

**BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE HAMILTON CITY COUNCIL**

UNDER THE

Resource Management Act 1991 ("**Act**")

IN THE MATTER OF

of an application for subdivision and land use
consent for the Amberfield development pursuant
to the Act

BETWEEN

WESTON LEA LTD LIMITED

Applicant

AND

HAMILTON CITY COUNCIL

Consent Authority

**SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF
THE TANGATA WHENUA WORKING GROUP**

13 MAY 2019

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. I am engaged as Counsel for the Tangata Whenua Working Group (“**TWWG**”) to assist it in advancing the TWWG’s submission, evidence, and position at the hearing.
2. The TWWG has had the benefit of considering the evidence of Weston Lea Ltd (“**Weston Lea**”), including the evidence and supplementary evidence of Mr Hill.
3. These submissions set the legal framework for the consideration of the evidence of Mr Sonny Karena, the Chair of the TWWG. Given that the TWWG is supportive of the proposal, the submissions can be brief. To the extent that the TWWG is seeking refinements or additions to conditions, however, it is important for the Panel to consider those requests in light of the key statutory considerations and authorities.

The Part 2 Cultural Requirements – informing conditions

4. If it was ever in doubt, the Court of Appeal decision in *RJ Davidson*¹ has kept the door to Part 2 well and truly open in the context of a resource consent application being considered under section 104. While caution needs to be taken not to use Part 2 to override clear and directive planning policies, that is not the context of any recourse to Part 2 in respect of the TWWG’s refinements sought to the conditions.
5. It must be, in considering refinements to conditions, that a consent authority can consider Part 2, particularly sections 6(e), 7(a) and 8 of the RMA. These are the “strong directions” that the Privy Council said in *McGuire*² should “be borne in mind at every stage of the planning process”:
 - (i) the s6(e) duty to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;
 - (ii) the s7(a) requirement to have particular regard to kaitiakitanga; and

¹ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [52].
² *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

- (iii) the s8 requirement to take into account the principles of the Treaty of Waitangi.

6. It is worth recording the relevant passage of *McGuire* in full (emphasis added):

Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. **By s6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process.** The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. **Thus, for instance, Their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route.** So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

7. The ongoing relevance of *McGuire* was confirmed in 2018 by the Court of Appeal in *RJ Davidson*:³

... As the Privy Council said in *McGuire* ss 6, 7 and 8 constitute "strong directions, to be borne in mind at every stage of the planning process". While it is true, as the Supreme Court in *King Salmon* observed, that s 5 is not a provision under which particular planning decisions are made, **the reference to pt 2 in s 104(1) enlivens ss 5–8 in the case of applications for resource consent.**

8. A little earlier in time, in 2014, the Supreme Court had also affirmed the importance of the Treaty principles (which include partnership, participation and protection), stating in *NZ King Salmon*⁴ that:

³ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [52].

⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [88].

... the obligation in s8 to have regard to the principles of the Treaty of Waitangi **will have procedural as well as substantive implications, which decision makers must always have in mind.**

9. It is also now well settled, in RMA proceedings, that:⁵

... persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

10. Decision makers under the RMA therefore are expected to place considerable weight on the position communicated to them by mana whenua representatives. In fact, where there is a clear "representative", that representative's position can be determinative of the decision-maker's findings on cultural matters, notwithstanding that individuals or other entities might hold different views.

Refinement of conditions

11. With the above framework / guidance in mind, TWWG seeks minor refinements to the conditions as follows:
- (a) specific consultation in respect of the naming of roads and reserves (etc), and the Heritage Reserve Management Plan; and
 - (b) a more general consultation condition, requiring consultation with the TWWG as the development progresses.
12. Otherwise, the TWWG supports the proposal, on the conditions offered by the applicant.

DATED 13 May 2019



J D K Gardner-Hopkins

Counsel for the Tangata Whenua Working Group