**IN THE HIGH COURT OF NEW ZEALAND**
**HAMILTON REGISTRY**

**CIV2009-419-1712**

| | |
|---|---|
| BETWEEN | WAIKATO TAINUI TE KAUHANGANUI INC<br>Plaintiff |
| AND | HAMILTON CITY COUNCIL<br>Defendant |

Hearing: 31 March and 1 April 2010

Appearances: J Milne and B J Tree for plaintiff
P M Lang and D Thresher for defendant

Judgment: 3 June 2010

---

**JUDGMENT OF ALLAN J**

---

*In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Thursday 3 June 2010*

*Solicitors/counsel:*
*Bell Gully, Shortland St, Auckland*
*J Milne, j_milne@xtra.co.nz Hamilton*
*P M Lang, p.lang@xtra.co.nz Hamilton*

[1] This is an application for judicial review of a decision by the Hamilton City Council to notify publicly a proposed variation to the Hamilton City Proposed District Plan (HCPDP).

[2] The plaintiff, Waikato-Tainui Te Kauhanganui Inc (Tainui), submits that the Council breached a duty to consult with it as the relevant iwi authority. It seeks declaratory relief, together with an order from this Court quashing the decision of the Council to notify publicly the proposed variation, and an order directing the Council to consult with the plaintiff regarding any proposed variation to the HCPDP affecting it before it is approved and publicly notified.

[3] The defendant, the Hamilton City Council, opposes the application on the grounds that it did not breach its duty to consult, or, if it did, that the Court should not exercise its discretion to grant relief.

**Background**

*Hamilton City Proposed District Plan*

[4] Councils are required to prepare a District Plan under s 73 of the Resource Management Act 1991 (RMA). Schedule 1 of the RMA specifies the process for the preparation, change, and review of Council plans.

[5] The HCPDP was publicly notified on 31 October 1999. Thereafter it progressed though the schedule 1 RMA process. On 27 October 2001 the Council publicly notified its decisions on the submissions it had received.

[6] The HCPDP has not yet been made operative pursuant to cl 20 of schedule 1 and is thus still classified as a proposed plan. Nevertheless, it is accepted that the provisions in the HCPDP relating to Commercial Services and Industrial zones (in contention here) are beyond challenge and the rules deemed operative by the former s 19 (now s 86F) of the RMA. It is to be noted also that the relevant HCPDP

provisions were affirmed by the Environment Court in *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (an appeal was dismissed by the High Court in *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556).

*The Base*

[7] Tainui is the owner and landholder of The Base, a large retail shopping centre at Te Rapa worth some $200 million. It is situated on a 29 hectare site which was vested to the local iwi as part of the Raupatu Treaty claim settlement to which I will return below.

[8] The Base has been developed in stages in accordance with four resource consents issued by the Council between August 2004 and June 2007. Under the provisions of the HCPDP prior to 29 September 2009, the southern 16.8 hectares of The Base were zoned 'Commercial Service' and the northern 12 hectares were zoned 'Industrial'.

[9] Within the Commercial Service zone, retail activity on premises with a minimum floor area of 400m$^2$, or small retail activity as part of an integrated development with a gross floor area in excess of 5,000m$^2$, or offices, were permitted activities under the HCPDP. Subject to certain conditions, resource consent for such activities would usually be granted on application. However, if an activity required 50 or more car parks, that activity would become a controlled activity — that is, it would be permitted subject to traffic management and infrastructure conditions.

[10] Within the Industrial zone, offices and retail activity were permitted activities, provided that retail activity was either not greater than 150m$^2$ or not less than 1000m$^2$. Retail activity was limited to one activity per site. The minimum net site area was 1000m$^2$.

[11] In summary, the provisions of the HCPDP prior to 29 September 2009 restricted the Council's discretion to decline resource consents in relation to The Base, although the Council retained limited discretion to impose traffic management and infrastructure conditions on controlled activities.

*Reasons for Variation 21*

[12] Under these HCPDP rules, The Base has developed considerably, providing both large format retailing and a complex of small shops, with plans to develop further.

[13] The original development plan for The Base was for large format retail activity only, but subsequently small format stores in two mall structures have been authorised, and Tainui plans to establish a full town centre on the site in order to meet what it believes to be significant market demand.

[14] By mid-2009 the Council had formed the view that these liberal HCPDP rules (and particularly those directly affecting The Base) were undermining the sustainable and efficient operation of the Hamilton CBD. The Council was increasingly concerned, for example, that the Hamilton central retail area was the only sector of the city suffering from a decline in retail trade employment. Mr Kivell and Mr Tremaine (both expert witnesses) each gave evidence on behalf of the Council to the effect that The Base was drawing custom away from the CBD and other suburban business centres.

[15] The Council also considered that the existing HCPDP rules inappropriately constrained the Council's discretion when assessing resource consent applications relating to The Base. The rules did not, for example, allow the Council to take into account the impact of granting a resource consent on other retail shopping areas. The Council also considered that the existing rules conflicted with the Regional Policy Statement and emerging Future Proof sub-regional growth strategy. It decided that urgent action was needed to remedy what it saw as a rapidly growing problem.

*Variation 21*

[16] By way of response to the perceived inadequacies of the HCPDP rules, the Council developed a proposed variation to the HCPDP ("Variation 21"). Variation 21 introduces new assessment criteria which emphasise the need to maintain the

CBD as the principal retail and commercial hub of the city. On receiving a resource consent application, the Council may in terms of Variation 21 take into account inter alia:

> iv) The extent to which the needs of the activity could not be met within the CBD.
>
> v) Any potential adverse effects on the function and amenity of the central city through the dispersal of major employment or travel generating development, the diversion of trade and the accessibility and convenience of services and facilities of citywide and sub-regional importance.

[17] Variation 21 also imposes greater restrictions on retail and office activity, so directly affecting The Base. Within the General Commercial Service zone, retail activity on premises exceeding 150m$^2$, and office activity on premises exceeding 250m$^2$, become discretionary activities (while activities on smaller premises are permitted activities). Within the Industrial zone, ancillary offices and ancillary retail activity less than 150m$^2$ are permitted; offices less than 250 m$^2$ are discretionary; and offices greater than 250m$^2$ and retail activity greater than 150m$^2$ are non-complying.

[18] The effect of Variation 21 is to give the Council greater control over the resource consent procedure and a significantly greater discretion in respect of the future development of The Base.

[19] The Council publicly notified Variation 21 on 29 September 2009.

*Consultation*

[20] Under cl 3(1)(d) of schedule 1 of the RMA, the Council is required to consult the tangata whenua of the relevant area during "the preparation of a proposed policy statement or plan". Tainui alleges that the Council breached its statutory obligation under cl 3(1)(d) in that it was not consulted before public notification of Variation 21.

[21] The Council accepts that the plaintiff represents the tangata whenua of the affected area for the purposes of cl 3(1)(d). The Council also accepts that it chose

not to engage in consultation with Tainui before publicly notifying Variation 21. The primary issue is, therefore, whether cl 3(1)(d) requires consultation before notification of a proposed variation.

*Reasons for prompt action on Variation 21*

[22] Before turning to a discussion of the nature and extent of the Council's obligation to consult, it is useful briefly to explain the reasons the Council gives for deciding not to engage in a consultation process with Tainui before publicly notifying Variation 21.

[23] The concerns that led to Variation 21 are encapsulated in the Council's s 32 report, which at s 3.4 reads:

> This variation recognises that whilst Council has embarked on a review of the Proposed District Plan, that process will take some considerable time to reach the stage where it would be capable of public notification and will be considerably before it will be capable of having legal effect. The significance attached to matters of commercial development and the role of Hamilton CBD in the Future Proof strategy suggests to Council that it would be preferable to address these matters, at least in part, through an early variation process, rather than await the district Plan review and its eventual notification.
>
> The current exercise also has recognised that with the passing of the Resource Management Amendment Act in September, that notification of a variation after October 1, 2009 would have no legal effect until Council has made decisions, possibly in six months time or later.
>
> The exercise also recognises the RMA context within which any variation would need to be progressed. The variation needs to clearly identify and articulate the resource management issues and satisfy the requirements of Section 32 of the Act to ensure that any objective is the most appropriate way of fulfilling the purpose of the Act and that any policy or rule change is the most appropriate method for achieving the objective.
>
> The general position of the Council leading up to preparing this variation as a matter of urgency is as follows:
>
> - The concern over the loss of retail enterprises from the CBD has heightened over recent years;
>
> - The concern over the possible loss of public confidence in the existing CBD by developers, business enterprises and the community, as a vibrant and vital part of the heart and identity of Hamilton City;

- The concern over safeguarding and maximising long standing and recent significant public investment in the infrastructure, public spaces, and public facilities in and around the CBD;

- The concern that the current District Plan provisions whilst successful in enabling new and modern commercial areas to establish throughout the City during a time of considerable population and economic growth and wealth creation, the benefits of that liberalisation (market-led change) have 'run its course' and a more 'managed' strategy needs to be incorporated in to Plan policy to promote an integrated and sustainable future urban environment for Hamilton;

- The concern over the development of significant traffic generating activities outside the CBD and their impacts on parts of the City network have not been matched by timely public investment in road network improvements as these improvements have become increasingly hard to programme and fund in the Council's Long Term Council Community Plan (LTCCP);

- Investment in road network improvements has also diverted or deferred other significant public investment; and

- Depletion of the industrial land resource by non-industrial activity.

[24] Tainui is arguably in something of an unusual position. It is the relevant iwi authority under cl 3(1)(d) and s 2(1) of the RMA, and represents the tangata whenua with mana whenua over the rohe of Waikato-Tainui in the Hamilton City region. However, it is also a very substantial property owner in Hamilton with a direct financial interest in the effect Variation 21 will have, in particular on The Base.

[25] The Council decided not to consult Tainui before notifying Variation 21 for two reasons. First, it was concerned that consultation before notification of the variation would be likely to result in the plaintiff making applications for protective resource consents in anticipation of Variation 21 taking effect. In the Council's opinion, this would have allowed the plaintiff to secure its position under the pre-Variation 21 HCPDP rules in a manner which would largely defeat the purpose of Variation 21.

[26] Mr Milne for Tainui agrees that the effect of notifying Variation 21 before consultation has been that Tainui was deprived of an opportunity to apply for resource consents under the pre-Variation 21 HCPDP rules. He submits, however,

that this was permissible under, and in fact protected by, the schedule 1 RMA procedure.

[27] The second reason for publicly notifying Variation 21 in September 2009 is closely related to the first. Under the RMA as it stood prior to 1 October 2009, a variation to a district plan that has not been made operative took effect from the date of public notification: cl 16B(2), schedule 1 of the RMA. That is, the replaced proposed district plan provisions would cease to have effect immediately on public notification of a variation, and resource consent applications would fall to be determined only against the provisions of the variation (notwithstanding that the variation may be at an early stage of the schedule 1 process and still subject to challenge).

[28] However, as from 1 October 2009, an amendment to the RMA modified this rule. Under s 86B of the RMA (inserted by s 68 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009), variations to proposed district plans no longer take effect immediately on public notification. Instead, a variation takes effect (subject to specified exceptions) only after submissions on the variation have been received and the Council has publicly notified its decision on those submissions. (One of the exceptions enables a Council to apply to the Environment Court for an order that a variation take effect at an earlier date: s 86B(1)(b).)

[29] The Council readily acknowledges that it deliberately notified Variation 21 before the Amendment Act came into force on 1 October 2009. Subject to s 86B(1)(b), Variation 21 would not have taken immediate effect if it had been notified after the Amendment Act came into force. That would have opened the door to Tainui, enabling it to protect its position by applying for resource consents before submissions on Variation 21 could be decided upon. The Council desired to forestall any such action by Tainui. So it ensured that public notification occurred before 1 October.

[30] Variation 21 was publicly notified on 29 September 2009. It is common ground that, under the transitional provisions of the Amendment Act, Variation 21 is

to be dealt with under the provisions of the RMA in effect immediately prior to 1 October 2009.

**Summary of Issues**

[31] Tainui's standing is not challenged. Mr Milne, for the plaintiff, submits that the Council was under a duty to consult Tainui before publicly notifying proposed Variation 21, that in not performing this duty the Council has adversely affected Tainui, and that accordingly the Court should grant Tainui relief.

[32] Mr Lang, for the Council, submits that cl 3(1)(d) does not require consultation before notification, or that if it does, the circumstances of this case justified the Council's decision to undertake post-notification discussions instead. Mr Lang further submits that, if the Council is in breach of its cl 3(1)(d) obligation, the Court should nevertheless refrain from exercising its discretion to grant relief.

[33] This case therefore raises three issues:

a) Whether as a matter of strict statutory construction cl 3(1)(d) requires consultation before notification of a proposed variation;

b) Whether, even if the answer to issue (a) is "yes", a purposive approach to the RMA permits flexibility with regard to the timing of compliance with the consultation requirement; and

c) Whether, if Tainui has made out its case, the Court should exercise its discretion to grant relief.

**Whether as a matter of statutory interpretation clause 3(1)(d) requires consultation before notification of a proposed variation**

[34] Clause 3 of schedule 1 of the RMA provides:

**3 Consultation**

(1) During the preparation of a proposed policy statement or plan, the local authority concerned shall consult—

(a) the Minister for the Environment; and

(b) those other Ministers of the Crown who may be affected by the policy statement or plan; and

(c) local authorities who may be so affected; and

(d) the tangata whenua of the area who may be so affected, through iwi authorities; and

(e) the board of any foreshore and seabed reserve in the area.

(2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.

…

(4) In consulting persons for the purposes of subclause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.

[35] Mr Milne submits that under cl 3(1)(d) the Council was required to consult Tainui before notification of Variation 21. He refers in that respect to cl 2(1) of schedule 1, which provides:

**2 Preparation of proposed policy statement or plan**

(1) The preparation of a policy statement or plan shall be commenced by the preparation by the local authority concerned, of a proposed policy statement or plan.

[36] Mr Milne submits that cl 3(1)(d) contemplates consultation with iwi during the preparation of a proposed plan. In this case, Variation 21 is the proposed plan. As preparation of a variation occurs prior to notification, Mr Milne argues that the consultation period must necessarily occur before such notification.

[37] Mr Lang for the Council focuses on the definitions of the terms used in cl 3. In particular, he emphasises that under s 2 (now s 43AAC), "proposed plan" means a "proposed plan, or variation to a proposed plan, or change to a plan that has been notified under cl 5 of Schedule 1 but has not become operative". This may be contrasted with the s 2 (now s 43AA) definition of a "district plan", which is defined as an "operative plan".

[38] Mr Lang submits that cl 3 is directed at the preparation of a "plan", and that the process of preparation of a plan is the whole schedule 1 process, from the

preparation of a "proposed plan" through to the time when that plan becomes operative. Hence, consultation may occur at any stage of this process. Though Mr Lang accepts that in most situations consultation under cl 3 would be expected to occur in the early stages, he submits that the circumstances of this case illustrate why it may be appropriate for consultation to occur later. I will address these circumstances at a later stage in this judgment.

[39] It is apparent that counsel on either side interpret cl 3 differently. Mr Lang reads the phrase "preparation of a proposed policy statement or plan" to mean either 'preparation of a proposed policy statement', or 'preparation of a plan'. Mr Milne, on the other hand, reads the phrase to mean either 'preparation of a proposed policy statement', or 'preparation of a proposed plan'.

[40] If cl 3 on its proper construction reads as Mr Lang interprets it, then the consultation process could technically take place at any time before the plan becomes operative. If, however, cl 3 reads as Mr Milne interprets it, then the Council was under an obligation to consult Tainui during the commencement stage — that is, while preparing the proposed plan.

*Analysis*

[41] I consider that cl 2 must bear upon the proper construction of cl 3. Clause 2 makes sense only if the phrase "proposed policy statement or plan" is read to mean "proposed policy statement or proposed plan". The term "proposed plan" is defined as meaning a plan that has been notified under cl 5 of schedule 1, but has not become operative. At the point of notification therefore, the process of preparation of the proposed plan ceases.

[42] In order to achieve consistency with cl 2, the opening words of cl 3(1) must be interpreted as meaning "during the preparation of a proposed policy statement or proposed plan …". The preparation process concludes at the time of notification of the proposed plan. Accordingly, the cl 3 consultation obligation, which must be undertaken during the preparation of a proposed plan, must occur prior to public notification.

[43] I reach that conclusion simply upon the basis of what I believe is the proper construction of clauses 2 and 3, read in the light of the definition of the expression "proposed plan". But there are other indicators which also point to that conclusion.

[44] Clause 3(4) of schedule 1 incorporates a reference to s 82 of the Local Government Act 2002 (LGA) which reads:

> **82 Principles of consultation**
>
> (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
>
> (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
>
> (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
>
> (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:
>
> (f) that persons who present views to the local authority should be provided by the local authority with information concerning both the relevant decisions and the reasons for those decisions.
>
> (2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).

[45] Section 82 of the LGA requires consultation to be undertaken before a local authority makes a decision. In this case, the decision was whether to approve proposed Variation 21 for public notification. Subsection (e) requires the local authority to consult with an open mind and, when making its decision, to give due

consideration to the views presented during consultation. Due consideration can only be given if the consultative process precedes the decision.

[46] Curiously, cl 3(4) expressly applies s 82 to cl 3(2), but not to cl 3(1). Nevertheless, it would be an odd result if the principles of consultation found in s 82 of the LGA were to apply to consultation with parties whom the Council was not bound to consult, but did not apply where the Council faced a mandatory obligation to consult.

[47] It may have been that Parliament was concerned to ensure that any discretionary consultation undertaken by a local authority pursuant to cl 3(2) should be meaningful, and so expressly applied the provisions of s 82 of the LGA to that subclause. But it would be logical to infer that Parliament saw no such need to spell out the detail of a local authority's consultation obligations where there was a mandatory duty to consult. Where such a duty exists, there is a settled body of case law which discusses the metes and bounds of public law consultation obligations.

[48] The leading case on consultation principles is *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671. In that case, the Court of Appeal allowed an appeal by the Wellington Airport, holding that the Airport had sufficiently consulted with the airlines prior to notifying them of its decision in relation to the setting of landing fees. The Court cited with approval the discussion of McGechan J in the High Court decision under appeal (at 675):

> Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. To 'consult' is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Despite its somewhat impromptu nature, I cannot improve on the attempt at description which I made in *West Coast United Council v Prebble* at p 405:
>
> > Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.
>
> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while

> quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.

[49] Consultation must be a meaningful process which enables the party consulted to be adequately informed so that it can make intelligent and useful responses. Consultation is a two-way process to be conducted in mutual good faith: *Rural Management Ltd v Banks Peninsula District Council* [1994] NZRMA 412; *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481 at 509.

[50] The primary purpose of consultation is to enable decision-makers to make informed decisions. In *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A080/02, 17 April 2002 at [243] (citing *Minister of Corrections v Northland Regional Council* EnvC A074/02, 8 April 2002 at [547]), the Court stated that:

> The purpose of consultation is twofold. 'The first is to recognise the rights of Maori under the treaty as a party which has a right to be consulted (the recognition limb). The second purpose is to obtain appropriate and accurate information on the potential effects and effects on affected Maori (the information limb).'

[51] Furthermore, the party required to consult must approach the consultation with an open mind. Where the consulting party has already finally decided upon the matter, true consultation cannot occur. In *Wellington International Airport Ltd v Air New Zealand* at 684–685, the Court summarised what might be expected of a party before it could be said that a decision was made after consultation:

> If the party having the power to make a decision after consultation holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation.

[52] Mr Milne submits that the key principle is that consultation cannot occur when a proposal is already decided upon; consultation is the discussion that occurs before deciding what will be done. I agree.

[53] *Ngati Kahu v Tauranga District Council* appears to be the sole case dealing with the consultation requirement in respect of a plan change. In that case, the issue concerned the adequacy of consultation. The Planning Tribunal (now the Environment Court) said at 510:

> [W]hile consultation is expected to assist the council in fulfilling its function under the Act in the formulation of a plan change, once the change is notified, the council has to stand back and proceed to hear and consider all submissions and cross-submissions in a judicial manner, impartially determining them on their merits. In other words, when the council has entered its "judicial phase" in relation to a plan change, it must be free to determine any submission or cross-submission made to it on the change, without being fettered in its decision-making responsibility by an understanding reached prior to the change's notification.

[54] The Tribunal clearly considered that consultation should precede notification.

[55] The "judicial phase" to which the Tribunal refers is the role the Council takes as decision maker in receiving and considering submissions on a variation or plan change after it has been notified. As Mr Milne submits, the distinction between the judicial phase and the consultation phase is important. The determination of submissions is a judicial process based on the evidence presented in light of a notified proposed plan. It is inconsistent with a consultative approach, which requires the consulting party to discuss a proposal that has not yet been decided upon. The Tribunal in *Ngati Kahu* found that the Council's attempt to meet its consultation obligation after notification was "misconceived" (at 509):

> We consider this post-change consultative approach of the council, though doubtless well-intentioned, to be misconceived. … In effect, the council has sought to consult against the background of Bethlehem's planning future having been determined by the change.

[56] Mr Lang for the Council nevertheless submits that consultation can occur concurrently with the submissions process. He suggests that the formulation of the submissions process as a judicial process which is incompatible with consultation, is "an oversimplified account of the process". The process of changing a plan post-

notification requires the Council to conduct discussions with various submitters, stakeholders and consultants, all of which will influence the development of a plan change. Consultation after notification of the variation can still affect decisions that are part of the process and so affect the outcome, he argues.

[57] To illustrate this, Mr Lang points out that, soon after notification of Variation 21, the Council opened two channels of consultation with the plaintiff. The Council engaged in consultation with Tainui's representatives personally, as well as with Nga Mana Toopu o Kirikiriroa (NAMTOK), the consultation body appointed by Tainui for ordinary RMA consultation purposes. The discussions were held on a 'without prejudice' basis and the parties have both respected that in this proceeding. The discussions did not result in agreement and the meetings have now been discontinued. However, Mr Lang submits, that does not preclude further consultation during the schedule 1 submissions and appeal processes.

[58] Mr Lang argues that there is nothing Tainui could have said, before notification, to influence Variation 21 that it cannot say in consultation after notification. He contends that, because Variation 21 is still in the 'proposed' phase, issues raised both in consultation and through the submissions process can influence its ultimate form.

[59] The difficulty with that argument is that it effectively diminishes Tainui's right to prior consultation to a right to make submissions on a notified variation; a right which it enjoys in any event. The argument flies in the face of the nature and purpose of a statutory right to be consulted.

[60] The plain intention of the Legislature was, in my view, to ensure that tangata whenua were consulted before notification of a proposed plan. That conclusion is reinforced by the chronological sequence of the clauses set out in schedule 1.

[61] Preparation of a proposed plan is the commencement stage (cl 2(1)). This stage requires consultation with specified parties (cl 3(1)) and permits consultation with other parties (cl 3(2)). Clause 4 outlines certain requirements which must precede notification of a proposed district plan. Only after these clauses have been

complied with may the Council publicly notify the plan under cl 5(1). Following notification, the Council opens the submission process (cl 6), summarises the submissions and calls for further submissions (cl 7), ultimately coming to a decision on each submission (cl 10). Hence, consultation under cl 3 must logically precede notification under cl 5.

[62] The meaning of an enactment must be ascertained from its text and in the light of its purpose: s 5(1) of the Interpretation Act 1999. I consider that the plain meaning interpretation of cl 3 supports the conclusion that consultation must occur prior to notification. Clause 3(1)(d) requires a local authority to consult with the relevant iwi authority during the preparation of a "proposed" plan. This is apparent both from the language of the clause itself and from the chronological sequence in which schedule 1 is organised.

[63] The process of preparing a proposed plan ceases at the point the proposed plan is notified. At the point of notification, a decision has been made on the form of the proposed plan. The proposed plan then moves from the schedule 1 preparation stage to the next stage, involving the submissions process. In order for consultation to be effective, it must occur before the proposed plan is notified. The consultation process is inconsistent with, and therefore must precede, the judicial phase of the submission process: *Ngati Kahu* at 510.

[64] This approach reflects the manifest purpose of cl 3, and is consistent with both s 82 (1)(e) of the LGA and the observations of the Court of Appeal in *Wellington International Airport Ltd* at 684–685. Consultation is the process which aids a Council to come to its decision on the content of a proposed plan during its preparation. If the Council engages in consultation after notification, it is consulting on a plan upon which it has already made a decision.

[65] Finally, an interpretation in line with Mr Lang's reading of cl 3 would produce illogical consequences. Under such an interpretation, the HCPDP itself would still be in the preparation stage because it is not operative. If that were the case, the Council would technically still not yet be obliged to undertake consultation

in relation to the HCPDP, despite the submission process having been substantively completed a very long time ago.

**Whether a purposive approach to the RMA permits flexibility with respect to the consultation requirement**

[66] Mr Lang submits that there is sufficient flexibility in the language of the RMA to justify consultation after notification of a variation despite the requirements of cl 3. He argues that if the fulfilment of the RMA's purpose is considered, on reasonable grounds, to be likely to be compromised by strict adherence to the prescribed procedure, departure from the procedure should be within the discretion of the Council. He relies on ss 5 and 72 of the RMA.

[67] Section 5 provides that the purpose of the RMA "is to promote the sustainable management of natural and physical resources". The purpose of district plans "…is to assist territorial authorities to carry out their functions in order to achieve the purpose of…" the RMA: s 72.

[68] Mr Lang submits that the purposes of the RMA would in this case be undermined by strict adherence to the cl 3(1)(d) consultation requirement. In brief, his argument is that, had consultation with Tainui in its capacity as the iwi authority preceded notification of Variation 21, Tainui in its capacity as owner of The Base would have been able to secure its position by applying for resource consents under the pre-Variation 21 rules, so undermining the effectiveness of Variation 21. That being so, he submits that the requirement that consultation occur before notification must be subservient to the overarching purpose of the RMA (in particular s 5) and the need for Variation 21 to be effective.

[69] Mr Lang summarises the Council's position as follows:

> 2.14 The Defendant's situation is that it wishes to propose significant changes to its District Plan to achieve better alignment with its strategic planning documents, particularly in relation to the CBD, and at the same time it faces requirements to consult with one of the most significant stakeholders that stand to be affected by the proposed plan changes. That situation might not be a difficult one if it were not for the fact that the provisions of the RMA and the

> Proposed District Plan would enable that stakeholder to preserve its rights and opportunities under the existing plan provisions if it becomes aware of the proposed changes.
>
> 2.15 On the one hand the Council believes the best interest of the city and the sub-region will be served best by promoting the proposed variation with a minimum of advance notice, to avoid the purpose of the variation being significantly undermined through pre-emptive applications for authorisation. On the other, it is faced with a requirement to consult with a party that arguably has the greatest incentive to undermine that purpose.
>
> …
>
> 4.15 The Defendant had received from its consultants a recommendation that the best way of pursuing the purpose of the Act is to proceed with Variation 21. … That advice followed a review of the present provisions of the Proposed District Plan, assessed against the most recent strategic planning document for the sub-region and the city. The Council had also received advice about the opportunities that prior consultation would provide to a party with the potential to significantly undermine the effectiveness of such a variation.

[70] The advice to which the Council refers is to be found in part in a s 32 report dated 21 September 2009 prepared by Mr Kivell, a resource management consultant with Environmental Management Services Ltd, which worked with the Council on the proposed Variation 21. The Council also relied on evidence by Mr Redman, the Hamilton City Council Chief Executive Officer and previous Mayor of Hamilton from 2004 to 2007. In his s 32 report summary, Mr Kivell stated:

> Overall, it is considered that the amended and new objectives and policies, and rules [in Variation 21] are necessary to address the significant resource management issues identified. These provisions will enable Council and the community to provide for their social, economic and cultural wellbeing (section (5.2)), the efficient use and development of physical resources (section 7(b)), the maintenance and enhancement of the amenity values (section 7(c)), and the maintenance and enhancement of the quality of the environment (section 7(f)) as required under the Purpose and Principles of the RMA 1991.

[71] The crux of the issue is whether the Council should be able to prevent a party from preserving its rights and opportunities under existing plan provisions in anticipation of a proposed variation taking effect. Mr Lang submits that the Council must retain a discretion in order to preserve the effectiveness of a proposed variation. Absent a discretion, he maintains, the purposes of the Resource Management Act

may not be achieved. In other words, Tainui's statutory consultation rights must be subordinated to what the Council regards as the greater public good.

[72] Mr Milne submits that Councils do not have a discretion and raises a number of objections to Mr Lang's approach, which if upheld would, he claims, defeat the intention of Parliament. Mr Milne's objections may be summarised as follows:

a) Parliament did not legislate for an exception to the cl 3(1)(d) duty to consult, or grant Councils a discretion not to adhere to an obligation expressed in mandatory terms. The Council has not provided any authority to support the proposition that the purposes of the RMA can be invoked to justify a failure to comply with a specific statutory duty.

b) The present case involves no "unusual circumstances" and does not in any event warrant a departure from the Council's legal obligations, even if a discretion existed. Tainui is by no means the only iwi authority with significant property interests.

c) The purposes of the RMA are more likely to be achieved through early, rather than delayed, consultation. In performing its duties, the Council is under an obligation to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands (s 6(e)), to have regard to Kaitiakitanga (s 7(a)), and to take into account the principles of the Treaty of Waitangi (s 8). Consultation is the process by which these principles may be addressed. To defer consultation would be contrary to the Council's statutory obligations.

d) Had the HCPDP earlier been made operative (an obligation which must be met "as promptly as is reasonable in the circumstances": s 21), the proposed amendment would have been effected by way of a plan change. In that event, cl 16B would not have applied and the amendment would not have taken effect immediately on public

notification. To that extent, the Council seeks to take advantage of its dilatory approach to the administration of the HCPDP.

e) The new s 86B is intended specifically to enhance the ability of stakeholders to preserve their rights and opportunities under existing plan provisions by postponing the time at which variations to proposed plans take effect.

f) The Council has had years to review its Plan provisions in light of the expansion of The Base, which has occurred incrementally over time. The only explanation for recent urgency is the Council's desire to notify Variation 21 before s 86B came into effect, and thereby to defeat the will of Parliament.

[73] Mr Milne's objections highlight the difficulties inherent in the Council's position. Notwithstanding that there may be a legitimate need to protect the CBD by amending the HCPDP (as to which it is unnecessary to express any view) it is difficult to accept that prior consultation is inimical to that process. The obligation to consult with iwi about proposed plans is an important principle, protected by the RMA. Its purpose is to facilitate good faith discussions which might influence the drafting of such plans. To hold that a Council can bypass the consultation requirement because of its potential effect on the effectiveness of a proposed plan would run contrary to that purpose. The right to be consulted is conferred primarily in order that iwi have a prior opportunity to influence the drafting of the plan.

[74] Mr Lang presents the issue as a choice between competing interests: Tainui's ownership interest versus the public interest in protecting the CBD. I do not consider such stark adversarial language to be appropriate. Rather, consultation is a process by which parties with different interests can discuss in good faith their concerns and suggestions for proposed plans.

[75] Consultation prior to notification may result in an increase in resource consent applications to preserve a stakeholder's current position. However, such an outcome does not appear to conflict with the purposes of the RMA. The legislation

contains no exception to cl 3(1)(d) on these grounds. Moreover, the new s 86B clearly indicates Parliament's intention to reconcile the differences between the implications of notifying a variation and notifying a change to a plan. The risk of protective resource consent applications presents no bar to pre-notification consultation.

[76] Mr Milne further submits that the Council has not met the evidential burden of establishing its claim that Variation 21 is necessary in order to satisfy the purposes of the Resource Management Act; nor has it established a causative link between activities at The Base and the alleged effects on the CBD. It is not necessary for me to analyse that argument. Nor is it appropriate for me to make an assessment of the merits of Variation 21 from a resource management viewpoint, despite the voluminous affidavit evidence tendered on that topic by both parties.

[77] I consider Mr Milne's argument to be unanswerable. The Council was under a statutory duty to consult with Tainui before notification of Variation 21. It has breached that obligation. The arguments advanced by Mr Lang do not persuade me that there is anything so exceptional about this case as to justify a departure from the language of cl 3 even if there is (contrary to my conclusion) a discretion to do so.

**Whether the Court should exercise its discretion to grant relief to Tainui**

[78] Tainui seeks the following relief:

a) A declaration that the approval of Variation 21 for public notification is unlawful, invalid and of no effect;

b) An order quashing the decision of the Council to notify publicly proposed Variation 21 to the HCPDP;

c) An order directing the Council to consult with the plaintiff regarding any proposed variation to the HCPDP affecting the plaintiff before any variation is approved and publicly notified.

[79] The grant or refusal of relief involves the exercise of a judicial discretion. Both counsel referred to the following passage of the Court of Appeal in *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139:

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
>
> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL), Lord Bingham of Cornhill described the discretion as being "very narrow" (at 608) whereas Lord Hoffmann said cases in which relief would be declined were "exceptional" (at 616).
>
> [61] In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief. The usual assumption is that where there is "substantial prejudice" to the claimant, a remedy should issue: *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 at 122 (HC).

[80] Mr Lang argues that the Court should decline relief in this case because:

a) The consequences of any procedural failure by the defendant are not significant for the plaintiff and are of short duration.

b) The balance between serving the wider public interest and meeting the plaintiff's interests will be best met by the plaintiff participating in the submission and appeal procedures provided in schedule 1 of the RMA, and not by providing the relief sought.

*Whether the consequences of the procedural failure are insignificant*

[81] Mr Lang submits that when assessing the loss or harm resulting to Tainui, only that loss or harm caused by a lack of pre-notification consultation may be considered (and not the harm that eventuated by reason of the notification itself). In that regard, Mr Lang states that Tainui's loss is minimal because any influence it might have had in pre-notification consultation may equally be exerted in post-notification consultation.

[82] Changes introduced as a result of consultation with Tainui would have been effective at the date of notification. Mr Lang submits however that this would produce only a small short-term benefit to Tainui because the changes would make a difference only during the period from notification of the variation until the notification of the Council's decision on submissions with respect to the variation. Nevertheless, the submission identifies in my view a potential benefit to Tainui which it was not able to realise.

[83] Mr Lang submits further that, regardless of consultation, the Council would not have produced a plan significantly different from Variation 21. There is evidence from Council deponents to that effect. It must be said that such evidence suggests a degree of misapprehension on the part of the Council about the nature and extent of the obligation to consult. Some of that evidence tends, disappointingly, to indicate a closed mind on the Council's part.

[84] Finally, Mr Lang submits that Tainui has not established that it suffered any loss or harm as a result of the absence of pre-notification consultation. I do not consider that submission to be correct.

[85] Several witnesses gave evidence for the plaintiff. Among them was Mr Morgan, chairperson of Te Arataura, the executive Board of Te Kauhanganui, itself the governing body of Tainui. Mr Morgan says that pre-notification consultation would have enabled the plaintiff to provide a degree of input into the Council's deliberations, and in particular, to advance arguments which might tend to:

a) avoid, remedy or mitigate the significant adverse effects on the social, economic and cultural well being of the plaintiff;

b) provide recognition of the relationship of the plaintiff with their lands (and in particular The Base as Treaty Settlement land);

c) ensure that Variation 21 had regard to Kaitiakitanga and the ethic of stewardship; and

d) ensure that the principles of the Treaty of Waitangi were taken into account.

[86] The points made by Mr Morgan reflect to some extent the provisions of ss 5–8 of the RMA. The importance of those sections in the context of consultation obligations was underscored by the Environment Court in *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001. At [447] the Court said:

> [447] The essence of consultation is such that, at the end of the day, we can make an informed decision. That is, one that is sufficiently informed as to the relevant facts and law, so that we can say we have had proper regard to the provisions of ss 6(e), 7(a) and 8 of the Act. Furthermore, those sections should not be read in isolation but should be considered as being integral to achieving the single purpose of sustainable management, as expressed in s 5, and consistent with the remaining provisions of Part II which are subordinate and accessory to s 5.

[87] With guidance from its consultants, the plaintiff would also have been able to highlight certain issues appearing in the s 32 report, which may have produced important changes to the ultimate shape of Variation 21. In addition, the plaintiff believes that the Council ought to have considered non-regulatory options aimed at facilitating development within the CBD. These included rating reductions or breaks, relaxation of current parking provisions, more innovative urban design, traffic flow alterations and similar mechanisms aimed at offsetting the identified development difficulties within the CBD which are of concern to the Council.

[88] At this point it is appropriate to say something about the status of The Base. Evidence on the topic was given in an affidavit by the Hon Koro Wetere. Although the land upon which The Base is situated was not Maori land as such, the property formed part of the historic settlement achieved with the Crown in 1995. The background history is set out in the preamble to the Waikato Claim Settlements Act 1995. Mr Wetere describes The Base and its importance as an asset that is able to further the goals and policies of Tainui by providing a future income stream for the tribe. Profits from The Base are returned to marae and to Tainui members by way of educational grants and as distributions made for cultural and health purposes. The Base is valued at approximately $200 million and forms about one-third of the total

value of the Raupatu settlement. It is the jewel in the settlement crown for Tainui. Anything which tends to reduce the value of The Base and therefore the plaintiff's ability to care for tribal members from the income The Base produces, is of the gravest concern to the plaintiff. For these reasons, the interests of the plaintiff in its capacity as a significant landholder affected by Variation 21, and its iwi authority interests are closely related, and indeed are largely inseparable.

[89] Because the plaintiff was not consulted prior to notification, it has lost the opportunity to lay before the Council all of these considerations. To minimise these issues, as Mr Lang's submission tend to do, is to overlook the important link between the plaintiff and The Base, which represents in its most tangible form the on-going importance to Tainui of the Raupatu settlement.

[90] The obligation to consult with the relevant iwi authority is mandatory and unconditional. All that is required is that tangata whenua be "affected" by the proposal. Responsibly, Mr Lang does not contend that the plaintiff is not affected. It does not matter that The Base was not formerly land of exceptional significance to Tainui, as Mr Milne points out. Much of the Waikato was formerly Tainui land in a general sense, but The Base has now become an area of particular importance to the plaintiff by reason of the terms of the Raupatu settlement. In other words, there is a direct nexus of significant importance between the plaintiff and The Base: see in a somewhat different context the observations of Holland J in *The Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* HC Wellington M655/86, 31 March 1987 at 8–9.

[91] The nature and extent of the right to be consulted is discussed in such cases as *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 at 609 and *Ngati Maru Iwi Authority Inc v Auckland City Council* HC Auckland AP18/SW01, 24 October 2002. An iwi authority has the right under the RMA to be consulted partly by way of recognition of the rights of Maori under the Treaty, and partly in order that the Council may obtain appropriate and accurate information on the effects and potential effects of a proposed plan, variation or change on affected Maori interests. The plaintiff has lost that opportunity in the present case. It cannot be contended that Tainui has suffered no (or minimal) loss.

[92] It is, in my opinion, no answer to say, as certain of the Council's deponents do, that by reason of the existing close relationship between Council officers and various Tainui representatives, the Council already has a detailed understanding of the aspirations of the plaintiff and its members and of all matters which the Council ought to take into account when considering the interests of the tangata whenua. The divergence of views expressed in the affidavits suggests that the Council's confidence about its understanding of the issues may be somewhat misplaced. But quite apart from that, there is an important issue of process to consider. Put simply, Tainui had the right under the RMA to be consulted irrespective of the extent to which Council officers or indeed the councillors themselves were already informed.

[93] To decline relief upon the ground that the Council already had sufficient information would, in circumstances such as these, be to negate the plaintiff's right to be consulted.

W*hether the schedule 1 submission and appeal procedures are a better alternative to relief*

[94] Both parties acknowledge that, occasionally, a district plan change or variation is notified without specific public consultation where that is necessary to avoid serious adverse effects. Mr Lang submits that the present situation reflected such a need. He submits that "liberal" pre-Variation 21 rules were undermining the CBD's ability to perform its identified and intended role. The Council decided that immediate action was required, and that delaying consultation was necessary to avoid a rush of consent applications.

[95] As discussed earlier in this judgment, I do not accept that this was a situation where notification without the statutorily prescribed consultation was necessary to avoid serious adverse effects. On the contrary, Tainui has been affected adversely because the Council did not consult.

[96] The consultation duty is consistent with the purposes of the RMA. As the Tribunal in *Ngati Kahu* noted, the "judicial" function of the Council in hearing and making decisions during the submissions process is incompatible with its duties to

consult with an open mind. It is no answer to say that Tainui can engage in meaningful consultation on the proposed variation while also engaging in the schedule 1 submissions process. The discussions which often accompany that process are of quite a different order from the consultation envisaged by 3(1)(d).

[97] None of the reasons provided by Mr Lang present as "extremely strong reasons to decline to grant relief": *Air Nelson Ltd v Minister of Transport* at [60]. In light of the Council's breach of its duty to consult, it is appropriate in my view to grant relief.

*The type of relief which should be granted*

[98] Mr Lang submits that if the Court does consider this to be an appropriate case in which to grant relief, then that the relief should be limited. His concern is that if the whole of Variation 21 were nullified, the present controls on all new commercial development and activity in the Industrial and General Commercial Service zones would be removed. He argues that this would be out of proportion to a procedural breach which affected only one party, and that it would not best serve the purposes of the RMA or the public interest.

[99] He argues therefore that this Court could grant the plaintiff relief by directing the Council to enter into a consultation process with Tainui to determine what (if any) changes should be made to Variation 21. If changes were found to be appropriate, the Council could be directed to notify a further variation to the HCPDP.

[100] Mr Lang recognises that this approach would be frustrated by the new s 86B of the RMA (which provides that a notified variation takes effect only after the submissions process). He submits that this Court could in such circumstances make a further order directing that the Council apply to the Environment Court under s 86D for an order that the new variation take effect immediately on notification (and that if such an order were not granted, the plaintiff could re-apply to this Court).

[101] The relief suggested by Mr Lang presents as an overly complicated remedy in the face of a simple alternative solution. The Council was under a duty to consult Tainui before notification of Variation 21. The Council breached that duty. If a declaration that Variation 21 is invalid results in third parties making protective resource consent applications, that is a consequence which flows from the Council's own breach.

[102] As from 1 October 2009, s 86B permits stakeholders to preserve their positions after notification as a matter of course. There was no demonstrated urgency such as might justify what occurred. The proposed changes to the Regional Policy Statement (with which the Council wished to align the HCPDP) had not become operative. Given the plain legislative intention lying behind s 86B, it is not possible to discern a compelling public policy consideration that suggests the relief sought should not be granted in the exercise of the Court's discretion.

**Conclusion**

[103] The plaintiff's application for judicial review succeeds. There will be:

a) A declaration that the decision of the defendant Council publicly to notify Proposed Variation 21 to the Proposed Hamilton City District Plan is unlawful, invalid and of no effect;

b) An order quashing that decision;

c) An order directing the Council to consult with the plaintiff with respect to any proposed variation to the Proposed District Plan affecting the plaintiff before any further variation is approved and publicly notified.

**Costs**

[104] Having succeeded, the plaintiff is entitled to costs. Counsel may file

memoranda if they are unable to agree.

**C J Allan J**