**BEFORE THE WAIKATO REGIONAL AND HAURAKI DISTRICT COUNCILS**

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| **IN THE MATTER** | of the Resource Management Act 1991 ("**RMA**") |
| **AND** | |
| **IN THE MATTER** | of an application for resource consents to extend the Waihi Gold Mine via underground and open pit mining methods known as Project Martha |
| **BY** | **OCEANA GOLD (NEW ZEALAND) LIMITED** |
| | Applicant |

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# SUBMISSIONS OF COUNSEL ASSISTING HAURAKI DISRICT COUNCIL STAFF

**Dated: 19 November 2018**

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**MAY IT PLEASE THE PANEL**

1. These submissions address two discrete issues that arose during the first week of hearings on the application by Oceana Gold (New Zealand) Ltd (**Applicant**) to extend the Waihi Gold Mine via underground and open pit mining methods known as Project Martha (**Application**).

**Section 104D Gateway Test: Consistency with Objectives and Policies**

2. Counsel for the applicant and its planning witness have brought to the Panel's attention a tension between objectives and policies in the District Plan which aim to protect sites of significance to Maori; and objectives and policies in the Martha Mineral Zone (**MMZ**). Section 6.1 of the District Plan includes, at Objective 3:

> To recognise and protect sites of significance to Maori.

3. Included among policies to achieve this objective are:

> (i) Identification and protection, in consultation and partnership with local iwi, of sites of significance to Maori.
>
> (ii) Avoid a reduction of historical, cultural and spiritual values associated with sites of significance to Maori.
>
> …

4. On the other hand, the sole objective of the MMZ (Chapter 5.17) is:

> To provide for the utilisation of the mineral resource in a sustainable manner.

5. Policies of the MMZ include:

> (i) Recognise the development of the mine and its processing areas, its ongoing rehabilitation and its longer term likely uses.
>
> (ii) Provide for the social, economic and cultural well-being of the people of the District and for their health and safety.
>
> …

6. It is accepted that historical mining has resulted in a reduction in historical, cultural and spiritual values in Pukewa. These effects had already been felt prior to the MMZ being introduced. We note that the Council received no opposition from iwi to the objectives and policies of the MMZ when it was introduced to the District Plan, and further received no submissions seeking the scheduling of Pukewa, pursuant to Section 6.1, Policy (i).

7. Nonetheless, it is accepted by all parties that the mining of Pukewa creates adverse cultural effects. These effects need to be appropriately managed both until the mine is closed and as part of rehabilitation and restoration of the mine site. It is also the Council's understanding that all parties agree it would not be possible to entirely "avoid" adverse cultural effects, even if this consent were not granted. This understanding arises because of other consents and plan provisions which enable mining in the pit to continue. It is acknowledged that underground mining is not enabled by those consents and permitted activity provisions.

8. Tensions between objectives and policies are not uncommon when considering consent applications. Priestley J provided a useful recap of the law on the question of whether a proposal is "contrary to" the objectives and policies of relevant plans in the East West link decision[1]. In summary:

   a. The finding by the Court of Appeal in **Dye v Auckland Regional Council** that a holistic approach is required, with the "objectives and policies read as a whole"[2]; and

   b. The "helpful comments" by the Environment Court in **Akaroa Civic Trust v Christchurch City Council** where the Court described the "usual position" as being *"that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed"*[3].

*9.* This approach was recently confirmed by the Environment Court in **SKP v Auckland Council** where the Court stated:[4]

> The evaluation under subsection 1(b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach. As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.

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1 Final Report and Decision of the Board of Inquiry into the East West Link Proposal, at pages 96-98.

2 Para 365 of East West Link, and para 25 of **Dye v Auckland Regional Council** [2002] 1 NZLR 337.

3 Para 366 of East West Link, and para 74 of **Akaroa Civic Trust v Christchurch City Council** [2010] NZEnvC 110.

4 **SKP Inc v Auckland Council** [2018] NZEnvC 81 at [50].

10. In my submission, the Application is not contrary to the objectives and policies of the District Plan when considered holistically. The specific provisions of the MMZ enabling mining activity, together with the comprehensive mitigation measures in the proposed conditions, and collaboration between Te Kupenga o Ngati Hako and the Applicant appropriately manage the cultural effects of the mining activity.

**Request that Conditions of Consent address all aspects of Project Martha Property Policy**

11. The Panel has the power to impose conditions of consent where they are for a resource management purpose, fairly and reasonably relate to the development; and are not so unreasonable that a reasonable planning authority could not have approved them.[5] Conditions will also be invalid where they are ultra vires the powers of the local authority, involve a delegation of the local authority's duties or are uncertain.

12. The Panel does not have the power under section 108 of the RMA to enforce conditions relating to payments to residents (such as those contained in the Project Martha Property Policy) unless these conditions are offered by the Applicant. These payments do not relate to resource management purposes and are therefore beyond the scope of the Panel's powers.

13. By way of analogy, in **Ngai Te Hapu Inc v Bay of Plenty Regional Council**[6] there was a question as to the Court's jurisdiction to include in the consent conditions an *Augier* agreement. The proposed condition was that the applicant would provide a marae for a representative Maori group by way of offset mitigation. The Court held that there was no basis to require the *Augier* agreement to be included in the consent conditions. It was a private contract that would be a matter for enforcement under contract rather than under the RMA enforcement regime.

14. I submit that **Ngai Te Hapu Inc** is analogous to the Property Policy insofar as it relates to a private agreement between the Applicant and residents and may only be included in conditions of consent where offered by the Applicant.

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5 **Newbury DC v Secretary of State for the Environment; Newbury DC v International Synthetic Rubber Co Ltd** [1981] AC 578; [1980] 1 All ER 731 (HL).

6 [2017] NZEnvC 169.

**DATED** this 19th day of November 2018

**Andrew Green**

Counsel for Hauraki District Council