

## Plan Changes What can happen when a Council does not consult?

In the recent case of **Waikato Tainui Te Kauhanganui Inc v Hamilton City Council**, the High Court found that the Council had failed to consult Waikato Tainui Te Kauhanganui (**Tainui**), an Iwi Authority, as required under the Resource Management Act 1991 (RMA) when it amended its District Plan. The case illustrates the pitfalls of trying to avoid pre-notification consultation.

Tainui are the owners of "The Base" shopping centre at Te Rapa, developed on land that was vested in Tainui as part of the Raupatu Treaty settlement. The Council was concerned that development outside of the CBD was affecting the CBD's sustainable and efficient operation. Variation 21 was developed to enable the Council to consider the effect of future developments on the CBD, and gave greater control of development at The Base. The Council chose not to consult with Tainui because of their position as landowners of The Base and concern that Tainui would seek resource consents to protect the development of their land prior to the notification of the Variation. The Council also sought to notify the Variation prior to amendments to the RMA (effective from October 1 2009), to ensure the rules had legal effect from notification as per the pre-amendment provisions of the Act.

### (1) Did the RMA require consultation *prior* to notification?

It was held that Schedule 1 of the RMA requires consultation during the preparation of a Proposed Plan and that preparation ends at the time of notification. This finding was based in part on the requirements for consultation under section 82 of the Local Government Act 2002 and also on the principle that consultation is intended to enable decision makers to make informed decisions, must be meaningful and conducted in mutual good faith, and, the party required to consult must approach the consultation with an open mind. The Court did not accept the argument that anything that Tainui may have said in pre-notification consultation could have been said in a submission.

### (2) Does the purpose of the RMA permit flexibility in respect of the consultation required?

The Council argued that the purpose of the RMA would be affected if Tainui sought resource consents under the pre-Variation 21 rules, and that therefore the Council should have discretion to depart from the prescribed consultation procedures. The Court considered that the RMA contains no exception to the requirements to consult.

The Court found that the crux of the issue was whether the Council should be able to prevent a party from protecting its position by seeking resource consents prior to a proposed variation taking effect. The Court agreed that consultation prior to notification could result in an increase in resource consent applications to preserve the applicant's position, however it did not consider that this was in conflict with the purpose of the RMA. The Court did not agree that there was discretion to depart from the consultation requirements of the Act, and even if there were, the circumstances of this case would not have justified that approach.

### (3) Should relief be granted?

The Council argued that there would have been only a short term benefit to Tainui if consultation had occurred prior to, rather than after, notification, that regardless of consultation the Council would not have produced a significantly different plan, and, that Tainui had not established any loss or harm as a result of the breach.

The Court did not accept these arguments. In terms of the argument that the consultation would not have significantly altered the variation, the Court felt that some of the evidence presented on that point showed a closed mind on the Council's part.

The Court pointed to a direct nexus of significant importance between Tainui and The Base, the land upon which the development is based being part of the Raupatu settlement. It did not matter that the land had not formerly been exceptionally significant to Tainui, the significance of the land came from that settlement. The Court did not accept the Council's contention that Tainui had suffered no (or minimal) loss through the failure to consult.

The Court rejected an argument that the Council was already informed of Tainui's view, and also the contention that this was a case where a variation was notified without specific public consultation to avoid serious adverse effects. In fact the Court found that Tainui were adversely affected by the Council's decision not to consult.

The Council argued that if Variation 21 were nullified the effects would be out of proportion with the procedural breach that had occurred. There was concern that the operation of the new section 86B introduced through the 2009 amendments to the RMA, meant that any new variation notified would not have effect until after the submissions process. While the Court acknowledged that the operation of section 86B would enable stakeholders to apply for resource consents following the notification of a new Variation, this was a consequence of the Council's breach and did not prevent the Court granting the relief sought in this case.

### Conclusion

The Council's decision to notify Proposed Variation 21 was declared invalid. The Council was ordered to consult with Tainui prior to any further variation being approved and publicly notified.

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