Document No: A429868

Report To: Council

Meeting Date: 28 May 2019

Subject: Upper Waipa River Integrated Management Plan (UWRIMP)

Type: Information only

Purpose of Report

1.1 The purpose of this Business Paper is to update Council on the on-going development of the Upper Waipa River Integrated Management Plan (UWRIMP). Council was first briefed on this matter in October 2018.

Background

2.1 On 27 September 2010, the Maniapoto Māori Trust Board (MMTB) and the Crown signed a Deed in Relation to Co-Governance and Co-Management of the Waipa River (the Maniapoto Deed) which was directed to deliver co-management over the Waipa River with an overarching purpose of restoring and maintaining the quality and integrity of the waters that flow into and form part of the Waipa River for present and future generations and the care and protection of the mana tuku iho o Waiwaia.

2.2 The Nga Wai o Maniapoto (Waipa River) Act 2012 (the Waipa River Act) was enacted to give effect to the Maniapoto Deed. The Waipa River Act specifies that a joint management agreement (JMA) be entered into between the Local Authorities and the MMTB. This collective agreement was signed in April 2013 and covers matters relating to the Waipa River and activities within its catchment affecting the Waipa River. The JMA sets out a series of overarching principles and covers monitoring and enforcement, Resource Management Act 1991 (RMA) planning documents and resource consents.

2.3 The JMA is administered through two forums. Nga Wai o Waipa (Maniapoto) Co-Governance Forum is a mayoral forum which functions as the guardian of the JMA, meeting twice yearly. Nga Wai O Waipa Co-Governance operational meeting is a technical and operational meeting which staff members attend. It is also held twice yearly.

2.4 Both Nga Wai o Waipa (Maniapoto) Co-Governance forums are currently working on a range of issues including:

- Development of the Upper Waipa River Integrated Management Plan (UWRIMP).
- A watching brief over the Healthy Rivers Wai Ora Plan Change One process.
- A watching brief over development of the Regional Plan & Regional Coastal Plan.
- A watching brief over the Maniapoto Treaty Settlement Process.
- Consideration of specific District Council and Regional Council topics (for example, Waitomo District Council's District Plan review).

Commentary

3.1 The Waipa River Act requires that an integrated management plan referred to as "UWRIMP" is drafted. Its purpose is to achieve an integrated approach between MMTB, relevant government departments and agencies, and relevant local authorities to manage aquatic life, habitats and natural resources within the Upper Waipa River. The main components are conservation management (Department of Conservation), fisheries management (under the Fisheries Act 1996), and a Regional Council component focusing on resource management, biosecurity and their functions under the RMA.

3.2 The Waipa River Act also states that the UWRIMP may incorporate any other component agreed between MMTB and local authorities - provided that this component is consistent with the purpose of the UWRIMP. As such, the participation of Waikato, Waipa, Otorohanga and Waitomo District Councils in the UWRIMP is voluntary. In the case of WDC, participation is undertaken in support of the strong and continued relationship with MMTB and in alignment with the principles of co-governance and co-management of the Waipa River.

3.3 Currently the Nga Wai o Waipa (Maniapoto) Co-Governance operational meeting is working through a draft Terms of Reference document for UWRIMP. Schedule 2 of the Waipa River Act sets out how the plan must be prepared notified and approved. However, it is not specific on some of the operational parameters which will instead be agreed through the Terms of Reference. At this stage, MMTB have indicated that their principal aim is to ensure a streamlined approach to conservation and resource management in the catchment in order to avoid policy and implementation misalignment between central government departments, agencies and local authorities.

3.4 Some of the matters that staff will seek to have included in the Terms of Reference include ensuring that UWRIMP clearly aligns to the purpose of the Waipa River Act, ensuring that all parties understand the statutory status of UWRIMP, that the spatial extent of UWRIMP is specified, and that the objectives align to outcomes that are specific and directive enough for local authorities to implement.

3.5 Staff have worked with MMTB staff on a draft framework for UWRIMP. Currently, the draft framework has four main components being fisheries, mahinga kai, habitat restoration and sites of significance. WDC will be required to take into account the provisions of UWRIMP once the plan comes into force. This potentially means that the objectives and outcomes set out by UWRIMP will need to be considered when a district plan or reserve management plan is reviewed, or an operational matter such as a new designation or resource consent of a certain scale or effect is being considered. Given this, the final Terms of Reference and agreed UWRIMP framework will be carefully evaluated. MMTB anticipate that UWRIMP will take three years to develop and bring into force.

3.6 The indicative timeframe provided by MMTB for the development of the UWRIMP is:

Preliminary discussions with Partners and River Iwi	By 2018
Agreements, planning and development of the UWRIMP	By 2019
Alignment of UWRIMP to give effect to Healthy Rivers and public consultation	By 20

Suggested Resolution

The Business Paper on Upper Waipa River Integrated Management Plan be received.

TERRENA KELLY
GENERAL MANAGER
ENVIRONMENTAL SERVICES

CATHY O'CALLAGHAN
PRINCIPAL PLANNER

14 May 2019

Document No: A428841

Report To: Council

Meeting Date: 28 May 2019

Subject: **Climate Change Adaptation – J Hodder QC**

Type: Information Only

Purpose of Report

1.1 The purpose of this Business Paper is to provide Council, for information purposes, the report written by Jack Hodder QC - "Climate Change Litigation: Who's Afraid of Creative Judges" ("the Report").

Background

2.1 The Report was presented to the "Climate Change Adaptation" session of the Local Government New Zealand Rural and Provincial Sector Meeting in Wellington on 7 March 2019.

Commentary

3.1 The Report outlines that Local government has been allocated major statutory responsibilities which relate to, or are affected by climate change, and provided with some powers to undertake those responsibilities. These include:

- Local Government Act 2002 ("LGA") - requirements for decision making, the performance of regulatory functions, financial prudence, asset management etc;
- Resource Management Act 1991:
  - To have particular regard to the maintenance and enhancement of the quality of the environment, and the effects of climate change'(section 7);
  - To recognise and provide for as a matter of national importance, the management of significant risks from natural hazards (section 5);
  - To control actual or potential effects of the use or development of land, including to avoid or mitigate natural hazards (section 31); and
  - To refuse subdivision consent where there is a significant risk from natural hazards (section 106).
- The New Zealand Coastal Policy Statement 2010 requires councils to ensure that coastal hazard risks are managed and identified for a period of at least 100 years, taking account of climate change, and applying a precautionary approach.

3.2 The report suggests that New Zealand local government leaders must understand and focus on credible responses to the following points:

(a) There are an increasing number of climate change cases being litigated around the world, mainly brought by private individuals against public authorities.

(b) Groups and individuals are getting more and more creative with bringing claims – unless central government steps in, the judiciary will likely play a greater role in developing legal rules in this area.

(c) Current local government litigation risk mostly relates to decisions to limit development (short-term judicial review). In the future it seems likely to extend to the consequences of *allowing* development and failing to implement adaptation measures (e.g. from homeowners suffering the physical and economic consequences of climate change in the *longer term*).

(d) There has not yet been any large damages claim in relation to failure to implement adaptation measures in New Zealand. However, it may be only a matter of time.

(e) In the New Zealand statutory context, it is up to local authorities to consider carefully the consequences of decisions to take or not take steps – for example, adaptation measures such as controlling development and protecting coastal regions. With limited guidance from central government, they require lots of evidence and information to make decisions that will withstand legal challenge.

(f) A more fundamental solution would sensibly recognise that anthropogenic climate change is a major "negative meta-externality" requiring collective action on the broadest scale and funded on the broadest base (i.e. central government taxation).

Suggested Resolution

The business paper on Climate Change Adaptation – J Hodder QC be received.

TERRENA KELLY
GENERAL MANAGER ENVIRONMENTAL SERVICES

28 May 2019

Attachment: 1 Climate Change Litigation: Who's Afraid of Creative Judges – Jack Hodder QC

CLIMATE CHANGE LITIGATION: WHO'S AFRAID OF CREATIVE JUDGES?

A paper for presentation to the "Climate Change Adaptation" session of the Local Government New Zealand Rural and Provincial Sector Meeting, Wellington, 7 March 2019

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1 Introduction

1.1 Local government is required to plan and act to meet the current and future needs of local, district and regional communities. This in turn requires prudent stewardship of resources and good quality risk management.

1.2 Those objectives have always been challenging. But now the challenges have been compounded by the strengthening of the consensus on the imminent impacts from significant climate change reflecting human activities.

1.3 This short report assumes the correctness of that consensus, and addresses the legal dimension of those compounded risks for local authorities. It seeks to explain that the combination of, first, climate change concerns, and, second, common law systems such as ours, has already created serious litigation risks for governmental agencies, including local government – ie, risks of damages awards.

1.4 More specifically, the English speaking world is now into the third decade of legal thinking about climate change litigation. Just late last year, the Auckland University Law Review published a detailed 21 page article which concluded that:

> The necessity of responding to plaintiffs seeking remedies for harm due to climate change will inevitably mean that judges use the inherent, creative element of the common law to mould remedies to provide relief.[1]

1.5 The passion and ingenuity behind such plaintiffs should not be underestimated. Nor should the corresponding risks to government defendants from a likely sustained campaign of litigation. Not just central government but also local government.

1.6 Accordingly, this report suggests that New Zealand local government leaders must understand and focus on credible responses to the following points:

(a) There are an increasing number of climate change cases being litigated around the world, mainly brought by private individuals against public authorities.

(b) Groups and individuals are getting more and more creative with bringing claims – unless central government steps in, the judiciary will likely play a greater role in developing legal rules in this area.

(c) Current local government litigation risk mostly relates to decisions to limit development (short-term judicial review). In the future it seems likely to extend to the consequences of *allowing* development and failing to implement adaptation measures (e.g. from homeowners suffering the physical and economic consequences of climate change in the *longer term*).

(d) There has not yet been any large damages claim in relation to failure to implement adaptation measures in New Zealand. However, it may be only a matter of time.

(e) In the New Zealand statutory context, it is up to local authorities to consider carefully the consequences of decisions to take or not take steps – for example, adaptation measures such as controlling development and protecting coastal regions. With limited guidance from central government,

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[1] Saul Holt QC and Chris McGrath "Climate Change: Is the Common Law up to the Task?" (2018) 24 Auckland University Law Review 10.

they require lots of evidence and information to make decisions that will withstand legal challenge.

(f) A more fundamental solution would sensibly recognise that anthropogenic climate change is a major "negative meta-externality" requiring collective action on the broadest scale, and funded on the broadest base (i.e. central government taxation).

2 Local government responsibilities

2.1 The Local Government Act 2002 Act includes repeated expectations of effective local government, not least playing a broad role in meeting current *and future* needs of their communities for good quality:

(a) local infrastructure;

(b) local public services;

(c) performance of regulatory functions [s 3, s 10].

2.2 "Good quality" means effective, efficient and appropriate to present and *anticipated future circumstances* [s 10(2)].

2.3 "Core services" include the avoidance or mitigation of natural hazards, which include subsidence, sedimentation, wind, drought, fire and flooding [s 11A].

2.4 Decision making must take account of the interests of future as well as current communities, and diversity within such communities [s 14].

2.5 Thus regard must be had to:

- prudent stewardship of resources;
- planning effectively for future management of assets;
- taking a sustainable development approach;
- maintaining and enhancing the quality of the environment;
- the reasonably foreseeable needs of future generations [s 14].

2.6 Decision making requires:

- identifying all reasonably practicable options;
- assessing options' advantages and disadvantages;
- if a significant decision regarding land or water, taking into account Māori culture and traditions [s 76, s 77].

2.7 Views presented to local authorities must be considered with an open mind [s 82].

2.8 Long term planning (10 years minimum) is required, providing a long-term focus for local authority decisions, activities – and how rates, debt and levels of service might be affected [ss 93, 93B, 96].

2.9 Financial management is required to be prudent and promote the current and future interests of the community, including provision for expenditure needs identified in the long term plan [s 101].

2.10 A long term plan must include:

- a financial strategy covering:
  - land use
  - capital expenditure on network infrastructure, flood protection and flood control works;

- other significant factors affecting the demand for and provision of services [s 101A];

- an infrastructure strategy, for at least 30 years [s 101B].
  - Local authorities must also have a liability management policy, covering both borrowing and "other liabilities" [ss 102, 104]. And be mindful that the Crown is *not* liable to contribute to the payment of local authorities' debts or liabilities [s 121].

2.11 Further, under the Resource Management Act 1991 ("RMA"), local authorities exercising powers must have particular regard to maintenance and enhancement of the quality of the environment, and to the effects of climate change [s 7].

2.12 Also under the RMA, local authorities' functions extend to controlling the effects of the use or development of land, including to avoid or mitigate natural hazards [s 31].

2.13 And the New Zealand Coastal Policy Statement 2010 requires local authorities to "ensure" that coastal hazard risks are managed and identified for a period of at least 100 years, taking account of climate change, and applying a precautionary approach.

2.14 Thus New Zealand local government has been allocated major statutory responsibilities which relate to, or are affected by climate change, and provided with some powers to undertake those responsibilities.

2.15 Further, with statutory responsibilities and powers, and permanent (and solvent) existence, local authorities are an obvious potential defendant if and when climate litigation gains greater traction here.

3 The "Common Law" and Creativity

3.1 An appreciation of any litigation risk requires some understanding of the role of judges in declaring and making law. This has two components: first, interpreting legislation enacted by, in our country, Parliament; and, second, refining and "developing" the common law.

3.2 To explain briefly, the common law is a general description of legal rules which exist outside legislation. These rules are sometimes called "judge-made law". The essential rules of the law of contract, the law of trust, and the law of torts, are prominent examples.

3.3 "Torts" is our legal jargon for "wrongs" – things for which A can sue B without relying on a statute or a contract. The classic forms are where A is struck by B – with a baseball bat (assault) or a vehicle (negligence). But the scope of torts has expanded dramatically ("developed") in the past century or so. Careless statements or exercises of powers may be held negligent, making the defendant liable to compensate for economic loss. The leaky buildings litigation saga is a leading example, needing little elaboration for New Zealand local government.

3.4 While common law rules are mostly settled and stable, they may overlap untidily. And they usually have a moral underpinning. Judicial perceptions of this moral dimension change over time. In tort, especially negligence, this includes ideas of protection of the vulnerable, sanctioning of careless conduct, and loss spreading.

3.5 Changes to the common law come from the appellate courts who restate the law in major and usually "hard" cases. In New Zealand, our Supreme Court and Court of Appeal look with interest at what their common law (and English speaking) counterparts do in the UK, Australia and Canada. Their collective output involves

a steady and accumulating flow of written reasoning. Major cases often involve policy choices about whether to refine or extend legal boundaries.

3.6 Another aspect of our common law is the fairly recent recognition that the "common law of New Zealand" either includes or must have some regard to *tikanga*. However, as a form of customary law, the contents of tikanga must be proved by evidence. The longer term implications of this are unclear.

3.7 In addition, while legislative rules are written in and passed within the Parliamentary process, their precise meaning may not be clear. That meaning will only be settled by interpretation by, ultimately, our appellate courts. And in this interpretation work, the courts will have regard to the inferred legislative purpose as well as the actual statutory text. And, where relevant, they may seek consistency with the rights specified in the New Zealand Bill of Rights Act 1990.

3.8 In other words, judges – principally those in appellate courts – have some scope for choice when interpreting statutes. This is especially so for those statutes using general language. Some may recall the unexpected reach of a few words in the State-Owned Enterprises Act 1986:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

3.9 In 1987, those words were held by the Court of Appeal to signify a partnership between Pakeha and Māori. That would have been inconceivable 50, 100 or 150 years earlier.

3.10 Additional scope for judicial choices (and creativity) has been provided by Parliament in the Bill of Rights Act. Its impact is difficult to summarise, but one significant consequence is the ascendency to the judiciary of lawyers taught that the Act provides potentially powerful bets for judicial creativity. To date, that creativity has been relatively muted. But it really is too soon to know whether that will continue. A fairly recent article by two Otago Law School academics concluded that:

> The New Zealand experience [with this Act] shows that the only certainty is that *some* judicial innovation under such instruments will occur, but just *how much* and to *what ends* is deeply uncertain.[2]

3.11 In short: the law provides binding and enforceable remedies. But the law changes. So judges matter.

4 The logic of modern Climate Litigation

4.1 In the USA, where the Constitution's checks and balances have often produced legislative stalemate, and the courts can strike down legislation as "unconstitutional", litigation has long had a political dimension. In particular, where there is a call for change to existing rules this may involve a series of proceedings which seek either to create enough attention and risk to get a response from government or Congress, or to persuade the courts themselves to order wide-ranging remedies. This process recognises and uses the "creative" aspect of the law, and the role of judges.

4.2 Those dynamics have not escaped attention further afield, nor in the efforts of concerned parties to see "something done" to address issues arising from greenhouse gases and climate change.

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[2] Andrew Geddis and MB Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland" (2016) 35 University of Queensland Law Journal 251.

4.3 It is also relevant that legal imagination (or creativity) is most frequently explored and published by legal scholars. Such scholars often have an understandable interest in matters that are new or could be changed. New Zealand law schools are no different. And senior advocates and judges are kept reasonably well informed on what areas are receiving attention from such legal scholars.

4.4 Climate change is one such area. The earliest US legal academic writing in this field dates from the late 1990s. Now there are many specialist legal journal services with this focus as well as dozens of articles in other law journals every year. Not to count the more informal sources of information on "climate change law".

4.5 To take tort law, and especially the law of negligence, as an example, the dynamics of seeking change to rules by suing government agencies – whether central or local government – is well described in the legal literature on climate change.

4.6 Those dynamics recognise that the existing rules around negligence are not likely to produce immediately effective results in any particular case. But they recognise, as almost all lawyers (and judges) understand, that over time negligence has changed to reflect judges' perceptions of the needs of contemporary society – not least those least able to protect themselves.

4.7 Further, the lawyers working with those seeking change understand that it just takes one decision to change perceptions and the law itself. There are many judge-made legal rules applied today that were regarded as heresy only a decade or so ago.

4.8 In tort, as mentioned, the traditional issue involves some variation on A having struck B. In climate change litigation, there are many thousands of As (emitters) and many millions of Bs (those whose life or property is at risk from the consequences of climate change). But there are also government agencies who are – or are expected to be – in the middle. These features confound the easy application of negligence rules in climate change litigation. But it is difficult to disagree with, say, Professor Douglas Kysar of the Yale Law School when he argues that (1) faced with the scale of problems that climate change creates, judges in tort cases will make a choice between being irrelevant or adapting tort law principles to deal with the complexities of a "barrage" of climate change litigation; and (2) at some point, possibly quite soon, they will choose adaption over irrelevance.[3]

4.9 Professor Kysar notes the description of global warming as "the mother of all collective action problems", and as a "super wicked problem". His argument is that if government agencies and legislatures do not address these problems – and to date they have not achieved a great deal – then courts will reshape tort law to fill the vacuum. He concludes:

> If scientists are even remotely correct in their assessment of harms to be expected from greenhouse gas emissions, then climate change will enter prominently into tort law's evolutionary dynamics.

4.10 Can we explain away this analysis as academic and/or American? In my view, that would be unwise. Consider two modern changes in the law of negligence relevant to New Zealand. First, English courts have in asbestosis cases involving successive employment by different employers effectively removed the previous need to prove that a specific period of exposure (and employment) resulted in the disease.

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[3] Douglas Kysar "What Climate Change can do about Tort Law" (2011) 41 Environmental Law 1.

4.11 Second, and closer to home, this month our Court of Appeal will hear the Crown's appeal against the High Court's conclusions that the Ministry of Agriculture and Forestry ("MAF") was negligent in issuing an import permit for kiwifruit pollen in 2006/07, and that a specific 2009 import consignment caused the Psa outbreak which became evident in late 2010.[4] In essence, the existence of the statutory powers to regulate biosecurity risk was held to establish a relationship where kiwifruit growers relied on, and were owed a (novel) duty of care by, MAF. This case is significant for anyone involved with the exercise of regulatory powers – as local authorities often are.

5 A sample of recent overseas Climate Litigation

5.1 There are now many climate change cases around the world. The cases outlined below are but a sample. They indicate that:

(a) Courts are prepared to make factual findings that climate change is related to anthropogenic CO2 emissions.

(b) Some courts are also prepared to be creative about remedies.

(c) Some courts feel that is simply wrong to disregard, or leave to the executive or legislative branches, the need to address problems associated with anthropogenic climate change.

(d) The courts find a basis for their intervention in expansive approaches to a "duty of care" in the torts of negligence or nuisance, and in human rights.

- *American Electric Power Co (USA)*

5.2 In 2004, a number of US states together with New York City and several non-profit land trusts, commenced proceedings against five large firms operating fossil-fuel fired power plants, alleged to be the largest CO2 emitters in the USA.

5.3 These proceedings alleged public nuisance under federal common law, or breaches of state tort law, because public lands, animal and plant habitats, infrastructure and human health were at risk from climate change to which the defendants' emitting activities had contributed. The proceedings sought court orders that would require each defendant to cap and then reduce its emissions by a specified percentage each year over at least 10 years.

5.4 A Federal Court of Appeals held that these claims were credible. But in 2011, the federal common law claims were held to be legally untenable by the US Supreme Court because the common law had been supplanted in this area by a federal statute, the Clean Air Act. The state law claims were removed back to the lower courts. It does not appear that these have proceeded further.

- *Asghar Leghari (Pakistan)*

5.5 In 2015, the Lahore High Court upheld a farmer's claim against the Federation of Pakistan that the government's inaction and delay in implementing its climate change policy violated his fundamental constitutional rights to life and dignity.

5.6 The Court ordered the government to appoint a focal person on climate change, to prepare a list of adaptation measures to be completed by the end of 2015, and to report back to the Court. Further, the Court also established a Climate Change Commission to help the Court monitor compliance and progress on an ongoing basis.

[4] *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559.

5.7 The Court stated that:

> climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is [a] clarion call for the protection of [the] fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.[5]

- *Juliana v United States (USA)*

5.8 In 2016 (and again in 2017), a Federal District Court rejected attempts to strike out a claim challenging inaction by the US President and various executive government agencies (e.g. the Department of Energy, the Environmental Protection Agency) in regulating the burning of fossil fuels, in the face of knowledge of its effects in destabilising the climate systems and of the need for urgent action.

5.9 The claims rely on constitutional principles to allege that such inaction was (a) a breach of the rights of individuals to life, liberty and property, and (b) a violation of a "public trust" obligation – to hold natural resources in trust for the people and for future generations. The remedies sought are declarations of breach, and an order requiring the protection of a "national remedial plan".

5.10 In particular, Judge Aitken rejected the defendants' arguments that these were "political questions" which the courts could not address. In her conclusion, she said:

> plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions – whether or not they violate any specific statutory duty – have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.[6]

5.11 And Judge Aitken also quoted from a paper produced by another Judge:

> The current state of affairs … reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits …
>
> The [courts] can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.[7]

- *Lliuya v RWE AG (Germany)*

5.12 In late 2017, an appellate court in Germany allowed a climate change proceeding against a private emitter to move to the evidence stage. The claim is brought by a Peruvian citizen who alleges that his home is at risk because it is located below a glacial lake in the Andes, and the lake is increasing in volume because of glacial melt.[8]

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5 *Asghar Leghari v Federation of Pakistan* [2015] W.P. No. 25501/2015 at 6.

6 *Juliana v United States* 217 F Supp 3d 1224 (D. Or., 2016), at 1261.

7 Alfred Goodwin "A Wake-Up Call for Judges" (2015) Wisconsin Law Review 785 at 785, 788.

8 *Lliuya v RWE AG* [2015] Case No. 2 O 285/15 Essen Regional Court (Germany).

5.13 The defendant is RWE AG, Europe's largest energy company. It is alleged that its subsidiaries' power plants have contributed 0.4% of all anthropogenic GHG emissions since the Industrial Revolution.

5.14 The claim seeks from RWE a 0.47% contribution (as "compensation") to the costs (apparently some 4M euros) of preventative measures to avoid a glacial lake defrost flood.

5.15 The legal basis for the claim would be described in our law as private nuisance: a liability of A where A's activities cause unreasonable interference to B's usual enjoyment of B's land. Our law also recognises public nuisance: where A's activities materially affect the reasonable convenience of a class of other persons.

5.16 The *Lliuya* case faces many hurdles under German law, but is continuing. As a recent legal article observed, the claim has already made "extraordinary progress through the German courts".[9]

- *Urgenda Foundation (Netherlands)*

5.17 In October 2018, the Hague Court of Appeal upheld a 2015 District Court judgment which ordered the State of the Netherlands to increase its reduction target for 2020 CO2 emissions, relative to 1990, from 14-17% to at least 25%. The claimant had sought a 40% reduction.

5.18 The facts accepted by the District Court, and not challenged on the appeal, included the "insight" that the parts per million CO2 equivalent needs to be limited to 430 ppm by 2100 to avoid the maximum safe temperature rise (since the Industrial Revolution) of 1.5%. And that:

> There is a direct, linear link between anthropogenic emissions of greenhouse gases, partially caused by combusting fossil fuels, and global warming. Emitted CO2 lingers in the atmosphere for hundreds of years, if not longer.
>
> As global warming continues, not only the severity of its consequences will increase. The accumulation of CO2 in the atmosphere may cause the climate change process to reach a 'tipping point', which may result in abrupt climate change, for which neither mankind nor nature can properly prepare.[10]

5.19 The claim was based on Article 2 (right to life) and Article 8 (right to private and family life) of the European Convention on Human Rights, which extend to environment-related situations. The Court concluded:

> … it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.[11]

5.20 The Court of Appeal then held that the 25% minimum reduction ordered by the District Court was "in line with the State's duty of care", and the State's own target was not protected by any "political question" or "margin of appreciation" defences.

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9 Vedantha Kumar and Will Frank "Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like *Lliuya* Succeed Under English Negligence Laws" (2018) 2 CCLR 110 at 123.

10 *Urgenda Foundation v the State of the Netherlands (Ministry of Infrastructure and Environment)* [2015] HAZA C/09/456689 at 12.

11 At 13.

6 So what (for New Zealand)?

6.1 It is possible to think that these cases could not succeed in New Zealand. We have a healthy judicial respect for parliamentary sovereignty, and limited appetite for "grandstanding" or "political" litigation. We do not have a constitution which allows or encourages the courts to override legislation. And our common law rules on, say, negligence create major problems for climate change litigants who seek to establish a private law duty of care, or causation.

6.2 Nevertheless, there are local indications that, in some form, climate change litigation will get real traction. These include the following.

6.3 In the leaky building cases, the New Zealand courts found clear signs in the Building Act that territorial authorities were meant to "ensure" that building work complied with the Building Code, and that this responsibility translated into a duty of care owed to residential home owners (including future owners), and now extended to commercial buildings. As is well known, the cost to local bodies and their insurers has been huge. In other countries, notably the UK, a different result has been reached in such cases. But the New Zealand courts' generally "liberal" reputation has been confirmed on the basis of apparent Parliamentary intention, fairness to the vulnerable and common law dynamics.

6.4 In 2013, our Supreme Court held, in the *Buller Coal* case, that the RMA directed central but not local government to address global climate change issues. This meant that, contrary to the opposition from conservation groups, emissions from burning West Coast coal in India was not relevant to relevant resource consents for the local mining operations. However, the Court's judgment was by a 4:1 majority, the Chief Justice dissenting. And the majority decision has been subjected to critical commentary by legal commentators, and cited as a reason for further legislative change.

6.5 In late 2017, in the *Thomson* case, the High Court upheld a judicial review challenge to the Minister for failing to review the 2050 emission reduction targets under the Climate Change Response Act 2002. The Court heard evidence on the effects of climate change (not contested by the Crown), and concluded that:

(a) the non-review of the 2050 target had failed to take into account as a mandatory relevant consideration the IPCC's recent report;

(b) in considering the 2050 target, the effect of climate change on the low-lying islands of Tokelau was also a relevant consideration.

6.6 Further, the High Court rejected the Crown's argument that climate change issues involved policy judgements and were not appropriate for judges to determine. The Court considered US, Canadian and English cases, as well as the *Urgenda* case, and stated:[12]

> The courts have recognised the significance of the issue for the planet and its inhabitants and that those within the court's jurisdiction are necessarily amongst all who are affected by inadequate efforts to respond to climate change. The various domestic courts have held they have a proper role to play in Government decision making on this topic, while emphasising that there are constitutional limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made.

6.7 In 2018, as noted earlier, the High Court held that MAF's biosecurity regulatory powers gave rise to a private duty of care to New Zealand kiwifruit growers. This was acknowledged as a "novel" duty but in part justified by analogy with the leaky building case law and by the vulnerability of the growers. Even if the High Court

[12] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733 at [133].

judgment is modified on appeal, it illustrates that our judges may have few qualms about a prolonged post-mortem on statutory decision-making, and a major (and expensive) extension of negligence law.

6.8 In late 2018, as noted earlier, the Auckland University Law Review published a major article by two barristers with Australian practices and a strong interest in climate litigation. Their article is entitled "Climate Change: Is the Common Law up to the Task?" Their answer, following a review of, among other things, the *Buller Coal* case and the *Adani Mining* litigation in Australia, is "Yes". In essence, they agree with Professor Kysar's analysis: courts confronted with many climate change lawsuits are likely to expand the boundaries of tort law.

6.9 Just a few weeks ago, a well-regarded litigator, Davey Salmon (one of the counsel in the *Buller Coal*, *Thomson* and kiwifruit cases), presented a provocative paper to a conference in Auckland. His "thoughts" on climate litigation in New Zealand were powerful and valuable. And they seemed to me to be well received by many in the audience – which included a respectable proportion of New Zealand's senior judges.

6.10 Salmon's general thesis was consistent with that of Professor Kysar, albeit from a New Zealand perspective:

> There are policy reasons why it will be argued that some climate change issues are better dealt with by legislation than by the courts. But I suggest that the courts are particularly well-placed to comprehend and process the problem. As seen in the Treaty of Waitangi and human rights spheres, our courts are capable of heavy lifting on difficult issues.
>
> … absent a meaningful legislative response to climate change, we can expect a significant role for the courts. We are in the early days, but I predict various New Zealand Bill of Rights Act arguments, a more engaged approach to judicial review on unreasonableness/irrationality grounds, perhaps a novel tort case, and to the extent the arguments succeed, plenty of jurisprudence about remedies.[13]

6.11 His thesis is in significant part founded on the proposition that it is the courts, and not politicians in Cabinet or Parliament, which will take a careful evidence-based approach to climate litigation issues. And that, once they are "educated" about these issues, judges may well try to adapt the law to do something about addressing them.

6.12 More generally, in a small country such as ours, judges are well used to considering and drawing lessons from cases with similar issues that have been decided overseas. Such decisions are in no way binding here, but they may be intellectually persuasive and provide examples of creative decision-making for a New Zealand judge tasked with deciding novel issues.

7 Preparing for the next (legal) revolution …

7.1 Since, say, 1970, various aspects of New Zealand law have undergone radical change – to the extent that the scale might have seemed revolutionary to earlier generations. Examples include: what used to be known as divorce, illegitimacy, and matrimonial property; the influence of the Treaty of Waitangi; and no fault accident compensation.

7.2 Those changes are enacted or encouraged by new legislation. But the impetus for such changes often included the opinions of legal scholars and judges

[13] Davey Salmon, "Thoughts on Climate Change Litigation in New Zealand", 31 January 2019 (paper presented to Legal Research Foundation Conference to mark the retirement of the Chief Justice, Sian Elias).

expressing criticisms of the status quo. And sometimes seeking more creative ways of interpreting and applying the existing legal rules.

7.3 To repeat: the law changes. So judges matter. And it is not difficult to conclude that a barrage of climate litigation is a risk for New Zealand local government.

7.4 As always, identifying a risk is infinitely easier than removing it. But it is a necessary start.

7.5 The strengthening consensus on anthropogenic climate change and its adverse consequences indicates issues which in some cases will materialise only over decades. And there are many interests in play: owners and users of private assets; those undertaking local use changes and developments; insurers; publicly owned assets; central government and taxpayers; local government and ratepayers.

7.6 If major climate litigation, involving large monetary claims, does occur in future years, it will involve an *ad hoc* inquiry into fault and apportionment of responsibility for any one or more of thousands of exercises of statutory powers, or alleged failures to exercise such powers.

7.7 This will almost inevitably feature the distortions of hindsight:

> In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed.[14]

The obvious unpredictability of this adds further complexity to the nature of climate litigation risk.

7.8 In the face of such risks, with impact on most and perhaps all parts of any country, the idea of national standards and solutions seems obvious. In New Zealand, appropriate legislation also seems obvious. We have a long history of public welfare legislation backed by taxpayer funding, and our legislation does trump the common law (including by enacting immunities or limitation defences against litigation risks).

7.9 I will not venture into details of the shape of "appropriate" legislation. But I suggest that some refined and expanded version of the EQC system justifies serious investigation. At a conceptual level, that would involve expansion of the range of "natural hazards" covered by a protective legislative scheme. And the ultimate backstop would be the Crown and its general taxation powers.

7.10 The political and economic ramifications and difficulty of handling the risks which climate litigation would bring – and reflect – may also deserve the label "super wicked". But it seems to me that doing nothing requires a surprising level of bravery.[15]

JE Hodder QC
7 March 2019*

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[14] *Rosenberg v Percival* (2001) HCA 18, (2001) 205 CLR 434, per Gleeson CJ at [16].

[15] Often legal-speak for foolhardiness.

*And with thanks to Nina Opacic, a graduate student of Victoria University of Wellington, for research assistance.

New Zealand Cases

- *Thompson v Minister for Climate Change Issues* [2017] NZHC 733.
- *West Coast Ent Inc v Buller Coal* [2013] NZSC 87.

Overseas Cases

- *In re Vienna-Schwechat Airport Expansion* [2017] W109 2000179-1/291E (Austria).
- *Earthlife Africa Johanessburg v the Minister of Environmental Affairs and others* [2017] 65662/16 (South Africa).
- *Juliana v United States* [2016] 217 F Supp 3d 1224 (D. Or., 2016) (USA).
- *Urgenda Foundation v the State of the Netherlands (Ministry of Infrastructure and Environment)* [2015] HAZA C/09/456689 (the Netherlands).
- *Asghar Leghari v Federation of Pakistan* [2015] W.P. No. 25501/2015 (Pakistan).
- *Lliuya v RWE AG* [2015] Case No. 2 O 285/15 Essen Regional Court (Germany).
- *VZW Klimaatzaak v Kingdom of Belgium, et al.* [2015] (Court of First Instance, Brussels) (Belgium).
- *American Electric Power Co v Connecticut* [2011] 564 U.S. 410 (USA).
- *Massachusetts v Environmental Protection Agency* [2007] 549 US 497 (USA).

Articles

- Kim Bouwer "The Unsexy Future of Climate Change Litigation" (2018) 30 Journal of Environmental Law 483.
- Myanna Dellinger "See You in Court: Around the World in Eight Climate Change Lawsuits" (2008) 42 Wm & Mary Envtl L & Pol'y Rev 525.
- Andrew Geddis and MB Rodriguez Ferrere, "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland" (2016) 35 University of Queensland Law Journal 251.
- Alfred Goodwin "A Wake-Up Call for Judges" (2015) 4 Wisconsin Law Review 785.
- Saul Holt QC and Chris McGrath "Climate Change: Is the Common Law up to the Task?" (2018) 24 Auckland University Law Review 10.
- David Hunter and James Salzman "Negligence in the Air: The Duty of Care in Climate Change Litigation" (2007) 155 U Pa L Rev 1741.
- Vedantha Kumar and Will Frank "Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like *Lliuya* Succeed Under English Negligence Laws" (2018) 2 CCLR 110.
- Douglas Kysar, "What Climate Change can do about Tort Law" (2011) 41 Environmental Law 1.
- Jacqueline Peel and Hari M Osofsky "A Rights Turn in Climate Change Litigation" (2018) 7 Transnational Environmental Law 37.
- Brian Preston "Climate Change Litigation (Part 1)" (2011) 1 CCLR 3.
- Nathan Ian Ross "Climate Change and the Resource Management Act 1991: A Critique of *West Coast ENT Inc v Buller Coal Ltd*" (2015) 46 Victoria University of Wellington Law Review 1111.
- Meredith Wilensky "Climate Change in the Courts: An Assessment of Non-US Climate Litigation" (2015) 26 Duke Evtl L & Poly F 131.

Document No: A430948

Report To:	**Council**
	Meeting Date: 28 May 2019
	Subject: **Earthquake Prone Buildings – Priority Buildings: 'Strategic Transport Routes' and 'Unreinforced Masonry Buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation'**
	Type: Decision Required

Purpose of Report

1.1 The purpose of this business paper is to seek a decision from Council regarding whether to formally consult on Earthquake Prone Building (EPB) 'Strategic Transport Routes' and/or 'Unreinforced Masonry Buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation'.

Background

2.1 On 1 July 2017, a new national system for managing earthquake-prone buildings in New Zealand came into effect, and this is now incorporated into the Building Act 2004 ("the Act").

2.2 The new legislation standardises the rules and processes that apply to identifying and remediating earthquake-prone buildings. It avoids a 'one-size-fits-all' approach, by prioritising geographic areas, buildings and parts of buildings that pose the greatest risk. This approach aims to ensure that the national response is proportionate to the risk, costs are minimised, and built heritage is retained as much as practicable.

2.3 Under the Act, Waitomo District has been classified as a medium risk zone. This provides Waitomo District Council (WDC) with 10 years to identify potentially earthquake-prone buildings, one year for building owners to provide an engineer's assessment, and then 25 years for building owners to strengthen the building.

2.4 In addition, the Act requires councils to identify 'priority buildings' in half the time of other buildings. For Waitomo District, this means that priority buildings must be identified in 5 years (i.e. by July 2022), and building owners have 12.5 years to strengthen (remediate) or demolish the building.

2.5 'Priority buildings' are defined as follows in the Act:

> *133AE Meaning of priority building*
>
> *(1) In this subpart, priority building means any of the following that are located in an area of medium or high seismic risk:*
>
> *(a) a hospital building that is likely to be needed in an emergency (within the meaning of the Civil Defence Emergency Management Act 2002) to provide—*
>
> *(i) emergency medical services; or*
>
> *(ii) ancillary services that are essential for the provision of emergency medical services:*

(b) a building that is likely to be needed in an emergency for use as an emergency shelter or emergency centre:

(c) a building that is used to provide emergency response services (for example, policing, fire, ambulance, or rescue services):

(d) a building that is regularly occupied by at least 20 people and that is used as any of the following:

(i) an early childhood education and care centre licensed under Part 26 of the Education Act 1989:

(ii) a registered school or an integrated school (within the meaning of the Education Act 1989):

(iii) a private training establishment registered under Part 18 of the Education Act 1989:

(iv) a tertiary institution established under section 162 of the Education Act 1989:

(e) any part of an unreinforced masonry building that could—

(i) fall from the building in an earthquake (for example, a parapet, an external wall, or a veranda); and

(ii) fall onto any part of a public road, footpath, or other thoroughfare that a territorial authority has identified under section 133AF(2)(a):

(f) a building that a territorial authority has identified under section 133AF(2)(b) as having the potential to impede a transport route of strategic importance (in terms of an emergency response) if the building were to collapse in an earthquake.

(2) For the purposes of subsection (1)(a) and (b), the likelihood of a building being needed in an emergency for a particular purpose must be assessed having regard to—

(a) any national civil defence emergency management plan made under section 39 of the Civil Defence Emergency Management Act 2002; and

(b) the civil defence emergency management group plan approved under section 48 of the Civil Defence Emergency Management Act 2002 that covers the district in which the building is situated.

(3) If only part of a building meets the criteria set out in subsection (1), only that part of the building is a priority building.

(4) Whether a building is a priority building affects—

(a) the deadline by which a territorial authority must identify whether the building or a part of the building is potentially earthquake prone (see section 133AG); and

(b) the deadline for completing seismic work on the building or a part of the building, if it is subject to an EPB notice (see section 133AM).

2.6 There are two key categories of priority buildings:

a) Those that are prescribed in the Building Act, which include hospitals and other buildings used for emergency response and education buildings regularly occupied by more than 20 people (as outlined in section 2.5 above); and

b) Those that are described in the Building Act and are determined (if required) by using the special consultative procedure in the Local Government Act 2002 (LGA). This includes parts of unreinforced masonry buildings that could fall in an earthquake onto a thoroughfare with sufficient pedestrian or vehicle traffic to warrant prioritisation; and

buildings that could impede transport routes of strategic importance if they were to collapse in an earthquake.

2.7 Section 133AF of the Act sets out the role of Council in identifying priority buildings:

> *133AF Role of territorial authority in identifying certain priority buildings*
>
> *(1) This section applies to a territorial authority whose district includes any area of medium or high seismic risk.*
>
> *(2) The territorial authority, —*
>
> *(a) for the purpose of section 133AE(1)(e) (prioritising parts of unreinforced masonry buildings), must use the special consultative procedure in section 83 of the Local Government Act 2002 to identify any part of a public road, footpath, or other thoroughfare in an area of medium or high seismic risk—*
>
> *(i) onto which parts of an unreinforced masonry building could fall in an earthquake; and*
>
> *(ii) that has sufficient vehicle or pedestrian traffic to warrant prioritising the identification and remediation of those parts of unreinforced masonry buildings; and*
>
> *(b) for the purpose of section 133AE(1)(f) (prioritising buildings that could impede a strategic transport route),—*
>
> *(i) may, in its discretion, initiate the special consultative procedure in section 83 of the Local Government Act 2002 to identify buildings for that purpose; but*
>
> *(ii) must not identify buildings for that purpose other than in accordance with the special consultative procedure.*
>
> *(3) However, a territorial authority is not required to act under subsection (2)(a) if there is no reasonable prospect of any thoroughfare in its district satisfying the criteria set out in subsection (2)(a)(i) and (ii).*
>
> *(4) If a territorial authority is required by subsection (2)(a) or decides under subsection (2)(b) to use the special consultative procedure in section 83 of the Local Government Act 2002, it must use the procedure within a time frame that enables the territorial authority to meet the applicable time frame under section 133AG(4) for identifying potentially earthquake-prone priority buildings in its district.*

2.8 It is noted that section 133AF (3) of the Act states that councils do not have to use the special consultative procedure for the 'consideration of thoroughfares with sufficient vehicle or pedestrian traffic to warrant prioritisation' if there is no reasonable prospect of any thoroughfare in its district satisfying the criteria (s133AF(2)(a)(i) and (ii)).

2.9 Likewise, section 133AF(b)(i) of the Act states that it is discretionary for Council to use the special consultative procedure for buildings that could impede a strategic transport route.

2.10 An URM building is defined in the Ministry of Business, Innovation and Employment (MBIE) Guidance document ("Priority Buildings: A guide to the earthquake-prone building provisions of the Building Act" (July 2017)) as follows:

> *"A URM building has masonry walls that do not contain steel, timber or fibre reinforcement. URM buildings are older buildings that often have parapets, as well as verandas, balconies, decorative ornaments, chimneys and signs attached to their facades (front walls that face onto a street or open space)."*

Commentary

URM Buildings on a Thoroughfare with Sufficient Vehicle or Pedestrian Traffic to Warrant Prioritisation

3.1 As outlined above in section 2, Council is not required to use the special consultative procedure if it considers there is no reasonable prospect of any thoroughfare in its district satisfying the criteria in the Act (s133AF(2)(a)(i) and (ii)), which is:

> *"…to identify any part of a public road, footpath, or other thoroughfare in an area of medium or high seismic risk—*
>
> *(i) onto which parts of an unreinforced masonry building could fall in an earthquake; and*
>
> *(ii) that has sufficient vehicle or pedestrian traffic to warrant prioritising the identification and remediation of those parts of unreinforced masonry buildings…"*

3.2 In Te Kuiti, it is considered that the only roads and pedestrian routes that could possibly have URM buildings which may fall in an earthquake with sufficient vehicle or pedestrian traffic are: Rora Street, Sheridan Street, King Street East and Taupiri Street.

3.3 The only other road / pedestrian route this could apply to in our District is Moa Street in Piopio (where there is one potential URM building).

3.4 An analysis of these roads / pedestrian routes follows below.

Vehicle Traffic

3.5 MBIE's guidance document "Priority Buildings: A guide to the earthquake-prone building provisions of the Building Act" (July 2017) provides the following basic criteria for identifying areas with high vehicular traffic:

Table 1

Areas with high vehicular traffic *(people in motor vehicles/on bikes)*

Description of use	Description of area	Example of application to city or metropolitan area	Exam appli smal rural
Key traffic routes	Key traffic routes regularly used by vehicles including public transport	Central business district streets, well trafficked suburban streets, arterial routes, heavy use bus routes	Well tr streets of stat arteria
Areas with concentrations	Areas where high	Busy intersections, areas where traffic	Busy ir

3.6 Council's records (last taken in 2017) show that Rora Street and Taupiri Street have the following vehicle movements per day (VMPD):

- Rora Street - 3855
- Taupiri Street - 1420

3.7 Note: There is no data for Sheridan Street, Alexandra Street, King Street (Te Kuiti); and Moa Street in Piopio.

3.8 Having regard to the criteria in table 1 above, the width of the roads, the number of potential URM buildings on those roads, and the recorded vehicle movements; it is considered that there is not sufficient vehicle traffic to warrant prioritisation.

Pedestrian Traffic

3.9 MBIE's guidance document "Priority Buildings: A guide to the earthquake-prone building provisions of the Building Act" (July 2017) provides the following basic criteria for identifying 'high pedestrian areas':

Table 2

High pedestrian areas *(people not in vehicles)*

Note: high pedestrian areas are those areas where people are concen routes with high foot traffic.

Description of use	Description of area	Example of application to city or metropolitan area	Exam appli smal rural
Areas relating to social or utility activities	Areas where shops or other services are located	City and suburban areas with shops, cafes, restaurants, bars, theatres and malls	Areas shopp the m the lo comm
Areas relating to work	Areas where concentrations of people work and move around	Areas around office buildings or other places of work where there is a concentration of workers	Areas busine towns areas a conc worke larger shops
Areas relating to transport	Areas where concentrations of people access transport	Areas around transport hubs, train stations, bus stops, car parks	Areas bus st statio centre
Key walking	Key walking	Routes from	Route

3.10 WDC does not hold any pedestrian count data; therefore, to provide an estimate of pedestrian numbers, Council staff undertook some monitoring of pedestrian traffic passing 127 Rora Street, Te Kuiti.

3.11 The data collected (on different days and times) equated to an average of 80 pedestrians per hour, or approximately 640 pedestrians per day (during usual shop opening hours - 9am to 5pm).

3.12 Table 2 above provides some examples of high pedestrian areas as applicable to a small town/rural area. It is considered there are no areas (i.e. local pub,

community centre, bus stop, tourist centre etc) applicable in our District either where potential URM buildings are located; and/or that have a concentration of people at any one time that are of a number to warrant prioritisation.

3.13 Therefore, having regard to the criteria, the width of the roads, the number of potential URM buildings, and the (estimated) pedestrian traffic; it is considered that there is not sufficient pedestrian traffic to warrant prioritisation.

Conclusion

3.14 It is considered that there is no reasonable prospect of any thoroughfare (traffic or pedestrian) in our District satisfying the criteria in the Act. While some of the roads identified have reasonably "high" pedestrian and vehicle traffic in the context of other roads in our District, they are not considered to warrant consultation or prioritisation.

3.15 Therefore, it is recommended that Council does not formally consult pursuant to section 133AF of the Act on "URM buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation".

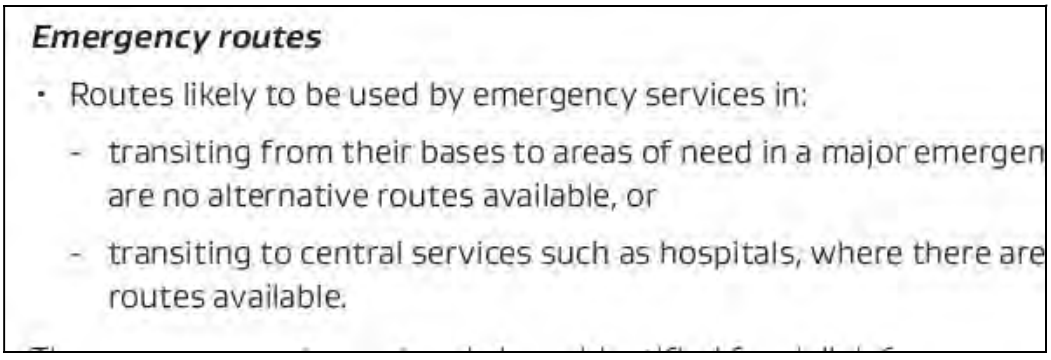
Transport Routes of Strategic Importance

3.16 As outlined in section 2 above, pursuant to Section 133AF(b)(i) of the Act, it is discretionary for Council to use the special consultative procedure for buildings that could impede a transport route of strategic importance ("strategic transport routes").

3.17 MBIE's guidance document outlines the rationale for identifying strategic transport routes as follows:

> *"to ensure that buildings impeding a strategic route in an earthquake could inhibit an emergency response to the detriment of the community (i.e. loss of life), if timely access to emergency care is not possible."*

3.18 The guidance document provides the following criteria to identify strategic transport routes:



Emergency routes

- Routes likely to be used by emergency services in:
  - transiting from their bases to areas of need in a major emergen
    are no alternative routes available, or
  - transiting to central services such as hospitals, where there are
    routes available.

3.19 In addition to the above, the strategic transport routes must also have at least one building located on them that would impede the route if it collapsed in an earthquake.

3.20 A map showing the routes likely to be used by emergency services is attached as Appendix 2. As shown on the map, all emergency service routes (as per the criteria) either have an alternative route available, should a road be impeded.

3.21 Meetings were held externally with the relevant emergency services (Police, New Zealand Fire Service, St John Ambulance), and internally with WDC's Roading Infrastructure Team, to explain the legislation and discuss whether they considered there were any strategic transport routes of concern.

3.22 All parties considered there were no strategic transport routes in the Waitomo District, as there were alternative route options to enable emergency services to operate in the case of a major emergency.

Conclusion

3.23 It is considered that there are no strategic transport routes in the Waitomo District pursuant to Section 133AF(2)(b)(i) of the Act.

3.24 Therefore, it is recommended that Council does not formally consult pursuant to section 133AF of the Act on strategic transport routes.

Analysis of Options

4.1 There are three options available to Council:

a) Do not undertake consultation on 'URM Buildings on a Thoroughfare with Sufficient Vehicle or Pedestrian Traffic to Warrant Prioritisation' or 'Transport Routes of Strategic Importance'; or

b) Undertake consultation on 'URM Buildings on a Thoroughfare with Sufficient Vehicle or Pedestrian Traffic to Warrant Prioritisation' and 'Transport Routes of Strategic Importance'; or

c) Undertake consultation on either 'URM Buildings on a Thoroughfare with Sufficient Vehicle Pedestrian Traffic to Warrant Prioritisation' or 'Transport Routes of Strategic Importance'

4.2 These options have been discussed in section 3 above.

Considerations

5.1 Risk

5.2 The Act provides the statutory authority (section 133AF (2)(b)(i) and section 133AF(3)) for Council to determine not to undertake consultation in accordance with the Special Consultative Procedure of the Local Government Act 2002. Therefore, there is minimal risk to Council in taking this decision.

5.3 Consistency with Existing Plans and Policies

5.4 The proposal is not inconsistent with Council's plans and policies.

5.5 Significance and Community Views

5.6 The decision is not a significant decision pursuant to WDC's Significance and Engagement Policy (the Policy).

5.7 In respect of Strategic Transport Routes, WDC staff have consulted with local emergency services and WDC's Roading Infrastructure Team.

Recommendation

6.1 It is recommended that Council resolve pursuant to sections 133AF(2)(b)(i) and section 133AF(3) of the Building Act 2004 not to consult on 'Strategic Transport Routes' or 'Unreinforced Masonry Buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation' in accordance with the special consultative procedure in section 83 of the Local Government Act 2002.

Suggested Resolutions

1 The business paper on Earthquake Prone Buildings – Priority Buildings: 'Strategic Transport Routes' and 'Unreinforced Masonry Buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation' be received.

2 Council resolve pursuant to section 133AF(2)(b)(i) that there are no Strategic Transport Routes in the Waitomo District and that prioritisation in accordance with section 133AE(1)(f), and consultation in accordance with the special consultative procedure in section 83 of the Local Government Act 2002, is not required; and

3 Council resolve pursuant to section 133AF(3) of the Building Act 2004 that there is no reasonable prospect of any thoroughfare in the Waitomo District satisfying the criteria set out in section 133AF(2)(a)(i) and (ii) and that prioritisation in accordance with section 133AE(1)(e), and consultation in accordance with the special consultative procedure in section 83 of the Local Government Act 2002, is not required.

TERRENA KELLY
GENERAL MANAGER ENVIRONMENTAL SERVICES

28 May 2019

Attachment: 1 Maps – Priority Buildings 'Strategic Transport Routes' and 'Unreinforced Masonry Buildings on a thoroughfare with sufficient vehicle or pedestrian traffic to warrant prioritisation'

TE KUITI - Potential Vehicle and Pedestrian Traffic Prioritisation

Waitomo District Council

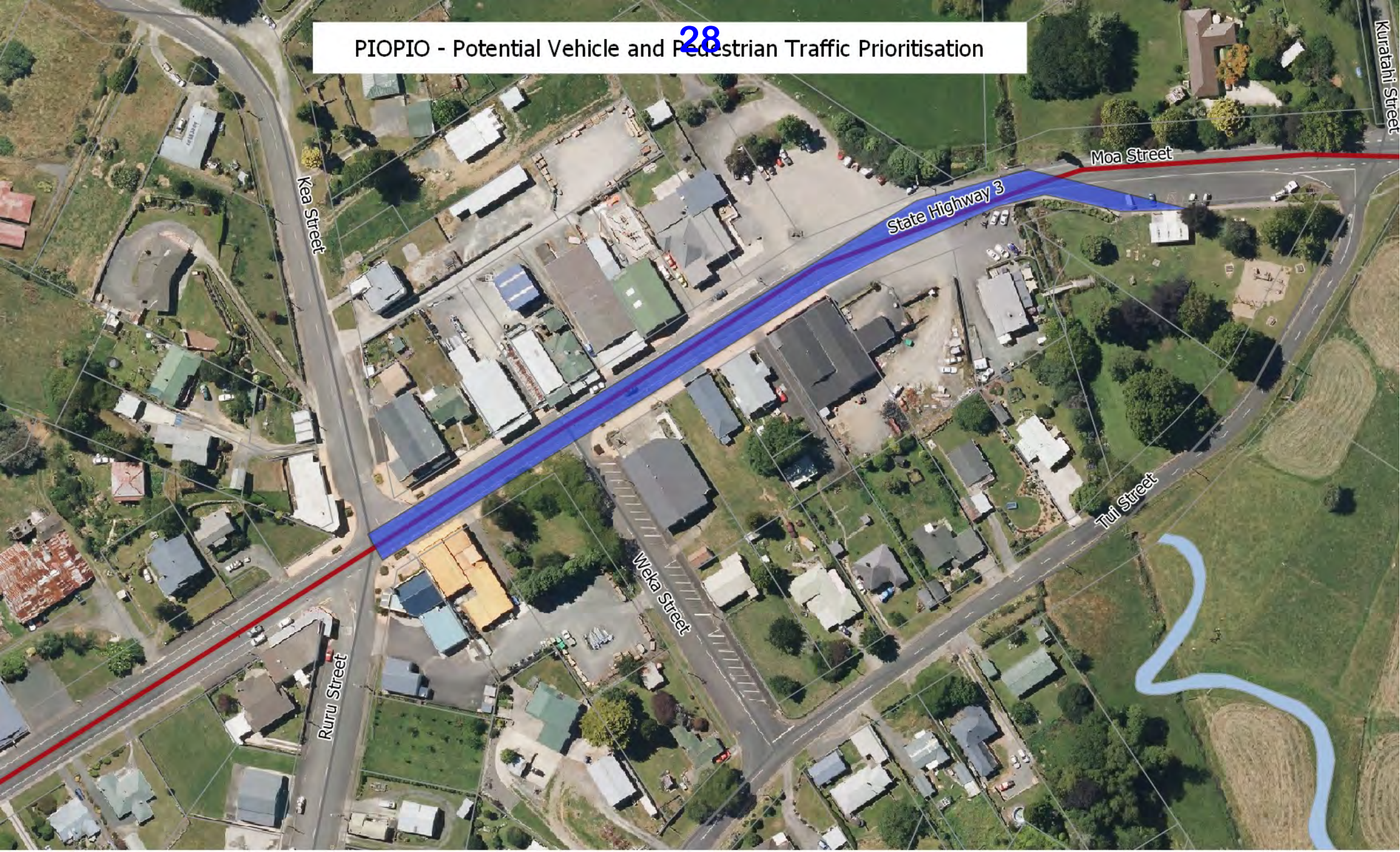
LEGEND

Potential High Pedestrian Area

N

E

PIOPIO - Potential Vehicle and Pedestrian Traffic Prioritisation



Waitomo District Council

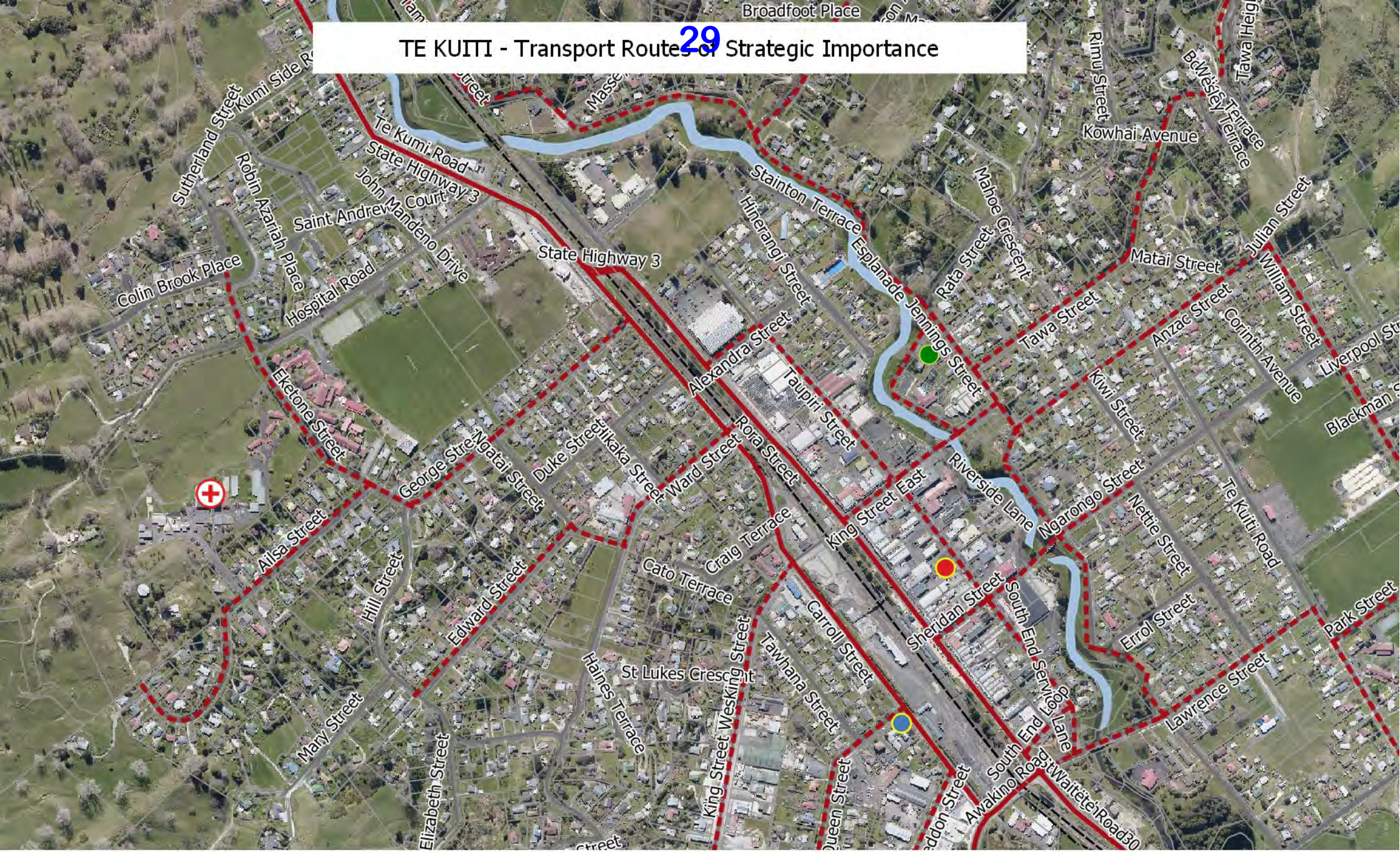
LEGEND

Potential High Pedestrian Area

N

E

TE KUITI - Transport Routes of Strategic Importance



LEGEND

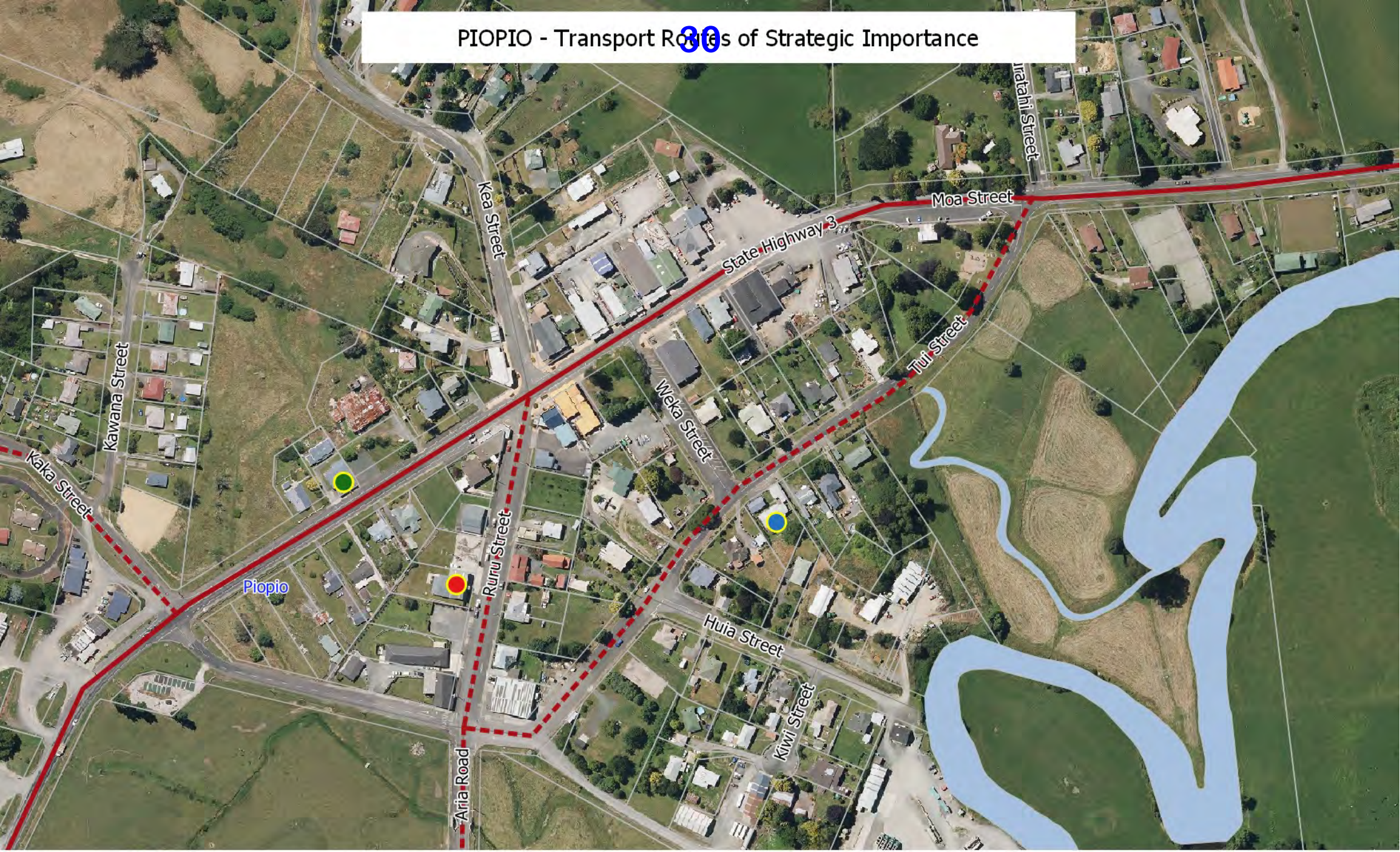
- St John Station
- Fire Station
- Police Station
- Te Kuiti Hospital

Roads

- SH/Primary Collector
- Secondary Collector

Waitomo District Council

PIOPIO - Transport Routes of Strategic Importance



Waitomo District Council

LEGEND

- St John Station
- Fire Station
- Police Station

Roads

- SH/Primary Collector
- Secondary Collector

BENNEYDALE - Transport Routes of Strategic Importance

Waitomo District Council

LEGEND

- St John Station
- Fire Station
- Police Station
- Te Kuiti Hospital

Roads

- SH/Primary Collector
- Secondary Collector

MOKAU - Transport Routes of Strategic Importance

Waitomo District Council

LEGEND

- St John Station
- Fire Station
- Police Station

Roads

- SH/Primary Collector
- Secondary Collector

N

E

Document No: A429895

Report To: Council

Meeting Date: 28 May 2019

Subject: **Progress Report – Community Development**

Type: Information Only

Purpose of Report

1.1 The purpose of this business paper is to brief Council on current work streams within the Community Development portfolio.

Background

2.1 The Community Development Group exists to provide a dedicated resource for collaborating with the community across elements of well-being. It facilities access to many opportunities and resources available within and beyond the District in support of community outcomes – Vibrant Communities, Thriving Business and Effective Leadership.

2.2 Waitomo District Council is committed to the provision of the Community Development Group to support and encourage Council and community involvement in initiatives that improve social, cultural, economic and environmental aspects of everyday life.

2.3 The Community Development Group involves:

- Community Support
- Tourism Development and District Promotion
- District Development
- Te Kuiti i-SITE Visitor Information Centre
- Library Services
- Customer Services

2.4 These activities form the foundation for engagement and the focus of work streams.

Commentary

3.1 Youth Liaison/Waitomo District Youth Council

3.2 The first Waitomo District Youth Council (WDYC) meeting for the 2019 year was re scheduled from 21 February 2019 to 2 March 2019 with eight members in attendance.

3.3 Events completed for this cohort of Youth Councillors include:

- **Induction Workshop –** To engage in annual planning and strengthen the understanding of the role of Council in the community.

- **Family Movie Night –** WDYC taking full lead in the organisation and running of the event, drawing increased numbers on 2017 evening.

- **Waitomo's Got Talent –** The outdoors 'Waitomo's Got Talent' entertainment was held as a pre-event bracket at the Brook Park Fireworks event. There were eight performances on the day with contestants aged 10-16 years with both vocalists and dance mediums presented for judging.

- **The Great New Zealand Muster -** WDYC provided an opportunity for the youth of Waitomo District to work with a Graffiti Artist.

3.4 Recent discussions with the Te Kuiti High School Gateway Coordinator have indicated that level 3 credits for 'planning and engaging in an activity intended to benefit the community' are available through NZQA. This will consolidate the purpose of committing to the annual plans for young people and increase the mutual benefit for the WDYC member and the community.

3.5 The WDYC will be presenting to Council at the 28 May 2019 Council meeting.

3.6 The Great New Zealand Muster

3.7 The Great New Zealand Muster was held on Saturday 30 March 2019.

3.8 There was the equivalent of 79 stall sites registered for the event with some opting for the larger 6 meter stand. Stall sites ran both sides of Rora Street starting at the parking area beside PGG Wrightson (north) and finishing at the rear of the paved area of Stoked Eatery (south). This event footprint seemed to work well for both the crowds and stall holders.

3.9 This year the event area included the introduction of a Food Court, Health and Wellness area, Arts Alley and a Rangatahi area.

3.10 The Food Court was located between ANZ and PGG Wrightson on Rora Street. Within the Food Court was additional seating with gazebo's providing extra shade areas for the public.

3.11 A concerted effort was made to engage emergency services and social services to set up promotional sites in the development of the Health and Wellness area. Within this area were the Fires Service, St John, Police and Maniapoto Family Violence Intervention Network. Performances were held by a Zumba group, The Lifestyle Line Dancers and the local Taekwon-Do group.

3.12 Arts Alley was a popular addition to the day. Located in Sheridan Street, Arts Alley offered chalk painting, coloring-in, loom weaving and wool spinning.

3.13 The Rangatahi area was set up within the PGG Wrightson carpark for those young people wanting to engage in a range of physical activities. This was led by Te Kuiti High School Waka Ama Group and Dede Downs and Rozel Coffin from Sport Waikato.

3.14 The Muster provided an opportunity to platform messaging linked to recycling in our community leading up to, and on, event day. Two strategies were used:

- Wheelie bins were covered with colour coded recycling covers; and
- A 'Wearable Art' competition was held. Criteria included wearable art to be formal attire, made from 80% recycled material and feature wool in the design. The competition proved very popular with many indicating interest for next year.

3.15 The stage was again located in the recess beside the Town Clock with a mix of local and national entertainment brackets, thanks to the support of our sponsors Crusaders Meats New Zealand Ltd and Universal Beef Packers.

3.16 The Running of the Sheep was a success. People were eager to see the 874 strong flock of sheep make their way down the street to the clipping site.

3.17 In conjunction with Glenbrook Vintage Railway, a train trip was organised to attend The Muster. Approximately 300 passengers from Auckland, Hamilton and Te Awamutu disembarked.

3.18 Feedback from the Network Controller and Promotions Manager has indicated that they will be returning to the event in 2020.

3.19 The New Zealand Motor Caravan Association was in attendance for the full weekend, arriving on the Friday. An estimated 120 caravan/motorhomes parked on the Te Kuiti Domain over the weekend.

3.20 WDC and the NZ Shearing Committee continue to have a good working relationship, holding meetings in preparation for the event and a debrief meeting in April. The Shearing Committee actively worked with WDC to ensure efforts complimented each other's event where possible.

3.21 Critical to the day's success was the planning and the presence of volunteers.

3.22 Feedback forms were provided to all of the registered stall holders with positive and constructive feedback received for future growth and development.

3.23 The 2020 Great NZ Muster has been confirmed for 4 April 2020 which will coincide with the NZ Shearing Championships running from 1 April to 4 April 2020.

3.24 Social Services

3.25 Maniapoto Family Violence Intervention Network (MFVIN) remains pivotal in the promotions and interventions they initiate to support community action around reducing harm related to domestic violence.

3.26 On Friday 5 April 2019 David White (father to Helen Meads who tragically died as a result of Domestic Violence) presented "Harm Ends – Futures Begin". The presentation on the tragic journey has been presented in 71 electorates nationwide. The presentation was hosted by MFVIN.

3.27 The NZ Police led "Loves-Me-Not" workshops have been offered to secondary schools within the Waitomo District.

3.28 Loves-Me-Not is a 'whole-school approach' to prevent abusive behaviour in relationships. It is based on a student inquiry learning process, where students take action (personal action, effective bystander action and community action) to prevent harm from relationship abuse. Loves-Me-Not is designed for Year 12/13 students as the appropriate age to discuss relationship abuse and to start to take action for change.

3.29 Vibrant Safe Waitomo

3.30 Of significance is that the Local Government (Community Well-being) Amendment Bill passed its third and final reading in Parliament on the 8 May 2019, reinstating the four aspects of community well-being; social, economic, environmental and cultural well-being of communities, which provides the work undertaken in Vibrant Safe Waitomo (VSW) with added foundation and purpose.

3.31 The full application for VSW to be accredited by Safe Communities Foundation NZ (SCFNZ) has been submitted in draft format. Initial reviews were completed by Advisor, Michael Mills and Director, Tania Peters. Both were extremely impressed with the draft application.

3.32 The report is currently being reformatted into the final document which will then be submitted to the SCFNZ external review panel to form the basis of their Waitomo District site visit on 14 August 2019. This date has also been set for the formal launch of Vibrant Safe Waitomo within the community.

3.33 The identified priorities to work on within Vibrant Safe Waitomo have been grouped into categories which are:

• Settings	Mahi/Workplaces, Hakinakina/Recreational Spaces Whanau/Family
• Populations	Maori
• Issues	Alcohol and Drugs
• Demographic	Youth

3.34 Over the coming months Stakeholder Groups will be confirmed to support the delivery of the action plans around reducing harm and increasing safety within the Waitomo District. MFVIN has formally accepted that VSW will become a regular item on the agenda of their monthly meetings to ensure links are made.

3.35 Te Kuiti Community House – Reporting against Service Level Agreement for Novice Driving Programme

3.36 In accordance with the Service Level Agreement between the parties, Te Kuiti Community House provide quarterly reporting to inform activity within the Driver Licence Programme.

3.37 Key objectives for the 2018-2019 financial year include:

- Achieving the following pass rates with students aged 16-24 years of age with a target pass rate of 90% achieved

Licence Type	**Number of Students**
Learners	30 per annum
Restricted	50 per annum
Full	30 per annum

3.38 74 students have successfully obtained their Learner Licence for the period 1 July 2018 to 31 March 2019. 46 of these students reside within the Waitomo District.

3.39 In the Restricted Programme, 75 students have obtained their Restricted Drivers Licence. Of the 75 students, 37 reside within the Waitomo District.

3.40 The target pass rate for the Full Licence Programme is 30 per annum. For the period 1 July 2018 to 31 March 2019 16 students have successfully obtained their Full Driver Licence. Of the 16 students, 10 reside within the Waitomo District.

Suggested Resolution

The Progress Report: Community Development be received.

HELEN BEEVER
GROUP MANAGER – COMMUNITY SERVICES

May 2019

Document No: A427408

Report To: Council

Meeting Date: 28 May 2019

Subject: **Discharge of Statutory Land Charge SA36A/86, Mairoa Road, Piopio**

Type: Information Only

Purpose of Report

1.1 The purpose of this business paper is to inform Council that a Discharge of Statutory Land Charge on SA36A/86, Mairoa Road has been authorised by Kobus Du Toit, General Manager Infrastructure Services, under delegated authority.

Background

2.1 Authority for executing documents relating to interests in land such as discharges or partial discharge of mortgages granted by Council is delegated to the General Manager Infrastructure Services. The relevant extract from the Statutory and Other Delegations from the Chief Executive to Staff is **attached** to support this paper.

2.2 A report on the documents signed under this authority is required to be submitted at the next available Council meeting.

2.3 The Release of Statutory Land Charge document was signed on 19 March 2019, the next available Council meeting is 28 May 2019.

Commentary

3.1 Forgeson Law wrote to Waitomo District Council ('WDC') in March 2019 seeking written authority to Discharge Statutory Land Charge S218604. The Notice of Statutory Land Charge S218604 (**attached)** is a Statutory Land Charge pursuant to Rural Housing Act 1939 which was registered on 28 September 1961 against Certificate of Title SA36A/86.

3.2 The Notice registered a charge of two thousand five hundred pounds against the land on account of an advance made by the County of Waitomo to MacAlister Broderick.

Suggested Resolution

The business paper on Discharge of Statutory Land Charge SA36A/86, Mairoa Road, Piopio be received.

KOBUS DU TOIT
GENERAL MANAGER INFRASTRUCTURE SERVICES

15 April 2019

Attachment:
1. Extract Statutory and Other Delegations from the Chief Executive to Staff – Operational Delegations (A427648)
2. Release of Statutory Land Charge (A427645)
3. Record of Title under Land Transfer Act 2017 SA36A/86 (A427646)
4. Notice of Statutory Land Charge S218064 (A427647)

Delegation	GMIS	IM	ISO	GCS	FM
Authority and power to act on Council's behalf as a landlord for the purposes of entering leased/tenanted land and buildings to carry out the landlord's rights and obligations under the lease.	✓	✓	✓		
To apply for any resource consent in relation to Council owned land or with respect to activities proposed to be undertaken by Council together with the authority to sign land transfer title plans for subdivisions approved by Council.	✓	✓			
Authority to collect revenue and file annual returns with respect to mining licenses.	✓	✓		✓	✓
Authority to approve the registration of a caveat on land not owned by Council pursuant to Part 8 of the Land Transfer Act 1952.	✓	✓			
To enter into contracts, and execution of the same, for the use and management of Council facilities and land together with the authority to renew such agreements.	✓				
To apply for a building consent for work to be undertaken on Council property.	✓	✓			
Authority to negotiate to acquire land for purposes of road construction or road maintenance	✓				

4. Executing Documents

Delegations	Limitations	Delegate	Delegate
For all deeds to be executed by Council under the Property Law Act 2007, to be signed and sealed by two elected members and the Chief Executive.			
Subject to the delegation above, to sign on behalf of the Council all documents relating to interests in land, including reserves vested in Council or for which Council is the administering body and which include: ▪ Tenancies, leases and licences up to a 5 year term and renewals of leases where the original grant of lease contained a right of renewal ▪ Easements and similar rights ▪ Caveats and encumbrances ▪ Discharges or partial discharges of mortgages granted by Council ▪ Subdivision whether of Council owned property or in connection with resource consents granted by Council ▪ Options to purchase (but not the exercise of any option)	Provided that in each case such documents: ▪ include terms and provisions customary to such documents; ▪ reflect and include specific provisions including price as resolved by Council or a Council committee ▪ adequately protect Council. A report on the documents signed under this authority (other than with the authority of a Council or committee resolution) shall be submitted to the next available meeting of the Council or a Council committee.	GMIS	
Agreements to variations to the price of any property which Council has resolved to purchase or sell	Such variation must not exceed 10% of the amount resolved by Council or a Council committee and must be reported to the next available meeting of Council or Council committee.	GMIS	

Delegations	Limitations	Delegate	Delegate
Authority to sign documents on behalf of Council for the removal of limitations on titles as the owner of the land for which the limitation applies or owner of land adjoining.		GMIS GMES	
Authority to issue and sign on behalf of Council any notices which may be required to be given by Council under the provisions of the Local Government Act 2002, Local Government Act 1974 or any other legislation or bylaw		All GMS	
Authority and Instruction forms To sign on behalf of Council all necessary 'Authority and Instruction' forms as required from time to time: (a) to authorise and instruct solicitors acting for Council to undertake land conveyancing transactions electronically by e-dealing on behalf of the Council on the Land Information NZ Internet based land registry system known as 'Landonline'; and (b) to comply with the requirements of s 164A of the Land Transfer Act 1952 and Rule 3.03 of the NZ Law Society's Rules of Professional Conduct		All GMS	PP
Signing of documents other than those relating to contracts or interests in land	▪ Documents which have been authorised by Council or a committee resolution ▪ Documents include terms and provisions customary to such documents ▪ Reflect and include specific provisions including price as per the resolution ▪ Adequately protect Council	All GMS	PP (related to Resource Management Act 1991)
To apply the Council Seal on any document which requires the Council Seal	Authorised by a Council Resolution and in accordance with Council's Policy on Use of the Council Seal. Provided that any documents requiring sealing pursuant to processes under the Resource Management Act are authorised to be signed by the GMES and the PP.	All GMS	PP (only documents as part of processes under Resource Management Act 1991)

RELEASE OF STATUTORY LAND CHARGE

THE DISTRICT LAND REGISTRAR
SOUTH AUCKLAND LAND REGISTRATION DISTRICT

I HEREBY certify that the statutory land charge hereinafter referred to has been satisfied and you are hereby required to make an entry in the register and [where necessary] on the outstanding instrument of title, noting that the charge is released wholly accordingly.

DESCRIPTION OF LAND AFFECTED AND REFERENCE TO CHARGE

Name of Proprietor(s):	Iola Jane Broderick, Quentin MacAlister Broderick, Russell Laird Thomson
Situation:	Mairoa Road, Piopio
Area:	237.7528 ha
Description by Reference to	
- Section Number:	Section 33 Block VIII Maungamangero Survey District
- Certificate of Title:	SA36A/86
Description of Charge:	Statutory Land Charge under the Rural Housing Act 1939 registered as number S218064.

Dated at Te Kuiti this 19th of March 2019.

K du Toit
General Manager – Infrastructure Services
Waitomo District Council

RECORD OF TITLE
UNDER LAND TRANSFER ACT 2017
FREEHOLD
Search Copy

R.W. Muir
Registrar-General
of Land

Identifier	**SA36A/86**
Land Registration District	**South Auckland**
Date Issued	14 April 1986

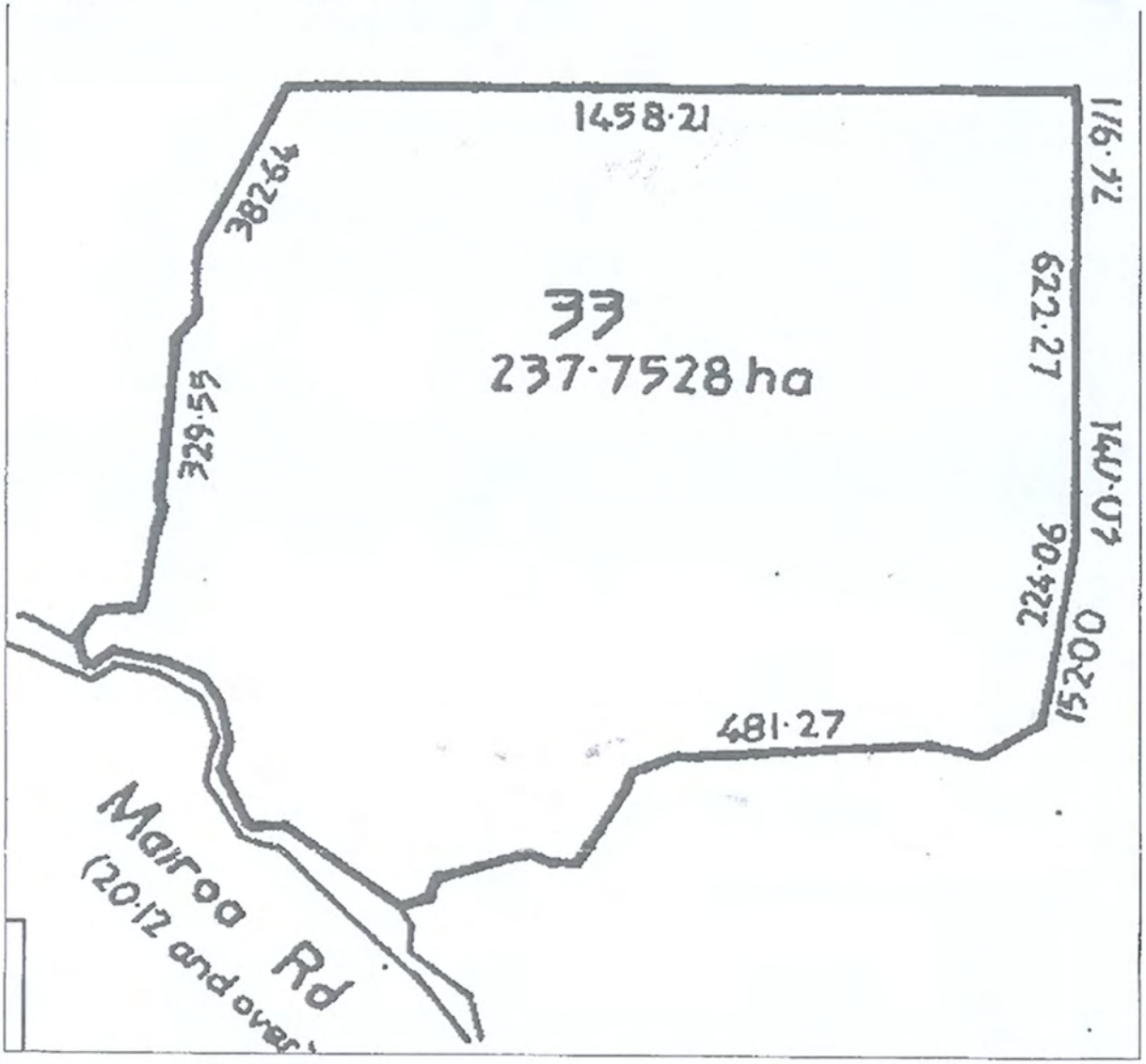
Prior References
SA1712/53

Estate	Fee Simple
Area	237.7528 hectares more or less
Legal Description	Section 33 Block VIII Maungamangero Survey District

Registered Owners
Quentin MacAlister Broderick, Iola Jane Broderick and Russell Laird Thomson

Interests
Subject to Section 59 Land Act 1948
S218064 Statutory Land Charge pursuant to Rural Housing Act 1939 - 28.9.1961 at 1.45 pm
6219883.2 Mortgage to Bank of New Zealand - 18.11.2004 at 9:00 am
9725331.2 Variation of Mortgage 6219883.2 - 22.5.2014 at 10:54 am

Identifier SA36A/86



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5218064 SLC

NOTICE OF STATUTORY LAND CHARGE

To the District Land Registrar
Auckland Land Registration District.

Take notice that the land hereinafter described in subject to a charge for Two Thousand Five Hundred Pounds on account of an advance made by the Body Corporate called the Chairman, Councillors and Inhabitants of the County of Waitomo under authority of the Rural Housing Act, 1939, and that you are hereby directed and required to register the same pursuant to the Statutory Land Charges Registration Act, 1928.

DESCRIPTION OF LAND AFFECTED BY CHARGE:

Name of Proprietor	:	MACALISTER BRODERICK
Situation:	:	MAIROA R.D., PIO PIO.
Area	:	587 acres 2 roods 00 perches
Description	:	Section 33, Block VIII Maungamangero Survey District. Freehold. Certificate of Title 1712/53.

Dated this 26th day of September, 1961.

COUNTY CLERK.

218064

PARTICULARS ENTERED IN REGISTER-BOOK
VOL. 1712 FOLIO 53. 36A/86
THE 28th DAY OF September 1961
AT 1.45 O'CLOCK.

DISTRICT LAND REGISTRAR AUCKLAND, N.Z.

Assistant Land Registrar.
AUCKLAND

LAND & DEEDS
Nature: S/L/Engr
From: Working Class
28 SEP 1961
Time: 1.45
Fee: £ Nil
Division No. 1897