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To

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From

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By Email

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Tēnā koe Sarah

Local authority statutory obligations to Māori

1. Thank you for your instructions in relation to this matter.
2. You have asked for an overview of Kāpiti Coast District Council's (**Council**) legal and engagement obligations with Māori in the Kāpiti Coast district.

Summary of advice

3. There are a number of express statutory obligations on the Council in relation to Māori and the Treaty of Waitangi. These obligations arise under statutes such as the Local Government Act 2002 (**LGA**), Resource Management Act 1991 (**RMA**) and the Reserves Act 1977 (**Reserves Act**).
4. These obligations require the Council to engage with and build relationships with Māori, and consider Māori values and perspectives, including in the Council's regulatory role and as an infrastructure developer.
5. The nature of the individual legal obligations vary but there are a number of powerful legal obligations that affect the role and functions of the Council. For example, effective working relationships with Māori and addressing Māori values well are key success factors for successful consenting of local authority infrastructure (such as in relation to 3 waters).
6. The legislation is not always clear as to which Māori group should be engaged with. There is a generally accepted practice that local authorities engage primarily with Iwi authorities that represent tangata whenua in the district. While there are also obligations to work with 'Māori', including mata waka (Māori that are from another area), that is often (but not universally) facilitated by the Iwi authorities. The Council will always need to remain open to engaging more broadly if the particular circumstances warrant it.
7. There are currently RMA and 3 waters law reforms underway, and a review of local government has been commenced. It appears that through those various processes, the role and influence of Māori will grow significantly. The recent amendments relating to Māori wards are another example. That further reinforces the strategic importance of strong Council relationships with Māori.

Statutory obligations

8. There are a range of statutory obligations on the Council in relation to Māori and/or the Treaty of Waitangi. These obligations are highly relevant and they set an important context for local government relationships for Māori. The obligations are both directive and enabling – the Council must comply with them; and they provide the legal basis to enable a Council to enter into meaningful relationships with Māori.
9. These obligations are summarised in **Appendix One**.

Who should the Council be working with?

10. There is a generally accepted practice that local authorities engage primarily with Iwi authorities that represent tangata whenua in the district. While there are obligations to work with 'Māori' (under for example the LGA), including mata waka (Māori that are from another area), that is often (but not universally) facilitated by the Iwi authorities. However, most of the obligations under legislation focus on tangata whenua and Iwi authorities, either expressly or through reference to the values and traditions held by tangata whenua.
11. In terms of the Kāpiti Coast district, it appears that the Council is entitled to rely on the views expressed by the three Iwi partners. While the LGA refers to 'Māori' more generally in this context, and in the absence of clear reasons to the contrary, it appears appropriate for the Council to rely on the views of its Iwi partners as tangata whenua.
12. The Council and the Iwi partners have a well-established history of working together with those Iwi representing the views of tangata whenua in the district (that has been reflected in, for example, the Memorandum of Partnership and Te Whakaminenga o Kāpiti).
13. The various documents you have provided (for example the Governance Structure and Delegations and the Memorandum of Partnership) confirm that tangata whenua are represented by those Iwi authorities and that tangata whenua may engage with mata waka.
14. The Courts have recognised that it is appropriate for local authorities to rely on mandated Iwi entities, including in the context where the role of those entities may be disputed. For example, in the recent Mt Messenger case the Environment Court stated:¹

[380] Te Rūnanga and the Agency opposed the inclusion of Te Korowai in the Kaitiaki Forum Group. As all members of Te Korowai whakapapa to Ngati Tama, the other parties considered that Te Korowai's interests are appropriately recognised and represented through Te Rūnanga.

[381] The local authorities also said that such an approach would be unprecedented and administratively inefficient. They argued that as a matter of administrative necessity the Agency, local authorities and other bodies that wish to engage with Ngati Tama must be able to rely on Te Rūnanga as the voice for Ngati Tama. To the extent there may be internal dissatisfaction with the


¹ *Director-General of Conservation v Te Rūnanga O Ngati Tama Trust* [2018] NZEnvC 203.

leadership or direction of Ngati Tama, they are matters that should be left to Ngati Tama to resolve through its own processes.

[382] We think there is considerable force in that submission.

15. There will of course be occasions when the Council may have to consider broader engagement with Māori, for example where an individual Māori land block may be particularly affected by a proposal. There will also need to be mechanisms in place to ensure that the views of mata waka are considered as well, but often that is appropriately achieved through invitations from tangata whenua. Those matters will need to be assessed on a case-by-case basis and at times the requirements are not as clear as they could be.
16. We trust this summary is useful and we look forward to discussing it with you further.

Ngā mihi nui



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APPENDIX ONE

LOCAL AUTHORITY STATUTORY OBLIGATIONS TO MĀORI

1. There are a range of statutory obligations on the Council in relation to Māori and/or the Treaty of Waitangi. These obligations are relevant as they set an important context for local government relationships for Māori. The obligations are both directive and enabling – the Council must comply with them; and they provide the legal basis to enable a Council to enter into meaningful relationships with Māori.
2. However, Councils should not seek to define their relationships with Māori only by way of compliance with legal obligations (in other words by adopting a 'minimum compliance' approach). Rather, those obligations are a baseline for the development of meaningful and effective relationships with Māori.
3. There is considerable scope within the current legislation for local authorities to create relationship frameworks with Māori, and in a form that best suits the local context. The legislation is not particularly limiting in this regard, and if a local authority wanted to, it could involve Māori in significant governance and decision-making processes. In fact, there are obligations on a local authority to, for example, provide opportunities for Māori to contribute to its decision-making processes.
4. There are key provisions within statutes such as the LGA and RMA that both require and enable local authorities to enter into relationships with Māori. More generally, there are a range of other statutory obligations on local government that relate to Māori.
5. There is no one coherent framework for these statutory obligations – rather they have been developed on a statute-by-statute basis over many years, and are framed in different ways depending on the statute in question.
6. It is also important to emphasise that there are different obligations that may apply to the Council depending on the circumstances. For example, under the RMA, there are certain obligations that are relevant to the Council in its regulatory capacity; and others when acting as an applicant for resource consent (eg. when seeking consents for 3 waters infrastructure).
7. The obligations arise under a range of statutes, including:
 - (a) local government legislation (such as the LGA);
 - (b) planning and environmental legislation (such as the RMA);
 - (c) Treaty settlement legislation (such as the Ngāti Toa Rangatira Claims Settlement Act 2014); and
 - (d) other legislation (such as the Reserves Act).
8. There are also other obligations to Māori that arise, for example, under RMA national policy statements such as the New Zealand Coastal Policy Statement.

9. The specific legal obligations vary depending on the statute and the context, and those differences are important. Obligations may focus on (for example):
 - (a) Te Tiriti o Waitangi / the Treaty of Waitangi;
 - (b) recognition of Māori tikanga, values, culture and traditions;
 - (c) participation for Māori in local authority decision-making;
 - (d) recognition of areas or resources of particular significance to Māori; and
 - (e) processes such as consultation.
10. Further, the specific obligations refer to Māori groups or entities in different ways, including:
 - (a) 'Māori';
 - (b) 'tangata whenua' or 'mana whenua';
 - (c) 'Iwi authorities';
 - (d) 'Iwi, hapū, whānau'; and
 - (e) 'customary marine title groups'.
11. Given the range and complexity of these legal obligations, local authorities often find it helpful to have:
 - (a) an overarching framework for the relationship between a local authority and Māori; and
 - (b) within that framework, individual mechanisms to deal with specific issues (for example in relation to particular areas or resources, or under the RMA, or the Reserves Act).

The LGA Treaty provision

12. As a starting point, section 4 is the 'Treaty' section in the LGA.
13. This provision was particularly controversial during the law reform process leading to the enactment of the LGA, reflecting the broader controversy over how Treaty obligations have or have not been devolved to local authorities.
14. Section 4 provides:

4 Treaty of Waitangi

In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.

15. That section focuses on the "*Crown's responsibility*" under the Treaty of Waitangi, and imposes specific statutory obligations on local authorities to reflect that Crown responsibility.²
16. While it is considered that a local authority is not a Treaty partner as such (the formal partnership sits with the Crown), local authorities do have specific statutory obligations relating to the Treaty of Waitangi (section 8 of the RMA is another example). The Treaty is therefore directly relevant to local authorities under legislation, and many local authorities base their relationships on the principles of the Treaty (including principles such as partnership, acting in good faith, informed decision-making and active protection of Māori interests).

Other key LGA provisions in relation to Māori

17. The key provisions in the LGA that frame the opportunity for a strategic relationship with Māori are section 14(1)(d) and section 81.
18. Section 14 of the LGA sets out the principles of the Act including:

14 Principles relating to local authorities

- (1) *In performing its role, a local authority must act in accordance with the following principles:*

...

- (d) *a local authority should provide opportunities for Māori to contribute to its decision-making processes...*

19. Section 81 of the LGA expands on the principle under section 14(1)(d) referred to above:

81 Contributions to decision-making processes by Māori

- (1) *A local authority must—*

- (a) *establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and*
- (b) *consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and*
- (c) *provide relevant information to Māori for the purposes of paragraphs (a) and (b).*

(emphasis added)

...

20. A key challenge for local authorities is to develop a strategic and relationship-based approach (as required in section 81) to:
 - (a) *"provide opportunities for Māori to contribute to the decision-making processes of the local authority"; and*

² The legal effect of section 4 type Treaty provisions may be stronger than first thought – the decision of the Supreme Court in *Trans Tasman Resources* will be important in that regard.

(b) *"consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority."*

21. That section also provides an opportunity for local authorities who are seeking to build strategic relationships with Māori. The obligation to *"foster the development of Māori capacity"* is often the basis for the provision of funding to Iwi to participate in local authority processes.
22. Another important obligation is to provide for consultation with Māori. This obligation arises not only under the LGA, but also under other statutes such as the RMA. Section 82 of the LGA requires local authorities to have processes in place to consult with Māori:

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:*

...

(2) *A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).*

23. It is important to emphasise that the obligations on local authorities extend well beyond consultation with Māori. Historically, the primary focus has been on consultation but we are seeing an increasing emphasis on local authority partnerships with Māori.
24. There are a range of other LGA obligations to Māori. For example, section 77 of the LGA imposes a particular obligation on a local authority that is making a significant decision in relation to a land or body of water. This is an example of an obligation that applies specifically to tangata whenua:

77 Requirements in relation to decisions

(1) *A local authority must, in the course of the decision-making process,—*

...

(c) *if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.*

Resource Management Act

25. The RMA imposes a range of obligations on local authorities that relate to Māori. Examples of such obligations are set out below.
26. The sustainable management purpose of the RMA includes a reference to *"enabling people and communities to provide for their ... cultural wellbeing."*
27. Section 6 of the RMA requires local authorities to recognise and provide for the identified matters of national importance:

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(e) *the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:*

...

(g) *the protection of protected customary rights*

28. Section 7 of the RMA requires local authorities to have particular regard to certain matters:

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to:

(a) *kaitiakitanga*:³

...

29. Section 8 of the RMA sets out the obligations on local authorities in relation to the Treaty of Waitangi:

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

30. These are powerful provisions in Part 2 of the RMA and they can have a real influence on RMA processes. That will be even more so if the RMA reforms continue in the same direction.

31. Section 35A of the RMA requires local authorities to keep and maintain records of Iwi authorities representing Iwi and hapū in the region or district.

32. There are specific consultation obligations with 'tangata whenua' through 'Iwi authorities' and any 'customary marine title group' when a local authority is preparing a proposed policy statement or plan under Schedule 1 of the RMA.

33. There are a number of other provisions under the RMA that relate to local authority relationships with Māori, including for example the ability to transfer powers, enter into joint management or the more recent 'mana whakahono a rohe' agreements. There are real complexities in how resource consent applications are processed and determined, while complying with the Māori provisions in

³ This can generally be described as the customary exercise of guardianship by Māori over an area or a resource.

the RMA. Treaty settlements add another layer to that process, as will the proposed RMA law reform.

The Reserves Act

34. The Reserves Act is another statute that imposes obligations on local authorities that administer reserves under the Reserves Act. That obligation arises under section 4 of the Conservation Act 1987 which requires administer bodies of reserve to 'give effect to' the principles of the Treaty of Waitangi. This is a powerful legal obligation which should have a significant impact on how the Council works with Māori in the context of reserves.

Other statutes

35. There are a range of other statutes that impose obligations on the Council (as a regulator or a developer) in relation to Māori and/or the Treaty of Waitangi. Other examples include:
- (a) the Local Electoral Act 2001 (including in relation to Māori wards);
 - (b) the Local Government (Rating) Act 2002 (including recent amendments in relation to rating of Māori land);
 - (c) the Heritage New Zealand Pouhere Taonga Act 2014 (primarily in relation to Council as a developer);
 - (d) the Marine and Coastal Area (Takutai Moana) Act 2011 (primarily in relation to coastal infrastructure); and
 - (e) Te Ture Whenua Māori Act 1993 (in relation to Māori land).
36. It is therefore important to focus on the specific legal obligation and how that is best satisfied in the particular circumstances.