BEFORE A HEARING PANEL
CONSTITUTED BY HORIZONS REGIONAL COUNCIL

IN THE MATTER	of an application dated 21 December 2020 for regional consents by Grenadier Limited to develop the Douglas Link Golf Course at 765 Muhunoa West Road, Ōhau
IN THE MATTER	of Part 6 of the Resource Management Act 1991

REPLY FOR GRENADIER LIMITED

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MAY IT PLEASE THE PANEL:

Housekeeping

[1] This reply for Grenadier Ltd is delivered as part of an electronic folder called "Grenadier Horizons Reply". The folder is internally hyperlinked using the links shown in the PDF. Also, these hyperlinks are indicated by underlining. The electronic folder contains this reply, a hyperlinked table of contents and four sub-folders as follows:

(a) A bundle of authorities folder called "the Applicant's Authorities".

(b) Supplementary materials, including photomontages and other documents in the "the Applicant's Supplementary Materials" folder.

(c) The reply evidence of the Applicant's experts in the folder called "the Applicant's Reply Evidence".

(d) The Applicant's offered Conditions are in the "the Applicant's Offered Conditions" folder.

[2] This reply has been checked for accuracy with all Grenadier Ltd's witnesses where the witnesses' material is referenced to ensure accuracy.

[3] There were several loose ends from the hearing as follows:

(a) The Panel asked for a copy of the decision quoted in Grenadier's opening submissions. It cited from the *Ngāti Maru Trust v. Ngāti Whātua Orakei Whaia Limited*[1] decision (provided to the Panel in the opening and in the electronic folder "The Applicant's Authorities"), the case called *Ngāti Hokopu ki Hokowhitu v. Whakatāne District Council.*[2] That decision is in the "Applicant's Authorities" folder.

(b) The Panel wanted better information about what hole 14 would look like from various coastal locations, including from land owned

[1] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768
[2] *Ngāti Hokopu ki Hokowhitu v. Whakatāne District Council* (2002) 9 ELRNZ 111.

by Ngāti Tukorehe on the Southside of the Ōhau River. Supplied in the "Applicant's Supplementary Materials" folder are photomontages providing this information but reflecting adjustments to hole 14 outlined below and the adjusted earthworks to reduce cultural and ecological effects. Some graphics in the Supplementary Folder also show what hole 7 will look like after the development and includes a more detailed summary of the modest cut and fill.

(c) A question arose about whether the One Plan implemented the New Zealand Coastal Policy Statement (NZCPS). The *Day* v. *Manawatu Wanganui Regional Council* [3] decision is included again in the Applicant's Authorities, and the Panel is referred to [3]-[128]. That paragraph is explicit that the Environment Court implemented the New Zealand Coastal Policy Statement 2010 through the One Plan provisions. A search of the term 'New Zealand Coastal Policy Statement' in the *Day* decision also shows that the Environment Court implemented the NZCPS.

(d) The planners have revised the suite of conditions and in the sub folder called "Applicant's Offered Conditions". It contains the suite of conditions offered by the Applicant in Word and PDF and a covering joint statement by the planners. There is no longer any debate on the freshwater chemistry parameters identified in the technical note from Pattle Delamore Technical Review to Ms Morton dated 28 April 2022.

(e) The Panel asked for the instrument that created the Esplanade Reserve in favour of Horowhenua District Council ("HDC"). A copy of the survey plan is in the electronic folder called "Applicant's Supplementary Materials." On the deposit of the plan in 1976, the lot was vested in the (then) Horowhenua County Council under Section 34(2) and 35(4) of the Counties Amendment Act 1961 with the endorsement of *the deposit as aforesaid of any approved*

[3] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182

survey plan, all land shown thereon as reserves (other than as reserves for road or access way or service lane purposes. Section 35(4) Counties Amendment Act 1961 stated "*On the deposit as aforesaid of any approved survey plan, all land shown thereon as reserves (other than as reserves for road or access way or service lane purposes) shall vest, free from encumbrances, in the Corporation or, in the case of land in the County of Sounds or the County of Fiord that is not within the jurisdiction of a Road Board, in Her Majesty the Queen, and shall be held as reserves set apart for the purposes indicated on that plan, and subject to the provisions of the Reserves and Domains Act 1953".*

[4] Supporting this reply is reply evidence in the "Applicant's Reply Evidence" folder. It contains reply evidence from:

(a) Mr Tom Bland.

(b) Mr Philip Tataurangi.

(c) Dr Keesing.

Relevant matters addressed by the Horowhenua District Council in its Reserves Act and RMA capacities

[5] HDC self-identified Ngāti Kikopiri as the lead hapū of Ngāti Raukawa for consultation on the Douglas links Golf Course proposal. That is reflected in the HDC's acceptance of the Cultural Facilitation Report by Mr Tataurangi and the HDC's decision.

[6] HDC passively 'administered' the Esplanade Reserve over decades. Its current state is poor through neglect. Factors that influenced the Council's approach to facilitating the Douglas Golf Links proposal under the Reserves Act were the following:

(a) Active management by Grenadier Ltd of the golf course and dune system to improve its overall ecological values and ecological persistence; and

(b) The creation of a public easement to facilitate public access as recorded in HDC's decision at Decision A, Condition 2 and

Decision B, Condition 3 of the HDC resource consent dated 5 October 2021 (attached to Counsel's Opening Legal Submissions and also in the Applicant's Supplementary materials Folder).

[7] HDC, in its reasoning, considered that the management of the Esplanade Reserve proposed by Grenadier's Restoration Plans is consistent with the NZCPS. The relevant reasoning for the decision is below.

> *"**New Zealand Coastal Policy Statement 2010***
>
> *As explained by Mr Holmes in his assessment of s229 of the Act;*
>
> > *The Esplanade Reserve is 16.14ha in area (survey area). It was surveyed and vested in 1976 under the Counties Amendment Act 1961 (CAA 1961)7. It covers land from the Waiwiri Stream in the north to the Ohau River in the south. Since that time, the land in front of the Esplanade Reserve (active beach and spinifex zone) has prograded westward (through the process of accretion) and the 'usable' part of the coastal margin is somewhat west of the currently surveyed Esplanade Reserve. The relatively small part of the Esplanade Reserve proposed to be occupied by the Golf Course is not currently easily accessible by the public because it has been invaded by large exotic weed species...*
> >
> > *The closest public vehicular access to this coastal margin is some 5.8km to the north via Hokio Beach. At that distance, most of the people visiting the area drive along the active beach area. It is interesting to note that the CAA 1961 did not specify a particular purpose or intent for an esplanade reserve so assessing it against the current RMA settings may be outside the scope of this application. However, to dismiss an assessment on that technical ground because, and based on the information provided by the applicant on 27 August 2021, the proposal is wholly consistent with the current settings (or purpose) of section 229 of the RMA. The reason for setting a purpose for esplanade reserves in the RMA (through section 229) is more future looking when developing planning instruments (District Plans) or*

consideration of new esplanade reserves through the subdivision process. None of those situations exist for the current proposal.

Esplanade areas are important for several reasons. They can:

- *provide public access to and along rivers, lakes and the coast*
- *enable public recreational use of the esplanade area (where this is compatible with conservation values)*
- *contribute to the management of natural hazards (eg, stream bank and coastal margin erosion, flooding)*
- *protect the natural character of coastal and riparian margins*
- *protect and enhance aquatic habitats and riparian ecosystems and help to improve water quality*
- *provide for the relationship of Maori with their taonga (eg, protection of wahi tapu) and protection of protected customary rights (e.g., gathering of mahinga kai)*

These reasons are highlighted in the RMA under s6 as matters of national importance, and the purposes of esplanade reserves and strips under s229.

The creation of esplanade areas can also contribute to achieving objectives and policies of the New Zealand Coastal Policy Statement 2010 (NZCPS), particularly Objective 4 (maintaining and enhancing the public open space qualities and recreation opportunities of the coastal environment). The NZCPS explicitly recognises the role that esplanade reserves and strips have in contributing to public open space needs (policy 18). For the reasons outlined in section 6.5 of this report, I consider the proposal to be in general accordance with the NZCPS.

The proposal, as outlined on pages 123 - 138, is considered to accord with the general strategic direction of Horizon's Regional Policy Statement."

Further consultation with tangata whenua

[8] Grenadier's further consultation with Muaūpoko has resulted in an agreement, and Grenadier understands MTA has sent a letter confirming that to Horizons. That agreement recognises the appropriate restoration of the duneland, which will enhance Muaūpoko's cultural values.

[9] Grenadier consulted further with Ngāti Tukorehe, and Grenadier outlines that process in a separate section of these submissions below. Regrettably, Grenadier did not make progress in resolving Ngāti Tukorehe's concerns, but the dialogue was helpful.

Adjustment to the application and its implications

[10] To recognise and provide for the concerns of Ngāti Tukorehe concerning hole 14 and to further improve ecological outcomes, the Grenadier Ltd moves hole 14 about 20m north, as shown in the Applicant's Supplementary Materials Folder. The consequences of that change are:

(a) There is now no part of hole 14 within the active dune area, and hole 14 is situated wholly within the areas of historical vegetation shown in the figures of Ms O'Keeffe's archaeological assessment in Appendix 10 to the AEE extending back to the 1920s. That means the area cannot be within the bare duneland where Adkin situated Tirotiro Whetu.

(b) The natural character values will be preserved, as shown in the Boffa Miskell visual material for the adjusted hole 14.

(c) Further opportunity is provided for ecological enhancement outlined in the supplementary evidence of Dr Keesing. That is also reflected in the current Draft Restoration Plan.

(d) Following the above and the agreement by ecologists at the hearing that the application achieves an appropriate offset, the application is now strongly positive from an ecological point of view.

[11] It is essential to recognise that these benefits and enhancements to the coastal ecosystem were part of the reason that HDC granted rights over the Esplanade Reserve. As the administering body with obligations to manage the reserve according to its natural values, HDC considered it essential for ongoing active maintenance of the foredune to prevent continued degradation by neglect.

Planning matters raised at the end of the hearing concerning ecology

[12] One of the questions the Panel asked was whether or not indigenous vegetation needed to be present for Schedule F to apply. That issue has become somewhat 'overtaken' with the movement of hole 14. It is submitted that indigenous vegetation is an important requirement of both stable and active dunes based on a plain interpretation of Schedule F. It is accepted that some substrates are protected in their own right, but dune ecosystems are not. That is outlined in the Opening Submissions. Plainly, for example, a stable dune with production forestry on it cannot be a protected habitat on substrate grounds. The provisions of the One Plan do not support such a finding.

[13] The planners were asked questions about Policy 11, NZCPS. With such an instrument approved by the Environment Court, it makes no sense to go further up the hierarchy recognising Policy 11 is a National Policy Statement at a scale that is not regionally specific. Grenadier's position is that the regime of the One Plan is the regionally relevant well-constructed policy regime to be applied following *Davidson. v. Marlborough District Council.*[4]

[14] In any event, Counsel has just recently argued a case in the Supreme Court that 'avoid' does not mean 'avoid' in a regulatory sense and a more nuanced policy that is reasonably specific is anticipated by the Plan Change. That case called *Port Otago v. EDS*[5] will become known as "King Salmon (The Sequel)".

[4] *Davidson v. Marlborough District Council* [2018] NZCA 316
[5] *Port Otago v. Environmental Defence Society* SC 6/2022

[15] Furthermore, *King Salmon*[6] itself recognises that enhancing the environment in the locality may implement an avoidance policy even though it does not achieve complete avoidance. The following paragraph from Arnold J's judgment in *King Salmon* at [145] is sufficient to make this point:

> *"The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."*

[16] The approach that looks pragmatically at the overall outcome is also consistent with English case law on planning. The Panel is referred to the decision of the English Court of Appeal in *City & Country Bramshill v. Secretary of State*.[7] In that case, there was a statutory direction to have particular regard for national policy. Admittedly not an implementation obligation at [57] p 5779 line H, resulting in a highly directive policy quoted at p 5780 line B and the Court said at [78] p 5788:

> *"Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it so that there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications*

[6] *Environmental Defence Society v. The New Zealand King Salmon Company* Limited [2014] NZSC 38
[7] *City & Country Bramshill v. Secretary of State* [2021] 1 WLR 5761

for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with."

[17] It is inappropriate to read policy from a National Policy Statement as absolutist rules. They are intended to constrain strategic planning to ensure well-constructed regional policies. That is the point of strategic planning.

Analysis of Ngāti Tukorehe's submission and position

A comparative analysis of the positions of tangata whenua

[18] The position of Muaūpoko and Ngāti Kikopiri concerning the Douglas Links proposal is similar. Their position is that the proposal will cause minor adverse cultural effects and, in some respects, have positive cultural outcomes. The rationale for that assessment is the following:

(a) The proposal enhances the natural character of the locality. That is, of course, also confirmed by the evidence of Dr Boffa and Dr Keesing and other experts. That analysis supports appropriate respect for the care of the whenua consistent with their manawhenua status and, therefore, as kaitiaki.

(b) There is nothing intrinsically inappropriate about the use of the land as a recreational facility given that:

(i) The modifications to the landscape are slight.

(ii) The impacts on the natural character are less significant than other long-standing pastoral permitted uses.

(iii) The enjoyment of land by the public is consistent with the ethic of manaakitanga.

(c) The proposal will provide for public access through the reserve that sustains the relationship of tangata whenua to the locality better than the existing neglected Esplanade Reserve and affords opportunities for other the public to enjoy the coastline.

(d) There are estimable offered conditions providing for cultural monitoring proposed in the resource consent that appropriately involves the exercise of spiritual and customary practices on the whenua within an area of historical occupation. It accords appropriate respect for ancestral lands and the relationship of manawhenua with the place.

(e) Grenadier Ltd has entered into side agreements with these hapu to develop by a collaborative process distinctive design elements of the structures and other methods for cultural amplification that recognise and provide for the historical occupation of tangata whenua in the locality. There is also separate cultural monitoring of the restoration programme to sustain the relationship of tangata whenua to a locality and ensure its appropriate enhancement and restoration.

[19] Tirotiro Whetū for Muaūpoko and other sites exist on the Site. In the hearing, attention was drawn to the area around hole 7. Muaūpoko, through MTA, confirms that the design for hole 7 satisfies their interests, being a delicate intrusion into the whenua. Please refer to the hole 7 graphics in the Applicant's Supplementary Materials Folder.

[20] Ngāti Kikopiri accepts the assessment of Ms O'Keeffe (Appendix 10 in the AEE by Ms O'Keeffe) (also in the Applicant's Supplementary Materials Folder" with annotations to show locations of interest on Ngati Kikopiri's rohe) concerning the history of the southern area of the Site that:

(a) As noted, Tirotiro Whetū sat beside the northern edge of the River Ōhau river mouth and was occupied by Ngāti Tukorehe and Ngāti Te Rangi (hapū of Ngāti Raukawa (the latter being descendants of Ngāti Kikopiri) (refer O'Keeffe Archaeological Assessment, Appendix 10 of AEE at page 35).

(b) The permanent occupation at this location moved inland with an area known as "Tirotiro Whetū" shown adjacent to Muhunoa West Road, Ōhau in the Muhunoa Block close to the present-day marae

of Ngāti Kikopiri (refer to O'Keeffe Report Figures 18, 19, 25 , 26 and 28 page 35). These figures denote Tirotiro Whetū on Muhunoa West Road, where Adkin places Kawea Marae (Figure 28).

(c) The Tirotiro Whetū site shown by Adkin has been impacted by the movement of the Ōhau River, as shown in Figure 29.

[21] The position that Ngāti Tukorehe adopt is the following:

(a) Tirotiro Whetū is not a small grassed area, as stated by Adkin but a region within the Site, including incorporating areas along the foredune around holes 14 and 13.

(b) Ngāti Tukorehe is manawhenua with special rights to articulate cultural beliefs and values concerning the appropriate management of the whenua within that 'region';

(c) The whole 'region' is waahi tapu.

(d) Following the above, a golf course (i.e. not earthworks) is inappropriate for much of the Site adjacent to the Ōhau River and the active foredunes.

[22] A consequence of Ngāti Tukorehe's position is that Ngāti Tukorehe asks the Panel to decline Grenadier's application, which will improve the natural character and coastal ecology desired by other hapū.

Dialogue with Ngāti Tukorehe after the hearing

[23] Following Minute No. 2 of the Panel, Grenadier initiated the following:

(a) Preparation of photomontages to illustrate refinements to hole 14.

(b) Summarise further opportunities to enhance the ecology and the active dune already disturbed by vehicle activity. That vehicle activity made the previous location of the hole 14 green looks far more like an active dune than in the original design, showing how disturbing those vehicles are to the local ecology.

(c) Reflection on how other opportunities might arise to enhance the relationship of Ngāti Tukorehe to the river margin and the active dune area, including through easements and access arrangements and cultural facilitation of the type provided to Ngāti Kikopiri and Muaūpoko.

[24] Because of inclement weather, a Zui (Zoom hui) was held on 21 May 2022 at 4.00 pm with Ngāti Tukorohe, where Ngāti Tukorehe allowed Grenadier to present its material. A reply by Ngāti Tukorehe was provided in a Zui on 22 May 2022 at 11.00 am.

[25] Counsel explained to Ngāti Tukorehe that if an agreement were not reached, it would be helpful for Ngāti Tukorehe to state their position to be included in this reply. Ngāti Tukorehe declined to put their position in writing on the proposal but noted that their response at the Zui was sufficient. Counsel has therefore had to capture Grenadier's understanding of the position of Ngāti Tukorehe to the proposal. In summary, the position was:

(a) Grenadier has been consulting with the wrong people (1st Zui per Lindsay Poutama).

(b) Muaūpoko has no interest in the whenua (1st Zui per Lindsay Poutama).

(c) The situation has arisen because of the fault of HDC, which made errors.

(d) The only acceptable option is a co-design process with Ngāti Tukorehe incorporating a matrix of values comprising:

(i) Ecological values.

(ii) Kaitiaki values.

(iii) Spiritual and esoteric values (2nd Zui per Tina Wilson).

(iv) The design is established in 'partnership' with tangata whenua (2nd Zui per Lindsay Poutama).

(e) Tirotiro Whetū incorporates a large part of the Site, and there would need to be significant modifications to the golf course design.

(f) Tirotiro Whetū is not defined (1st Zui per Dr Huhana Smith).

(g) The Grenadier site is historically part of the land of Ngāti Tukorehe, but the records and background to establishing this is complex and still underway (1st Zui per Dr Huhana Smith).

[26] It will be evident from this response from Ngāti Tukorehe that there is no simple way through for this application to accommodate Ngāti Tukorehe's distinctive beliefs and values while achieving an 18 hole golf course to a Links standard.

[27] Accordingly, the parties respectfully agreed to disagree, and Grenadier advised Ngāti Tukorehe that it would proceed with its application subject to the modifications proposed to hole 14. The other options offered to Ngāti Tukorehe to bring that hapū closer to the position of Ngāti Kikopiri, and Muaūpoko remained open.

A reply to Mr Poutama

[28] Mr Poutama took some umbrage in his oral presentation at the hearing about using the term 'first among equals' used in Counsel's legal submissions to explain why Ngāti Kikopiri was identified as the appropriate hapū to lead consultation on cultural impacts. In response to Mr Poutama, Grenadier makes the following points:

(a) The consultation programme followed advice from Horizons and HDC, reflecting the Ōhau River as the appropriate boundary for defining rohe.

(b) Discussions were held with Ngāti Tukorehe (including Mr Poutama) led by representatives from Ngāti Kikopiri before the

submission date. On none of the occasions was the issue of Ngāti Kikopiri leading these discussions challenged.

(c) The terminology was socialised by Grenadier Ltd with Ngāti Kikopiri before the hearing.

[29] Respectfully, Mr Poutama is incorrect to claim that Muaūpoko has no interest in the Grenadier site. There are significant inter-relationships between the three hapū from common historical occupation and inter-marriage. For example, that is graphically indicated by the Adkin record (Figure 29 'Adkin's Plan' in Ms O'Keeffe's Archaeological Assessment at Appendix 10 of the AAE). That shows a Muaūpoko kainga south of the river near the Tutangata-Tiano cultivations in the Ngāti Tukorehe lands.

[30] Respectfully, Mr Poutama is also incorrect to prioritise Ngāti Tukorehe's interests in Tirotiro Whetū on the northern side of the Ōhau River because:

(a) Mr Poutama relied on Ōhau Block surveys which is incorrect because tangata whenua define boundaries by physical reference points. The Ōhau awa was a natural boundary between Ngāti Kikopiri and Ngāti Tukorehe.

(b) In any event, Tirotiro Whetū is shown in the relevant plans attached to Ms O'Keeffe's Appendix 10 as all within the Muhunoa Block, not the Ōhau Block at the time it was on the northern side of the Ōhau River. The Muhunoa Block is Ngāti Kikopiri whenua. See O'Keeffe Figures 18, 19, 25 , 26 and 28 page 35.

(c) Ngāti Tukorehe has no map that shows Tirotiro Whetū has a cultural tradition by reference to other similarly named locations in the Ōhau Block. On the other hand, all of the plates provided by Ms O'Keeffe show that Tirotiro Whetū is used for the puke where the Kawea Pa is now located and historically identified as Tirotiro Whetū Figures 25 , 26 and 27.

[31] Grenadier identifies these matters from the record and agrees with Ngāti Kikopiri that tikanga requires the various contentions to be addressed on the land in front of the marae.

A legal analysis

Statutory Limits

[32] It is essential to place this issue within a legal context and assess the matter according to law.

[33] The first point (already touched on in the Opening Legal Submissions) is that the Council is exercising its planning role under the One Plan to perform the functions of a regional council as set out in RMA, s 30 and concerning the control of the use of land, the function is limited to exercising powers for s 30(1)(c) that states:

> *"**30 Functions of regional councils under this Act***
>
> *(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*
>
> …
>
> *(c) the control of the use of land for the purpose of—*
>
> *(i) soil conservation:*
>
> *(ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:*
>
> *(iii) the maintenance of the quantity of water in water bodies and coastal water:*
>
> *(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:*
>
> *(iv) the avoidance or mitigation of natural hazards":*

[34] Following *Davidson*[8] recourse to Part 2 despite well-constructed policy in regional plans to undertake an overall judgment using Part 2 is erroneous. It is not the function of the regional council in this context to place default controls on the use of land for a golf course to recognise and provide for cultural and spiritual land use preferences following the relevant provisions of RMA, Part 2 beyond the effect of the activity. Therefore, exercising a discretion concerning limited consents for limited earthworks for the purpose that Ngāti Tukorehe seeks is unlawful. It attempts to deprive the Applicant of the benefit of the existing permission from the HDC in circumstances where none of these cultural provisions finds their expression in relevant district planning instruments. Worse, it invites some form of a *de facto* blanket cultural overlay on private land owned by a third party who has the current freehold title called Campbell Andrews through a process singularly ill-equipped to that task causing serious injustice.[9] It is no less onerous simply because tangata whenua rely on Part 2.

[35] HDC did not see it as necessary to impose conditions concerning archaeological and excavation affecting cultural interests, but the Applicant has offered conditions protecting cultural heritage in this proceeding. These incorporate Ngāti Tukorohe's interests. A condition making power under RMA, s 108 and 108AA to address archaeological discoveries may arguably be employed by Horizons for that ancillary purpose even if it is not within Horizons' statutory functions. But Horizons must not go beyond that to use cultural matters in its assessment under RMA, s 104 as to whether consent should be granted or declined.

The Ngāti Maru decision

[36] Even if the relevant parts of Part 2 were engaged and become relevant to whether consent should be granted, the question of cultural effects has to be addressed according to law.

[37] Counsel referred in the Opening Submissions to the decision of Whaata J in *Ngāti Maru* where His Honour at [116] expressly approved of the decision

[8] fn 4
[9] Grenadier Ltd has a contract on the land and Mr Andrews remains the legal owner.

of Jackson ECJ in *Ngāti Hokopu ki Hokowhitu v. Whakatāne District Council.* The *Ngāti Hokopu* decision will be addressed below.

[38] In addressing the question of manawhenua status (following *Ngāti Maru*), Grenadier's position is that Ngāti Tukorehe is entitled to assert that relationship with the subject land. Whether Ngāti Tukorehe's relationship confers manawhenua status based on patterns of authority and occupation used by the Waitangi Tribunal is not for Grenadier to determine. Grenadier rejects the assertion that Ngāti Tukorehe has a special voice above Ngāti Kikopiri. Ngāti Kikopiri indubitably does have manawhenua over the Site based on the records of the respective local authorities and for the reasons set out later in these submissions using Ms O'Keeffe's analysis.

[39] Counsel also pointed to [133] of *Ngāti Maru* and, in particular, the last sentence that reads:

> *"But any assessment of this kind will be predicated on the asserted relationship being grounded in and defined following tikanga Maori and matauranga Maori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Maori and to a precise resource management outcome."*

[40] There are two points of significance to draw out from that final sentence:

(a) As Dennis Paku of Ngāti Kikopiri stated to the Panel, the claims to special manawhenua status by Ngāti Tukorehe in this context is against tikanga Māori, and any issues should be dealt with at the marae grounds. Support for that proposition is also found in the recent *Ngāti Whātua* decision.[10]

(b) A Panel hearing is not a place for tangata whenua to assert status but rather to explain how their relationship affects the performance of statutory obligations with a *precise resource management outcome*. That emphasises that the RMA does not authorise a free ranging enquiry on how land may be used based on cultural preferences. It must be focused on what environmental outcomes are needed to respond

[10] *Ngāti Whātua Orākei Trust v. Attorney-General* [2022] NZHC 843

to that relationship. Ngāti Tukorehe cannot articulate what that precise environmental outcome is. In contrast, Ngāti Kikopiri and Muaūpoko do that by referencing the specific proposal, the mitigation and design proposed by Grenadier, and the proposed conditions.

[41] Following Whaata J's point about statutory obligations, it is also relevant to mention that any land disturbance outside of a line of 200m inland from the line of first vegetation is a permitted activity provided it does not exceed 2,500m^2 per year per property. Attached in the Applicant's Supplementary Materials folder is a map showing that 200m line and a summary of the relevant One Plan permitted earthworks rules. Therefore, substantial disturbance of the Site could occur as of right under the One Plan in the 13 and 14 holes locality where Ngāti Tukorehe claim Tirotiro Whetū extends. The existing environment includes modifications of this character that could be implemented as part of the unimplemented consent granted to Grenadier by HDC or by the landowner performing rural uses.[11]

[42] The Panel will note that Ms Morton did not suggest that Grenadier's inability to satisfy all interests of tangata whenua means consent should be declined.

The Ngāti Hokopu decision

[43] Counsel has considered Judge Jackson's *Ngāti Hokopu* decision in 2002 carefully. As Whaata J noted, that decision does provide some thoughtful guidance on how to navigate different belief systems while applying Part 2. In that case, the functions that were being performed engaged Part 2 in a much more comprehensive way than the limited earthworks consents sought for Horizons in this application. Parliament has addressed the latter part of the decision on consultation through RMA, s 36A.

[44] Concerning RMA, s 6(e), the Court at [39] correlated the word *relationship* in section 6(3) with the concept of "whanaungatanga", and the Court said:

[11] *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (2006) 12 ELRNZ 299

> *"Of all the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking, relationships are everything – between people, between people in the physical world; and between people in the atua (spiritual entities). The glue that holds the Māori world together is whakapapa identifying the nature of the relationship between all things."*

[45] At [43] His Honour stated:

> *"In our view there can be some meeting of the two worlds. We start with the proposition that the meaning and sense of a Maori value should primarily be given by Maori. We can try to ascertain what a concept is (by seeing how it is used by Maori) and how disputes over its application are resolved according to tikanga Ngati Awa. Thus in the case of an alleged waahi tapu we can accept a Maori definition of what that is (unless Māori witnesses or records disagree amongst themselves). A second set of questions then relates to the application of that value to the physical world."*

[46] The following passages from [45]-[53] are very instructive and are set out in full below. The final paragraph [53] culminates in six factors to assess values and traditions.

> *"[45] Summarising section 6(e) - it can be expressed in terms that may assist Maori readers as that local authorities have to recognise and provide for the whanaungatanga between hapu (and other tribal groupings) and their land, water, sites, waahi tapu and other taonga. Three important aspects of this expression of section 6(e) are: first we can avoid reference to culture and traditions because the use of the Maori word 'whanaungatanga' incorporates the cultural and traditional dimensions; secondly it emphasizes that it is not the relationships of individual Maori to their taonga that is important, but those of their hapu (or sometimes their whanau - the smaller, family grouping, or, moving upwards, their iwi); thirdly, although section 6 suggests that these relationships must be provided for, it is inherent in the concept that the weaker the relationship, the less it needs to be provided for.*

[46] *Since section 6(e) does refer to Maori culture and traditions we have to be careful not to impose inappropriate 'Western' concepts. The appellants expressed concerns about that in various ways. Implicit in much of the appellants' evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture:*

> *... are not determined by how the world is, but are convenient ways in which to represent it. They maintain that the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.*

That is countered by the realist's view inherent in a sceptical, rational judicial system that the universe, including societies and cultures on this miniscule part of it, has an intrinsic structure which we can describe, albeit only approximately and in a limited fashion.

[47] *The witnesses for the appellants tended to express a relativistic argument along the lines that 'all interpretations are equally valid'. It is trivial that that proposition must apply to itself as well as to other viewpoints. Any account of knowledge that makes the standards of truth or falsity (experiment, evidence and logic) internal to a culture cannot escape relativism. If the claim that 'all knowledge is relative' is absolute then it is self-defeating. If it is 'relative' it need not be generally applied (and it appears to be regressive). In the latter case the relativist position is only as valid as the realist's view: that where evidence can be tested, the truth or falsity of disputed facts can be ascertained with some accuracy and with some independence from cultural perspectives.*

[48] *Our way through the cultural relativity impasse is to recognise that each culture has its own (value-laden) systems of traditions and beliefs. In the multicultural society which is New Zealand, two of those 'systems' have been given some pre-eminence in the RMA - the legal-economic system in whose language Parliament has largely expressed the Act, and the Māori values referred to in sections 6,7 and 8 (and 269) of the Act.*

[49] *It is impossible to determine whether values are true or false. As the European Court of Human Rights stated in Oberschlick v Austria:*

> *The truth of value-judgements is not susceptible of proof.*

No doubt that is why Courts give judgments not 'proofs'. At the most we can say values are right or wrong; and of course across cultures that is fraught with difficulties. However, the New Zealand legal system works on the assumption that within most cultures there are branches of scientific and rational knowledge which are testable. Those branches are simply sets of propositions or sentences that stand for possibilities (not certainties - nothing is certain in empirical science or enquiry) accompanied by methods for ascertaining which are likely to be true and which are likely to be false.

[50] *As a Court we accept that there are many different belief systems and that we should treat their adherents equally. New Zealand contains many: a Maori belief system; several Christian belief systems; belief systems for many other religions; for animists who believe in the spirits of animals and places; and belief systems for agnostics and atheists. It may be that none of those belief systems can do more than respect and tolerate the others. Many of the adherents of each of those belief systems may believe that their spirits speak to them directly. For them, their values are absolute; they are the Truth, and are not compromisable. From a legal perspective their values are subjective and non-justiciable in any meaningful sense.*

[51] *However, knowledge systems - sets of testable propositions as we have described them - may be about human behaviour (including belief systems) and can be epistemologically objective. As a consequence, the methods of rational and scientific knowledge can, in a sense, step outside cultures as belief systems and look at them with some objectivity. It will not give absolute knowledge: empirical science cannot do that, but it might provide very useful answers to important practical questions. For example, a scientific or rational approach can look at the values referred to in the RMA and test whether any landscape is*

'outstanding' and/or 'natural', by answering more objective questions as to its geomorphology and ecology as well as at more subjective questions as to how widely beliefs are held.

[52] Even in the confined way we are trying to define rational and/or scientific enquiry, it is possible for a committed relativist to argue that knowledge systems cannot be ranked in terms of more or less accurate accounts of reality. Our answers to that are, first, that we have tried to distinguish between the modest (methodological) claims of rational knowledge propositions as opposed to the substantive claims of many belief systems. Secondly, any account of 'knowledge' as a belief system which makes the standards of truth or falsity internal to its own cultural consensus can as we stated earlier, not escape relativism ("I believe what I believe - you believe what you believe, kei te pai"). Thirdly, belief systems may not be able to be ranked for truth or falsity and it is certainly not the Environment Court's function to do so. Finally, however, individual 'factual' propositions about those systems can be assessed for truth and that is our task.

[53] That 'rule of reason' approach, if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):

- *whether the values correlate with physical features of the world (places, people);*
- *people's explanations of their values and their traditions;*
- *whether there is external evidence (e.g. Maori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value holders;*
- *the internal consistency of people's explanations (whether there are contradictions);*
- *the coherence of those values with others;*

- *how widely the beliefs are expressed and held."*

[47] Each of these factors is now analysed below in tabular form in this case.

Factors from Ngāti Hokopu	**Grenadier submission**
Whether the values correlate with physical features of the world (places, people).	Adkin locates Tirotiro Whetū on the northern side of the river in the location shown in the archaeological assessment at Appendix 10 in Figure 29, not within the Site. None of the figures attached show Tirotiro Whetū as a region but rather as a place. The Adkin system was intended to be spatially accurate and, for example, uses the same symbol for kainga. Adkin describes it as *a spot* that was *a pleasant one fixed with grass and other vegetation. Now it is a waste of bare sand.*[12] O'Keeffe correctly *confirms* the landscape was still dynamic. That is also confirmed by figures 25 and 26, which show in the early 1990s that, the subject site had stable planting, and the river margin at the river mouth was complete bare sand in an active dynamic system. Ngāti Tukorehe could not correlate the specific pa site to any particular feature or place. Ngāti Kikopiri believes that the Site was more generally an occupation area, but the original landing site is unclear given the dynamic environment.

[12] O'Keeffe Appendix 10 Archaeological Assessment, page 33.

People's explanations of their values and their traditions.	Ngāti Kikopiri considers the natural character needs to be improved and enhanced, and the relationship through tangata whenua agency in that process that sustains the relationship. There was no clear articulation from Ngāti Tukorehe of what their values and traditions were impinging on the resource management functions of the Panel. Mr Seymour's more intangible articulation of the presence of powerful taonga in the sand areas where he played as a child was not located on any particular part of the Site. The Site is so dynamic that it would be difficult to pinpoint exactly where these were. What he stated about his personal experience of taniwha is not relevant to resource management issues under the RMA.
Whether there is external evidence (e.g. Maori Land Court Minutes) or corroborating information (e.g. waiata or whakatauki) about the values. By 'external', we mean before they became important for a particular issue and (potentially) changed by the value holders.	There were no waiata or whakatauki articulating values or traditions of particular significance to the Site's management. Nor is there any record of Māori Land Court Minutes supporting any particular traditions or values expressed by Ngāti Tukorehe.
The internal consistency of people's explanations (whether there are contradictions).	There is no consensus about people's explanations, and significant contradictions. Ngāti Kikopiri and

	Muaūpoko emphasise the importance of sustaining natural character in respect of traditions and values. That appears to be consistent with the common values of all cultures to preserve natural values as a way of anchoring spiritual and cultural relationships. Ngāti Tukorehe could not articulate particular values of a resource management character that can support the relationship.
The coherence of those values with others.	There is no coherence between relevant hapū on the values.
How widely the beliefs are expressed and held.	The views of Ngāti Kikopiri and Muaūpoko are widely held amongst those groups, whereas Ngāti Tukorehe's position is distinctive and has emerged latterly.

[48] Judge Jackson's resort to reason and testable propositions as a 'refuge' for assessing real-life resource management issues is sensible since it is the only refuge authorised by a legal system worthy of that name. Recourse to reason as a shared inheritance enables peoples with different cultural backgrounds to share a common space with a shared baseline. Anything else risks becoming an appropriation one way or another. The expert basis for Grenadier's application accords with matauranga Māori, according to Ngāti Kikopiri and Muaūpoko.

[49] A critical thesis of the oral presentation from Ngāti Tukorehe to the hearing was the existence of supernatural powers with the capacity for human harm outside the world of cause and effect (per Mr Seymour). That was delivered to Grenadier by Ngāti Tukorehe as a ministry of 'care' rather than to create fear. However, respectfully, Mr Seymour's claim that there are capricious intangible forces in the locality causing harm to innocent children and

others is not correlated to any types of belief systems intended to be organising principles under the RMA. They are incapable of reasoned analysis and does not represent a testable value. Whether or not those views are right or wrong is irrelevant and non-falsifiable. Respectfully, it is acknowledged they were valid for Mr Seymour but not true for Grenadier Ltd.

[50] The conclusions set out above of Ms O'Keeffe are supported by the official records that she references. While Dr Smith oddly stated at the hearing that she "hates" this sort of evidence, the fact is that Dr Smith was not able to provide any rational rebuttal evidence drawing upon her own experience or expertise.

Conclusion

[51] The Douglas Links Golf Course proposal has shifted in response to submissions. It has been developed to the highest environmental standards and enjoys considerable support from tangata whenua. It will produce a fantastic facility and enhance a regionally important ecosystem's persistence. It constitutes sound planning to grant the applications.

Dated 3 June 2022

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