

## 4.18.2 Reasons for Decision

1. The Panel notes that Policy 17.5.8 directs Council to protect the spiritual, cultural and historical values of Areas of Significance to Maori from inappropriate subdivision, use and development. On this basis, Nohoanga Areas and Areas of Significance to Maori identified in Appendix 17.2 are explicitly included in Rule 17.10.2.

2. Further to this the Panel notes that areas not identified in the Plan can still be protected through the Historic Places Act 1993 if it is defined under that Act as an archaeological site:

*An archaeological site is defined under the Historic Places Act 1993 as either—*

*archaeological site means any place in New Zealand that—*

*(a) either*

*(i) was associated with human activity that occurred before 1900; or*

*(ii) is the site of the wreck of any vessel where that wreck occurred before 1900;*  
*and*

*(b) is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.*

3. The Panel accepts in part the submissions to the extent that changes are made to Rule 17.10.2 to improve the readability of the rule and consistency with the Policy Framework.
4. The Panel notes that the NZAA Site Recording Scheme can be used by Council to inform applicants where there are archaeological sites.

## 4.18.3 Changes required to Chapter 17 as a result of Decision

*[Amend Rule 17.10.2 (Parameter) as follows]*

**Earthworks on a site containing a Category A Resource or Feature identified in Appendix 17.1 or an Area of Significance to Maori identified in Appendix 17.2.**

*[Amend Performance Standards of Rule 17.10.2 as follows]*

Any activity on a site listed in Appendix 17.1 is permitted if:-

- a) the activity does not involve earthworks within 20m of any Category A heritage resource or feature listed in Appendix 17.1 or Area of Significance to Maori identified in Appendix 17.2; and
- b) Earthworks do not exceed 500mm in depth or cumulatively 100m<sup>2</sup> in area per site unless the Site Management Protocol (Rule 17.9.1) and Accidental Discovery Protocol (Rule 17.9.2) are followed; and
- c) It complies with the relevant rules and performance standards in Part B.

Note 1: In addition to the standards above, any works that would modify, damage or destroy an 'archaeological site' require approval from the New Zealand Historic Places Trust in accordance with the Historic Places Act 1993.

#### 4.18.4 Consequential Amendments

No consequential amendments are required.

#### 4.19 [PAN 17.19] – Chapter 17 Maps

One submission seeks that the Areas of Significance to Maori is removed from the property at 42 Blackswamp Road Mangawhai and the adjacent land.

##### 4.19.1 Decision

That submissions

Submission #	Submitter Name	Hearing Report	Page	Decision
92/12	Riverside Holiday Park	17	24	Be Rejected

##### 4.19.2 Reasons for Decision

1. The Panel notes that Areas of Significance to Maori have been identified in the relevant Treaty Settlements process. On this basis, the Panel does not feel it is appropriate to remove this area from the subject sites.
2. The Panel considers that mapping of these areas is an appropriate method to respond to Council's Part 2 requirements (particularly Section 6 and 8 of the RMA).

##### 4.19.3 Changes required to Chapter 17 as a result of Decision

No changes are required.

##### 4.19.4 Consequential Amendments

No consequential amendments are required.

## Memorandum

**To:** Proposed Kaipara District Plan Hearing Panel      **Date:** 3 June 2010  
**From:** Gemma Henry  
**Copy:** Amelia Linzey  
**Subject:** Addendum to Chapter 17 Heritage Hearing Report

### 1.1 Clarification of submission 25/4 (Page 23 of Chapter 17 Hearing Report)

As outlined in the Chapter 17 Heritage Hearing Report:

Submission 25/4 opposes Rule 17.10.2 and seeks it be amended so that it does not apply to sites which are identified as 'Area of Significance to Maori'. The submitter states that Rule 17.10.2 is unclear and requires clarification as to whether it applies to only the sites listed in Appendix 17.1 or whether it applies to all sites identified as being 'Area of Significance to Maori'. If it applies to all sites of 'Area of Significance to Maori' this is opposed as it restricts beyond the other rules controlling earthworks in the plan. FS511/2 supports submission 25/4 because the relief sought is appropriate, necessary and consistent with the provisions of the RMA.

#### 1.1.1 Interpretation

In the Chapter 17 Hearing Report, it has been assumed that this submission point is requesting to remove the term 'sites of significance' from Rule 17.10.2. After communication from the submitter, further clarification has been provided on their intent regarding this submission and it is now understood that this submission point is seeking clarification of whether Rule 17.10.2 applies to only those sites listed in Appendix 17.1 or all sites identified as being 'Area of Significance to Maori'. As such, a revised assessment for this submission point is to be included in the Chapter 17 Hearing report as outlined below.

### 1.2 New Assessment to be included in the Chapter 17 Heritage Report

The 'Parameter' of Rule 17.10.2 states that this rule applies to an 'area of significance to Maori'. However, the 'Heritage Activity Performance Standard' of Rule 17.10.2 states that only Appendix 17.1 applies to this rule. It is noted that Appendix 17.1 may include those sites that are registered as features or sites of significance to Maori and not 'areas of significance to Maori'. As such, it is recommended that the 'Parameter' of this rule be amended as follows to provide clarification of this matter. It is recommended submission 25/4 be accepted and that Rule 17.10.2 be amended as follows:

**Parameter**

***Earthworks on a site containing a Category A Resource or Feature or an Area of a Site of Significance to Maori***

**Gemma Henry**

Planner

Direct Dial: +64-9-300 9240  
Email: [gemma.henry@beca.com](mailto:gemma.henry@beca.com)

Reviewed and confirmed by Amelia Linzey.

## Memorandum

**To:** AMELIA LINZEY / VENESSA ANICH  
**From:** ANDREW GREEN / MELINDA DICKEY / ELIZABETH MOLLOY  
**Client/Matter:** KAIPARA DISTRICT COUNCIL / PROPOSED PLAN  
**Subject:** CORRECTION TO RULE 17.10.2 OF THE DECISION VERSION  
**Date:** 3 NOVEMBER 2011

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### Introduction

1. We refer to Beca's memorandum dated 2 November 2011 ("the Beca Memorandum"). Beca's Memorandum identifies that Rule 17.10.2 of the Decisions Versions of the Proposed Kaipara District Council District Plan ("the Decisions Version") does not correctly represent the meaning intended by the Hearings Panel in its decision on submissions.
2. In particular Rule 17.10.2 was unclear in the Notified Proposed Kaipara District Council Plan and a submission was made on that point by Mr Stephen Martin and the Council itself. Mr Martin's submission sought that Rule 17.10.2 be amended so that it did not apply to sites which are identified as an "area of Significance to Maori". Mr Martin's concern was that Rule 17.10.2 was unclear in whether it related only to those specific sites listed in Appendix 17.1 or whether it applied to all areas which are identified as being an "area of Significance to Maori". Mr Martin's submission also sought any consequential amendments as necessary to address his concerns. The Hearings Panel accepted Mr Martin's submission in part.
3. The Council's submission sought that Rule 17.10.2 be reworded to make it clear that it was the physical features of significance to Maori, rather than areas of significance to Maori, that were intended to be protected. For that reason the Council sought that the ambit of Rule 17.10.2 be reworded so as to refer to any site of significance to Maori rather than an area. The Council also sought that an explanatory note be included in the rule to explain that a site of significance to Maori could include a physical feature such as (but not limited to) middens, kumara pits or a pa site.
4. The Hearings Panel delegated deliberation and decision-making on the Council's submission to the Chair. The Chair instructed Beca to accept the submission, or accept it in part, to be consistent with the submission made by Mr Martin in relation to the rule.
5. Mr Martin has raised concerns over the wording of Rule 17.10.2 in the Decisions Version and his Planning representative (Mr Hay) has informed the Council that Rule 17.10.2 does not give effect to the intentions of the Hearings Panel. Officers agree that it is desirable that Rule 17.10.2 be amended.

## Executive Summary

6. At first blush, an erratum process cannot be used because it is not clear to us that the Chair of the Hearings Body contemplated the amendments now proposed.
7. Further, the amendments sought to Rule 17.10.2 cannot be sought as alterations or minor corrections to the Proposed Plan under Clause 16 of Schedule 1 to the Resource Management Act 1991 ("RMA").
8. Clause 16A may be used to seek the alterations through a Variation. This will require the Council to comply with the public notification provisions of Schedule 1 and will enable public submissions.
9. As an alternative the Council may seek the amendments to Rule 17.10.2 through an appeal against the Decisions Version. The amendments sought by the Council are within the scope of the Council's original submission and therefore within the jurisdiction of the Court to consider. As the Council may expeditiously resolve its appeal by consent order we consider that approach will be the most efficient way for the Council to deal with the amendments sought to Rule 17.10.2.
10. Mr Martin may also appeal the decision on Rule 17.10.2. Mr Martin's appeal may also rely for jurisdiction on the relief sought in the Council's original submission. That appeal may be resolved through consent order with the Council and the parties may agree that costs will be met by the Council, either upon a costs order from the Court or through an agreement between the parties.

## Clause 16 Correction

11. Beca's Memorandum notes that the correction to Rule 17.10.2 does not fall within the ambit of those corrections permitted under Clause 16(2). Clause 16 states that:
 

"16. Amendment of proposed policy statement or plan

...

(2) A local authority may make an amendment, without using the process in this Schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors."
12. The nature of the errors that may be dealt with under Clause 16(2) was considered in **An Application by Christchurch City Council**<sup>1</sup>. Judge Willy treated clause 16(2) as enabling two classes of amendments to a proposed plan. The first class related to the alteration of information.
13. 'Information', Judge Willy found, related to anything said in the plan which informs the public of their rights and obligations. Clause 16 allows an alteration to information that is of minor effect. The test as to whether an alteration is of minor effect, was determined by Judge Willy as question of whether the amendment affects (prejudicially or beneficially) the rights of some member of the public, or whether it is merely neutral<sup>2</sup>.
14. While the changes to Rule 17.10.2 shown in the Beca Memorandum in both red and blue seek to clarify the rule, the changes do alter the restrictions on earthworks created under

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<sup>1</sup> 2 ELRNZ 43

<sup>2</sup> Ibid at page 440

Rule 17.10.2 and therefore affect the rights of members of the public. The effect of the alterations sought to Rule 17.10.2 therefore have more than a minor affect.

15. We do not consider that the changes sought by Mr Martin and the Council may be considered as the correction of minor errors. In **An Application by Christchurch City Council** Judge Willy concluded that:

"Providing the drafts person seeks only to clarify what is clearly intended by the document and does not in any way make a change to it which alters its meaning then the correction will be within Clause 16."<sup>3</sup>

The Changes sought to Rule 17.10.2 do not fit within such a definition.

16. For the above reasons we agree with Beca's conclusion that the amendments sought to Rule 17.10.2 may not be made by operation of Clause 16.

#### **Notification of a Variation**

17. As the amendments do not fall within the ambit of Clause 16, any amendment sought to Rule 17.10.2 by Council would need to be treated as a Variation to the Proposed Plan as stipulated in Clause 16A:

"Clause 16A Variation of proposed policy statement or plan

- (1) A local authority may initiate variations (being alterations other than those under clause 16) to a proposed policy statement or plan, or to a change, at any time before the approval of the policy statement or plan.
- (2) The provisions of this Schedule, with all necessary modifications, shall apply to every variation as if it were a change."

18. Clause 16 provides the only exception to the Schedule 1 process under the RMA and any other amendment must be made as a Variation to the Proposed Plan in accordance with Schedule 1 to the RMA.
19. Should a Variation be notified, the Council would be required to follow the appropriate notification processes under Schedule 1 and this may result in submissions from parties outside of the original submitters on Rule 17.10.2.
20. Notifying a Variation will not restrict the progress of the Proposed Plan. The Court may continue to hear the appeals on the Decisions Version. Once the appeals on the Decisions Version are resolved the Council may also continue to approve the Proposed Plan despite the Variation outstanding<sup>4</sup>.

#### **Appeal by Council**

21. As an alternative the Council may lodge an appeal on Rule 17.10.2 as that was a rule upon which the Council submitted.

<sup>3</sup> Ibid at page 441

<sup>4</sup> Clause 17 (1A) of Schedule 1 states that "However, a local authority may approve a proposed policy statement or plan (other than a regional coastal plan) in respect of which it has initiated a variation".

22. While the relief sought in the Council's submission was narrow, and arguably does not assist the changes that the Council now seeks, the Council may seek any changes to the Proposed Plan that fall within the package of the relief sought by all submitters<sup>5</sup>.
23. The amendments sought by Council must be shown to be within the within the package of the relief sought by submitters to the Proposed Plan. In this case the amendments fall within the Council's own submission. The Council's submission directly requested that the application of Rule 17.10.2 be restricted to 'sites' of significance to Maori rather than areas of significance. However, the Council's submission also expressed, as the explanation to the submission, the Council's concern that the reference to areas of significance to Maori referred to wide areas that might not necessarily contain physical features requiring protection. It was for that reason that the Council sought the amendment from "areas" to "sites" of significance to Maori.
24. As sites of significance to Maori have not been identified, however, the Council realises that there is no provision within the Plan to limit the application of Rule 17.10.2 to sites rather than areas of significance. Therefore, to give effect to the relief sought in the Council's submission, further clarification to Rule 17.10.2 is required. The amendments now sought are intended to give effect to the relief sought by the Council's original submission and are therefore within the jurisdiction of the Environment Court to consider through the appeals process.
25. We consider that seeking amendment to Rule 17.10.2 through an appeal by the Council is the most efficient way to resolve this issue. However, we note that as the Council will be aware, other parties may join the Council's appeal under section 274 of the RMA. This may complicate the resolution of the appeal. However, the Council is entitled to settle its issues by consent order and may withdraw its appeal unless a section 274 party seeks to pursue the matter to a hearing itself.

#### **Appeal by Mr Martin**

26. Mr Martin may also appeal the Decisions Version. The changes sought by the Council to Rule 17.10.2 go beyond the relief sought by Mr Martin, however, as they seek to make Rule 17.10.2 less restrictive, Mr Martin may be happy to seek such relief through his own appeal. Furthermore, Mr Martin may seek any relief through his appeal that is within the scope of the submissions originally received on Rule 17.10.2<sup>6</sup>; as the amendments sought are within the scope of the Council's submission, Mr Martin would have jurisdiction to seek those changes through his own appeal.
27. As above, the relief sought in Mr Martin's appeal will be limited by the relief sought by the submitters. We have not reviewed all submissions and cannot conclude whether the Court would have jurisdiction to make either the red or blue changes to Rule 17.10.2 shown in Beca's Memorandum.
28. Should there be jurisdiction for an appeal by Mr Martin, the Council may seek to settle Mr Martin's appeal through a consent order. Again there may be some complication added if any parties join Mr Martin's appeal under section 274.
29. As the appeal between the Council and Mr Martin could be settled by consent, it would also be open to the parties to reach an agreement on costs. Should the Council seek transparency this could be dealt with through a costs application by Mr Martin to the Environment Court, alternatively it could be dealt with through a separate private agreement.

<sup>5</sup> **General Distributors v Waipa District Council** (2008) 15 ELRNZ 59

<sup>6</sup> **General Distributors v Waipa District Council** (2008) 15 ELRNZ 59

**Confidentiality**

30. This advice has been given on the basis of lawyers being retained on matters pertinent to the memorandum which is privileged from disclosure.
31. The information in this memorandum is not to be made available under the Local Government Official Information and Meetings Act without prior legal advice.
32. This memorandum is confidential for the purposes of the Council's Standing Orders. Disclosure in breach of Standing Orders may be an offence.
33. This advice is given to the Council alone and we assume no responsibility to any other person. Neither the whole nor any part of this memorandum, or its advice, should be released to, or relied upon by any third party, without further legal advice.