BEFORE THE QUEENSTOWN-LAKES DISTRICT COUNCIL

UNDER THE	**RESOURCE MANAGEMENT ACT 1991**
IN THE MATTER OF	**Inclusionary Housing Proposed Variation to the Proposed Queenstown-Lakes District Plan**
	OFFICE FOR MĀORI CROWN RELATIONS - TE ARAWHITI
	Submitter

LEGAL SUBMISSIONS ON BEHALF OF OFFICE FOR MĀORI CROWN RELATIONS – TE ARAWHITI

26 February 2024

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INTRODUCTION

1. These legal submissions are provided on behalf of the Office for Māori Crown Relations – Te Arawhiti (**Te Arawhiti**) (submitter #127).

2. Te Arawhiti has lodged briefs of evidence from:

   2.1 Ms King, in relation to the background and context of the Hāwea / Wānaka Sticky Forest land (as SILNA Substitute land); and

   2.2 Ms Ellis, in relation to planning matters.

3. In brief, the relief sought by Te Arawhiti is that the land known as "Sticky Forest" be excluded from the variation as a specific exemption in Rule 40.6.1.3 with appropriate policy support (discussed below).

4. In recent related hearings regarding Sticky Forest[1] the name adopted has been Hāwea / Wānaka Sticky Forest. That is the name approved in the PC54 Council decision concerning Northlake and ensuring access to the land (and that decision is beyond appeal). It was also discussed in the recent rezoning appeal heard by the Environment Court. So that is the term that I will use today, or alternatively "the land".

5. I appear as counsel for Te Arawhiti with two witnesses as noted. Also here today is Ms Rouse. Ms Rouse will be an owner of Hāwea / Wānaka Sticky Forest when the land transfers from the Crown. Ms Rouse was also an appellant in the recent appeal to rezone a part of Hāwea / Wānaka Sticky Forest to enable residential development. Ms Rouse also seeks an exemption for Hāwea / Wānaka Sticky Forest.

6. Also being heard this morning is Te Rūnanga o Ngāi Tahu (Ms Stevens) and Aukaha (1997) Ltd, Te Ao Marama Inc and Te Rūnanga o Ngāi Tahu (Ms Pull). These submitters seek an exemption to rule 40.6.1(3) to apply to land identified in s 129 of the Te Ture Whenua Māori Act 1993 and Hāwea / Wānaka Sticky Forest).

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[1] PC 54 and *Bunker and Rouse v Queenstown Lakes District Council* ENV-2018-CHC-69 (the Upzoning appeal).

7. The three groups are submitters in their own right but have asked to be heard together given the overlapping interests.

HĀWEA / WĀNAKA STICKY FOREST LAND

8. As Ms King's evidence (and that of Ms Stevens) explains, Hāwea / Wānaka Sticky Forest is SILNA Substitute land. That is, it is land in substitution for that allocated under the South Island Landless Natives Act 1906 (**SILNA**) to those left without sufficient land to provide a living as a result of land purchases in the 1840s and 1850s, but not transferred before that Act was repealed in 1909. The untransferred land it substitutes was land at 'the Neck' (between lakes Hāwea and Wānaka) allocated to some 50 individuals.

9. In the Ngāi Tahu Deed of Settlement in 1997 the Crown accepted that the failure by the Crown to transfer the Hāwea / Wānaka SILNA Land to the intended beneficiaries after 1906 was a breach of the principles of the Treaty of Waitangi and that there is an obligation on the Crown to complete the transfer. The original land at 'the Neck' was not available as it was subject to a pastoral lease. The Crown and Ngāi Tahu agreed that the Crown would commit the Hāwea / Wānaka SILNA Substitute Land (the Sticky Forest land) in substitution. There is no mechanism to seek an alternative block of land, or other compensation, to provide redress. [2] Under the Ngāi Tahu Deed of Settlement and the Ngāi Tahu Claims Settlement Act 1998, the Sticky Forest land must transfer.

10. The process of identifying the successors of the originally identified recipients has taken time. As of mid-2023 there are 2,070 successors or future owners.

11. Pending transfer to these intended owners, the land vested in the Crown in 1998. Te Arawhiti and Te Puni Kōkiri are currently running a process through which a representative body will be formed to speak for the interests of the successors, including to explore how best to receive and

[2] Evidence in Chief of Dr Terry Ryan, 22 September 2022, at [5.7] and [5.8] attached to the evidence of Ms Rouse dated 19 December 2023.

hold the Hāwea / Wānaka SILNA Substitute Land (now to be called Hāwea / Wānaka Sticky Forest).

12. The land is planted in plantation forest and is currently zoned rural. Recreational use including mountain bike tracks has been allowed on a grace and favour basis by the Crown in the interim. The hearing of an appeal has recently concluded in the Environment Court seeking to rezone part of the land for residential development (18 ha which is approximately a third).[3] Closing submissions have just been filed and so a decision is awaited. In closing Council (in fact all parties) supported the rezoning of the land. As Ms King notes, it will be up to the owners to decide whether and how to pursue use and development of the land but it is highly likely that the way has been opened for residential development to occur on a part of the land. As part of PC54 (now decided and beyond appeal) legal access has been secured to the land on its eastern boundary from Northlake.

OUTCOME OF CONFERENCING

13. Given the specific context of this land (and the s 129 Te Ture Whenua Māori Act 1993 land), a separate planners' expert conference was held with Council, with a Joint Witness Statement filed on 9 February.

14. All the planners agreed that this land is unique given its history and purpose as SILNA land. Council planners were concerned that an exemption would apply where the SILNA successors no longer have ownership. The premise is that if the ownership of the land changes, then that "results in the land no longer providing for the economic wellbeing of the successors". [4] This concern that any exemption should be specific to the successors is reiterated later. [5] An alternative to an exemption is suggested that inserts a policy in the variation that recognises the unique circumstances of the land, and which could be taken into account in any resource consent process seeking a reduction/waiver of any financial

[3] Approximately half Sticky Forest is in an ONL.

[4] At 3.1 JWS

[5] At 3.3 JWS

contribution.[6] The three planners representing the Māori interests consider a carve-out more appropriate as it provides meaningful redress and clarity and certainty. [7]

COUNCIL'S REBUTTAL POSITION

15. Council's rebuttal evidence adopts the Council planners' proposal from the Joint Witness Statement. That is, Mr Mead proposes policy support for assessment of the contribution to take into account the specific barriers to the development of the Hāwea / Wānaka Sticky Forest land, to be determined by resource consent processes that seek a reduction or waiver of the AHFC. [8]

16. The new policy would read:

> ***Policy Xy*** *Take into account the specific circumstances of the Hāwea / Wānaka Sticky Forest land, which is redress land transferred under the Ngāi Tahu Claims Settlement Act 1998 when determining an appropriate contribution to affordable housing.*

TE ARAWHITI'S POSITION

17. This approach is not accepted by Te Arawhiti (or the other parties present who will address this themselves). I submit that it is not an appropriate approach for this land but rather the carve out sought in the relief is appropriate. We dispute that the land is no longer providing for the successors' support and maintenance as SILNA intended if it is no longer held by those to whom it initially transfers. While some sort of "sunset clause" may be possible, albeit difficult to draft, we consider it unnecessary (discussed further below).

18. The three parties have coordinated on the drafting of the relief. Updated relief sought is attached at **APPENDIX 1** to these submissions and will be addressed by Ms Ellis.

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6 At 3.1 JWS.

7 At 3.1 JWS.

8 Statement of Rebuttal Evidence of David Mead at [9.6] and [9.7].

LEGAL FRAMEWORK

19. This position that seeks an exemption (rather than a potential waiver through the resource consent process) hinges on the status of this land as SILNA substitute land.

Relevance of Part 2 RMA

Section 8

20. The intended owners are entitled to this land because their ancestors were rendered landless by historical breaches of the Treaty of Waitangi. The obligation in s 8 RMA to have regard to the principles of the Treaty of Waitangi must always be kept in mind and is clearly engaged here.

21. The Council, in exercising its functions under the Act, must identify and take into account relevant Treaty principles in the course of preparing its district plan. As Ms Ellis points out in her evidence, that is reflected in Objective 2.1 of the Partially Operative Otago Regional Policy Statement 2019 requiring that the principles of the Treaty of Waitangi are taken into account in resource management decisions. Objective MW-01 of the Proposed Otago Regional Policy Statement 2021 has a stronger requirement that the principles of the Treaty are given effect to in resource management decisions. [9]

22. The Courts identify and articulate Treaty principles relevant to the case before them, adopting a case by case approach.[10] The Treaty principles of partnership, active protection, and redress, are apt in this case, particularly as the future owners are individuals (rather than an iwi) without a representative voice at this time.

23. The principle of partnership contains a concomitant duty to act in good faith.

24. Under the principle of active protection, the Crown has a positive duty to protect Māori interests and taonga. In the *Lands* case, the Court of

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9 Statement of Evidence of Katrina Ellis at [19.1].

10 *Mason-Riseborough v Matamata-Piako DC* (1997) 4 ELRNZ 31 (EnvC) at 32.

Appeal said that the Crown's duty to protect Māori rights and interests "is not merely passive but extends to active protection of Māori people in the use of their lands and waters".[11] The Privy Council has stated that the duty requires what is reasonable in the prevailing circumstances.

Section 6(e)

25. A wider consideration under Part 2 is relevant where the relevant planning documents do not "cover the field".[12] Ms Ellis considers that, aside from the provisions relating to Treaty principles, the District Plan and regional policy statements are limited in their guidance of decision-making concerning this SILNA land.[13] Ms Pull notes the lack of understanding that the Ngai Tahu Claims Settlement Act 1998 applies to SILNA land.[14] Objective 5.3.4 *The Sustainable use of Māori Land* may or may not apply to this land depending on whether it is Māori land, which is not defined in the Plan.[15]

26. This brings section 6(e) RMA into play. S 6(e) requires decision-makers to recognise and provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". This "site" is important to those who will receive it. As Dr Ryan identified, the intended owners whakapapa in the main to Ngāi Tahu, and the return of SILNA land was a core aspect of the Ngāi Tahu Deed of Settlement.[16] Aside from any whakapapa connections which individual intended/future owners may have to the land, there is a relationship between the intended owners and the land because the intended owners' ancestors were promised the land as redress for Treaty breaches, having been rendered landless by the Crown's historical actions or inactions. The origins of the other intended owners' relationship with this

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11 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 664.

12 *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [85].

13 Statement of Evidence of Katrina Ellis at [35]. A specific policy to address this deficit has been proposed for chapter 5 as part of the upzoning appeal resolution.

14 Statement of Evidence of Rachael Pull at [18].

15 It is not land covered by s 129 Te Ture Whenua Māori Act 1993.

16 Evidence in Chief of Dr Terry Ryan, at [1.4].

site can therefore be traced back to the 1870s.[17]

27. Dr Ryan found it significant that redress for the Crown's failure to provide the original 50 individuals with the land allocated to them under SILNA has been provided in the Ngāi Tahu Settlement by way of transfer of land rather than transfer of money or other resource because land was, and remains, crucial to the mana of Ngāi Tahu.[18]

28. The s 6(e) relationship arising in this case may be a slightly different type of relationship than that which is relevant to, for example, a waahi tapu site. That difference is something the Panel can rightly recognise. But there is nevertheless a relevant s 6(e) relationship to be considered.

29. The matters in s 6(e) and s 8 are relevant to this case because of the history and context of the land. The Privy Council in *McGuire v Hastings District Council* commented that all authorities making decisions under the RMA are "bound by certain requirements, and these include particular sensitivity to Māori issues."[19] The Privy Council found further (relevant to the issues in that case, which related to a proposed road through Māori Land) that: [20]

> By section 8 the principles of the Treaty of Waitangi guaranteed Māori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads.

THE RELIEF

30. The Council planners note in the Joint Witness Statement, and Mr Mead in his rebuttal,[21] that they now have a much better understanding of the status of this SILNA land. However, in my submission they continue to

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17 Evidence in Chief of Dr Terry Ryan, at [4.1]. It is something of a live question as to whether this is "ancestral land" but the s6(e) submission does not depend on it.

18 Evidence in Chief of Dr Terry Ryan, 22 September 2022, at [5.9].

19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21]. Recently cited in *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

20 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].

21 At [9.1].

underplay the complexity of this land's ownership, the significance of this land as redress and fulfilment of SILNA intentions, and the obligations created by Part 2 of the Act.

31. As discussed in the evidence of Ms King, there are already barriers to utilisation of collectively owned Māori land. She references various studies that point to ongoing challenges in accessing finance for development or utilisation of such land [22] and points to the fact that as a newly forming collective the owners have no pre-existing collective assets to leverage for the use and development of this land. Further, there will be more than 2,000 beneficial owners of the Hāwea / Wānaka Sticky Forest making land use decisions challenging. Ownership will be diverse and dispersed. Succession fractionation means administration and transaction costs and complexity in decision-making are high, even if the land is legally owned and administered by a trust. As she notes: It can be difficult with a large number of owners to be flexible and to obtain agreement around use and development of land. [23]

32. Council officers appear not to have considered that making this land subject to a AHFC creates another barrier to its use. This barrier alone may not prevent utilisation of this redress land, but in conjunction with those just discussed it is likely.[24] Kicking the decision off to the consenting stage is, with respect, a cop out and just creates an inevitable, costly, argument at that point with uncertainty as to whether a waiver will apply or how much deduction might be made. It will be another obstacle to collective decision-making. Importantly, it would also mean that an application would be bundled overall to have discretionary activity status. The proposed provisions that the Environment Court is currently considering for the rezoning of a part of the land will bundle to controlled or restricted discretionary activity status (depending on where the Court lands). The appellants in the rezoning appeal have had to fight hard to

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22 See discussion at [37] – [42].

23 At [40].

24 Approximately half this land is a designated ONL which already severely limits use of the land.

get the land rezoned and so usable.[25] Discretionary activity status at the consenting stage opens up the future owners to yet more opposition. The Council officers' approach is therefore creating a further barrier to the future development of this land.

33. There seem to be a number of concerns running through the Council officers' position. First, a lingering concern as to why this group deserves an exemption and a floodgates risk if one is made. Second, if an exception is made, whether it should be limited in some way that ensures that only the immediate owners reap the benefit.

Why is this group exceptional?

34. The history and context of this land make it exceptional. First, it is redress land. Second, its purpose is to provide an economic basis for the owners in accordance with the original intention of the 19th century allocation. Third, it is land. As noted by Dr Ryan the transfer of land rather than the transfer of money or other resource remains, crucial to the mana of Ngāi Tahu.

35. To attempt to claw back either some of the land or its value from people who have an association with it in terms of s 6(e) RMA and have waited 120 years for it, who cannot take redress in any other form, and where the very land was intended to provide an economic basis for their support seriously brings into contention the Privy Council's finding in *Mcquire* that decision makers under the RMA are "bound by certain requirements and these include particular sensitivity to Māori issues". [26] This is an instance where the Treaty principle of active protection applies. It is appropriately recognising that principle to ensure that the owners of the land once transferred to them are able to use their land fully.

36. Finally, it is fundamentally unfair to expect the owners to sacrifice some

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[25] For example, submitters opposed the rezoning on the basis that it should remain as a community asset for recreation and Wānaka amenity. The original submission on the PDP, filed in 2016, sought rezoning of the total 50 hectares now reduced to 17.6 hectares.

[26] *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21]. Recently cited in *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

of the value of this land to provide affordable housing for the district when this long awaited land is itself recompense for their forbears having been left landless.

Does this exception risk opening the floodgates?

37. We do not consider that this exception is likely to open the floodgates to other viable claims for exception. The circumstances applying to this land, as SILNA redress, make it, as everyone has acknowledged, "unique". Not only is it redress land but it is a singular form of redress - to the descendants of those who experienced the original Treaty breach. This contrasts to standard Treaty settlement redress which is committed to (generally) iwi as part of a comprehensive collective settlement package comprised of a mixed portfolio of redress types (e.g. monetary, cultural redress properties, commercial redress properties, and ongoing post-settlement rights).

38. This land is also unique in the Queenstown Lakes district as the only redress land committed in fulfilment of SILNA intentions and thereby the only SILNA land.

Should the benefit of the exemption be limited?

39. While it might transfer to the successors as Māori freehold, the successors may take the land as general land.

40. There seems to be an assumption (or a reservation) that as the land is intended to provide for the economic wellbeing of the successors/owners the benefit of any exemption should only be enjoyed if the land stays in their ownership and/or if the land is taken as "Māori land".

41. As noted above, Council officers believe that it is no longer providing for the successors economic well-being if it passes out of their hands.

42. That is a somewhat naïve approach to this land. Sale of it, or a part of it, may very well provide for the future economic well-being of the successors who are individuals. As noted, the successors' options are already limited by the fact that they cannot substitute this land for other

recompense (for example) so they should not be further constrained.

43. Quite how this land will be used or developed is, at this stage, an open question. The land is yet to transfer and those decisions cannot yet be made. It may be that individual owners choose to occupy the land, to sell their share, to allow a child to occupy their share, to agree collectively to the whole land being commercially developed. In my submission, none of that matters. If a cost is added to the land (effectively by 5% of its value being taken) that is a cost that has to be paid.[27] If the land is sold to a developer we can expect that the owners will receive less than they otherwise would, where the land has not yet been acquired, because the developer paying the AHFC will pass back that loss (to avoid increasing the price of the houses). If a whānau sells their land the same will apply.

44. It may be possible to decide that at the point that the land passes, for example, for the second time out of successor hands, the 5% becomes payable but even that may result in a loss because the cost may be anticipated in an earlier sale in the chain.

45. We do not consider a 'sunset clause' is necessary. Aside from the risk that it will devalue the land, this land has only so much development potential. If it is developed in accordance with the residential zoning appeal it is likely to be a one stage subdivision of up to 150 houses. There will be limited opportunity to further develop each site given the topography. A lot of the land will be large lot residential zone, so consent to breach density could be difficult. District Plans have a limited life. There is the opportunity to impose a different approach subsequently. From a practical point of view, there is not much to be gained from having a sunset clause.

46. Essentially, Council should accept that this is a situation that qualifies for exemption because of the status of this land and its future owners. Attempting to say how long the benefit may be enjoyed (only while the

[27] The evidence accepts that the cost is likely to be passed on in some way. (Mead rebuttal at 7.1). Mr Mead also acknowledges that it is greenfields developments that are most likely to be affected. The Hāwea / Wānaka Sticky Forest land will be a greenfields development. (Rebuttal brief at [7.5].)

land stays in the successors' hands), or that the exemption will apply only if the land is taken in a particular way (for example as Māori freehold land), is placing limits on the concept of redress and, in the case of limiting the exemption according to the way the land is taken, it is adding another barrier to the land's use.

THE DRAFTING

47. The relief in **Appendix 1** is as discussed at the expert conference with one addition. An additional policy is proffered as an alternative to incorporating the exception for Hāwea / Wānaka Sticky Forest into Policy 40.2.1.4. We do not consider that development of this land (or that included in s 129 Te Ture Whenua Māori Act) will generate pressure on housing resources. Given the nature of this land (rural/Māori/redress) it can never have been expected that it would be part of the general pot of land available for housing.

48. However, if Council considers that the exception sought does not fit comfortably under the introductory words to this policy, an alternative specific policy is offered.

CONCLUSION

49. There are costs anticipated from imposing requirements for affordable housing contributions such as additional transaction / consenting costs for those who wish to develop land for residential use, and the possibility of housing developments being delayed, not proceeding or having to be sold at a higher price to offset increased costs. [28]

50. These costs will fall on the new owners of the Hāwea / Wānaka Sticky Forest land even if it is not possible to say precisely how, given the land is yet to transfer. It is inappropriate that any cost fall on these owners. The land is unique. It is redress land in fulfilment of SILNA intentions; much effort and cost has gone into rezoning it for development; it will be held by a collective of Māori individuals where there are well documented barriers to development. Its status justifies an exemption.

26 February 2024

Rosemary Dixon
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[28] S 42A report at [4.19]

APPENDIX 1: RELIEF SOUGHT

Policy 40.2.1.3

Ensure that residential subdivision and development set out in Policy 40.2.1.1 and 40.2.1.2 provides a financial contribution for affordable housing. Avoid subdivision or development for residential activities and Residential Visitor Accommodation that does not provide a contribution, or otherwise does not make appropriate provision to help meet the affordable housing needs of the District. **Note that this policy does not apply to development identified in policy 40.2.1.4.**

Policy 40.2.1.4

Recognise that the following forms of residential development either provide affordable housing or do not generate pressure on housing resources and should not be subject to the affordable housing contribution:

…

e) Land identified as meeting the status of one of the following in s129 of the Te Ture Whenua Māori Act 1993:

- **i. Māori Customary land**
- **ii. Māori freehold land**
- **iii. Crown land reserved for Māori; or**

f) The Hāwea / Wānaka Sticky Forest land, which is redress land transferred under the Ngāi Tahu Claims Settlement Act 1998.

Rule 40.6.1.3 Exemptions …

(f) Land identified as meeting the status of one of the following in s129 of the Te Ture Whenua Māori Act 1993:

- **i. Māori Customary land**
- **ii. Māori freehold land**
- **iii. Crown land reserved for Māori; or**

(g) Any residential subdivision or development on the Hāwea / Wānaka Sticky Forest land, as shown on the map at schedule 40.9.1.xx

Alternative standalone policy to incorporate into Policy 40.2.1.

Policy 40.2.1.x

Recognise that residential development should not be subject to the affordable housing contribution on the following land because of their status under the Te Ture Whenua Māori Act 1993, or land as redress land transferred under the Ngāi Tahu Claims Settlement Act 1998:

a) Land identified as meeting the status of one of the following in s129 of the Te Ture Whenua Māori Act 1993:

i. **Māori Customary land**
ii. **Māori freehold land**
iii. **Crown land reserved for Māori; or**

b) The Hāwea / Wānaka Sticky Forest land, which is redress land transferred under the Ngāi Tahu Claims Settlement Act 1998 in fulfilment of SILNA.