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Event: New Plymouth District Council Hearing -
Mount Messenger Bypass

Date: 10 October 2018

Before: Mr S Daysh - Hearings Commissioner

Witnesses: Mr H Milliken - Speaking to additional
evidence
Mr S Chapman - Speaking to additional
evidence
Mr R MacGibbon - Speaking to additional
evidence

Counsel: Mr D Allen - NZ Transport Agency
Mr T Ryan - NZ Transport Agency
MS S Ongley - Department of
Conservation
Mr T Hovell - Te Rūnanga o Ngāti Tama
Mr R Walden - Te Korowai Tiaki o te
Hauāuru

Also present: Mr P McKay - Hearing Manager
Ms R McBeth - Reporting Officer, New
Plymouth District
Council

THE COMMISSIONER: Welcome back, everyone. I have to say, on behalf of the planning profession I am very disappointed we do not have a larger gallery to hear the planners talk about conditions, but that is the bane of our life, I think.

So, look, before we start today's proceedings I will just let everyone know that Mr McKay and I took the opportunity to drive up the road again today, this morning. I just wanted to get a mental map of the two catchments right through to the mouth, which I have not managed to do before, and in doing so -- and my pronunciation is not very good but I went to the end of the road and where the marae was for Ngati Tama Pukearuhe, and also Tongaporutu. I have flown over those areas and I have certainly been around the site itself but it just gave me a really good appreciation of the mental map of the two catchments and those areas. That was very helpful.

Mr Allen, do you have an update on where things are at?

MR ALLEN: Yes, sir. Following the discussions yesterday and the suggestion of conferencing, both the planners and the ecologists have been conferencing this morning, starting with the ecologists and they are still ongoing. Obviously the report back is on Friday but apparently very good progress has been

made, as in a number of issues have been or are being resolved such that, fingers crossed - and jump in, anyone else, as you wish - there may be a reasonable level of agreement by Friday. Obviously there will be minor technical matters but some of the higher matters may have a level of agreement, whereas to date there has not been that level of agreement. So, as I understand it, very positive.

THE COMMISSIONER: Yes. Who is involved in the conference?

MR MILLIKEN: That was myself, Roger MacGibbon, Willie Shaw, Tim --

FEMALE SPEAKER 1: Martin.

MR MILLIKEN: Tim Martin and Colin O'Donnell, and Brett Ogilvie took notes.

FEMALE SPEAKER 1: And Simon.

MALE SPEAKER 1: And Simon Chapman.

THE COMMISSIONER: Great, okay.

MR ALLEN: So, a good crew. My understanding is those discussions will continue and there is some work to do but on Friday we will get the joint witness statement and hopefully that will be good news and will significantly narrow the focus of what is still in dispute.

THE COMMISSIONER: Sure. Okay, great. Thank you very much.

MR ALLEN: That is the ecologists. The planners: as I understand it, they've made good progress this morning. They are up to - lucky planners - condition 29 in the designation condition set, which is where it starts to hit ecology. That is, from memory, the bat condition. Gen 24 in the set for the resource consents. To date, as I understand it, there might be one condition where there is some disputed wording out of all of those conditions. Again, that is very good progress.

The planners are making good progress and are keen to carry on. With the ecologists also now making progress, there is going to need to be a potential time for a feedback loop from the ecologists to the planners.

THE COMMISSIONER: Interface. Yes, I understand.

MR ALLEN: Again, this is for discussion with the parties and obviously the Commissioner's timetable and wishes, but if the ecologists report back the joint witness statement on Friday potentially the planners could be close of play next Wednesday. Then potentially we could do a written reply maybe close of play the following Tuesday.

THE COMMISSIONER: What are these dates we are talking about?

MR ALLEN: I am not sure whether they will work for the other parties and their planners. Potentially, too, early next week or Wednesday next week the planners could be in a room together again and finish any loose ends.

MALE SPEAKER 1: I think as planned, it would still be the ecologists reporting back formally this --

THE COMMISSIONER: The joint witness statement due on the end of Friday.

MALE SPEAKER 1: -- Friday, 12 October. Then I guess our tentative suggestion for discussion is that the planners then file a joint witness statement on Wednesday the 17th. Mr Roan

mentioned the possibility of meeting in person again early next week but perhaps we can leave that for the planners to arrange.

MALE SPEAKER 2: I think there has been a matter put forward on the availability of the (several inaudible words).

THE COMMISSIONER: It is very difficult to co-ordinate the diaries of four people, but that would be good. One of the thoughts I have - and I think we should keep this flexible - is the idea of hot-tubbing, which I think is really useful when you are down to a limited number of things. That enables some discussion. Perhaps even for some of the key ecologists and the planners, if there are things still not resolved I would like to reserve the opportunity to have that on a suitable date. If everything is reasonably well agreed and that is not needed, we should keep that option open. It might just be able to be done on the papers. If you could just keep in touch with Mr McKay on that, the parties, that would be appreciated.

MR ALLEN: I see Friday the 19th is Hawke's Bay Anniversary Day.

THE COMMISSIONER: Yes. I am going to be doing something down in Wellington so I am already working that day.

MR ALLEN: I am just wondering, maybe we use the time now to potentially have a fall-back date if needed. It might take a little bit of time.

THE COMMISSIONER: I was thinking, well, I do have availability Tuesday, Wednesday, Thursday next week. Any of those dates is possible. Even if Mr Roan felt that he needed, for example, Wednesday morning to convene and then we spent Wednesday afternoon or Thursday, those dates are available for me. I would need to probably have those locked in by -- if you did want to use one of those days for that, with the potential opportunity of talking to the planning team and also the ecology team if that was thought to be helpful, together in that hot-tub environment. I will let you come back.

MR ALLEN: We will be in touch on that one.

THE COMMISSIONER: I am also mindful that in the hearing we have been for quite a long journey so we need to finish it up, but just for the sake of a week or so, if a day next week was what we needed I think we should be a little bit flexible on that too.

MR ALLEN: Yes. Subject to those timings, there is that degree of flexibility. A week here is not going to make any difference in the long run.

THE COMMISSIONER: No, okay. If you could just keep in touch with everyone and with Mr McKay and he'll liaise with Ms Straka in terms of organisation, that would be good.

MR ALLEN: Thank you. Then potentially just to finish off that tentative timetable, it could be our closing submissions on Tuesday the 23rd. That could be flexible potentially, without direct instructions, by a week or so maybe, depending on timing.

MALE SPEAKER 1: Maybe, I think, yes.

THE COMMISSIONER: Let me just quickly check. Just for your information, at the moment 24th and 25th I have availability if you do need to flick it through. All right? Thank you.

MR ALLEN: Thank you, sir. In terms of time now then, there are planners here if you would like to ask them any questions and get an update from them. I am not sure if there was -- I have forgotten his name. Mr Doherty.

THE COMMISSIONER: Doherty, yes.

MR ALLEN: On alternatives.

THE COMMISSIONER: I will talk to Ms McBeth and Mr Harwood(?) about that but I think for the moment, if you only have one area that currently there is some discussion around, best to all do it at once. I do not think there is any point in getting going and getting organised and then breaking so I would prefer to do it in one go.

Look, I think we have finished that discussion. So we won't start the hot-tub today. It means I can get in the car and drive home and get home at a reasonable hour as well. Ms McBeth, where are we up to with Mr Doherty?

MS MCBETH: He is expecting a phone call.

THE COMMISSIONER: Okay. Has he produced any other written statement for me?

MALE SPEAKER 1: No.

THE COMMISSIONER: All right. I have not read his material on the anticipation that I thought he was going to produce a clearer position statement of why he was suggesting that I consider going back and looking at the auctioneering again. Again, I would prefer that. I have had a skim. I do not think his position, which is right at the end of that last paragraph, is a clear enough reason for me to have a proper discussion with him. I would prefer it, if he still holds that position, that he gave me a one or two-page summary of exactly why, in his opinion, he holds that view. We can reconvene with him when we come back together.

MS MCBETH: Would you prefer he was present?

THE COMMISSIONER: Not necessarily. We could do it through Skype or something if it is only a brief statement. That is my preference. Thank you.

I did have a couple of other things that I just wanted to reconfirm. I had asked Mr Harwood to give me some advice, I suppose, about the iwi authority issue, Te Puni Kōkiri and the various parties involved. If that could be in a written form looking at the current iwi authority status under the two councils, the process that Te Puni Kōkiri use to confirm iwi

authority status, perhaps the differences between iwi authorities and other -- there are two categories.

Probably it would also be helpful if you could produce me a map showing the different areas that are covered in the different authorities because they each come with maps, as I understand them. A reasonably thorough briefing for me from a legal and process point of view about that aspect. Part of the reason I am asking Mr Harwood to do that is because it is registered on the council website, and I have certainly had evidence and seen myself that both parties, Ngati Tama and Ngā Hapū o Poutama, are on those websites. That would be very helpful.

The other thing we talked about yesterday was the Te Korowai position. Mr Walden, you may have an update on that for me?

MR WALDEN: Yes, sir, thank you. I am here assisting Mr Enright. I communicated the difficulty to Mr Enright yesterday. I talked to him this morning. I then talked to a number of senior members of Te Korowai. The position has not changed from the position it was at the hearing in any way whatsoever.

THE COMMISSIONER: Okay.

MR WALDEN: Is that sufficient for you?

THE COMMISSIONER: That is sufficient, thank you.

MR WALDEN: You do not want it in writing? I do not think you need it.

THE COMMISSIONER: No, I do not think so. That is on the record.

MR WALDEN: Thank you, sir.

THE COMMISSIONER: That is helpful, thank you. Is there anything else we talked about yesterday that I have forgotten about in terms of work that is going on, if anyone can remember? No, it sounds like not.

MR ALLEN: Sir, there was the copy of the archaeological authority but there was the comment that that is in the SEMP.

THE COMMISSIONER: The SEMP, yes.

MR ALLEN: Any issues in finding it, we can send another copy. That is all conditions, which the planning team is doing.

MS ONGLEY: Sir, you did ask me about the Ruataniwha position. I spent about an hour and a half looking for the comment in the High Court decision --

THE COMMISSIONER: It was not a High Court decision. This was the Board of Inquiry's decision.

MS ONGLEY: I looked there as well, actually.

THE COMMISSIONER: I am very familiar with that project. Essentially, just to give you guidance, there is a large offset programme - \$10 million, six different projects - and there was a request from some of the parties that all of the land required to implement those was locked down before the project could be built. There was a condition inserted that said that the core part of the project, which was to do with project A, had to be acquired and in the consent-holder's hands before the project could commence. But all the other projects, the six of seven others, there was not a condition precedent required for every last bit of land. That was the guidance I was trying to give.

MS ONGLEY: Right. Sorry, I possibly misunderstood.

THE COMMISSIONER: That is in the Ruataniwha conditions. There are a set of conditions that should be on the EPA website and it is schedule 6, I think, which is the offset projects. There is a condition that flags that the land for project A has to be secured as a condition precedent, but not anything else. That was a bit of a hybrid of what you were perhaps suggesting.

MS ONGLEY: I would be happy to provide you with a brief.

THE COMMISSIONER: A note on that.

MS ONGLEY: A note on that, because I understand that that is the point of contention that the planners had identified. I raised this condition 28(a) yesterday. Yes, I am happy to provide you something on that.

MR ALLEN: We can work together on it and maybe do a joint --

THE COMMISSIONER: Also, there is probably some other authority because this issue comes up. Buller, for example. When you have conditions that require land that is not held by a consent holder, how should that be dealt with from a certainty point of

view? The Board of Inquiry in Ruataniwha took one approach; there may well be others. Any guidance you could give on that point, which is partly a legal, partly a conditions planning point, would be useful.

MS ONGLEY: Yes. Just while we are here, I was involved in a designation case in South Taranaki and I included the case in the case book. In that case there was discussion about an offset or mitigation that would occur outside the designation footprint. Just out of interest, Judge Hassen raised during the proceeding that because you make a recommendation on a designation, which can include modifications, it would be possible for a decision-maker to make a recommendation modifying the designation to extend the project footprint over the mitigation area, because this was new mitigation that had been raised through the proceedings. So that was quite interesting.

THE COMMISSIONER: That was under the ability to modify a designation by adding --

MS ONGLEY: Yes. Yes, that was the Handley case but I think that would be quite difficult here because we are going to nail it down.

THE COMMISSIONER: I do have your case book in the black folder.

MS ONGLEY: Yes. Handley.

THE COMMISSIONER: Handley?

MS ONGLEY: H-A-N-D-L-E-Y.

THE COMMISSIONER: And what is that, a roading designation?

MS ONGLEY: Yes. A local road.

THE COMMISSIONER: Judge Hassan?

MS ONGLEY: Yes. It is quite difficult to read the decision because it was a very complicated set of facts, but that was raised in the case.

THE COMMISSIONER: He is very experienced with notice of requirement.

MS ONGLEY: I thought of it because you raised yesterday that a land owner should not be able to hold the Environment Authority over a barrel. If you have one of these conditions, that may

occur. That comment by Judge Hassan was on the policy behind designations themselves, that because you have the ultimate, you could have the compulsory acquisition, they do not get to hold you over the barrel. That is why he talked about extending the footprint of the designation.

THE COMMISSIONER: Yes. I am sure that would be a pretty big call for such a big area of land.

MS ONGLEY: I think so. It was just quite interesting.

THE COMMISSIONER: No, but certainly I have worked with Judge Hassan before as a judge and he is very experienced with these sorts of matters. That is good.

Yes, a joint submission on that from Ms Ongley and Mr Allen.

MR ALLEN: We will see what we can do.

MS ONGLEY: We will see if we agree.

THE COMMISSIONER: If you do not agree, just let me know. I am not trying to reinvent the wheel, I am just trying to get the

best outcome and the best advice on these tricky legal issues.
Thank you.

MALE SPEAKER 1: Commissioner, just one other thing on Te Korowai. Mr Gard(?) has just reminded me that yesterday you spoke with Mr about the suspended trustees.

THE COMMISSIONER: Yes.

MALE SPEAKER 1: I think he was going to put something in writing to you on that. Obviously you have heard from Mr Alden(?) today but it might be that you will hear from Mr Hovell for the Rūnanga.

THE COMMISSIONER: I wonder whether I should just do a brief minute confirming these matters that we discussed here. Perhaps when we --

MALE SPEAKER 1: With the timetable?

THE COMMISSIONER: -- can nail a timetable down, I will include that in a minute, including the various aspects. Now, in terms of this advice from the lawyers, I would be very comfortable

receiving that on the date that -- you want that before you close, I presume? No?

MR ALLEN: No, I do not think so. We will work with Ms Ongley.

THE COMMISSIONER: Suggest a date to Mr McKay when those various submissions will come in.

MR ALLEN: Sure, when the bundles all come in.

MR WALDEN: I have a few concerns about the matter that has just been raised about Te Korowai. I believe I have settled the matter for the questions you have asked.

THE COMMISSIONER: That is right.

MR WALDEN: Mr Hovell does not represent Te Korowai. He does represent someone who is slightly in opposition, or to one side, and I just wondered what that contribution would make, which I might seek for (inaudible) the right to reply. Is that your wish?

THE COMMISSIONER: No. Of the questions I had for Mr Hovell, one was to clarify the Te Korowai position, which you have done

now, so that is good. The other position is that I wanted to understand the status of the trustees on the Ngati Tama Trust Board. That was a job for Mr Hovell.

MR WALDEN: Okay. His comment will be confined to that?

THE COMMISSIONER: I will issue that in that minute. We got a bit muddled but those are the two distinct pieces of information I was interested in.

MR WALDEN: Thank you, sir.

THE COMMISSIONER: Thank you, Mr Walden. Is there anything else anyone would like to raise? Okay. Look, on that basis let us adjourn the hearing again. As I said yesterday, I thought yesterday was very well worthwhile. Some excellent advice from the various witnesses and I look forward to when we reconvene. If you can just let us know -- I think definitely on the planning side it is likely that we will want to have a discussion. If there are matters on the ecological side which you think would benefit from a discussion with me in that hot-tubbing situation, I have used that with ecologists before and they are very helpful because quite often there are differences

of opinion and if we can have a discussion together that might possibly move some issues forward a little bit.

MR ALLEN: No, that is great. Thank you.

THE COMMISSIONER: Thank you very much. I will see you at all in some stage in the next week or two. Thank you very much.

(Adjourned to a date to be fixed)