

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2014] NZEnvC 38

**IN THE MATTER** of appeals pursuant to Clause 14 of First  
Schedule of the Resource Management Act  
1991 (the Act)

**BETWEEN** TE TUMU LANDOWNERS GROUP, TE  
TUMU KAITUNA 14 TRUST, TE TUMU  
KAITUNA 11B2 TRUST, AND FORD  
LAND HOLDINGS PTY LTD  
(ENV-2010-AKL-000325)

NGAPOTIKI TAHUWHAKATI  
KI MĀRAE AND TE RUNANGA O NGATI  
KAHU  
(ENV-2010-AKL-000328)

BAY OF PLENTY REGIONAL COUNCIL  
(ENV-2010-AKL-000329)

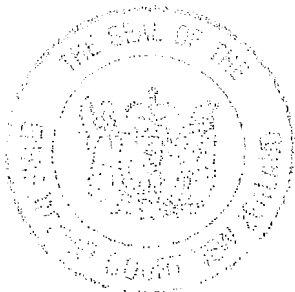
NEW ZEALAND HISTORIC PLACES  
TRUST POUHERE TAONGA  
(ENV-2010-AKL-000300)

TAURANGA MOANA TANGATA  
WHENUA COLLECTIVE  
(ENV-2010-AKL-000330)

Appellants

**AND**

TAURANGA CITY COUNCIL  
Respondent



**Court:** Environment Judge J A Smith  
Environment Commissioner A C E Leijnen  
Environment Commissioner I M Buchanan

**Appearances:** Ms H J Ash & Mr T R Fisher for Tauranga City Council (**the City Council**)

Ms V J Hamm and Ms N Swallow for Te Tumu Landowners & Ors (**the Landowners**)

Dr D T Kahotea for C Reeder and Ngapotiki Tahuwhakatiki Marae and Te Rununga O Ngati Kahu (**Ngapotiki**)

Mr P H Cooney for Bay of Plenty Regional Council (**the Regional Council**)

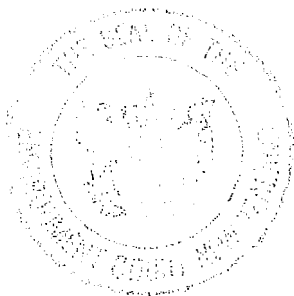
Ms K E Krumdieck for New Zealand Historic Places Trust Pouhere Taonga (**NZHPT**)

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**DECISION OF THE ENVIRONMENT COURT**

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- A. A delineated TTAMA and scheduled TTSMAs are justified in the area around V14/40.**
- B. Both should be co-extensive and cover the area identified in Annexure C (including the buffer land) plus the area extending to Mean High Water Springs to the north and east.**
- C. Costs applications are not encouraged. However, any application is to be filed within 20 working days. Reply within a further 10 working days, and final reply, 5 working days thereafter.**



## REASONS FOR DECISION

### Introduction

*Should an area of land on the true left bank at the mouth of the Kaituna River have a planning overlay as a Significant Maori Area, a Significant Archaeological Area, or both? If so, what areas should be provided for each overlay?*

[1] This is the final issue under the Tauranga City Proposed Plan (the **Plan**) and relates to the resolution of the notation of Significant Archaeological Areas (SAA) and Significant Maori Areas (SMA) in the Tauranga City District Plan review. The subject appeals are the only outstanding appeals in relation to the Plan review and all other aspects of the subject matter other than the planning map notations have been settled and are operative by way of an approved consent order.

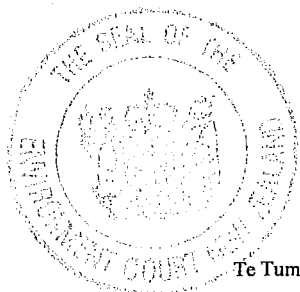
### The parties and their positions

[2] Five parties to this appeal were represented at the hearing:

- (a) The Te Tumu Landowners Group being Te Tumu Kaituna 14 Trust, Te Tumu Kaituna 11B2 Trust and Ford Land Holdings PTY Limited (**Landowners**);
- (b) The New Zealand Historic Places Trust (**NZHPT**);
- (c) The Bay of Plenty Regional Council (**BOPRC**);
- (d) Ngapotiki Tauwhakatiki Marae and Te Runanga O Ngati Kahu (**Ngapotiki**);
- (e) The Tauranga City Council (**Council**) – respondent.

[3] A further appeal had been lodged by Tauranga Moana TangataWhenua but they did not appear.

[4] The parties involved have slightly different objectives, as we will now explain:



### *Landowners*

[5] The Te Tumu Landowners do not believe that Te Tumu Pā is located on the site (Ford land). They oppose on a principled basis imposing delineated Te Tumu Archaeological Management Area (**TTAMA**) and Te Tumu Significant Maori Area (**TTSMA**) overlays on the site because they represent (or are at some level associated with) the Te Tumu Pā. The Landowners believe that the weight of evidence clearly favours that the Te Tumu Pā location is east of the Te Tumu Cut.

[6] Given the absence of firm evidence that the Te Tumu Pā is located on Ford land, they rely on the TTAMA to provide the appropriate management. We understood them to accept notation of the specific archaeological discoveries undertaken under s18 NZHPA, on the relevant TTAMA Sheet Appendix 7E – Sheet 2 by a referenced single marker.

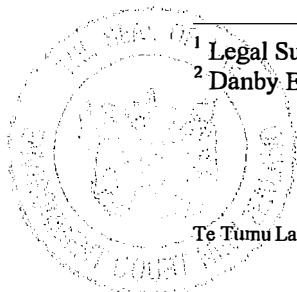
[7] Further, the Landowners rely on the confirmed TTSMA provisions to manage those areas located within the Te Tumu Future Urban Zone (**TTFUZ**) (see Section 7C.3 of the Tauranga City Plan.) TTSMA's are described in the Plan as areas that are generally physically intact or unmodified relative to their original function or purpose and as such are of high value to tangata whenua. They are spatially defined on the planning map (R100) attached hereto as **Annexure A**. The Landowners contend that the area in contention neither contains remaining features of the Te Tumu Pā, nor is it at risk from subdivision, use and development. This is because further urbanization will be subject to structure planning and there is no doubt that this must include provision for significant cultural and heritage features.<sup>1</sup>

### *NZHPT & BOPRC*

[8] The NZHPT and BOPRC support the Council in the identification of this site as a TTAMA by way of the polygon delineation and referenced by the Council as V14/40 to be Appendix E<sup>2</sup> and Planning Map R100.

<sup>1</sup> Legal Submission for the Landowners, paragraph [41]

<sup>2</sup> Danby EIC Appendix 6



[9] In the case of BOPRC, the application and delineation of the TTAMA is supported subject to agreement by tangata whenua. This is based on the regional policies that *only tangata whenua* can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (Policy 4.3.2(b)(iv) operative Bay of Plenty Regional Policy Statement (**RPS**) and Policy 1W 2B(b) of the proposed RPS.<sup>3</sup>

[10] The NZHPT supports the proposition that the TTAMA polygon notation be further refined so that it aligns with the Council administrative boundary at Mean High Water to define the northern edge of the SAA.

[11] The BOPRC have the same position as NZHPT, but also seek a TTAMA over the same area.

### ***Ngapotiki***

[12] Ngapotiki seeks the identification of both a TTAMA and TTAMA over land associated with the Te Tumu Pā and the last battle which took place in this area in 1836 where Te Arawa defeated Ngapotiki.

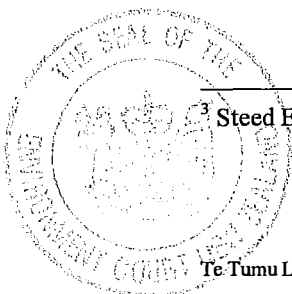
[13] Ngapotiki are concerned with the archaeological importance of the site and the importance of the area as waahi tapu. They are not so concerned with the exact location of the Te Tumu Pā whawhai (fighting Pā) but rather the importance of the location as both a TTAMA and TTAMA.

[14] They say that they do not wish to engage in an argument over the exact location of the Te Tumu Pā, but prefer a precautionary approach so that the area is protected.

[15] Ngapotiki broadly accepts the TCC's polygon identification of the TTAMA although demonstrating it as an elliptical circle.

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<sup>3</sup> Steed EIC Para 4.1-3



[16] As a TTAMA, the area is waahi tapu and a waahi Parekura. This means it is both sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense and is an area of slaughter, massacre, calamity and a battlefield. As such the RMA requires that the Te Tumu whawhai be recognised as a matter of national importance, and protected from inappropriate subdivision, use and development.

[17] The area which has been delineated by Ngapotiki to be identified as TTSMAs has taken two forms. The first was delineated in their submission to the Council on the Plan (submission number 647), which takes in the whole of the title site and part of the adjoining sand dunes. The second is a smaller area put forward as evidence to the Court by Dr D T Kahotea in his rebuttal statement (his Attachment 5). This is represented by an elliptical shape encompassing the fore-dunes, a length of approximately 302m along the edge of the tree (and fence) line between the Ford Land and the fore-dunes, and a depth from that line of 150m into the Ford Land towards the south. This is a smaller area than the original submission, and less well defined in terms of site boundaries to enable easy application on the ground. We agree with counsel for the TCC that both options are promoted and thus set the scope of what we might consider appropriate if we do support the imposition of a SMA here.

### ***TCC***

[18] The TCC position is that the Council's decision in respect of these matters in terms of both spatial identification and notation is appropriate. However, in respect of Ngapotiki's concerns regarding the identification of the TTSMAs, TCC suggest the spatial identification of this area should be extended to better reflect cultural values associated with the related battlefield by means of a 20m deep surrounding buffer along the western and southern edges of the notation amounting to some 5536.92m<sup>2</sup>.<sup>4</sup>

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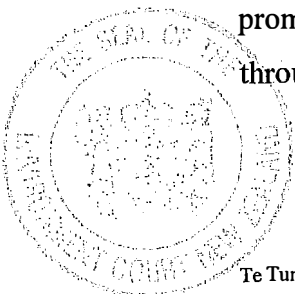
<sup>4</sup>Danby EIC Appendix 9

### The site

[19] The land subject to these appeals is located on Ford land located on the western bank of the Kaituna River mouth (which we refer to as the “**Te Tumu Cut**”), which is part of the “Sandhills Farm” belonging to the Ford family. The Kaituna river wraps around the eastern and southern edges of this particular allotment (known as *Section 3 Bloci VI Te Tumu Survey District* containing an area of *69 Acres, 2 Roods and 30 Perches*).

[20] The Ford family has had a long association with this area, dating back to the early 1900s when the current Mr Geoffrey Ford’s grandfather settled at Maketu in 1907. According to the certificate of title, Mr Edward Ford acquired the subject site in 1991. It is part of a much larger landholding which stretches to the west adjoining the Te Tumu Kaituna 11B2 Trust land. This area in turn adjoins land owned by the Tauranga City Council/Western Bay of Plenty District Council which meets up with a land parcel owned by Te Tumu Kaituna 14 Trust. Overall the land adjoins the eastern side of urban development of the Wairakei area which has extended to the end of Papamoa Road. This area was described to us as the *Te Tumu Land Holding* in Attachment 2 to Mr Geoffrey Ford’s evidence in chief. This entire group of land holdings make up *Papamoa East – Stage 2 (Te Tumu)* identified on Map 15 of the Bay of Plenty Regional Policy Statement and reflected in special provisions which we will come to, in the Plan to provide for future urban development. Despite the fact that the specific location in dispute in these proceedings relates to the Ford land, the Te Tumu Landowners as appellants include all the landholders in this group except for the Council (as a landowner). This is due to their common interest in pursuit of a comprehensive structure plan across the entire area, which is known as the *Te Tumu Future Urban Zone* (the TTFUZ).

[21] The site is generally flat, being where the plains meet the Pacific Ocean. It is rich in history, being a fertile plain with coastal and river access. It rises to a small promontory at the river mouth and has clearly been subject to erosion and modification through manmade intervention in re-directing the path of the river to the sea. The area is



mostly pastureland with trees along the seaward edge, most of which have been planted as weather protection as explained to the Court by Mr Ford.

### **The Approach to Plan Provisions**

[22] The matters to be addressed by the Court are set out in Sections 32, 74, 76, and Part 2 of the Act, in particular. The Plan works on a hierarchy in that it fits within the context of both the statute, other documents such as the National Policy Statements, Regional Policy Statements, and Regional Plans. The Plan has objectives which address the superior documents and the policies which implement the objectives. The Methods to be utilised achieve the objectives and policies of the Plan.

[23] In this particular case, the issue relates to a Method and therefore the approach espoused in cases such as *Long Bay*<sup>5</sup> and *Eldamos*<sup>6</sup> apply. Stated briefly, the policies are to implement the objectives, and the rules (if any) are to implement the policies (see Section 75(1)(b) and (c), and also Section 76(6) of the Act). Further, the method in this case, including each rule, is to be examined having regard to its efficiency and effectiveness as to whether it is the most appropriate method for achieving the objectives of the District Plan taking into account the benefits and costs.

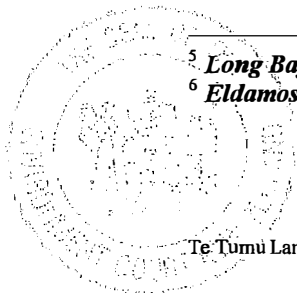
[24] In considering which is most appropriate under Section 32 of the Act, we consider:

- [a] whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
- [b] whether it is in accordance with Part 2 of the Act;
- [c] whether it achieves the objectives and policies of the Plan;
- [d] the efficiency and effectiveness in the provision; and
- [e] the benefits and costs of that provision.

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<sup>5</sup> *Long Bay-Okura Great Park Society Incorporated & Ors v North Shore City Council*, A78/2008

<sup>6</sup> *Eldamos v Gisborne District Council*, W047/05





[25] Although we cite this from *Coatesville*<sup>7</sup>, we understand that this approach is consistent with *Eldamos*<sup>8</sup> and also *Long Bay*<sup>9</sup>. In this case there was no dispute that the superior documents require recognition of both historic heritage and Tangata Whenua interests, from the National Coastal Policy Statement (NZCPS) through the Regional Policy Statement (RPS) to the District Plan.

[26] For example, Objective 18 of the Proposed RPS notes:

**Objective 18** The protection of historic heritage and outstanding natural features and landscapes from inappropriate subdivision, use and development

and Objective 21 promotes:

**Objective 21** Recognition of and provision for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

[27] PRPS Policies IW 2B and IW 5B refer to matters of significance to Maori and avoiding adverse effects on those matters of importance. Policy IW 2B particularly notes that only Tangata Whenua can identify and substantiate the relationship with their ancestral sites and other taonga.

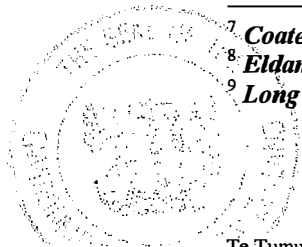
[28] Policies MM 1B, MM 3B, MM 7B are also relevant and provide recognition and provision for Sections 6(f) and 6(g) matters. A suite of criteria are developed under Appendix F Set 4 (Maori Culture and Traditions) and Appendix F Set 5 (Historic Heritage), and Appendix G criteria applicable to Policy MN7B (for assessing inappropriate development).

[29] The City Plan picks these up as Policies at s7A (Purpose of Heritage Provisions) and more particularly at 7C.4 (Objectives and Policies for Maori Heritage) and 7E.1 (Objectives and Policies for Significant Archaeological Areas. The Method utilised is multi-layered.

<sup>7</sup> *Coatesville Countryside Residents Living group v Rodney DC* A77/2009

<sup>8</sup> *Eldamos Investments Ltd v Gisborne DC* W047/05

<sup>9</sup> *Long Bay Okura Great Park Society Inc & Ors v North Shore City Council* A78/08



## City Plan Method

[30] The method utilised to recognise these obligations is to identify AMAs and SMAs on the planning maps. However, in the Te Tumu Future Urban Zone there are special provisions for TTAMAs and TTSMAs. This area basks in the acronym TTFUZ, and within it are identified, TTAMAs, which are a particular type of AMA and TTSMAs, which are SMAs. The purpose is to allow for sustainable management of the archaeological and cultural heritage within that zone, pending the completion of a comprehensive rezoning and structure planning process.

[31] There are currently seven listed TTSMAs in Appendix 7B to the City Plan. The Plan in Section 7C notes SMAs as:

### 7C Purpose of Maori Heritage Provisions

... *Significant Maori Areas* are only included where the features of those areas remain and where *subdivision*, use and development of the *Significant Maori Areas* could compromise the cultural values and relationship within those *Significant Maori Areas*.

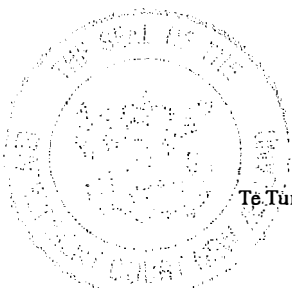
[32] In respect of TTFUZ, it goes on to say:

#### 7C.3 Purpose of Te Tumu Significant Maori Areas

Te Tumu *Significant Maori Areas* include only those areas located within the Te Tumu Future Urban Zone. These areas are generally physically intact or unmodified relative to their original function or purpose and as such are of high value to tangata whenua ...

... The values associated with these areas are best managed through other methods that sit outside the Plan. The intention is that where development occurs, the *Council's* recognition of such *Significant Maori Areas* forms part of an information, advocacy or educational role, in conjunction with other non-statutory tools (e.g. Council's Tangata Whenua Consultation Policy, Hapu Management Plans or GIS systems) or other legislation (e.g. The Historic Places Act 1993) ...

[33] One of the factors recognised for the TTFUZ areas is that further refinement of values and areas can be considered through the future structure planning processes (Policy 7C.4.4.1(b)).



[34] Mr Frentz (planning consultant for the Landowners) was of the view, which did not appear to be contested, that Significant Maori Areas are those that have been researched and determined to be significant. Five of these sites (seven listed entries in the table) are identified as TTSMAs. However, there may be other TTSMAs identified in the future.

#### **TTAMA and V14/40**

[35] V14/40 is a site of archaeological significance identified by the New Zealand Archaeological Association.<sup>10</sup>

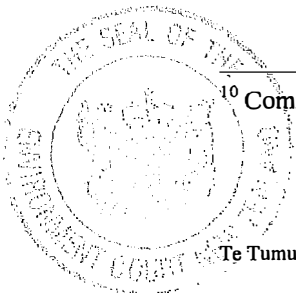
[36] It is important at this juncture to note that the Te Tumu Landowners did not dispute that a TTAMA should be identified at position V14/40. The issue was whether this should be identified by area or simply as a star (being a notation used on planning maps where a delineated area is not defined) on the Plan. Although other areas are demonstrated by physical extent, Mr Frentz's view was that it was not necessary in this case, a position advanced in submissions for the Landowners. Their position was that the TTAMA should be recorded, but should stop short of arbitrarily delineating the TTAMA

[37] The Landowners have drafted a Memorandum of Understanding and are keen to maintain a strong relationship with Ngapotiki. They consider that this method is more appropriate to recognise the relationship with Ngapotiki and is supported by Objective 7C.4.5 and its related policy 7C.4.5.1:

#### **7C.4.5.1 Policy – Recognition of other Ancestral Areas**

Recognising other ancestral areas not currently recognised as *Significant Maori Areas* through GIS alert layers, *Iwi/Hapu* Management Plans or *Iwi/Hapu* Protocols or other similar methods to promote the involvement of Tangata Whenua through the *subdivision*, use and development of land.

<sup>10</sup> Common bundle, Tab 3, Section 18 Investigation report to NZHPT (Appendix F)



### **The Te Tumu Pa**

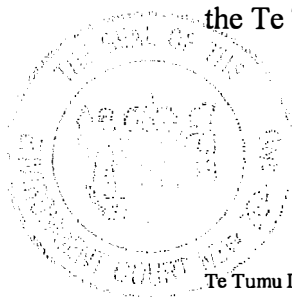
[38] As this case progressed it became clear that the parties were talking about a particular Pā during a particular period of fighting between Ngati Awa and Ngaiterangi. From a period of around 1832 – 1836 a defensive Pā was constructed west of Maketu in order that Ngaiterangi (Ngaipotiki) could protect disputed lands and, in particular, flax plantations. There were a number of battles, with a decisive battle in 1836 leading to the Ngaiterangi/Ngaipotiki losing occupation of this land and Ngati Awa and their allies, Te Arawa, reoccupying it.

[39] The battle is of significance to Te Arawa, Ngati Awa, and Ngaiterangi and Ngapotiki, but also in the wider context of the musket wars of the time. Given the number of chiefs, warriors, women and children who died at the Pā or escaping from it, the area has a particular significance to these iwi and many of the hapu in the area.

[40] We conclude that all the archaeologists recognise that if the Te Tumu fighting Pā site could be located, it would be a matter of high significance, not only in archaeological terms but also in terms of its importance to Maori in the Bay of Plenty.

[41] What we do know from investigations undertaken to date are that the promontory around V14/40 has evidence of occupation over several periods of time. There is evidence of early occupation in the 14<sup>th</sup> Century and at least two other later times of occupation. Beyond the middens and hearth areas there has been identification of posthole remnants.

[42] To date no one has been prepared to suggest that these postholes were part of the defensive structure of a Te Tumu fighting Pā, but there appears to be agreement that they are clear evidence of occupation of this area. Given the situation of these findings on higher sand dunes adjacent to the Kaituna River and the sea, such evidence is not surprising. However, this case seems to hinge on whether it also represented the site of the Te Tumu fighting Pā through this period of 1832 – 1836.



### *Archaeological Significance*

[43] It was acknowledged by counsel for the Landowners by the end of this hearing that a site should be identified at V14/40 as a TTAMA. This appears to be one of the earliest recorded sites of occupation within the Bay of Plenty coastal area, several hundred years earlier than the majority of other sites.

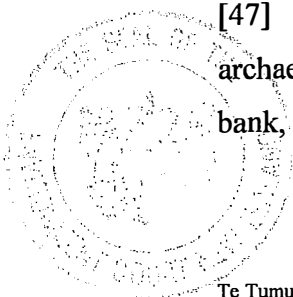
[44] There appears to still be dispute between the archaeologists as to whether these coastal sites and those in the close hinterland were permanently occupied, or were only occupied during certain times of the year. This Court, in an earlier decision, considered that a swamp Pā around 2–3km to the north-west was of such importance that it should include the surrounding land. This site seems to be further evidence of the utilisation of the coastal area by Maori, demonstrating earlier use than previously established. As to whether this was some form of village and/or permanent Pā site is unclear. The only studies undertaken to date were sample trenches in a confined area.

### **The Te Tumu Cut**

[45] In the 1830s we know that the river turned back inland at the point where it currently discharges to the sea. From time to time the river cut through the sand and discharged temporarily to sea before closing again. In the 1940s – 50s a cut was established directly to the sea to drain the swamp land in the Maketu area, which incidentally significantly reduced water entering the Maketu Estuary.

[46] We are satisfied that there is clear evidence of that cut including part of the sand dune on the true left bank. The majority of the cut itself seems to be in areas that did wash out from time to time in heavy flooding. The establishment of a hard wall on the southern side seems to have provided a stable outlet, although some ongoing maintenance is required.

[47] In essence, the evidence for the Landowners, advanced by Dr Campbell, an archaeologist, was that the fighting Pā was several hundred metres south-east of the left bank, probably in the vicinity of the current true right bank of the Te Tumu Cut, or in the



area in the next hundred metres beyond that. His view was that the fighting Pā was built on the sandspit, on the flat below the sand dunes. He also notes that the promontory around V14/40 was reduced to create the Cut, and if there had been some remnant of the Te Tumu Pā there, it was removed at the time of that cut.

[48] In part this argument depends on a relatively lightly garrisoned fighting Pā with little long- term occupation associated with it. Clearly it would not be possible to live on the sand, and one would need to assume that the fighting Pā was simply for the purposes of battles, and beyond that the warriors lived elsewhere. Dr Campbell also acknowledges that some of the aspects of the description of firing pits and the like would be difficult in terms of the sandspit itself, given that it was at or near water level (i.e. there are descriptions of waves washing over the spit).

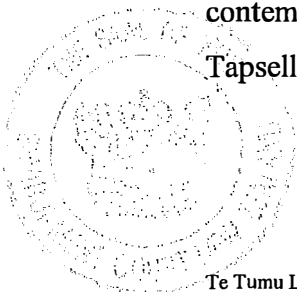
[49] Dr Kahotea's evidence, supported by Mr Phillips and others, was that the fighting Pā included the area remaining on the true left bank. The majority seemed to accept that that would have been reduced by the Cut formation, but that some significant portion of the fighting Pā likely exists on the true left bank as it remains.

### **Survey Evidence**

[50] Several early maps were produced going back to the period of the 1860s. One of these (an 1880 map) had marked *Te Tumu* on the spit. Dr Campbell used this as evidence that Te Tumu was in fact on the sandspit, and not on the adjacent sandhills.

[51] Dr Campbell sees *Te Tumu* and *Te Tumu fighting Pā* as the same place. Essential to Dr Campbell is the view that it is a spot or small area. The differences between maps and descriptions can all be explained if we see Te Tumu as a general location/area or place.

[52] There are a number of early European references to Te Tumu, but no contemporary diary or other accounts were of assistance. Although the trader Captain Tapsell resided at Maketu and described these battles in vivid detail, he was somewhat



vague about the placement of the fighting Pā, and overall we can't reach any firm conclusion as to where the fighting Pā was located.

[53] Others such as Captain Ensign Best, who visited the area in the 1840s, only refer to the site in the most general terms. Having left Tauranga, Captain Best notes:

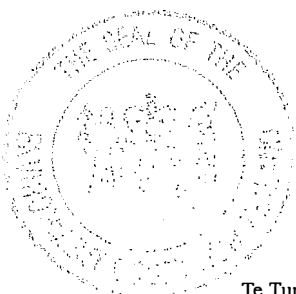
Two miles further brought us to "Te Tumu" formerly the site of a Pā. Alternating in the possession of Ngatiwhakaue and Ngaiterangi, it was finally taken and destroyed by the former. The river Kaituna flows past it from Rotorua. It appears formerly to have emptied itself at the sea here by. The Channel is now sanded up and its embouchure is at Maketu – to deprive Maketu of water and eels with which this river abounds. Ngaiterangi endeavoured to reopen the ancient channel but without effect.

[54] We also know that there were several major floods later, some of which were sufficient to take waves through to the Kaituna river and perhaps temporarily open the mouth. There is little detail. Nevertheless, we cannot assume that by the 1880s the landform seen by the then surveyors was exactly the same as it was in 1836.

[55] We listened very carefully to the evidence in respect of the fighting Pā site, and recognise the importance of this matter to Ngapotiki, to the Te Arawa confederation, and to Ngati Awa and Ngaiterangi.

[56] We have concluded that Te Tumu Fighting Pā (1832 – 1836) was at least in the vicinity of this site. We have reached this conclusion for the following reasons:

- [a] There is a strong sand dune formation to the north of the current Te Tumu Cut which appears to have been in place for a significant period of time. This is some 8–10m above sea level at this point and fluctuates in the surrounding area with primary and secondary dune formations and also with a formation along the river;
- [b] Prior to the Te Tumu Cut being put in place, we suspect that the river turned close to or at this point, and moved inland towards Maketu. We suspect that it was this area where the river was closest to the sea and the associated headland that was generally known as Te Tumu. We consider

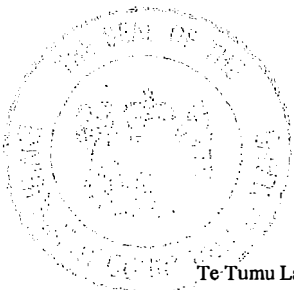


that the spit in this area and the headland itself would have both been referred to as Te Tumu. It was a generic area, not a spot.

- [c] The fighting Pā was in place for some 4 years and was occupied during this time.
- [d] We have concluded that the Te Tumu Pā was likely to have included, either within its defendable area or within the immediate area occupied by associated family and children, the subject area of this site.
- [e] Given the accounts of the nature of this Pā, we do not consider the distinction between the fortified portion on the south-east side and the portion occupied by family and children to be significant. Part of the significance of the Te Tumu battle in 1836 was the significant loss of women and children associated with the Pā and their fleeing towards Tauranga.

[57] Our reasons for concluding Te Tumu fighting Pā included this site are as follows:

- [a] Given the number of people we understand occupied this Pā from time to time (i.e. 300–400), they would not have been able to be accommodated on the spit;
- [b] Although there may have been some preliminary defensive features on the spit itself, we suspect that a stronger defensive position would have been around the headland, and certainly the north-western side of the Te Tumu Pā would have been on the headland given its more limited protection referred to in the correspondence;
- [c] Given the reference to defensive positions, including firing positions, we consider that these would have been constructed on slightly higher land than the sand dunes at or near sea level;
- [d] That the Pā existed and improved and changed over a period of 3–4 years. We do not believe that this would have occurred in respect of Pā built entirely on the sandspit. This is not to say that the Pā could not have had palisades or fortification features on the spit itself, which would have benefits in defending a line of access. Given that this was light sand (i.e.





subject to movement by flooding), these structures would not have been the only defensible features of the Pa;

- [e] The spit area could not have physically contained 400 people with room for sleeping and eating etc. As we have noted before, this is a particular case where the defensive features and the living area are historically important because of the way in which the battle was fought, and the people who lost their lives. It is clear that the living area of the settlement was invaded and that people within it fled.

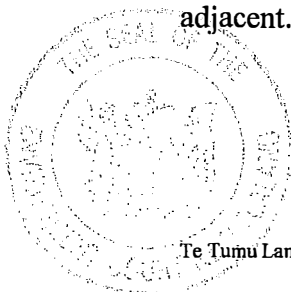
### **The Area of the Fighting Pa**

[58] Having reached that conclusion, there is no doubt in the Court's mind that some of the area on the left bank of the Kaituna River, near the outlet, is of significance. The question now is how much.

[59] To understand the scope of this argument, it needs to be understood that there are already very extensive areas identified as either TTAMAs or TTSMAAs on the Ford land. The original application by Ngapotiki sought to include the fore-dunes, including the beach on Kaituna River. A copy of Map 100 with the original submission is attached as **Annexure B**.

[60] Very responsibly, Dr Kahotea was not seeking that full area before the Court. He suggested an elliptical form described earlier based around the marking of V14/40. Accordingly, we did not understand Ngapotiki to be seeking a TTSMA to the extent of their original submission, but rather based upon the more limited form supplied by Dr Kahotea in his evidence (referred to below).

[61] When asked, Dr Kahotea recognised that this ellipse may have restricted interest in the foredunes beachfront area. We think those areas are of importance, not so much because they are likely to have artifacts, but because they demonstrate the issue of significance here – the relationship of the sea and foreshore area to the higher sand dunes adjacent.



[62] When one looks at existing TTSMAs and TTAMAs the entire foredune area is covered, and almost all of the Kaituna River margins (with the exception of this first stretch from the river mouth). We do wonder why the entire area is not included. Nevertheless, we recognise the effect of the TTFUZ. The requirements for esplanade reserves on rivers would also take effect in this area. Overall, it is likely that there would be some protection for the riparian margin of the river on the true left bank along its entire length.

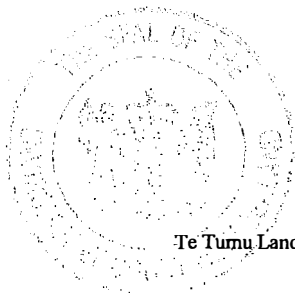
**Identification, and should the TTAMA and TTSMAs be co-extensive?**

[63] In this regard the primary argument of the Landowners was that the TTAMA should be recognised only by a single marker on the planning map rather than the inclusion of a delineated area. Given our conclusions as to a TTSMAs, the question then is what area should be included to identify it.

[64] We acknowledge the Council recognition that the area should be intact. Clearly that cannot mean it has to be in pristine condition, given that almost all of the TTFUZ has been subject to extensive farming over many years, as well as coastal erosion. Also much of this area has been drained as swamp land, and altered through farming practices and drainage so that it now constitutes arable land as opposed to swamp land.

[65] We have concluded that the factors that lead us to the view that this site as a TTSMAs is relatively intact are:

- [a] The position of the promontory, adjacent to the Kaituna River;
- [b] Its position adjacent to the Te Tumu Cut where the river formerly turned inland again at its narrowest point at which Te Arawa and Ngati Awa interests and those of Ngapotiki coincided. Also the position of the subsequent flax mill;



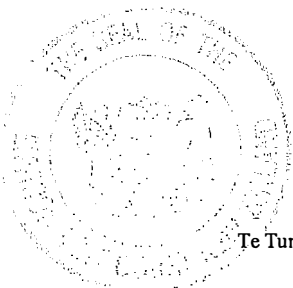
- [c] There being a clear relationship of the Te Tumu Cut and the adjacent Pā site;
- [d] An area from which a number of chiefs, warriors, women and children were killed in the various battles culminating in 1836;
- [e] The significance of that battle in terms of the subsequent repossession of the lands by Ngati Awa and Te Arawa, and the end of the Ngatiterangi and Ngapotiki domination of this area; and
- [f] The practical application of the promontory overlooking the river and flatter lands to the south where flax was grown.

[66] Given the promontory, its historical physical connection to the sandspit, the historical significance for the 1836 battle and the proximity to the flax plantations, we have concluded that the area is TTSMa. It is also our conclusion that the relevant area is larger than just the remnant promontory adjacent to the Te Tumu Cut.

[67] Given that signs of occupation were found in the exploratory trenches both to the south and west, we have concluded that an area of the order preferred by the Council should be included, together with the foreshore to the north and east which was shown in Ngapotiki's original submission. However, we do not subscribe to the ellipse as this would be difficult to define on the ground. Thus we have concluded the map appended to Mr Danby's EIC at Appendix 9, including the entire area (including the 20m buffer) as the delineated area, and extending this to the north and east to the MHWS is appropriate. We attach this as Annexure C.

[68] Although we acknowledge that the battle may have ranged over a wider area and that warriors, women and children may have fallen beyond this area, we have contained the area for the following reasons:

- [a] There is extensive coverage of the fore-dune area travelling towards Tauranga, where the majority of escapees are known to have headed;

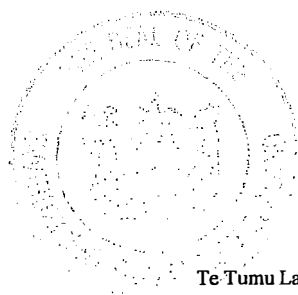


- [b] There are also protection areas along the Kaituna River. The current archaeological evidence does not show that there was occupation of the site further up the Kaituna River, and we were reluctant to go too far into this area;
- [c] There is a relatively high part of the promontory approximately 200m up the Kaituna River, and from this point the land drops sharply down towards the lower portions of the river. Early photographs show this as being lower and part of the flax lands; and
- [d] Our view is that this represents the natural southern limit of the Pā when occupied. Although the line to the west is more arbitrary, we note that the fore-dune area is already protected by other planning overlays, and thus the area shown is consistent with evidence of occupation and makes reasonable allowance for the undulations of the land in this area.

[69] There is no reason in principle that the two overlays could not cover different areas, but curiously enough no party addressed this. It seems that the argument for the Landowners was that it should only be a TTAMA, and that it should be represented by a star or dot, with no extensive area. Their position with respect of the TTSMA was not clear as a result.

[70] In the end, we have concluded that they should be co-extensive, for the following reasons:

- [a] That this is an interim step only, and will be subject to greater investigation and study in the course of any development of the land. It recognises that, as part of the TTFUZ, the areas may be altered as a result of further studies, and these may classify the correct area more definitively;
- [b] It is the area immediately adjacent to the promontory and the Te Tumu Cut which is of particular interest in terms of its significance to Maori as a representative landmark in respect of the various aspects of their oral and known history; and



- [c] Identification of the fighting Pā needs to recognise the area of occupation engaged both during the life of the fighting Pā itself (1832 – 1836), but also during prior occupation.

### **The Statutory Tests**

[71] In reaching a conclusion as to the area to be covered and the use of these overlays, we now apply the various tests under Section 32 of the Act. In doing so, we note that the identification of these areas is in keeping with the Objectives and Policies of the District Plan and its superior documents, as already discussed.

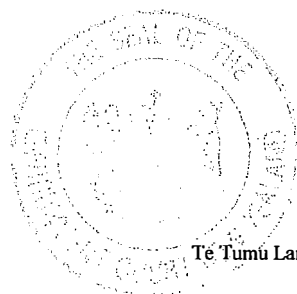
[72] In the end, the use of each overlay and its extent is a matter for discretion.

### **Does it assist the territorial authority to carry out its functions?**

[73] In our view, the identification of an area of significant archaeology and of significance to Maori in this area is of some importance in future planning in this area. The recognition of the relationship of Ngapotiki and Ngati Awa and their iwi, and the flax growing history of this area should be appropriately recognised in any future development. Although further studies may elucidate and provide more information as to the extent, it is likely that this area will be of prime interest and should be recognised and provided for at the time of subdivision.

[74] Whether this promontory might form part of reserves or parks or a dune and river reservation is a matter for the Council to consider at an appropriate time. Nevertheless, the elements that make up that potential reserve are represented appropriately by the dune overlay, the various river overlays for TTAMA and TTSMA, and recognition for this promontory area next to the Te Tumu Cut, as shown.

[75] In our view, this would better enable the Council to make provision for its obligations under Section 6 in future development.



**Does this achieve the purpose of the Act?**

[76] As has been noted by the Privy Council in *Hastings DC v McGuire*,<sup>11</sup> the obligations under the Treaty of Waitangi and those recognised under Part 2 of the Act (Sections 6(e), (f) and Section 8 in particular), permeate the Act. In expressing decisions in relationship to it, the Court is obliged to recognise and provide for the various matters.

[77] We must recognise that with many matters of waahi tapu or historical interest to Maori, the sites may not be in pristine condition and may have been subject to change, both man-made and natural. This does not necessarily lessen their importance to Maori. We are satisfied in this case that the area remains significant to a number of hapu and iwi in the Bay of Plenty and is of archaeological significance.

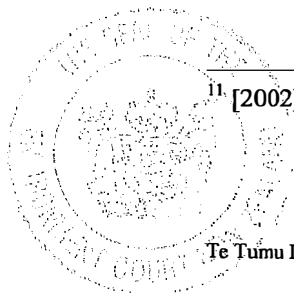
**Does the Rule or the Method achieve the Objectives and Policies of the Plan?**

[78] In our view, the methodology of utilising an area overlay clearly achieves the purpose of the Plan. The reference in both cases is to an *Archaeological or significant Maori Area*.

[79] An area cannot be a spot. By definition an *area* is capable of spatial identification on a plan. This is the course of action that the Council has adopted in respect of other TTAMAs and TTSMAs, and we believe it is the appropriate methodology to adopt in this case. The mere identification of an area within the TTFUZ does not automatically determine that it is the entire area for all time. The Plan provisions for the TTFUZ recognise that these areas may be subject to further clarification or alteration as further studies are done for the purposes of development. They are intended to be interim overlays. To this extent we believe that the area now determined reasonably represents an appropriate area for both the TTAMA and TTSMAs in the meantime. Where there is only a star or dot this is because the feature is too small to be spatially represented at the plan scale. That is not the case here.

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<sup>11</sup> [2002] ELNZR 577



**The efficiency and effectiveness of the provision**

[80] Efficiency and effectiveness might also be relevant to the question of whether it achieves the objectives and policies.

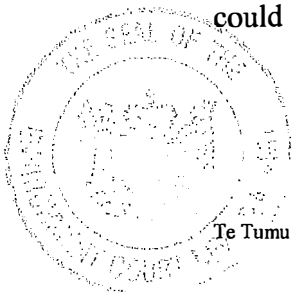
[81] The position of the Landowners was that the TTAMA would be sufficient to achieve the objectives and policies in the Act and that it would give interim protection to the site until further studies were done. Accordingly, their view was that a TTSMA was unnecessary.

[82] It does not appear to us that the purpose of the identification of a TTSMA is to obtain a particular protection. Its purpose is to realise the obligation under the Act to recognise and provide for areas of significance to Maori. An area may have archaeological values, but also display values which make it significant to Maori for historical, waahi tapu, or other reasons. On a proper application of the Plan and the Act, our view is that in such cases the area should be shown both with archaeological and Maori significance overlays.

[83] Certainly in respect of other overlays, there is no particular reason why multiple overlays cannot be shown in respect of an area. This appears to have been done elsewhere. Each overlay is directed at slightly different things. Our view is that in looking at any future development of the site, not only should matters of archeological interest be kept in mind, but the Council also needs to recognise and provide for its significance to Maori. How that might be achieved is of course a matter of consideration by the Council at that time.

[84] Nevertheless, we do not think that this Court can assume that simply because an area has a TTAMA, that will mean that matters that are of significance to Maori will necessarily be achieved.

[85] If there was no distinction between the two sets of provisions, then the Council could have given consideration to utilising a single overlay. The fact that they have



utilised two (and that is not the subject of appeal), leads us to the conclusion that in this case, both overlays should apply.

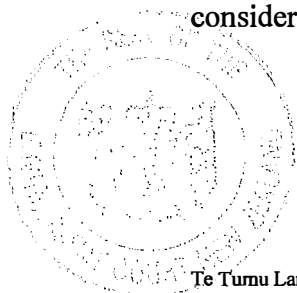
[86] We are cognizant of the fact that the foreshore area is probably of limited archaeological interest, and to that extent there might be a slight difference in the areas to be covered by each. Our view is that although this is likely, we should not make that assumption, and that in the circumstances should include both the TTAMA and the TTSMA within the same areas.

### **The Benefits and Costs of the Provision**

[87] Fundamentally, the issue as to the position of the Pā seems to have driven the Landowners' position. Given our factual conclusion on that matter, it appears that most of the Landowner's concerns in respect of the identification of the TTSMA are addressed beyond those we have discussed already.

[88] It is difficult to see that any particular extra costs are borne by the Landowners in respect of development, once the factual conclusion of the Court as to the location of the Te Tumu Pā and its associated occupation are taken into account. Certainly the benefits are clear in terms of Section 6 of the Act, and the necessity of recognizing and providing for matters under Section 6(e). The Te Tumu area has been identified for future development, and it is at that stage that further extensive investigation will be undertaken of the areas of land in question on this site.

[89] There appears to be a significant benefit to particular identification of this promontory, and the area adjacent to the Te Tumu Cut itself. There appears to be multiple layers of interest, from 14<sup>th</sup> Century occupation, through various occupations, until the Te Tumu fighting Pā of 1832 – 1836 and subsequently the area's use as part of the milling operation for flax. It's association with a number of other identified TTAMAs and TTSMA's makes the area rich in interest and requiring detailed consideration prior to development.





[90] It is therefore appropriate that the investigation include this area, and the relevant values are taken into account at that time. The TTFUZ provisions do provide for some flexibility, and accordingly, further investigation may allow an opportunity for further consideration of treatment of the areas within the TTFUZ.

### **S 290 of the Act**

[91] As notified the Plan identifies an SMA associated with Te Tumu Pa on the western bank of the Kaituna River south of V14/40. The Council decision on submissions was to relocate the position to the Mouth (V14/40) and the boundaries of the SMA were made to coincide with the boundaries identified through an archaeological survey report dated July 2000. (ie the M81 area identified in Annexure A). The Council also decided that all archaeological sites should be excluded from the Plan. The result was to not apply an SAA to the site.

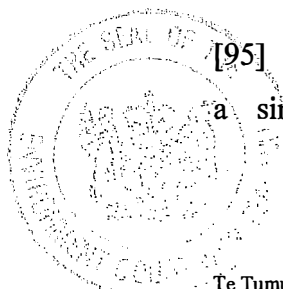
[92] Having settled all the appeals related to the inclusion of SAAs and other SMAs the Council's position has clearly shifted from its original decision. The decision is now of little relevance to the current situation.

### **Evaluation under Part 2 of the Act**

[93] We have concluded that part of the Te Tumu Pā, and certainly some of the occupation area associated with it (being the Pā from 1832 – 1836) was on this promontory adjacent to the Te Tumu Cut.

[94] Furthermore, we are satisfied that the area has been subject to occupation through various periods from the 14<sup>th</sup> Century. It is of significant interest to Maori, and is associated with the period of flax production and the associated European occupation for the same purpose. The area is clearly of archaeological interest, as was conceded by the parties.

[95] In making appropriate recognition and provision for this, we do not consider that a single spot identification appropriately identifies the area of significance.



A representative area supported by at least the topography of the land and some archaeological trenching supports the area we have included. Such recognition would best meet the sustainable management purpose and achieve the objectives and policies of the Plan relating to the TTFUZ.

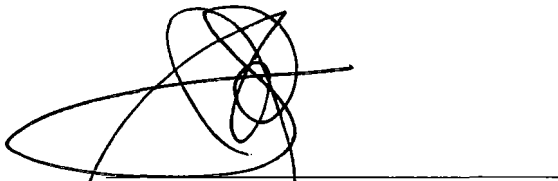
[96] Accordingly, the Council is directed to prepare forthwith an amended Plan showing the area from high-water mark and including the area identified in Annexure C (inclusive of the 20m buffer), for inclusion in the Plan, with appropriate annotations in the scheduling and maps.

#### **Costs**

[97] An application for costs is not encouraged. In the event that any application for costs is to be made, this is to be filed within 20 working days; reply, if any, within 10 working days; final reply, within 5 working days thereafter.

**DATED** at AUCKLAND this 27<sup>th</sup> day of February 2014

*For the Court*



J A Smith  
Environment Judge



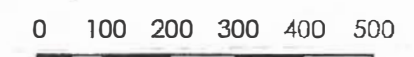
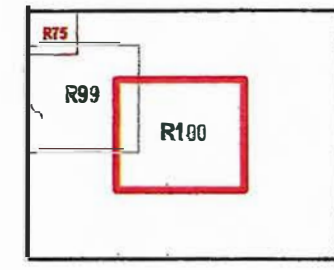
Section 2 R100



# City Plan

Planning Map

**R100**



Scale = 1:10,000

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**Tauranga City**



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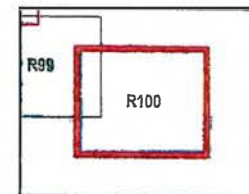


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### City Plan

Planning Map

**R100**



0 100 200 300 400 500



Meters

Scale = 1:10,000

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Tauranga City

Annexure B

