Before the Independent Hearings Panel

In the Matter of	the Resource Management Act 1991
And	
In the Matter of	the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014
And	
In the Matter of	the Proposed Christchurch Replacement Plan (**Chapter 14: Residential (Part) and Chapter 8: Subdivision Development and Earthworks (New Neighbourhood Zones**)

Opening Legal Submissions on behalf of Te Rūnanga o Ngāi Tahu and Ngā Rūnanga [1145 and FS1448] and Ngāi Tahu Property Limited [840 and FS 1375]

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INTRODUCTION

1. These opening submissions are presented on behalf of Te Rūnanga o Ngāi Tahu and Ngā Rūnanga (**Te Rūnanga**) and Ngāi Tahu Property Limited (**Ngāi Tahu Property**).

SUMMARY OF KEY ISSUES

Te Rūnanga

2. Te Rūnanga's submission points fall into 3 broad categories:

   (a) Issues that are no longer being pursued, or will be dealt with during Stage 2:

      (i) Māori Urban Design Protocol – and the policy support for that is no longer being pursued at this point in time[1];

      (ii) Waterway setback – this will be dealt with at Stage 2 in Proposal 6 General Rules and Procedures[2];

      (iii) Silent files and wāhi tapu – this too will be dealt with at Stage 2 in Proposal 9 Natural and Cultural Heritage[3];

      (iv) Design of waste management spaces – although accepted by the Council, the change to the built form standards is no longer being pursued as Te Rūnanga agrees with Maurice Dale that the amendment is not necessary for the reasons outlined by Mr Dale[4].

   (b) Issues that are agreed to by the Council in evidence (or elsewhere):

      (i) Papakāinga housing – with the exception of a minor wording change dealt with by Mr Vial in his evidence[5]; and

      (ii) Provision for comprehensive planning and Ngāi Tahu presence and cultural values[6] – the changes requested to

[1] See paragraphs 26 – 28 of Mr Vial's evidence
[2] See paragraph 39 of Mr Vial's evidence
[3] See paragraph 39 of Mr Vial's evidence
[4] At paragraphs 7.14 – 7.18, 13.4 – 13.5 of Mr Dale's evidence
[5] Para 12 of Mr Vial's evidence
[6] Paras 15-25, and 29 of Mr Vial's evidence

8.4.2.6[7], 14.1.5[8], 14.1.6[9] and 14.1.6.1[10] have all been agreed to by the Council. Te Rūnanga also sought that "Ngāi Tahu manawhenua cultural features" be included in Assessment Matter 8.5.4.1 for the reasons outlined by Mr Vial[11]. Although this has not been addressed in the Council's evidence, counsel has confirmed that this amendment is not opposed. A similar amendment will also be recommended by Mr Vial to Assessment Matter 14.9.1A(1).

(c) One (minor) issue that remains outstanding:

(i) Stormwater management – Te Rūnanga support the Crown's proposal to delete stormwater Policy 14.1.6.6 and build it into Policy 8.1.3.4. Mr Vial will however, propose some wording changes when giving evidence to clarify a potential inconsistency between 8.1.3.4(a), Policy 14.1.6.8 and 14.1.6.10, and the Maahanui Iwi Management Plan[12].

Ngāi Tahu Property

3. Ngāi Tahu Property's outstanding issues can be boiled down to two main areas:

(a) The NNZ provisions; and

(b) The RMD zone provisions in respect of site coverage (and to a lesser extent, building height).

4. Ngāi Tahu Property also made several other submissions which are mostly resolved and which I discuss briefly in these submissions.

5. I also focus on the life-stage standards, as although the Council has agreed to delete them, Mr McIndoe has proposed that some standards remain.

[7] Which is accepted in Mr Blair's version of the Proposal on 26 March
[8] Adopted by Mr Blair in his EIC at paragraph 14.11 – 14.12
[9] Adopted by Mr Blair in his EIC at paragraph 14.13
[10] Adopted by Mr Blair at paragraph 14.14 of his EIC
[11] As explained in paragraphs 20 to 21 of Mr Vial's EIC
[12] This will be addressed by Mr Vial when giving his summary of his evidence

New Neighbourhood Zone Provisions

6. Although the provisions have vastly improved, in my submission they remain unnecessarily complex, and in certain areas they are overly prescriptive and subjective. They also lack the flexibility that is both desired and needed to encourage innovation and choice in new greenfield zones and in order to be consistent with Objective 3.3.4(b) of Chapter 3.

7. Overall, they are still some way (although perhaps not considerably so) from meeting the Statement of Expectations (**SofE**).

NNZ – Subdivision and built form standards

8. In particular, Ngāi Tahu considers:

   (a) The RD1 and RD2 framework (under Rule 8.4.2.1) should be stated more clearly. If we as counsel and expert planners are having difficultly in understanding the provisions even with our collective years of experience, then the provisions have not achieved what is expected of them. This becomes particularly apparent when it comes to working through the information requirements for each consent path.

   (b) The assessment matters require condensing to avoid duplication, and overly subjective phrases. Mr Jones has spent time working through the assessment matters and has been able to suggest some changes in the time available[13]. Ngāi Tahu Property readily accepts however that further refinement is not only possible but is required if we are to achieve the sort of Plan that is expected by the SofE and Chapter 3.

   (c) The subdivision and built form standards require less rigidity if Objective 3.3.4 is to be met to provide a range of typologies and lot sizes to meet the diverse and changing population and housing needs of Christchurch. The present inflexibility has potential to stymie innovative design. In particular:

      (i) A minimum lot size of 200m^2 will assist in broadening the overall range of lot sizes and will provide for more innovative

[13] See paragraphs 105 to 111 of Mr Jones and his amendments in Attachment 4A

ways of achieving the greenfields target density of 15hh/ha[14];

(ii) Although not common in greenfields, rear lots may still form a useful component and should be exempt from standards which have no logical application to rear lot design (eg the allotment road boundary and allotment frontage standards have no proper application to rear lots)[15]. Mr Blair's evidence was that the widespread use of rear lots could lead to issues such as unsafe urban environments or inefficient design[16]. However, in questioning, Mr Blair confirmed that rear lots were uncommon in greenfield developments. Further there was no evidence to suggest that the purported safety and inefficiency issues existed in newer greenfield neighbourhoods[17];

(iii) To encourage innovation and greater variance in lot and building design; the road setback, site coverage and minimum outdoor space standards require some relaxation (although not a great deal). In many instances, the proposed rules go quite some way beyond the present operative rules with little or no justification for those changes[18].

NNZ - Controlled Activity Status

9. Given the context of the SofE[19], it is my submission that the starting point that should be adopted is one of trying to achieve the most permissive framework possible unless satisfied it is appropriate to impose a greater restriction.

10. The evidence of Mr Macleod[20], Mr McIndoe[21] and Mr Jones[22] shows there is a strong case for selective use of controlled activity status. Subdivision in the NNZ which:

[14] See the evidence of Mr Jones at 92 - 96
[15] Standards 8.4.2.5 (2) and (7) and as per the evidence of Mr Jones at 98 - 100
[16] See para 2.15 of Mr Blair's second rebuttal statement
[17] See Transcript dated 31.03.15 at page 242 lines 10-45 and 243 lines 1 - 5
[18] See the evidence of Mr Jones at 112 – 124 which outlines his reasons for retaining the same or similar rules to the existing Living G zone in this regard and as replicated in his Attachment 4B
[19] Schedule 4, Clause A(i)
[20] See Transcript dated 31.03.15 at page 201, lines 21 – 45 and page 202, lines 1 – 37

(a) Is underpinned by a detailed ODP which is in accordance with Polices 6.3.2 and 6.3.3 of the CRPS; and

(b) Which is generally in accordance with that ODP;

Is, in my submission, such a case.

11. As was conceded by Ms Carter in the Natural Hazards hearing, the decision to use restricted discretionary activities throughout the Plan, without any use of controlled activities, was a decision made by senior level officers rather than a decision founded in any proper analysis of the evidential basis for that classification or as a response to advice from the experts working on the detailed rules.[23]

12. Mr MacLeod also accepted that the Council's "mindset" against using controlled activities was not consistent with section 32[24].

13. Mr Blair has already accepted that controlled activity status is appropriate for all subdivision at Prestons (except for the "Density A" area)[25]. On the same reasoning, if other NNZs are also underpinned by detailed ODPs which give effect to Objectives 6.3.2 and 6.3.3 of the CRPS, then there should be no reason why they too should not benefit from a controlled activity regime.

RMD – height standard

14. Ngāi Tahu Property agrees with the height standard as proposed by Ms McIntyre[26] and considers that is preferable to Ms Sakin's standard[27] as it is clearer and less restrictive.

RMD – site coverage standard

15. Mr Jones considers the existing residential floor area ratio to provide greater flexibility and will allow for a greater variety of building types[28].

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[21] See Transcript dated 30.03.15 at page 89, lines 8 - 23
[22] At paragraphs 77 – 85 of Mr Jones' evidence
[23] See page 447 line 11 – 46 and page 448, lines 1 - 19 of the Transcript dated 05.03.15 of the Natural Hazards Hearing.
[24] See page 214, lines 29 – 46 and page 215 lines 1 – 30 of the Transcript dated 31.03.15
[25] See para 2.11of Mr Blair's second rebuttal statement
[26] Being an 11m height limit with a 3 storey maximum
[27] Being an 11m height limit with a roof pitch of 22 degrees
[28] Mr Jones' evidence para 62

16. He also considers that the proposed site coverage standard "down-zones" existing sites with more generous bulk and location provisions and has potential to create the same adverse effects outlined in his Report for the RS zone[29].

17. There is little section 32 justification in terms of the costs and benefits of downgrading the site coverage standard from the existing residential floor area ratio. This is not surprising given there was no consultation with developers in relation to the urban design review underpinning Proposal 14 particularly with regard to the potential effects this "downzoning" might have on existing and future developments[30].

18. Further, the design review focuses mainly (if not solely) on older subdivisions and "narrow" sites and it was accepted by Ms Sakin that newer, more comprehensively planned developments, were not considered[31].

19. In my submission, if Mr Jones' evidence is accepted, then the existing residential floor area ratio (or some form of that) is superior as it is more consistent with:

    (a) Strategic Directions Objective 3.3.4 to provide a range of housing opportunities; and

    (b) the SofE to encourage housing innovation and choice.

ISSUES THAT ARE LARGELY AGREED OR RESOLVED

Rezoning of Wigram Living 3 to RMD

20. The purpose of the RMD zone was for it to cover:

    (a) All existing Living 3 zoned land[32]; and

    (b) Any other land identified for upzoning or "intensification".

[29] See paras 55 – 63 of Mr Jones' evidence
[30] See cross examination of Ms Sakin at page 122, lines 5 – 40, of the Transcript dated 30.03.15
[31] See cross examination of Ms Sakin at page 123, lines 45 – 46 and page 124, lines 1 – 17, of the Transcript dated 30.03.15
[32] As confirmed in the underlying section 32 Report and Mr Blair's second rebuttal at para 2.4

21. However, the Council inadvertently zoned only part of the Living 3 zone at Wigram to RMD, and zoned the remainder as RS. Mr Blair has accepted this was an error[33].

22. In my submission, there is no scope issue nor prejudice to any party (being to the two "limbs" of the *Clearwater* test)[34] in accepting the land at Wigram be zoned RMD as:

    (a) It is clear from the supporting documents to the Residential Proposal that the RMD zone was to cover all Living 3 zoned land[35];

    (b) The land subject to Ngāi Tahu's request for RMD zone is Living 3 zone and is therefore clearly "on" the proposal;

    (c) This was clearly sought in Ngāi Tahu's original submission[36] and as such is an incidental or consequential extension of the zoning change proposed[37];

    (d) No substantial further s32 analysis is required to inform affected persons of the comparative merits of that change[38]; and

    (e) No further submissions were filed in opposition to Ngāi Tahu's submission.

Use of Control Tower and Hangars for non-residential activities

23. The former Wigram aircraft number 4 and 5 Hangars and the Control Tower are listed heritage buildings in the operative Plan (Group 3). The evidence for Ngāi Tahu Property shows that to ensure the longevity of these buildings into the future, flexibility in terms of their uses is required.

24. Ngāi Tahu Property accordingly seeks that a new rule be inserted into the RMD zone, to allow the buildings to be used for a range of non-residential purposes in addition to the permitted residential activities of the zone.

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[33] See para 2.4 of Mr Blair's second rebuttal.
[34] Being the bipartite approach outlined in *Clearwater Resort Ltd v Christchurch CC* HC Christchurch AP34/02 and as endorsed in *Palmerston North CC v Motor Machinists Ltd* [2013] NZHC 1290
[35] For example, see page 10, para (iii) of the Section 32 Report and at various places in section 5.3 of the Report at pages 62 - 68
[36] Submission point 42 of Ngāi Tahu Property Limited's original submission – this was secondary relief in lieu of keeping the existing Living 3 zoning
[37] *Palmerston North CC* (supra)
[38] *Palmerston North CC* (supra)

25. Mr Blair has confirmed his agreement to all of these non-residential uses except for retailing and warehousing. In that regard he agrees that some form of those activities are appropriate provided parameters are placed on them in terms of:

    (a) Either a maximum tenancy size or total gross floor area for retail activities; and

    (b) A limit on vehicle movements for the warehousing activity[39].

26. Provided those parameters are reasonable that is acceptable to Ngāi Tahu Property. The Council and Ngāi Tahu Property are working together on drafting those standards and anticipate these will be available before closing submissions.

Deferral of Wigram and Prestons Living G Rezoning until Phase 2

27. The existing Living G (Wigram) and Living G (Prestons) Zones have bespoke rules under the operative Plan. In both instances building and/ or detailed consenting is well advanced[40].

28. The section 32 analysis states that given the existing development is well advanced or at an advanced planning stage, all existing Living G zones would be deferred until Stage 2 as it would be too disruptive to the ongoing development process[41].

29. Despite that, around one third of both Wigram and Prestons Living G areas were included in Stage 1 as RS zone.

30. Mr Jones[42] and his Report at Attachment 2 to his evidence sets out in some detail the effect the RS zoning will have.

31. Both Ngāi Tahu Property and the Council are now in agreement that RS is inappropriate for this land[43] and that the proposed Residential Established New Neighbourhood Zone (**RENNZ**), a Stage 2 zone, may be a more appropriate zone.

[39] See pages 240 - 241 of the Transcript dated 31.3.15
[40] See paras 13 – 18 of Mr Jones' evidence
[41] See page 41 of the section 32 report at (9)
[42] At paras 13 - 47
[43] See Mr Blair's second rebuttal statement at paras 2.1 – 2.2

32. Ms Scott in her opening legal submissions proposes the Hearings Panel accepts Ngai Tahu Property's submission in part but rather than keeping the operative Living G zoning, that the Panel does not replace the Living G zoning through its decision on Stage 1 and that the decision on the land be dealt with when the RENNZ provisions are heard.

33. Ngāi Tahu Property has only seen the proposed RENNZ in its draft form and is of the opinion that it would require amendment in order to be the most appropriate zone to replace the current Living G zone at Wigram and Prestons.

34. Accordingly, while I agree with Ms Scott's approach in principle, any decision or deferral would have to be clear that:

    (a) The land will be dealt with in Stage 2 at the time the RENNZ is heard; and

    (b) Ngāi Tahu Property still has the opportunity to submit on the detailed rules of the RENNZ as they will apply to this land, to ensure there is no undue prejudice to Ngāi Tahu.

35. Further, and to ensure that Ngāi Tahu Property has the opportunity to submit on those rules in respect of this land, it would be appropriate for the Council to show the land as RENNZ when the provisions for Stage 2 are notified.

Life-stage and adaptive design standards

36. Ngāi Tahu Property supports the Council's decision to delete these standards.

37. Mr McIndoe however seeks that up to 10% of buildings in large multi-unit developments be required to provide for or be ready for life-stage design[44] and provides a provisional list of standards that could be applied.[45]

38. Section 18 of the Building Act 2004 stipulates that building work is not required to achieve "performance criteria" that is additional to, or more restrictive than the Building Code, unless subject to "any express provision to the contrary".

[44] Para 6.4 of Mr McIndoe's EIC
[45] Para 4.4 of Mr McIndoe's Rebuttal Evidence

39. "Performance criteria" includes qualitative or quantitative criteria that the building is required to satisfy in performing its functional requirements. Functional requirements mean those functions that the building is required to perform for the purposes of the Act[46].

40. The Building Act contains performance criteria that cover for example, minimum requirements for accessibility and slope of pathways. The life-stage standards cover the same matters and are therefore "performance criteria" which relate to a building's functional requirements. They are additional to or more restrictive than the Building Code. That is also the evidence of Mr Klein for the Crown[47].

41. Notwithstanding the express provision of section 18, case law shows that there may be limited instances to allow the Building Code to be exceeded when resource management considerations justify such a departure.

42. The findings in *Christchurch International Airport Limited v Christchurch City Council*[48] provides a helpful basis for assessing the life-stage standards against section 18 of the Building Act.

43. The case concerned the effect of airport noise on residences and a condition which required noise attenuation features to be included in any dwellings for which consent was granted.

44. Justice Tipping considered that both Acts fulfil different functions in respect of the control of buildings and it is permissible to provide rules in a district plan controlling buildings if those rules are intended to control activities or the effects of the activities for the purpose of the RMA. If they are intended to relate to the physical structure of the building then they are more properly Building Act requirements.[49]

45. Justice Tipping concluded that:

> "for the purposes of granting building consents section 7(2) prevails and different territorial authorities cannot impose their own requirements on top of or in substitution of the code. If, however, the territorial authority is facing a particular planning or resource

[46] Section 7 of the Building Act
[47] See for example para 4.1(c) of Mr Klein's evidence
[48] [1997] 1 NZLR 573
[49] Tipping J, at pages 3 and 9

> management issue, whose appropriate solution lies in the imposition of a requirement going beyond the Code, section 7(2) does not prevent that course."[50]

46. Justice Tipping qualified the above statement saying this will not give territorial authorities *carte blanche* to supplement or depart from the Building Code, which is clearly intended to have national application.[51]

47. Similarly, Justice Chisholm found that section 7(2) of the Building Act 1991 (which is the material equivalent of section 18) will only prevent the exercise of powers under the RMA if the consent authority under that Act is attempting to impose building controls in respect of the physical structure of the building which are not attributable to the legitimate exercise of power under the RMA.[52] In those circumstances, the consent authority would be usurping the statutory role of the Building Code as the supreme document.[53]

48. In *Re Portmain Properties (No 7) Ltd*[54] the Environment Court applied the High Court's reasoning in *Christchurch International Airport Limited*. The Court found that a condition in a subdivision consent requiring the upgrading of the fire ratings of the building was unlawful because it would not be for the purpose of controlling activities or the effects of activities in terms of the RMA.[55] Rather it would be a condition relating to the physical structure of the building.[56] The Court found that it would be a misuse of the RMA to seek to impose a condition requiring the remainder of the building to be brought up to Building Code because this matter was entirely within the control of the Building Act 1991.[57]

49. Applying these findings, it is my submission that unlike acoustic insulation of houses next to an airport to address reverse sensitivity effects, the Building Act is clearly intended to cover the matters contained in the life-stage standards. The purposes in section 3(a)(ii) and 3(a)(iv) of the Building Act require that buildings contain the attributes to contribute

[50] Tipping J, at pages 10-11
[51] Tipping J, at page 11
[52] Chisholm J, at page 25
[53] *Ibid*
[54] [1998] NZRMA 56
[55] At page 16
[56] *Ibid*
[57] *Ibid*

appropriately to the health, physical independence, and well-being of the people who use them (life-stage and adaptive design). The Building Code and Acceptable Solutions provided for in the Building Act contain performance criteria to achieve those purposes.

50. The life stage standards more properly fall within the remit of the Building Act and are for Building Act purposes not resource management purposes.[58] Therefore, section 18 of the Building Act should apply to prevent the Standards being included in the Replacement Plan.

51. Even if there were a legitimate resource management consideration applicable, in my submission the standards are "not appropriate and necessary" to justify a departure from the Building Code.[59]

52. Accordingly, it is my submission that the standards would be ultra vires and should not be included in the Plan.

NGĀI TAHU'S EVIDENCE

53. Ngāi Tahu Property and Te Rūnanga are calling four witnesses:

    (a) **Trevor Watt** – an architect who will be giving evidence in relation to the Wigram Control Tower and Hangars;

    (b) **Malcolm Timms** – a quantity surveyor, who will be giving evidence in relation to the same;

    (c) **Jason Jones** – who will be giving planning evidence for Ngāi Tahu Property; and

    (d) **Timothy Vial** – who will give planning evidence for Te Rūnanga.

Jane Walsh
Counsel for the Submitters

[58] This was the key test in *Christchurch International Airport Limited* see Tipping J at pages 2-3
[59] Tipping J, at pages 3 and 9