

KAIPARA DISTRICT COUNCIL

Decision on Proposed Private Plan 1 to the Kaipara District Council District Plan 2013 sought by the Li Liangren Family Trust to rezone part of Lot 1 DP 403278 at Tinopai. Hearing held on 6 July 2015 in the Dargaville Town Hall, Dargaville and 7 July 2015 in the Tinopai Hall, Tinopai.

COMMISSIONERS:	Les Simmons Burnette Macnicol William Kapea	Chair Commissioner Commissioner
COUNCIL OFFICERS:	Robert Schlotjes Mike Farrow John Cocks	Reporting Planner Consultant Landscape Architect Consultant Engineer

The following persons attended the hearing and presented submissions and/or evidence to the Commissioners, or others presented on their behalf:

APPLICANT:	Jeremy Brabant Simon Cocker Dean Scanlen Dean Botica Brett Hood	Legal Counsel Landscape Architect Traffic Engineer Engineer Planning Consultant
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SUBMITTERS:	Grahame Strez Mikaera Miru (on behalf of Waiaotea Marae) Mina Henare Tina Latimer Barrie Paterson Annette Paterson Barrie Paterson (on behalf of the Hambling Tinopai Family Trust) Judy Wilson Geoff Wilson Judy Wilson (on behalf of Fiona Vessey) Bob Steed
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DECISION OF THE COMMISSIONERS

1.0 INTRODUCTION

- 1.1 Proposed Plan Change 1 (“PPC 1”) is a private plan change to the Kaipara District Plan being sought by the Li Liangren Family Trust (“Trust”) to rezone 4.78 hectares of a 20.2896 hectare site on the southern side of Komiti Road, Tinopai, described as Lot 1 DP 403278, from Rural (Harbour Overlay) to Residential (Harbour Overlay).
- 1.2 The Plan Change request was publicly notified on 4 December 2013. Twenty-seven submissions were received, the majority sought to have the Plan Change declined. The summary of submissions was notified on 25 June 2014. At the closing date for further submissions, no further submission had been received. As the Proposed Change was opposed following public notification, this hearing was convened to consider the plan change request and the submissions lodged in opposition to it.
- 1.3 The hearing was adjourned shortly before 7pm on 7 July 2015 after the applicant had presented a verbal reply. The adjournment was to enable the applicant to prepare a written reply, for the offered encumbrance document to be drawn up, and for a revised survey plan to be prepared which identified the land being sought to be rezoned.
- 1.4 Mr Brabant, on behalf of the applicant, provided the above information by email on Wednesday 19 September 2015.
- 1.5 After considering the information provided by Mr Brabant the Commissioners issued directions dated 21 September 2015 seeking the following further information.

“We would like to receive legal, archaeological, cultural, planning and landscape advice from the Kaipara District Council in relation to the offered encumbrance.

We request that the Council provide us with legal/planning advice on the merits of the encumbrance approach in relation to the plan change. We also seek the Council’s legal, planning, archaeological, cultural and landscape advice on the wording of the proposed encumbrance.

With respect to archaeological and cultural matters we are aware that the coastal fringe is identified as an “Area of Significance to Maori” on the District Plan Planning Maps.

There may well be archaeological and cultural impacts that arise from the proposed “Coastal Rehabilitation and Use Plan” and the proposed public access to the coast offered in the encumbrance. We consider it appropriate at this stage that the Council and the applicant give consideration as to how these matters will be managed and what amendments should be made to the wording of the encumbrance to ensure that archaeological and cultural aspects and features of the site are enhanced rather than eroded in the future.

We seek the Council’s advice on whether the Council supports, supports with modifications, or opposes the offered encumbrance.”

- 1.6 We received the Council’s response on 12 November 2015 and the applicant’s final reply on 1 December 2015. We issued further Directions on 4 December 2015 advising the parties that the hearing was formally closed. As our decision was due on 4 December 2015 we also sought an extension of time until 31 March 2016 to complete our deliberations and prepare our decision. The extension of time was granted by the Council. A further extension of time was subsequently sought and granted to enable the decision to be issued by 8 July 2016.
- 1.7 This report addresses the decision of the Commissioners appointed by the Kaipara District Council to hear and decide the matter. Pursuant to sections 34 and 34A of the Resource Management Act 1991 (“the Act”), the Commissioners have been granted full responsibility to make a decision on PPC1 on behalf of the Council.

2.0 THE SITE AND SURROUNDINGS

- 2.1 Tinopai is a small coastal settlement located at Komiti Bay at the extreme southern tip of the Hukatere peninsula on the Kaipara Harbour. We were advised that the first major subdivision at Tinopai occurred in 1915. Since then a series of subdivisions between the 1940s and the 1970s have resulted in approximately 153 residential allotments within the settlement. The 2013 (5 March) census recorded there were 174 people living in the southern part of the Hukatere peninsula in 75 occupied dwellings. The census indicates that approximately half of the existing dwellings are permanently occupied with the half of the dwellings being holiday homes. We were also advised that there had been a gradual decline in population from 258 in the 2001 census, to 189 in 2006 and 174 in 2013.

2.2 Tinopai is a relatively compact coastal settlement with the majority of its houses located within 200 metres of the coast, generally along Komiti Road and Ngatoto Road. The land at Tinopai within the settlement is zoned Residential (Harbour Overlay). The land surrounding the settlement is zoned Rural (Harbour Overlay).

2.3 The Trust's land is located at the southern end of the Tinopai settlement. The site abuts the southern boundary of existing residential properties that have frontage to Komiti Road. The site has previously been used for forestry production and formed part of a considerably larger area of forest that was last harvested in 2008.

2.4 The site was described by Mr Hood as follows.

- “18. *The 20.2896ha site is located on the southern side of Komiti Road, behind a band of residential development on the southern edge of the coastal settlement of Tinopai. The site is accessed from a 40m section of frontage to Komiti Road located between numbers 132 and 142.*
19. *In addition to the residential development adjoining the northern boundary, the site adjoins farmland (owned by the applicant) on its western and south-western boundaries, and the Kaipara Harbour coastal margin on its southern and eastern boundaries.*
20. *The coastal margin of the site begins at the wharf at Te Whau Point. The coastal margin in this locality is defined by steep erosion prone cliffs. As the coastline continues towards the west, the backshore flattens out, and the intertidal area is defined by a small sandy beach.*
21. *The western part of the site contains a vegetated area consisting of a combination of native and exotic trees. This area forms a strong vegetated edge between the site and the rural land to the west.*
22. *With the exception of the area of vegetation in the western part of the site, the balance of the site is largely devoid of vegetation, although some shrubby, intermittent vegetation is evident on its margins.*
23. *There is a high point at the eastern edge of the site where the land rises steeply from the wharf area at the end of Komiti Road. This high point or “knoll” rises to approximately 28m above sea level. With the exception of the knoll, the site is largely hidden from view, with only the crest of the main north-south aligned ridge rising above the level of the foreground dwellings in the existing settlement.*
24. *There are several ephemeral watercourses running through the site. The main watercourse has a north-south alignment, discharging through existing residential land on the northern boundary, and ultimately to the harbour.”*

3.0 THE PROPOSED PLAN CHANGE

- 3.1 The plan change requests that the zoning of a portion of the site be changed from Rural (Harbour) to Residential (Harbour). At the time of notification it was proposed that the area to be rezoned would be approximately 8.1 hectares in area. This had been reduced to 4.78 hectares by the hearing and was accurately identified in the plan attached to the encumbrance offered by the Trust in its final written reply.
- 3.2 The main objective of the plan change was stated in the Plan Change Application to *“...enable residential development on the inland portions of Lot 1 DP 403278, as an alternative to pastoral and/or production forestry land use. The proposal is to change the zone of this land to residential (Harbour), while retaining the Rural (Harbour) zoning for the coastal margin, prominent elevated land “the knoll”, and the vegetated land to the west.”*
- 3.3 The Plan Change Application also stated at 2.2 that *“Running in tandem with the change of zone is a proposal/undertaking to register a covenant on a part of the new Residential (Harbour) zone land.”* The covenant proposed that future dwellings would be restricted to a maximum of 5 metres in height, that boat trailer parking for residents within the development would be included within the subdivision design and that a coastal rehabilitation and use plan would be submitted with the first application for subdivision consent. It was also stated that *“The covenant is preferred to the alternative option of inserting of new overlay zone and/or rules.”*
- 3.4 At the hearing we were advised by Mr Hood that the area of land to be rezoned was reduced to 4.78 hectares as a result of the technical reviews undertaken on behalf of the Council, together with further assessment and advice from the Trust’s consultants and in response to submissions. The reasons stated for the reduction were to avoid identified areas of instability, to preserve natural character and landscape values (in response to the landscape advice from Mr Farrow on behalf of the Council) and to retain amenity values for the adjoining residential development.
- 3.5 As a result of the reduction in the area of land sought to be rezoned the proposed height covenant was no longer needed in Mr Hood’s opinion, as the area that was to be subject to the covenant is no longer proposed to be rezoned.

- 3.6 At the start of the second day of the hearing Mr Brabant tabled a draft of an encumbrance document that the Trust would offer to provide a coastal rehabilitation and use plan, pedestrian public access to the coast and controls on the colour and reflectivity for any building in the Rural (Harbour) zoned portion of the land.
- 3.7 By the time of the final reply on 1 December 2015 a final version of the offered encumbrance had been prepared.
- 3.8 The Council, while not opposed to the concept of such an encumbrance, had prepared its own version of what it considered to be a more appropriately worded encumbrance. By the time the hearing was formally closed we had received both versions of the encumbrance however we agree with Mr Brabant that the only one on offer to us from the Trust was the encumbrance prepared on behalf of the Trust. We accept the Trust's position that we have no jurisdiction to impose any limitations on development within the Rural (Harbour) portion of the land, over and above that offered by the Trust.

4.0 STATUTORY CONSIDERATIONS

- 4.1 Several provisions in the Resource Management Act 1991 ("RMA") apply to any consideration of plan changes with additional requirements in the case of those that are privately sponsored, as this one is. Clause 21 of the First Schedule to the Act recognises that any person may request a change to a district plan. The form the request is to take and other administrative matters are covered by clauses 22-28 of that Schedule. Under clause 29(4) we may decline the Plan Change, or approve it, or give approval subject to modifications being made to the Change. Reasons must be given for the decision.
- 4.2 A section 32 evaluation was prepared by Mr Hood and submitted as part of the request for PPC1. A planning assessment in terms of section 32 was undertaken by Mr Schlotjes and incorporated into the section 42A report he prepared for the hearing.
- 4.3 A section 32 evaluation must examine: the extent to which each objective is the "most appropriate" way to achieve the purpose of the Act; whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the "most appropriate" for achieving the objectives; the benefits and costs of the policies, rules or other methods; and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

4.4 The Trust's objective is to enable residential development on a portion of its site as an alternative to farming and/or productive forestry. It was Mr Hood's evidence, at his paragraph 88, that this objective is the most appropriate way to achieve the purpose of the RMA for the following reasons:

- (a) It will improve the social wellbeing and development of the community through improving the potential source funding to improve amenities (greater rating base), improving the viability of existing and potential small businesses, providing work opportunities (both in small business, and on the land itself) and by building on community identity and sense of place.
- (b) It will provide economic benefits, to the community as outlined above, and to the current landowner.
- (c) It will avoid potential adverse effects on the natural and landscape character of the coastal environment through the limited spatial extent of the development area, and the replacement of intensive primary production and/or production forestry activities with a carefully planned residential development.
- (d) It will safeguard key elements of the natural environment, to be secured by conditions imposed on future subdivisions.
- (e) It will avoid an exacerbation of the adverse effects of primary production/rural land use (i.e. continuing coastal erosion, contamination run-off)
- (f) It creates the potential for rehabilitation of the coastal margin and enhanced public access to the coast to be secured by conditions imposed on future subdivisions.
- (g) Potential adverse effects on public infrastructure (roads) can be managed through appropriate conditions of consent at the time of subdivision.

4.5 Retaining the existing Rural (Harbour) zoning he considered to be less appropriate for the following reasons set out in paragraph 89 of his evidence:

- (a) The site is not a large enough holding to be economic for either farming or forestry uses. However he noted that the natural character of the coastal environment may continue to erode through intensive production land uses.

- (b) The site has very little life supporting capability evident on the property (i.e. poor soil quality, limited vegetation quality).
 - (c) There are adverse effects related to primary land use that are largely unregulated i.e. Erosion from farming and/or forestry activities near the coastal margin, stormwater quality from untreated forestry and/or farming activities. However he noted that there is unlikely to be any effects on ecosystems.
 - (d) No incentives or likelihood of coastal rehabilitation and public access.
 - (e) Does not contribute markedly to the social and economic wellbeing of the community.
- 4.6 The section 32 evaluation itself was set out in section 7 of the PPC1 document. Mr Schlotjes in his section 42A report concluded that the section 32 evaluation “...*met legal tests and the detail corresponded to the scale and significance of the effects that would be generated on environmental, economic, social and cultural values...*”
- 4.7 Some submitters raised concerns with the reasoning within the PPC1 document and considered the reasons were subjective and not a sound basis for the rezoning of the land.
- 4.8 We understand that before proceeding with the plan change request the decision was made to confine the extent of the plan change to a portion, rather than the entire landholding of 20 hectares. We understand from Mr Hood’s evidence that only the land considered to be suitable for future residential development should be the subject of the rezoning request. This rationale is clearly set out in the request to Council and that the proposed covenant/encumbrance was identified as the tool to respond to the relevant issues on the balance of the land where the current zoning is to be retained. This approach does raise some issues in terms of whether or not the proposed rezoning is in fact the most appropriate way to meet the purpose of the RMA.
- 4.9 Of particular concern after carefully considering all the evidence presented are the following:
- (a) By retaining the Rural (Harbour Overlay) zoning on the balance of the site (proposed to be 15.5 hectares in area), this creates a smaller property that retains many of the characteristics identified by Mr Hood as being a less appropriate means of achieving the purpose of the RMA. This 15.5 hectare

balance site would appear to be too small for economic farming or forestry, have very little life supporting capability, may have adverse effects on the coastal margin and stormwater effects and will not contribute markedly to the social and economic wellbeing of the community. In other words the rezoning of a small portion of the site does not fully address the actual or potential shortcomings of the existing rural zoning of the Trust's land and in fact reduces the site area by approximately 24%.

- (b) When considering the reasons identified by Mr Hood in support of the plan change as being the most appropriate method of meeting the purpose of the RMA, the primary environmental enhancement matters relating to the rehabilitation of the coastal margin, public access to and along the coastal environment rely almost exclusively on the encumbrance that has been offered.
- (c) With respect to the encumbrance itself the key provisions include a Revegetation Management Plan, enhanced public pedestrian access to the coast, the provision of land for boat trailer parking and for any application for building consent within the Rural (Harbour Overlay) zoned land to utilise building materials with recessive colours with low light reflectivity values.
- (d) The Revegetation Management Plan prepared by Mr Cocker identifies a pest plant management approach within Managed Revegetation Area A which is primarily located along the majority of the coastal portion of the land not to be rezoned. The control of plant pests will encourage and facilitate the indigenous revegetation in the area generally along the coastal edge. It is also proposed to plant 4,000 plants with 60% of them being Manuka along the southern boundary of the land to be rezoned Residential (Harbour), in an area described as Revegetation Planting Area A.
- (e) The indicative route for public pedestrian access is identified as a dotted line from Komiti Road, through the land being requested to be rezoned and then extending to the coastal edge. There is no indication if the public access will extend along the coastal edge, the wording of the encumbrance states "*...make provision for enhanced public pedestrian access to the coast on the southern edge of the site.*" The encumbrance states that the Trust accepts an advice note to any subdivision of the land stating that the public pedestrian access way shall be designed and implemented to comply with a "path" category under NZS 8630:2004

- (f) In relation to the proposed boat trailer parking, the plan attached to the encumbrance identifies an area of land behind (to the south of) the existing residential properties in Komiti Road. The parking area is sited outside the area to be rezoned for residential purposes.
- (g) In addition to the above key provisions the encumbrance also accepts an advice note to any subdivision of the land stating that archaeological accidental discovery protocol will be followed.
- (h) With respect to the ability of future residential lots to be able to treat and dispose of wastewater, Mr Botica's evidence was that there were two options available. Individual onsite treatment and disposal, although he had not investigated the soil conditions on the land proposed for rezoning. It was his opinion that the soil conditions would be similar to those encountered in the boreholes that had been drilled to investigate communal disposal areas. The second option of communal disposal areas he identified were all on the western half of the Trust's land and all four areas were outside the area of land being sought for rezoning.
- (i) Also with respect to wastewater treatment and disposal we noted that Mr Botica described the soil typology as *"poorly drained category 5 soils."* Mr Cocks, the Council's engineering reviewer, noted that this statement *"...in my view acknowledges that the subsoil has a limited capacity to assimilate hydraulic loads, and that the subsoil may be a control on the loading rate that is used for design."*
- (j) Setting aside the differences between Mr Cocks and Mr Botica on the actual ability of the soils to dispose of treated wastewater, it was the Trust's case that the final number of residential sites to be created will be determined at the time of subdivision when detailed design work will be undertaken. No set number of residential lots has been sought by the Trust and Mr Brabant stated that *"The Applicant will not obtain consent for a number of lots which cannot be adequately catered for from a stormwater or wastewater perspective."*

4.10 While the Trust has responded to the matters as set out in 4.9 above; as discussed, we have identified the following short comings in this approach.

- (a) The remaining 15.5 hectare rural portion of the land remains outside of the plan change process and as a consequence we have no scope to respond to the resource management issues on this environmentally sensitive portion of the site.
- (b) With respect to the encumbrance it contains the accidental discovery protocol advice note with respect to archaeological matters, but does not otherwise address any Maori cultural issues. No recent archaeological assessment of any part of the Trust's site has been undertaken, although Mr Hood noted that the previous owners Carter Holt Harvey carried out archaeological surveys of their forests, generally at the time of each harvest.

We appreciate that this site has been previously harvested and there may be little prospect of any archaeological sites existing given the past forestry and farming activities, however given the identified areas of significance to Maori along the coastal edge of the site in the district plan, we remain concerned that there has been no cultural assessment of the site particularly in relation to the route of the proposed public pedestrian access.

We additionally note the interest on the title securing right of access by "existing Maori Tracks." Mr Brabant in his Reply dated 18 August 2015 at his paragraph 78 submitted that "*...it is reasonable to assume that the key access across this particular site for Maori would have been (and remains) to the coastal marine area to the south.*" It is our finding that despite no evidence being put before us of the exact location of any "existing Maori Tracks" that the most appropriate way of determining where any future public pedestrian access across this site should be provided is through engagement with Tangata Whenua.

Given the Part 2 matters of relevance with respect to sections 6, 7 and 8 of the RMA in relation to the maintenance and enhancement of public access to and along the coastal marine area, the relationship of Maori with this land, kaitiakitanga, the maintenance and enhancement of amenity values and the quality of the environment and the principles of the Treaty of Waitangi, we find that the encumbrance, in seeking to provide for public access and rehabilitation of the coastal edge does not provide for the appropriate input of Tangata Whenua on these matters. The proposed rezoning is, because of the way the Trust has approached the rezoning; limiting it to only a portion of the site, to be considered in tandem with the encumbrance.

With respect to both the plan change and the encumbrance that has been offered, we find that Maori cultural issues have not been adequately addressed and we cannot be confident that the proposed rezoning appropriately responds to, in particular the interest on the title securing right of access by “existing Maori Tracks.”

- (c) In relation to wastewater we have concluded that it is highly likely that wastewater disposal matters can be resolved at the subdivision stage. The only question that remains is how many new residential lots can be designed for and accommodated within the area to be rezoned for residential purposes. The Trust has clearly indicated that they propose to seek consent for a subdivision that can satisfy the normal wastewater and stormwater requirements of both the district and the regional Councils.

We accept this outcome if individual onsite treatment and disposal is proposed. We note Mr Botica’s estimate that individual lots would need to be in the order of 2600m² to 3250m² to provide for onsite treatment and disposal. It was his evidence that the minimum lot size within the proposed zone would need to be 3000m² and that the maximum lot yield would be 12 sites on this basis.

We do not accept any outcome that requires communal treatment or disposal that occurs on land outside the area identified for rezoning. Mr Botica’s communal option is based upon all disposal areas being on the rural zoned portion of the site, with the primary 1.1 hectare disposal area sited on the western boundary of the site.

We note that in Mr Brabant’s reply dated 18 August 2015 at his paragraph 71 he refers to a likely yield of lots somewhere between 10 and 30. We note that Mr Hood’s costs and benefits analysis was based on 30 dwellings being established on the site. We also note that the Plan Change Application itself on page 30 stated that the future subdivision of the property will require the prior installation of a communal wastewater system. At Appendix 3 to the Plan Change Application Mr Botica’s assessment dated 2 April 2013 recommended that communal treatment and disposal be provided and that up to 70 dwellings could be accommodated on that basis.

We appreciate that these are all estimates and that no detailed design has been prepared. Despite the original estimate of up to 70 dwellings we accept that the

Trust's actual position is now reflected in the reply as being between 10 and 30. As we understand Mr Botica's evidence the estimate of 12 is based on individual onsite treatment and disposal, while the estimate of 30 is based on communal disposal areas outside the area to be rezoned for residential purposes.

We also note that the district plan requires a minimum net site area of 3000m² for unserviced residential lots and that onsite wastewater and stormwater servicing be provided within the individual sites.

We have carefully considered the engineering evidence presented on behalf of the Council. Mr Cocks concluded that the land *"is marginally suitable for the land application of treated wastewater"* and *"the proposed number of lots that the rezoned land may yield is dependent on specified land being available for land application of treated wastewater, preservation of the bush cover on the surrounding land, and determination of key design parameters."* He recommended that conditions be attached to the rezoned land as set out in his paragraph 7.6 of his 19 May 2015 report. His recommended conditions essentially were that individual onsite systems are provided on minimum net site area sites of 3000m.² If the communal disposal option is to be pursued he recommended that the disposal areas should be included within the area of land to be rezoned. After hearing all the evidence presented during the hearing Mr Cocks retained his recommendations as set out above and referred us to the specific wording set out in the s42A report from pages 191 to 194.

Our overall finding is that the district plan residential zoning provides for minimum lot sizes of 3000m² with onsite servicing and that Mr Botica's evidence is that this would result in 12 new lots within the area identified to be rezoned. We are concerned that Mr Brabant in his Reply is still signalling a yield of between 10 and 30 when more than 12 could only be achieved with communal treatment and disposal outside the area to be rezoned for residential purposes.

- (d) As identified above the areas for communal waste water discharge are all located outside of the area identified to be rezoned. Therefore the plan change process cannot address the effects of the proposed communal waste water discharge activities.

- 4.11 In this case, the plan change itself does not introduce any new objectives or policies rather it seeks to rezone a portion of the Trust's land. This requires consideration in respect of whether this is appropriate in terms of the objectives and policies of the Regional Policy Statement and District Plan and whether they are consistent with the purpose of the Act.
- 4.12 Section 74 of the Act sets out the matters to be considered when changing a district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32 and any regulation. In addition to the requirements of section 75(3) and (4), regard must be had to the matters included in subsection (2), 2A and 3. Of particular relevance to the current application any proposed regional policy statement or relevant regional plan and any management plans and strategies.
- 4.13 Finally in terms of section 75 (3) and (4), a district plan must give effect to any:

National policy statement; and

The New Zealand Coastal Policy Statement; and

Any regional policy statement.

In addition a district plan must not be inconsistent with –

a water conservation order; or

a regional plan for any matter specified in section 30(1).

- 4.14 Mr Schlotjes in his s42A report and Mr Hood in his evidence and the plan change application have canvassed the relevant matters of statutory consideration and concluded that PPC1 meets these requirements. We have carefully considered their evidence on these matters, together with the concerns raised by submitters, and record our findings below.

New Zealand Coastal Policy Statement 2010 (NZCPS)

- 4.15 It was Mr Hood's conclusion that the proposed rezoning would give effect to the NZCPS. He identified policies 2, 6, 13, 14, 15 and 25 as being the most relevant to the plan change. Mr Schlotjes in section 3.2 of his s42A report set out the seven objectives

of the NZCPS together with the ten policies he considered to be of most relevance. In addition to Mr Hood's six policies, Mr Schlotjes identified policies 11 (although he later concluded this policy was not relevant), 18, 19 and 24 as also being of relevance. It was Mr Schlotjes overall conclusion that PPC1 would give effect to the NZCPS.

- 4.16 Despite both of the expert planners being in agreement with respect to the NZCPS, we have carefully considered how they have reached their conclusions.
- 4.17 With respect to objective 3 and policy 2, in relation to the Treaty of Waitangi, Tangata Whenua and Maori, Mr Hood placed considerable weight upon the initial consultation with Te Uri o Hau that had led to the written approval that was effectively withdrawn as a later submission from Environs Holdings (subsidiary of the Te Uri o Hau Governance entity) in opposition was lodged. Notwithstanding the submission that had been lodged Mr Hood retained his opinion that these matters had been given effect to. In particular he concluded that clauses 2(a), recognising the traditional and continuing cultural relationship with areas of the coastal environment, and 2(b), undertaking effective consultation, had been given effect to.
- 4.18 It was clear to us at the hearing that although there had been consultation at the early stages, prior to the lodgement of the plan change, there were significant unresolved issues that remained of concern to Te Uri o Hau. We acknowledge that their greatest concern appeared to relate to the previous forestry activities and the effects that had resulted along the coastline and streams of the wider coastal environment, including this land, but primarily the rural land that surrounds Tinopai and well beyond the settlement itself. We agree with Mr Brabant that the adverse effects of the previous forestry activities on the Kaipara Harbour have no relevance to our consideration of PPC1. Our jurisdiction is limited to the Trust's site.
- 4.19 With respect to proposed rezoning and the application site, there are, however issues that remain unresolved.
- (a) No cultural assessment has been undertaken in relation to the Trust's site, even though the land is identified in the District Plan as a Site of Significance to Maori.
 - (b) The interest on the title securing right of access by "existing Maori Tracks" does not appear to have been discussed with Te Uri o Hau. We do not know if the "indicative route for public pedestrian access to the coast" referred to in the

encumbrance will be supported. The encumbrance does not contain any indication of further consultation on this matter.

- (c) The encumbrance is also silent on the issue of physical access along the coast and how such access would respond to the “Area of Significance to Maori” identified in the Kaipara District Plan. Mr Hood’s evidence was that *“This area is unaffected by the Plan Change and will remain in the Rural (Harbour) zone.”*
- (d) There has been no cultural assessment of the effects of other offers within the encumbrance; such as the boat trailer park and the planting proposal cannot be accurately assessed.

4.20 In terms of giving effect to the NZCPS the question is whether these matters need to be addressed prior to any rezoning, or whether they can be left until a later stage when the subdivision of the land takes place. Based on what has been presented to us, we do not consider the zoning proposal, nor the encumbrance that has been offered, will give effect to these provisions of the NZCPS. We have concluded that the above matters that are of significance to Maori cannot be effectively put to one side, just because the proposed rezoning only relates to a portion of the Trust’s site.

4.21 Furthermore we are not satisfied that future resource consent processes could adequately address these issues because, if approved, the Plan Change would effectively enable residential development on the identified land area and require works such as planting etc as offered in the encumbrance.

Operative Northland Regional Policy Statement (Operative NRPS)

4.22 At the time of the hearing the Northland Regional Policy Statement was still a proposed document as there were a number of appeals. The document has recently been made Operative (9 May 2016) with the exception of the provisions relating to genetic engineering and genetically modified organisms.

4.23 Both Mr Hood and Mr Schlotjes identified that they considered the most relevant provisions of the Operative Northland Regional Policy Statement were Chapters 21 and 22 relating to Natural Hazards and Coastal Management respectively.

- 4.24 Mr Hood acknowledged in evidence that there were also several other chapters that have peripheral relevance¹.
- 4.25 In summary the evidence stated that Chapter 21 was focussed on avoiding development in hazard prone areas. Mr Hood stated that this was a *“key determinant in finalising the extent of the proposed Residential (Harbour) zone for this site”*².
- 4.26 Engineering evidence was provided to address ground stability and natural hazards. The evidence from Mr. Botica for the applicant concluded that areas of the site that could be subject to instability or coastal hazards, had been excluded from the area proposed to be rezoned Residential (Harbour) zone. Mr. Mott on behalf of the Council, in Attachment 2 to the section 42A report, concluded that the land to be rezoned was suitable from a stability point of view, but was hesitant and said his conclusion was subject to conditions being imposed on the rezoning and future subdivision consent applications. These matters were set out on page 193 of the s42A report and are primarily matters to be considered at subdivision consent stage. Council and the applicant concluded that there were no land stability issues of sufficient concern to warrant refusing the plan change request. On the basis of the evidence we therefore find that the land is suitable, from a land stability, and coastal hazards perspective and as such the proposal is in keeping with the relevant hazard provisions of the Operative NRPS.
- 4.27 Chapter 22 of the Operative NRPS is focussed on the preservation of natural character, avoiding sprawling and sporadic forms of subdivision and development, and enabling public access to and along the coast. Mr Hood concludes, in his evidence, that *“...development on the proposed rezoning area will not adversely affect natural character, is not sprawling or sporadic, and it will present an opportunity to facilitate additional public access to the coast”*. The officer’s report focussed on the natural hazards aspects of the policy framework. We are satisfied that the land area identified to be zoned Residential (Harbour Overlay) could be developed for approximately 12 residential self-serviced sites, without undue effects with respect to natural hazards.
- 4.28 With respect to public access to the coast our understanding from the encumbrance submitted by the applicant is that the proposal is for *“enhanced public pedestrian access to the coast on the southern edge of the site”* to be provided and secured by

¹ Paragraph 123, evidence of Brett Hood dated 12 June 2015

² Paragraph 124, evidence of Brett Hood dated 12 June 2015

way of a condition on the first resource consent for subdivision of the land in the proposed rezoned Residential (Harbour) area.

- 4.29 In addition to providing enhanced public access, the applicant, by way of the proposed encumbrance, has offered to *“make provision for public boat trailer parking, in the position shown on the Proposed Boat and Trailer Parking Plan”* and for this to be secured by way of a condition on the first resource consent for subdivision of the land in the proposed rezoned Residential (Harbour Overlay) area.
- 4.30 Overall we find that PPC1 is generally consistent with the provisions of the Operative NRPS, however in relation to the potential to enhance public access to the coast we repeat our earlier concern that the proposed encumbrance does not appropriately resolve the lack of consultation with Te Uri O Hau and the difficulty in proceeding with the proposed rezoning without a full cultural assessment.

Proposed Regional Policy Statement for Northland (Proposed NRPS)

- 4.31 As stated above the Proposed NRPS was made operative on 9 May 2016. The relevant provisions are stated in section 3.4 of the Section 42A report and also addressed under Section 4.3 of the application lodged and also in paragraphs 127 to 134 of Mr Hood’s evidence. In summary the relevant provisions address Natural Hazards, Natural Character and Landscape Values, Settlement Form and Character and Environmental Effects.
- 4.32 Of all of the relevant provisions those relating to Settlement Form and Character are essentially a new ‘topic area’ from provisions in the Operative NRPS as existing at the time of the hearing.
- 4.33 As above the evidence was consistent in terms of the ability to avoid or manage any effects arising with respect to natural hazards. The engineers were satisfied that land stability issues could be appropriately managed and the land area included within PPC1 had been modified to exclude areas that could be subject to natural hazards.
- 4.34 Landscape and natural character evidence was provided from Mr. Simon Cocker for the applicant and Mr Farrow for Council. Mr Cocker was of the view that the modified rezoning plan which sought that only a portion of the site be zoned Residential (Harbour) zone will ensure that *“...built development within the proposed Residential zone will have limited visibility from the Harbour or other locations to the south, south*

west and south east". The modified zoning plan that represented the extent of zoning sought at the hearing, excludes the knoll and the ridge.

- 4.35 A key difference in the opinions of the landscape architects was whether or not a height restriction should be applied over the residential area; and whether or not control should be applied over the Rural zoned land, and in particular over the knoll to prevent built development which could generate cumulative effects in the future.
- 4.36 As we have stated above, the fact that only a portion of the land is included in PPC1 poses difficulties for the extent to which conditions or controls could be imposed or managed over the balance of the land holding and also the extent to which the plan change can be determined to achieve better, or optimal planning outcomes.
- 4.37 Mr Farrow remained of the view that control over built development on the knoll was an important consideration. We understood that Mr Farrow was satisfied that the effects could be addressed either by way of a covenant registered against the land or that 'special rules' would need to be applied to the land. Mr Farrow remained of the view that limiting the height of built development within the plan change area to 5 metres, rather than 8 metres, or applying design guidelines if the height were to be retained at 8 metres; would better achieve the outcomes sought by the planning documents; including the NZCPS. It is important to note that the existing residential zoning of Tinopai enables the construction of residential dwellings with a height not exceeding 8 metres, as a permitted activity. We agree that although the existing nature of built development in the settlement is typically of lesser height there are no restrictions that would limit the maximum height of built development to less than 8 metres or would require design guidelines to be adhered to. Having said this though the proposed rezoning seeks to extend the residential area further to the south and the land is within the coastal environment. As noted by Mr Farrow the land is part of an open harbour visual catchment. Mr Farrows' peer review noted that "*...the southern sector of the site, where a combination of more prominent terrain and a close relationship with a largely undeveloped stretch of the Kaipara Harbour's northern coast brings heightened sensitivity in my opinion*".³
- 4.38 The Commissioner's agree that there will be potential adverse visual effects arising from built development on the knoll; however the proposed Coastal Rehabilitation and

³ Littoralis Landscape Review April 2015, page 8

Use Plan is a key aspect in the avoidance and mitigation of effects. The Coastal Rehabilitation and Use Plan will be secured by way of the encumbrance offered. The Coastal Rehabilitation and Use Plan will enhance the natural character of this location by creating an indigenous planted area and assisted natural regeneration along the coastal edge.

- 4.39 The proposal is considered to be in keeping with the provisions of the Proposed NRPS relating to natural character and landscape values. Overall the natural character of the coastal edge of the land will be enhanced and any adverse effects on natural character and landscape values will be minor and will not adversely affect the integrity of the natural character of this location. There is the potential for public access to be improved and overall there will be net benefits as required by Policy 4.6.1 (1) (a) (iii) and also that benefits will accrue that would not otherwise occur for example achieving planting and the natural rehabilitation of the coastal edge.
- 4.40 Objectives and policies relating to settlement form and character; in particular Policy 5.1.1 requires subdivision, use and development to be located, designed and built in a planned and co-ordinated manner which is guided by 'Regional Form and Development Guidelines' as well as 'Regional Urban Design Guidelines'. The Policy requires integration between development, funding, implementation and operation of transport, energy, water, waste and other infrastructure. The note to this Policy states:
- "In determining the appropriateness of subdivision, use and development (including development in the coastal environment – see next policy), all policies and methods in the Regional Policy Statement must be considered, particularly policies relating to natural character, features and landscapes, heritage, natural hazards, indigenous ecosystems and fresh, and coastal water quality".*
- 4.41 The policy also seeks that sense of place and character of the surrounding environment is maintained or enhanced except where growth is anticipated or approved by Regional or District Council growth strategies. The issue of sense of place and character of the Tinopai settlement was an issue raised by most of the submitters who presented evidence at the hearing. We also note that the recent Kaipara Plan review did not identify Tinopai as one of its identified growth areas. The identified growth areas are Dargaville, Maungatoroto, Mangawhai and Kaiwaka⁴. In this respect there is

⁴ Chapter 3 – Land use and Development Strategy, Kaipara District Plan

no anticipated or planned growth of the settlement of Tinopai and this is an issue as typically Council funding for road upgrading and the like is directed and apportioned to areas earmarked for growth. We note that neither Mr Schlotjes nor Mr Hood raised any issue with this Policy. Mr Schlotjes commented that despite the fact that the land is not identified for growth “...does not mean that this precludes growth from happening at Tinopai that would over time occur should the proposed plan change be approved”. Mr Hood provided a more detailed planning assessment of the growth policies in the Proposed NRPS and the Kaipara District Plan. Although there is a preference for growth in identified areas we note that the policy framework does not prevent or prohibit growth outside the identified areas. Given these factors we consider it unlikely that Council funding would be available for any upgrading that may be required to manage or addresses growth issues associated with the proposed residential development; unless sufficient resources are able to be allocated as part of some future Long Term Plan. Development contributions that would be payable for the development will therefore be based on figures that do not assume growth at Tinopai. In our opinion there is an issue with respect to unplanned and uncoordinated growth; even though specific effects, such as effects on natural character may be acceptable.

4.42 Policy 5.1.2 relates to development in the coastal environment and states that urban development should be consolidated as required by the NZCPS; that public access shall be maintained and enhanced and that development should take into account the values of adjoining or adjacent land and established activities both within the coastal marine area and on land. Other than through the offered encumbrance there is limited ability to manage the effects of PPC1 on adjoining land.

4.43 We are satisfied that the measures proposed in the encumbrance have the potential to ensure that the effects on the environment are acceptable with respect to natural character and landscape values. The proposal is generally in keeping with the relevant proposed regional policy framework with the exception of the fact that Tinopai is not a location identified for growth. The degree however that rezoning the land would contribute to effects associated with ad hoc, unplanned growth are limited by the scale of the proposed rezoning and the likelihood that development will occur over a reasonably long time period. Because Tinopai is not an area identified for growth the payment of development contributions are unlikely to cover the actual costs and infrastructure effects associated with growth unless the Long Term Plan is amended to reflect growth associated with the plan change and future contributions are based accordingly.

Regional Plans

- 4.44 Regional Plans were not assessed in any detail. The direct discussion regarding regional plan provisions was with respect to the disposal of wastewater and whether or not on site disposal would achieve the standards required by the Regional Water and Soil Plan and whether or not these standards were considered to be sufficient to achieve the required environmental outcomes. Mr Cocks in particular was concerned with the hydraulic capability of the land to absorb moisture arising from wastewater and also managing nitrogen levels associated with wastewater disposal. Mr Cocks stated that a communal wastewater system would generate the requirement for resource consent under the Regional Plan but that individual site systems would not. Mr Cocks remained concerned about the cumulative effects of nitrogen loading on the environment and the evidence was that this was a matter that would not be addressed by the permitted activity standards for wastewater disposal.
- 4.45 Overall no issues were raised with respect to regional plans and even in relation to the disposal of wastewater the issues of concern were not portrayed as issues with the provisions within any relevant regional plan document.

Kaipara District Plan

- 4.46 Both Mr Hood and Mr Schlotjes provided extensive evidence in relation the relevant provisions of the Kaipara District Plan. In summary they both agreed that the plan change was appropriate in terms of the objectives and policies of the district plan, would be consistent with the intended environmental outcomes contemplated by the district plan and that the future resource consent process associated with the subdivision of the land would impose appropriate conditions of consent, or advice notes, to avoid, remedy, or mitigate adverse effects on the environment.
- 4.47 For the reasons discussed elsewhere in this decision we do not consider that all matters can be left until a future resource consent application. Particularly with respect to the lack of a cultural assessment and the proposed public pedestrian access to the coast we find that the plan change in its current form is not appropriate in terms of the relevant objectives and policies and the outcomes contemplated by the Kaipara District Plan.

Section 31 and 32

- 4.48 The purpose of a s32 evaluation is to determine whether or not the proposal is the most appropriate way to achieve the purpose of the Act. The assessment requires the benefits, costs and risks of plan change proposals to be identified and evaluated.
- 4.49 With respect to this proposal the evaluation must consider whether the portion of the site subject to PPC1 is better zoned Residential (Harbour) as sought by the plan change or whether a more appropriate outcome will be achieved by retaining the existing Rural (Harbour) zoning that applies to the land.
- 4.50 The primary objective of the plan change is to “...enable residential development on the inland portion of Lot 1 DP 403278 as an alternative to pastoral and / or production forestry land use.”⁵ The s32 evaluation assesses three options; retain the existing zoning Rural (Harbour) over all of the land; or zone all of the land Residential (Harbour), or zone part of the land Rural (Harbour).
- 4.51 The conclusion, as set out in the application lodged, is that retaining the Rural (Harbour) zone over the coastal margin and elevated part of the property is the most appropriate because of the instability issues existing in these areas and also the policy direction set out in the NZCPS; the regional policy statements and the Kaipara District Plan.
- 4.52 As stated above, while the approach to only rezone part of the land addresses issues relating to land stability for example, it also raises the issue of whether or not the plan change is the most appropriate way to manage the balance of the Trust’s site and the surrounding environment.
- 4.53 Overall, we have concluded that Mr Hood’s section 32 evaluation has focussed on the Trust’s desire to enable residential development on a portion of the site, rather than on whether or not the proposed rezoning is the most appropriate way to achieve the sustainable management purpose of the Act. While not wanting to criticise his approach, because the plan change itself recognises that the Trust’s objective is to develop part of its site for residential purposes, we are not convinced that the wider

⁵ Section 2.1 of Plan Change application document prepared by Reyburn and Bryant.

sustainable management outcomes envisaged by the Act, in relation to the entire Trust's site, and the surrounding environment have been appropriately evaluated.

- 4.54 The shifting nature of the actual extent of the site being sought for rezoning to residential is indicative of the focus on the outcome for only a part of site. The offer of the encumbrance for the balance of the site also signals a different management approach is proposed for this portion of the site. While we accept that the encumbrance may result in positive outcomes in terms of public access to the coast, revegetation and the other mitigation measures being offered, we remain unconvinced that the encumbrance approach is the most appropriate way to achieve the purpose of the Act.
- 4.55 Given the constraints imposed by limiting the plan change to just a portion of the Trust's site, along with the wider issues relating to Part 2 matters and in particular section 6, 7 and 8 matters, we have concluded that the proposed rezoning is not the most appropriate way to achieve the sustainable management purpose of the Act.
- 4.56 Whether or not the plan change will result in an appropriate area of land to be used for the intended scale of residential development is far from certain based on the evidence presented. For example, the extent of land sought to be rezoned has reduced from the original 8 hectares to 4.78 hectares in response to landscape issues raised by Mr Cocker and Mr Farrow. While limiting any adverse landscape effects associated with any future residential development, the reduced area to be rezoned further limits the ability of treated waste water to be disposed within the land being sought for rezoning. We remain concerned that Mr Brabant in his Reply is still signalling a yield of between 10 and 30 when more than 12 could only be achieved with communal treatment and disposal outside the area to be rezoned for residential purposes.
- 4.57 With respect to the encumbrance offered we have carefully considered the merits of the encumbrance itself, as well as the merits of utilising an encumbrance to provide mitigation measures and achieving the outcomes being sought by the Trust. Noting in particular; that the encumbrance seeks to provide the mitigation measures on the land not being sought to be rezoned. We have also considered the legal submissions of Mr Brabant and the legal and planning advice provide to us on behalf of the Council. By the time the hearing was closed, the Council was recommending an alternative version of the encumbrance to essentially provide greater certainty in relation to the outcomes being offered. As we have indicated earlier in our decision we agree with Mr Brabant that we have no jurisdiction to amend the encumbrance. In section 32 terms we have

concluded that the offered encumbrance is not the most appropriate way to achieve the purpose of the Act and the sustainable management of the Trust's site.

Part 2 of the RMA

4.58 With respect to Part 2 matters we agree with the opening legal submissions of Mr Brabant where at his paragraph 52 submitted that, *“Section 5 provides the overriding purpose of the RMA, which applies equally to plan changes as to the assessment of resource consents under section 104 of the RMA.”*

4.59 In his paragraphs 53 and 54 Mr Brabant stated that:

“53. As set out in Mr Hood’s planning evidence, PPC 1 will enable the Trust to provide for its social and economic well-being.”

I submit that based on the evidence to be put before you, the Commissioners can be satisfied in finding that PPC 1 will promote sustainable management of resources. In making that assessment the Commissioners must look beyond any particular individual preferences expressed by submitters.”

4.60 In his written reply Mr Brabant did not specifically address Part 2 matters further.

4.61 Turning to Mr Hood’s evidence on Part 2 matters, in his summary statement presented at the hearing at his paragraph 21, he stated that:

“In regard to the appropriateness of the Plan Change in terms of Part 2 of the RMA, my evidence concludes that the preferred option is the most appropriate due to superior social and economic benefits, positive environmental effects, and the ability to avoid or mitigate potential adverse effects on the environment.”

4.62 In his pre-circulated statement of evidence dated 12 June 2015 there was no specific Part 2 analysis or conclusion, apart from his section 32 evaluation at his paragraphs 88 and 89. These paragraphs have been fully discussed earlier in our decision at paragraphs 4.4 and 4.5 above. The concerns that we had with his conclusions are set out in our paragraphs 4.9 and 4.10 above.

4.63 The Plan Change Application itself, dated October 2013, also did not contain a specific Part 2 assessment or conclusions, apart from those contained within the section 32

evaluation set out in section 7 of that document. This 2013 evaluation concluded, in section 7.6 in the last paragraph on page 47, that:

“The Rural (Harbour)/Residential (Harbour) zone mix will enable the more efficient use of the land relative to the status quo, and there may also be some positive economic and social effects associated with an increase in population and living opportunities in Tinopai. However, unlike the comprehensive Residential (Harbour) option, it will also preserve the parts of the site that contribute positively to the natural character and amenity values of the area. Accordingly, this is the zone mix that best achieves the purpose of the Act.”

- 4.64 We acknowledge that the 2013 evaluation was based on a larger portion of the Trust’s site and the covenant being offered to be registered then is different from the encumbrance now being offered. However the resource management basis in terms of Part 2 of the RMA is consistent with Mr Hood’s evidence presented at the hearing in relation to the amended rezoning proposal.
- 4.65 We have carefully considered Mr Hood’s evidence and have concluded that he has placed significant weight on the social and economic benefits of the plan change. The primary economic benefits appear to be for the Trust and, in Mr Hood’s words, *“there may also be some positive economic and social effects associated with an increase in population and living opportunities in Tinopai.”* For the reasons we have discussed earlier in this decision we are unconvinced that the social and economic benefits anticipated by Mr Hood would in fact be delivered or that they would outweigh, the uncertainty that the proposed rezoning would result in the overall sustainable management of the entire site owned by the Trust and the surrounding environment.
- 4.66 Mr Schlotjes, in his section 42A report, specifically addressed Part 2 matters in sections 3.1 of Part A of his report, on page 3, and in section 2 of Part B of his report on page 34. Mr Schlotjes report comprehensively considers Part 2 matters in terms of sections 5, 6, 7 and 8 of the RMA. His overall conclusions on his page 7 were that; *“the matters in Part 2 of the Act have been provided for in this Plan Change proposal as modified by the Applicant. There are some matters that would need to be addressed in detail at a subsequent subdivision application, for example the protection of historic heritage and wastewater.”*
- 4.67 In his November 2015 Response to Commissioner Directions report Mr Schlotjes it was his overall advice that the Council’s alternative encumbrance be adopted if we

were to grant approval to the plan change. A key reason for the alternative encumbrance was set out on page 12 of his November 2015 report.

“It is now considered that an archaeological assessment be used to finalise the Coastal Rehabilitation and Use Plan and that the boundaries as shown on the Key Design Plan be modified to take into account any cultural effects that may arise.

4.68 Mr Schlotjes advice, together with the legal advice contained within his November 2015 report, supports the concerns the Commissioners have with the form of the encumbrance offered by the Trust and the uncertainty we have that the Trust’s approach will in fact deliver the sustainable management outcomes contemplated by Part 2 of the RMA.

4.69 Overall we find that the proposal to rezone a portion of the site as proposed will not sustainably manage the natural and physical resources of the site or the sounding environment as contemplated by Part of the RMA.

5.0 SUBMISSIONS OPPOSING THE PLAN CHANGE AND EFFECTS ON THE ENVIRONMENT

Submissions

5.1 A total of 27 submissions were received, most of which opposed the plan change. The issues raised by submitter’s are clearly stated in the s42A report prepared by Mr Schlotjes.

5.2 Submitter’s raised concerns regarding access over the land to the coast, the scale and associated effects of residential built development, effects of development on water quality, issues with previous forestry land use activity, stormwater and ground soakage, traffic flow in and around Tinopai and the intersection with the proposed access to Komiti Road, coastal erosion and consultation with Iwi.

Effects on the Environment

6.0 The Panel findings in relation to the effects of the proposal on the environment are detailed in the following section.

PANEL'S FINDINGS ON MATTERS RAISED

7.1 The principal issues raised by the submitters and the Council's evidence, have been summarised under the following headings:

a) Maori cultural issues. (The Rahui, consultation, the Te Uri o Hau Kaitiakitanga o te Taiao Plan, archaeology, environmental restoration, Part 2 of the RMA matters including the principles of the Treaty of Waitangi).

b) Landscape and natural character issues. (The visual impact of additional development and the height of new buildings, the existing character of Tinopai).

c) Infrastructure/engineering/ecological issues (Waste water, stormwater, traffic and roading, geotechnical).

d) Community facilities/amenities issues (Boat ramp and associated parking, access to the coast, footpaths).

e) The need for additional residential zoned land at Tinopai and the efficient use of the land resource.

f) Coastal edge and erosion.

g) Effects associated with forestry land use activities.

7.2 The principal issues raised on behalf of the Trust included the above matters but in addition the following issues:

a) Plan change versus resource consent with respect to the level of detail required to be provided at the plan change stage.

b) The proper approach to the "environment" and the "permitted baseline."

c) The encumbrance offered.

7.3 Our findings on all of the above matters are set out below, using the above headings.

Plan change versus resource consent with respect to the level of detail required to be provided at the plan change stage.

- 7.4 We have accepted Mr Brabant’s submissions on this matter. The plan change application relates to the question of whether or not it is appropriate for the land to be rezoned. The application is not for a specific development proposal. As such the level of detail required for us to determine if the land should be rezoned is significantly different from the level of detail that is likely to be required for a subdivision or land use resource consent to physically develop the land.

The proper approach to the “environment” and the “permitted baseline”

- 7.5 This issue arose because of the weight that had been placed by submitters and some of the Council’s reporting team on the “existing environment.” We have also accepted Mr Brabant’s submissions on this matter. We agree that “the environment” includes the future state of the environment as it may be modified by permitted activities under the district plan and by any relevant unimplemented resource consents. In this particular case the most relevant issue related to the fact that the district plan maximum height rule enables 8 metre high buildings within the existing Tinopai settlement, which is zoned Residential (Harbour). We also note that within the current Rural (Harbour) zoning of the Trust’s land the maximum height limit is also 8 metres and that only one dwelling is permitted on this site.

The encumbrance offered.

- 7.6 We acknowledge that the Trust has offered an encumbrance in relation to the balance of its land that is not part of the proposed plan change. Also as acknowledged earlier in our decision we cannot substitute the Council’s preferred, revised version of the encumbrance. We also accept the legal advice on behalf of the Council that an encumbrance could be an appropriate instrument, although it is an uncommon one. The most relevant issue for us, in relation to the encumbrance, is that the encumbrance itself is an additional matter, over and above the usual statutory tests and requirements as set out in the RMA, and we have included it in our consideration of the merits of the proposed plan change.
- 7.7 We have commented elsewhere in our decision in relation to the encumbrance and have concluded that the offered encumbrance is not the most appropriate way to achieve the purpose of the Act, given the uncertainty that the encumbrance will in fact deliver the sustainable management outcomes contemplated by Part 2 of the RMA.

Maori cultural issues.

- 7.8 (The Rahui, consultation, the Te Uri o Hau Kaitiakitanga o te Taiao Plan, archaeology, environmental restoration and Part 2 of the RMA matters including the principles of the Treaty of Waitangi).**

The rahui

- 7.9 Mr Mikaera Miru advised us that a rahui has been placed over all of the Trust's property, including the application site. The intention of the rahui, as we understood it, is to prevent development on any of the Trust's property until the land is restored and the mauri of the water, including the Kaipara Harbour is restored. Mr Miru described the rahui as "*...our customary practise that connects us to the environment and upholds our Mana whenua status. Rahui also embraces section 7(a) because rahui is a fundamental practise of kaitiakitanga. ...Rahui is an expression of Tino Rangatiratanga which is a fundamental principle of the treaty of Waitangi (Te Tiriti o Waitangi) under the second article which guarantees to uphold Tino Rangatiratanga. Rahui therefore is a statutory obligation for all crown entities to recognise and provide for in accordance with section 8...*"
- 7.10 Mr Miru, speaking on behalf of the Waiatea Marae, concluded that he wanted the Trust to "*clean up the mess that he has already created along the coastline and the freshwater streams before he is granted any right to continue his development aspirations in the Tinopai area.*"
- 7.11 In his Reply dated 18 August 2015 Mr Brabant responded to these concerns. He noted the following. The only jurisdiction that we have under this plan change relates to the Trust's application site. Therefore the other land holdings are outside the scope of our considerations. We accept this aspect of Mr Brabant's submissions.
- 7.12 Secondly Mr Brabant submitted that as a matter of law a rahui cannot "ban" the construction of buildings and does not have the force of law itself. He noted that in determining the outcome on this plan change the RMA requires us to: "recognise and provide for" matters of national importance, including 6(e) being the relationship of Maori and their culture and traditions; to "have particular regard to" section 7 matters, including kaitiakitanga; and to "take into account" section 8 matters in relation to the

Treaty of Waitangi. We accept his submissions in relation to our powers under the RMA.

- 7.13 Our overall finding in relation to the rahui is that the scope of our considerations is confined to the application site and the land being requested to be rezoned. We also find that in relation to this land and the plan change request that the RMA clearly sets out the matters that we must “recognise and provide for,” “have particular regard to” and “take into account.” Our findings on the specific Part 2 matters are set out under the heading of Part 2 matters in our decision.

Consultation

- 7.14 We note that the Trust consulted with and received written approval from Te Uri o Hau by way of an email dated 7 June 2013 from Environs Holding Trust, the environmental subsidiary of the Te Uri o Hau Settlement Trust. We were advised that this approval was subsequently withdrawn and submissions were lodged opposing the plan change on the grounds that further consultation with Te Uri o Hau and the wider community was required.
- 7.15 It was Mr Brabant’s submission that discussions and communications had taken place in good faith and that as a result the principles of the treaty, in terms of good faith consultation had been observed.
- 7.16 There is no doubt in our minds that consultation has taken place. There is also no doubt from what we heard at the hearing that the consultation had not led to agreement, despite the earlier written approval. It is our finding on consultation that while no agreement has been reached a consultation process has occurred. It appeared to us that further consultation would be beneficial in order to build a more positive relationship between the parties, however in terms of our consideration of the plan change adequate consultation has taken place through the initial consultation and the submissions process. We have therefore gone on to consider the merits of the differing views on the environmental matters at issue.

The Te Uri o Hau Kaitiakitanga o te Taiao Plan

- 7.17 We were provided with a copy of this plan. We note the purpose of the Plan as set out in Part 1 “...is to provide a comprehensive plan to support Te Uri o Hau kaitiakitanga (guardianship) and Rangatiratanga (authority) responsibilities in natural

resource management within the statutory area of Te Uri o Hau.”

- 7.18 We consider that this Plan is another matter for consideration. To this end many of the relevant aspects of the Plan are proposed to be addressed through the encumbrance offered.

Archaeology

- 7.19 It was Mr Hood’s opinion that the site had been so extensively modified by previous forestry and pasture conversion activities that it is unlikely that any archaeological sites will be uncovered when the land is to be developed. He accepted that an archaeological survey may be requested at the time of subdivision. The encumbrance offers the accidental discovery protocol to be an advice note on any future subdivision applications.
- 7.20 Ms Tina Latimer, the Environs Lead for the environmental arm of the Te Uri o Hau Settlement Trust sought a full archaeological survey of the whole of the Trust’s site in order to require an archaeological management plan to be prepared which would determine how best to protect such sites.
- 7.21 Mr Schlotjes on page 109 of his s42A report considered “...*that a detailed archaeological survey be undertaken of the subject land and this be taken into account when the subdivisional scheme plan is developed and finalised.*”
- 7.22 In the Council’s November 2015 response to our Directions, on page 12, Mr Schlotjes earlier conclusion was modified as follows. “*It is to be noted that the above approach was written **before** the hearing and **before** the Applicant offered an Encumbrance to cover certain matters. It is now considered that an archaeological assessment be used to finalise the Coastal Rehabilitation and Use Plan and that the boundaries as shown on the Key Design Plan (Attachment 1) be modified to take the findings into account and any cultural effects that may arise. [Emphasis Added by Writer]*”
- 7.23 As we understood the Council’s final position, particularly in relation to the wording of the encumbrance, also on page 12, that an archaeological survey is necessary in order “...*to ensure that archaeological and cultural aspects and features of the site are enhanced rather than eroded in the future.*”
- 7.24 In reviewing the encumbrance now offered and submitted with the closing submissions of the applicant there is no requirement for an archaeological assessment to be

undertaken to inform the Coastal Rehabilitation and Use Plan. Regardless of the previous use of the land there remains potential for archaeological sites to be present and the proposed Coastal rehabilitation and Use Plan will potentially further erode, rather than enhance, archaeological values. We also consider it unlikely that should the plan change be approved, that there would be a requirement for an archaeological assessment to be undertaken in the future to inform resource consent application/s for residential development.

Landscape issues

(The visual impact of additional development and the height of new buildings, the existing character of Tinopai).

- 7.25 It was the Trust's position that the rezoning would result in a modest level of development. As addressed above, Mr Farrow, Landscape Architect for Council, remained of the view that some form of additional control over built development would achieve a better outcome than the existing Residential (Harbour) development controls which include an 8 metre maximum height.
- 7.26 The final form of the plan change offers to manage built development in the Rural (Harbour) area through the encumbrance but offers no additional controls on the built development that will occur in the proposed Residential (Harbour) zoned area. We consider that the reduced area of the plan change and the encumbrance address the landscape issues. The proposed planting and natural regeneration has the potential to ensure that the landscape effects arising from the future residential development will be acceptable in the context of the existing settlement as well as the coastal environment.

Infrastructure/engineering/ecological issues

- 7.27 The key engineering issues relate to the disposal of waste water and also stormwater management. The ability of the land to absorb water and the relationship of this to the quality of ground water and land stability were in contention.
- 7.28 The evidence presented indicated that somewhere between 12 un-serviced, or potentially 30 serviced sites, could be created if the land were to be zoned Residential (Harbour). We were satisfied that sites of 3000m² providing for individual onsite wastewater disposal could be achieved with acceptable effects on the environment.

- 7.29 There was less certainty as to the effects of a communal waste water disposal system to service future residential development. All areas identified for the disposal of wastewater from a communal system were outside of the proposed residential zoned land area. Mr Cocks for Council, remained of the opinion that the land was only marginally suitable for the land application of treated wastewater. Mr Cocks stated that *“it is noted that land instability issues have not been considered in this report. The application of treated wastewater to land and other earthworks or soils disturbances associated with wastewater treatment and conveyance infrastructure including access tracks may aggravate instability”*. These concerns were not fully addressed at the hearing and the interrelationship between communal onsite wastewater disposal of treated effluent, stormwater disposal and land stability are matters over which we hold concern.
- 7.30 Areas where we consider there is still insufficient information to be satisfied that the effects are acceptable are the ability for a suitable location for land disposal of treated effluent in terms of land stability issues.
- 7.31 Concerns were raised by submitters regarding traffic on Komiti Road and access in and out of the site onto Komiti Road. No expert evidence was presented through that raised any insurmountable issues with traffic arising from the plan change. The Council peer review identified issues with respect to visibility from the site entrance onto Komiti Road; pedestrian connectivity; the existing formation of Komiti Road that has no footpath and the need to undertake traffic modelling with the new intersection that would be created onto Komiti Road as well as the Tinopai / Matakoho intersection. In summary the consensus was that the level of vehicle movements that can be anticipated should the land be zoned Residential (Harbour) as identified; can be managed through appropriate engineering design. We concur with this statement.
- 7.32 The volume of earthworks required to construct a new road in from Komiti road to serve future residential development was raised. No specific detail was provided and we considered that this is a matter that would be addressed in detail at the subsequent subdivision design phase.

Community facilities/amenities issues

- 7.33 The encumbrance offered as part of the plan change proposal seeks to secure public access over the land to the coast. The detail as to the location of the public access is to be provided as part of the first resource consent for subdivision of the land. An area

for boat trailer parking is also to be demarcated and identified as part of the information to be submitted with the first resource consent for subdivision.

- 7.34 It is clear that without some form of development occurring on the land that these amenities are unlikely to be secured as part of any rural land use activity.
- 7.35 The Council's traffic review identified a lack of pedestrian connectivity in the area and also identified that there are no footpaths on Komiti Road. In our view there is no evidence to suggest that traffic effects arising from proposed development enabled by the plan change would be sufficiently great to warrant significant road upgrading. The Council traffic effects review noted that the General Residential Subdivision rule includes Matters of Control that address the requirement for adequate servicing to be provided to Council standards. The review concluded that there were sufficient provisions within the Plan to enable a robust assessment to be undertaken addressing traffic effects and design solutions in relation to any future subdivision proposal. We are therefore satisfied with respect to traffic effects arising from the proposal.
- 7.36 The encumbrance offers that a public pedestrian access to the coastal edge within the southern catchment will be identified as part of the first subdivision application for the land. We have identified our concerns in relation to consultation and the alignment of the proposed public pedestrian access elsewhere in our decision. While we consider that there is potential for these matters to be resolved, we have concluded that the encumbrance does not provide sufficient certainty as to outcomes and that there are risks associated with proceeding with the proposed rezoning without a full cultural assessment.

The need for additional residential zoned land at Tinopai

- 7.37 Although the need for the proposal is not an RMA issue, the district plan does not identify the area for growth through additional zoning. This is an issue raised above in terms of the Proposed NRPS provisions which seek that sense of place and character of the surrounding environment is maintained or enhanced except where growth is anticipated or approved by regional or district council growth strategies. Tinopai is not an area identified for growth and the effects of this proposal on amenity values, sense of place and the character of Tinopai were key issues raised by submitter's.
- 7.38 Mr. Hood acknowledged that demand for residential sites, if the identified portion of the land were zoned Residential (Harbour), would likely be slow and that development

would likely occur over a long period of time. Whilst the district plan does not preclude seeking rezoning an area outside of identified growth areas, the fact that this proposal seeks a rezoning now in the context of the current environment, but acknowledges that development is unlikely to occur for some time, means that the effects of the proposal are being considered in the current environment, whereas the development could be occurring in a different context in the future. As an example the extent of pedestrian connectivity, public access to the coast and the provision of facilities such as boat trailer parking are being considered in the context of Tinopai as it currently is. A short coming of the approach to only include a portion of the land holding in the Plan Change and for the assessments to be undertaken at this site specific level, is that the wider context of Tinopai, and this land have not been considered in detail.

Coastal edge and erosion

- 7.39 The encumbrance provides for enhancement of the coastal edge that we consider is unlikely to occur in the future without some development benefit to drive that outcome. This therefore is a better and more optimal outcome that will be achieved over retaining Rural (Harbour) zoning over all of the land.
- 7.40 There was no evidence to suggest that the proposal would exacerbate coastal erosion and therefore any effects arising from residential zoning would be no different; and potentially lesser than effects arising from permitted rural land use activities.
- 7.41 Effects of the proposal on the coastal edge and erosion have the potential to overall be positive.

8.0 CONCLUSIONS AND DECISION

- 8.1 Our overall finding is that Private Plan Change 1 be declined.
- 8.2 The submissions that requested the plan change be declined have been ACCEPTED.
- 8.3 The reasons for our decision (in summary only as the decision records our detailed reasons) are:
- (a) That the proposal to rezone a portion of the site as proposed will not sustainably manage the natural and physical resources of the site or the surrounding environment as contemplated by Part 2 of the RMA.

- (b) In section 32 terms the offered encumbrance is not the most appropriate way to achieve the purpose of the Act, given the uncertainty that the encumbrance will in fact deliver the sustainable management outcomes contemplated by Part 2 of the RMA.
- (c) That PPC1 is generally consistent with the most relevant planning documents, however in relation to the potential to enhance public access to the coast the proposed encumbrance does not appropriately resolve the lack of consultation with Te Uri O Hau and the difficulty in proceeding with the proposed rezoning without a full cultural assessment.
- (d) With respect to objective 3 and policy 2 of the New Zealand Coastal Policy Statement, in relation to the Treaty of Waitangi, Tangata Whenua and Maori, the zoning proposal, nor the encumbrance that has been offered, will give effect to these provisions of the NZCPS.



Les Simmons

(Chair)



Burnette Macnicol

Commissioner



William Kapea

Commissioner

Dated 22 June 2016