



Hearing Committee

Te Komiti Whakatau Waeture

Monday, 22 July 2024
Rāhina, 22 Hōngongoi 2024

Room Totara, Council Chambers
Civic Centre, 14 Commerce Street, Whakatāne
commencing at 9:00 am

Chief Executive: Steph O'Sullivan

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1 Membership - *Mematanga*

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Councillor Nándor Tánczos - Chairperson

Councillor Tu O'Brien

Vanessa Hamm - Independent Commissioner

2 Hearing Process

Hearing Process

For quasi-judicial proceedings the local authority or a local or community board may amend meeting procedures.

At the commencement of this hearing, the Chair will provide an overview of the procedures and protocols that will direct the meeting.

3 Reports - *Ngā Pūrongo*

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3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade



To: **Whakatāne District Council Hearings Panel**

Date: **Day, 19 March 2023**

Author: **M Avery / Manager Resource Consents**

Authoriser: **D Bewley / General Manager Development & Environment Services**

Reference: **A2489283**

1. Reason for the report - *Te Take mō tēnei rīpoata*

The purpose of this report is for the Council to consider and make a decision on a request to vary an encumbrance affecting two properties at 14 and 36 Ōhiwa Parade, Ōhope (attached as Appendix 1 and Appendix 2).

Both requests pertain to the same encumbrance which expressly prohibits any application being made for a further subdivision of the land (attached as Appendix 3). Both parties are intending to further subdivide their properties and therefore each requires a variation to the encumbrance.

2. Executive summary - *Whakarāpopototanga*

The requested removal of the “no further subdivision” covenant on the Titles of 14 and 36 Ōhiwa Parade is assessed against the nine criteria within the Property Law Act 2007 and the encumbrance. These criteria can be usefully summarised as establishing whether or not there has been a change in circumstances since the time of the initial subdivision relating to the reasons why the covenant was established.

The assessment finds that, although there have been changes in legislation and further development of the Ōhope spit, these changes have had no impact on the reasons as to why the covenant was imposed in the first place. Therefore there is no legal basis for the removal of the covenant from the encumbrance.

3. Recommendation/s - *Tohutohu akiaki*

1. **THAT** the Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade report be received; and
2. **THAT** the Hearing Committee decline both applications requesting variation to the encumbrance B159002.16 registered against the Titles for 14 and 36 Ōhiwa Parade.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

4. Background - *He tirohanga whakamuri*

4.1. Property Details

The details of the two properties are:

	14 Ōhiwa Parade	36 Ōhiwa Parade
Legal Description	Lot 21 DP 64655	Lot 2 DP 502478 & Lot 2 DP 493445
Area	2942m ²	10,644m ²
Zone	Residential	Residential
Owner	Felicity Holden & Jarle Raimon	BBTLAW Trustees, Elizabeth & Jason McLeary – McLeary Trust

The two properties are shown in Figure 1 below.



Figure 1: Aerial image shown 14 and 36 Ōhiwa Parade

4.2. Application Background

An encumbrance was registered on each of the Certificates of Title as a part of the original subdivision process by the Munro Family Trust in April 1992 which created these lots. The same encumbrance is found on the Certificates of Title of 23 properties on Ōhiwa Parade. Although 21 Titles were originally involved, the owners of 34 and 36 Ōhiwa Parade have previously had the encumbrance varied to allow for two further Titles (34A and 36A Ōhiwa Parade) and requested that the encumbrance be reinstated on all resulting Titles.

The extent of the Munro Family Trust subdivision encumbrance is shown in Figure 2 below.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)



Figure 2: Properties with identical encumbrance to the two subject Titles

Each of the two owners now wishes to subdivide to create an additional allotment. They are prevented from doing so under the Fourth Schedule of the Encumbrance which states:

That no more than one household unit shall be erected, constructed or placed on any one of those Lots numbered 1-21 inclusive Of the Deposited Plans referred to in the Second Schedule and no further subdivision of the land subsequent to that shown in those Deposited Plans shall be requested by or on behalf of any owner of the land as a consequence of which a further household unit could be erected on the land.

Both owners have requested that the same process be followed which has occurred previously, i.e., the covenant would be removed to allow for subdivision, and then reinstated onto all Titles once the subdivisions were complete.

4.3. Legal basis for Encumbrance

The encumbrance is a binding legal agreement between the individual landowners of each lot and the Council. It is a form of covenant. It is similar to a consent notice which is the process used now under the RMA S221 to apply consent conditions which continue to apply following completion of a subdivision and restrict or manage the future use of land. The encumbrance contains several covenants relating to protection of the vegetation and habitats and a restriction on the number of dwellings per lot as well as the subject covenant.

The encumbrance is only enforceable by the Council. The other landowners, who also have the same encumbrance, cannot enforce it through the Court. Council acting in its statutory planning role under the RMA is also not able to enforce the encumbrance, and it is not be a matter which could be considered as part of any subdivision application made under the RMA.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

4.4. Previous Applications

The owner of 36 Ōhiwa Parade has made three previous applications to vary the encumbrance in 2007, 2009 and 2013. The same applicant, as owner of 34 Ōhiwa Parade, also made an application to vary the encumbrance in 2015. There has also been a petition to Council requesting removal of the subject covenant.

2007 Application – 36 Ōhiwa Parade

In 2007 the owner sought to remove the covenant to allow for a six lot subdivision in conjunction with the neighbouring property at 34 Ōhiwa Parade. The Council declined to uplift the encumbrance in this case. The reasons included:

- a lack of information to prove that the covenant was unnecessary, obsolete or unenforceable, and
- a lack of information to prove that the original reasons for imposing the covenant had changed.

The reasons also included an invitation to the applicant to submit a further application with more information; this information to include *"...the views of the other landowners affected by the encumbrance and also the views of the original submitters and other interested and affected parties associated with Ōhiwa harbour and environs"*. The decision also indicated the Council would expect a full assessment of effects to be provided including visual, landscape, coastal hazard and ecological effects.

2009 Application – 36 Ōhiwa Parade

In 2009 the owner again sought to remove the covenant; this time to allow for a two lot subdivision proposal. Although the matter was discussed informally at a Council level, the request did not progress to a Council or Council Committee Meeting and was withdrawn in 2010 by the owner after reviewing the Reporting Officers report. The reasons for that unfavourable report, although not given an opportunity for hearing before Council, were:

- Encumbrance not agreed as being obsolete due to continued significance of the Ōhiwa Harbour margins and the opportunity for precedent allowing for more widespread subdivision of the area.
- The surrounding residents maintained that the encumbrance has a significant role in protecting amenity of the area.
- The encumbrance was still able to be enforced, and therefore none of the tests for removing the condition of the encumbrance were met.

2013 Application – 36 Ōhiwa Parade

This was heard by Council in 2014. Council found that the covenant was obsolete and/or unnecessary, noting that a more appropriate consent notice covenant could be imposed as a result of further subdivision. As it was, the subdivision resulted in the existing covenant dropping down in its original form onto both resulting Titles.

2015 Application – 34 Ōhiwa Parade

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

This was heard by Council in 2016 when Council agreed to the requested variation. The reason for this was that the related subdivision application was effectively a boundary adjustment which led to the creation of a smaller allotment and the amalgamation of the balance area with 36 Ōhiwa Parade. The decision also records the precedent set by the 2014 decision. The existing covenant again dropped down in its original form onto both resulting Titles.

2015 Petition to have Covenant removed from all Titles

Following the 2014 removal of the covenant on 36 Ōhiwa Parade, the other landowners similarly affected by the covenant requested Council to remove the Covenant from all of their Titles. The reason for this was that the covenant had become redundant due to the precedent set.

Council responded that this could not be done except by way of application by each land owner. That response also confirmed that no further subdivision of the property would be available as the covenant had been reinstated.

No further request was received from the other landowners.

5. Issue/subject - *Kaupapa*

5.1. Process

This encumbrance is only enforceable by the Whakatane District Council (Council) as a “person entitled”. Although it is registered against 23 Titles, none of these property owners can enforce the covenants, but rely completely on Council to do so.

Any property owner can apply to the encumbrancee, which in this case is Council, to remove or vary the encumbrance. Council can then consider the request under the Property Law Act 2007 and, if it agrees, vary or remove the encumbrance as requested. Any variation agreed by Council is subject only to the terms of the encumbrance.

If Council does not agree to the variation, the property owner then has recourse to the Court under the Property Law Act 2007 Section 317. The Court makes its assessment against the criteria listed within that section, which may include a reassessment of the terms of the encumbrance itself.

5.2. Legislation

The variation of a covenant on a Title, not being a Consent Notice under the RMA, can only be done where the requirements of the Property Law Act 2007 and any within the covenant itself are met, depending on whether the application is before the Court or Council.

Section 317 of the Property Law Act 2007 states:

317 Court may modify or extinguish easement or covenant

1) *On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—*

a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

- i) the nature or extent of the use being made of the benefited land, the burdened land, or both:*
 - ii) the character of the neighbourhood:*
 - iii) any other circumstance the court considers relevant; or*
 - b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or*
 - c) every person entitled who is of full age and capacity—*
 - i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or*
 - ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or*
 - d) the proposed modification or extinguishment will not substantially injure any person entitled; or*
 - e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or*
 - f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.*
- 2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.*

In this case there are also other circumstances as required under S317(1)(a)(iii) above, with those being the requirements of the Fifth Schedule to the Encumbrance. This states:

FIFTH SCHEDULE (Events for Termination)

Upon the Council being satisfied that the covenants of the Fourth Schedule have become obsolete, unnecessary or no longer enforceable.

In making its decision Council need only assess the three criteria stated within the Encumbrance. However, as the applicants can also apply to the Court to assess the criteria within the Property Law Act 2007 which could lead to removing the encumbrance in its entirety or any parts of it, Council should consider all the criteria in making its decision. Any of the criteria within S317 will substantially inform at least the obsolescence and necessity criteria within the encumbrance.

The wording of both the Property Law Act 2007 and the encumbrance and the legal relationship between the two mean that only any one of the nine tests need be met to allow for the variation or removal of the encumbrance.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

5.3. Information provided in the Applications for Variation

The following summarises the arguments put forward by the two landowners to allow the removal of the “no subdivision” covenants.

14 Ōhiwa Parade

(a) Change in the nature or extent of the use being made of the land

The application references an application for subdivision submitted to Council. This application seeks to create two allotments: Lot 1 containing 1,796m² and Lot 2 containing 1,146m² in area.

Lot 1 will contain the existing dwelling and double garage. Lot 2 will contain the existing sleepout, which is incorrectly identified in the application as a dwelling.

This subdivision application was submitted in March 2022 but has not been further processed.

(b) Change in the character of the neighbourhood

No information provided, except for a statement that the surrounding built environment is now different from when the encumbrance was first placed on the titles.

(c) Covenant impeding the reasonable use of the land

No information provided.

(d) Person entitled has agreed

Council has not yet agreed to the requested variation.

(e) Person entitled not injured

No information provided.

(f) Covenant becoming obsolete

The covenant mechanism would now be via a Consent Notice under the RMA and Consent Notices are able to be varied where planning rules and circumstances have changed over time. Therefore, the covenant should likewise be able to be changed.

(g) Covenant becoming unnecessary

All of the protections for vegetation, wetlands and the environment contained within the encumbrance will not be varied but will be retained.

(h) Covenant becoming unenforceable

No information provided.

36 Ōhiwa Parade

(a) Change in the nature or extent of the use being made of the land

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

The application references an intent to subdivide the land into two allotments: Lot 1 containing 3,300m² and Lot 2 containing 7,300² in area.

Lot 1 will contain the existing dwelling . Lot 2 will be the balance undeveloped land.

(b) Change in the character of the neighbourhood

There has been significant development of the Ōhiwa Harbour margins. A total of seven separate major subdivisions are listed. The creation of small allotments at 13, 15A and 3 Ōhiwa Parade also evidence this change.

(c) Covenant impeding the reasonable use of the land

The property is a 10,644m² allotment in an urban area and it is unreasonable that this cannot be subdivided.

(d) Person entitled has agreed

Council has not yet agreed to the requested variation.

(e) Person entitled not injured

Council is the only entitled person and will not be injured by any subdivision of the property.

(f) Covenant becoming obsolete

The covenant has been rendered obsolete by both the further development of the Ōhiwa Harbour Margins and also the previous variations to the covenant which have been granted.

The legal landscape, and particularly the adoption of the RMA, has also rendered the covenant obsolete.

(g) Covenant becoming unnecessary

The protection afforded by the covenant has now been replaced by comprehensive policies and rules governing subdivision under the RMA. The legislation now allows any significant environmental concerns to be considered in the context of any subdivision application.

(h) Covenant becoming unenforceable

The covenant is confirmed as being enforceable.

5.4. Consultation with other owners

Neither of the two owners has engaged with other property owners to assist in determining the ongoing necessity of the covenant, i.e., its obsolescence or necessity. Council carried out that consultation in July 2023 (consultation letter attached as Appendix 4).

The letter was sent to all 23 property owners, including those who have requested variations. A total of 13 responses were received. Of these 10 objected to and 3 supported the variation.

The reasons given for support were:

- The restriction should just be no more than one dwelling per lot.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

- Subdivision of larger lots should not be prohibited.
- One of those supporting wishes to subdivide their 3,288m² property into two lots.

The following matters were raised in opposition:

- Protection of open land.
- Protection of harbour from run off from developed land.
- Potential reduction in amenity due to higher intensity development than originally agreed to.
- Potential inundation and flooding of properties.
- Owners bought into area knowing this restriction was in place and amenity protected.
- Potential to reduce the amenity of a quiet area.
- Lack of ability to subdivide was promoted as a selling point.
- Lack of equity – if the covenant is removed, it should be for all properties.
- Loss of amenity from the original subdivision which was purposefully planned and considered.
- Loss of community amenity for individual private financial gain.

Many of these comments were reiterated several times (responses are attached in Appendix 5).

5.5. Munro Subdivision and reason for encumbrance

The following outlines the development of the subdivision layout and encumbrance in response to issues raised during the subdivision process.

With reference to the Munro subdivision application dated 13 March 1987 (A1777016), the subdivision was specifically designed by the applicants at that time *“to be developed as exclusive ‘lifestyle’ blocks where an expanse of open land is likely to be preserved under private control..... the applicants wish to offer these “lifestyle” blocks to particular purchasers seeking to build homes with privacy and space, while having direct access to the Harbour”*. The applicants also stated their intention that *“the large blocks should retain potential for possible subdivision in the future in accordance with the zoning of this land, subject to normal development criteria. This would be the option of subsequent purchasers, but it is considered at the present time that the ‘lifestyle’ proposal is more practical for the particular area”*. These lifestyle blocks were all the lots on the south side of Ōhiwa Parade, which includes both subject lots.

The application was notified with a number of submissions being received; all were in objection to the subdivision and, significantly in terms of the encumbrance, raised concerns about the potential for flooding of the land to the south of Ōhiwa Parade and wider effects on the Harbour margin. Council agreed and recommended that no further subdivision of the larger lots be permitted.

A restriction on further subdivision, as discussed at the time, was objected to by the applicant in a submission dated 16 September 1987 (A1777016). On 14 October 1987 (A1776906) the subdivision was approved with building line restrictions but no restriction on further subdivision. This was also subsequently objected to by the applicant. That objection was set aside by Council and the approval decision with the building line restrictions confirmed on 02 March 1988 (A1776906). There was discussion between Council and the applicant at this time concerning the need for a restrictive encumbrance relating to the building line restrictions on the larger lots (A1776953).

That subdivision was subsequently appealed to the High Court in August 1988. That appeal centred on the liability of the subdivided area to flooding. The issues were whether the subdivision should have been approved and the required floor heights for the subdivision. The High Court in March

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

1991, agreed with the plaintiffs that Council had not had due regard to either the coastal hazard or the necessity for the subdivision in the coastal environment, and directed that the proposed scheme plan be set aside and a new one submitted to Council for consideration.

A new scheme plan, which included a proposed covenant restricting the number of dwellings to one per lot, was submitted on 13 June 1991, again notified, but was declined by Council on 16 September 1991 (A1220533). The decision was that the proposal did not adequately allow for the protection of the natural character of the harbour margins and coastal area.

Conditional approval of a further iteration of the scheme plan, as submitted in August 1991 and following further consultation with the submitters, was finally given on 05 March 1992. This included the restrictive covenant relating to further subdivision, which had been discussed with the applicant and submitters over January and February 1992. The approval decision was conditional on this encumbrance being formally agreed to.

This decision also agreed with and accepted the applicant's stated reasons (A1776933) for the large lots: *"The creation of large lots in Stage II and the reserves will leave natural vegetation features intact which will minimise the visual impact of the housing. This subdivision has had more focus on it than any ever before. The conditions and provisions set are such that the future residents and the community as a whole will enjoy a subdivision that:*

1. Protects the harbour character and ensures that the harbour remains intact.
2. Recognises that environmental controls are needed in sensitive water margins.

The applicant in response formally offered the restrictive encumbrance preventing further subdivision and a limit of one dwelling per lot on 02 April 1992 (A1776920). The reason given by the applicant for this specific covenant was to ensure *"the provision of an appropriate buffer between the harbour and normal residential development on the north side of the road"*. The applicant objected to the imposition of the covenant on the "normal" residential lots to the north of the road, but this objection was not upheld by Council. The entire encumbrance was therefore imposed on all lots.

The Third Schedule to the encumbrance states that the covenants as a whole were offered as they were *"desirable having regard to the potential environmental impact of development or consequent upon this further subdivision of the land"*.

That offered covenant is the subject of the two current applications.

6. Options analysis - Ngā Kōwhiringa

6.1. Approach to assessment

The two applications are assessed together. Both pertain to larger allotments on the south side of Ōhiwa Parade which front directly onto the harbourside reserve. It is noted that, although there are differences in the areas of the subject and resultant lots, this does not fundamentally change the assessment of the respective applications as both effectively seek a change in either density of development or the distance to the Harbour from that which was originally approved.

The other major difference is that the owner of 14 Ōhiwa Parade is seeking to subdivide off an existing building whereas the owner of 36 Ōhiwa Parade will be subdividing off undeveloped land. However, neither current Title has more than one dwelling at present and each will therefore be creating an allotment for further residential development.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

In effect, the decision to either approve of or decline the variation on either one of the applications must be followed through to the other.

6.2. Change in the nature or extent of use of the land

Both lots are currently zoned Residential, as they were at the time of the Munro subdivision. Although there is an intention to subdivide the lots, this does not fundamentally change either the nature or the use of the land as the land in its entirety remains available for residential activity.

6.3. Change in character of the neighbourhood

Both applications reference the wider development of the Ōhiwa Harbour margin on the northern side of Harbour Road as being evidence of a substantial change in character of the area since the time of the Munro subdivision. Eight subdivisions are specifically listed by the owner of 36 Ōhiwa Parade, but do have the following applicable attributes:

- Liddon Cove – subject to a similar layout and the same restriction on further subdivision.
- Ōhope Waterways – with the exception of two small lots which are unable to be subdivided, this subdivision is separated from the Harbour margin by Council reserves including elevated reserve land and/or road reserve.
- Waimana Trust / Te Taiawatea Drive – subject to the same restriction on further subdivision.
- Te Horo Drive – subject to the same restriction on further subdivision.
- Harbour Road – Subdivision is between Ocean Road and Harbour Road and has no impact on the Harbour margins.
- Port Ōhope apartments – separated from the Harbour margin by Council reserve and road reserve, i.e., on the northern side of the road.
- Rangitukehu Street extension – small lots with restricted building platforms identified on the Titles which achieve the same outcome of restricting further subdivision.
- 13, 15, 3 Ōhiwa Parade – None of these properties are subject to the covenant and all are located on the northern side of Ōhiwa Parade and have no effect in regard to the Harbour margins.

Although there has been continued subdivision along the Harbour margin, these developments have also been subject to the same restriction on further subdivision. Furthermore, as with the subject land, the zoning of these areas was and remains Residential Zone and has not changed regarding the planning landscape or in regard to the permitted character.

The word “neighbourhood” is not specifically defined in the Property Law Act 2007, and it could also be taken as referring to just the Ōhiwa Parade area. There has been no change at all in the character of this area since the original development of the subdivision; a fact raised in several of the received comments from residents.

6.4. Covenant impeding the reasonable use of the land

The owner of 36 Ōhiwa Parade has addressed this matter, whereas the owner of 14 Ōhiwa Parade has not. Reasonable use is held by the owner as being the ability to subdivide the land which is over a hectare in area within a built-up urban area.

The ability to subdivide is not what determines reasonable use. The land is zoned Residential Zone and reasonable use is the permitted residential activity. The covenant does not hinder this use in any way.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

Whether or not a property can be subdivided, irrespective of its size, is dependent on the rules within the District Plan and any relevant constraints within the RMA or on the Title. There is, however, no expectation that anyone has a reasonable right to be able to subdivide their property, as that ability is always subject to the relevant legislative requirements and may be lawfully declined. This contrasts with the legal ability to reasonably use the land for residential activity which, although constrained through applicable legislation, is not impeded by either the covenant or any legislation.

Even were it to be accepted that the owner of a large residential lot has a reasonable expectation of being able to subdivide the property, in these cases the landowners knowingly entered into the covenant through purchasing the properties. All the affected landowners purchased their properties with a reasonable expectation that no further subdivision would occur; a point raised several times in the feedback from other landowners.

6.5. Person entitled has agreed

The Property Law Act 2007 defines a “person entitled” as a person who is able to enforce the covenant. This criterion is only met if Council now agrees to varying the encumbrance.

6.6. Person entitled not injured

The owner of 36 Ōhiwa Parade simply states that Council is not injured by a decision to vary the encumbrance.

As evidenced in the feedback from other property owners, there is a view that Council has not adequately protected the amenity of the area in agreeing to previous requests to vary the encumbrance. Although Council found there was justification for the variation on those occasions, landowner feedback to these applications suggests further similar decisions will undermine the integrity of the original decision and raise a reputational risk for Council.

It is also noted that, as discussed above and in 6.8 below, there has been no change in the character or nature of the area and therefore no change which relates to the reason why Council and the developer agreed to the covenant in the first place. Removal of the covenant will therefore cause injury to the encumbrancee due to a failure to meet those stated obligations.

6.7. Covenant has become obsolete

Both owners refer to the change in legislation to the RMA which has now replaced the use of covenants, such as the subject one, with consent notices under the RMA S221. The owner of 36 Ōhiwa Parade also references the precedent set by previous variations of the encumbrance, and changes to development along the Harbour margins. The latter has been discussed above.

The fact that there is now the consent notice process which achieves the same result as the subject covenant has not rendered that previous process of an encumbrance obsolete. The two processes still exist side by side, as evidenced by the revision of the Property Law Act in 2007 as well as the continued use of the covenant by the owner of 36 Ōhiwa Parade as recently as 2016.

Each of the four harbourside subdivisions referenced in the application resulted in either the same restriction on further subdivision or, in the case of the Rangitukehu extension, a condition which achieved the same result. It is evident, therefore, that the harbour margins have continued to be found to be of sufficient significance to warrant this type of protection and that this type of covenant condition remains appropriate under the RMA. This is also the view expressed in the feedback received from other owners subject to the covenant.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

The remaining referenced subdivisions do not front onto the Harbour margins and have all been able to achieve setbacks from those margins which, in conjunction with further controls on buildings such as height and colour, can protect the values of the harbour from the developments.

The risk of undermining the covenant control is presented by the precedence argument. All the larger lots fronting the Ōhiwa Harbour are subject to a covenant prohibiting further subdivision, both in the Ōhiwa Parade area and those subdivisions further to the east. The applicant's position is that, having granted two variations, Council is now bound to grant another. This same argument would therefore apply to not only all Ōhiwa Parade properties, but also to all other properties fronting the Harbour. There is the potential, running the precedence argument, that the amenity values of the Harbour margin will change to a significant degree.

Relying on the District Plan lot size rules alone to control density of development would potentially allow for well over 50 lots within the Ōhiwa Parade subdivision area, depending on access arrangements. A similar number would also be potentially developed in the Liddon Cove subdivision and over 20 in the Te Taiawatea Drive subdivision for those areas fronting the Ōhiwa Harbour which are also subject to the same covenant restriction. A conservative estimate of the number of new lots fronting the Harbour would be over 120.

It must, however, be noted that any application for a subdivision or varying an encumbrance must be assessed on its merits taking into account the legislated requirements and the subject environment. Where there are sound reasons for not following a precedent, that option is open to Council.

6.8. Covenant has become unnecessary

The owner of 36 Ōhiwa Parade rephrases the arguments presented for obsolescence in referring to the change in legislation. This is discussed above.

The owner of 14 Ōhiwa Parade highlights that the controls within the encumbrance which protect flora and fauna will remain. The covenant prohibiting further subdivision was not, however, imposed for this reason.

Two documented reasons were advanced for the covenant. The first, relating to that particular covenant, was to provide a spatial buffer from the Harbour. This was rolled up within the encumbrance itself with the reasoning for the other covenants, and widened to managing any potential environmental impact of the subdivision. Either way, this is more than simply the flora and fauna and also includes the amenity of the area. The primary way in which the covenant achieves this is through imposing a control on density of development, that sits alongside the building line restrictions, along the harbour margin which goes beyond that which typically applies to residential development, i.e., a buffer of open space through providing larger lots.

Density of development is otherwise controlled through the rules of the District Plan. The Residential Zone has a minimum lot size of 350m² and any lot size of this area is assessed as being appropriate. In the case of those proposed allotments fronting the Ōhiwa Harbour, there has been a consistent approach from Ōhiwa Parade eastwards along the spit that smaller lots are not appropriate. Controls relating to setbacks and/or "no subdivision" covenants have therefore been used to control density and the amenity of open space against the Harbour.

The owners of 34 and 36 Ōhiwa Parade, which are now both owned by the current applicant and in the one Title, were granted variations to remove the covenant in 2014 and 2016. In each case the covenant was re-imposed in order to ensure that the Harbour amenity continued to be protected. The necessity for the covenant was therefore affirmed in 2016. The fact that both applicants are

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

seeking to again reimpose the covenant suggests that it still does remain necessary, albeit to some unquantified degree. The question is what level of density or setback is required and, if that is less than what was originally determined as being appropriate, then why?

Since the Munro subdivision in 1992, Ōhiwa Harbour has received national and regional recognition as an outstanding natural feature, and therefore has if anything increased in significance and the need for protection in that time. This has been recognised in the Bay of Plenty Regional Coastal Environment Plan and in the above local resource consent decisions involving land adjacent to Harbour margins. The encumbrance has a role in continuing to protect those values as it limits further development in the area, especially adjacent to this specific part of the Harbour.

There is an argument that the Ōhiwa Parade lots are particularly large, with three of the original lots being over 7000m² in area and a further four being over 3000m². A similar situation occurs in the Liddon Cove subdivision, with one lot being over 8000m² and another over 4000m². In each case, these lot sizes and layout were seen as being appropriate to achieve the protection of the Harbour margin in this immediate area and there has been no change in that immediate environment to support a change to this approach.

Although not referenced in either of the applications, there are building line restrictions which apply to lots to the south of Ōhiwa Parade. These restrictions were imposed primarily for dealing with effects from potential inundation and, by their nature, on their own do not deal with density of development.

The owner of 14 Ōhiwa Parade is seeking to split off a granny flat as a dwelling on its own allotment. Whilst the building line restriction would still apply, the second lot is then available for complete and separate redevelopment which has a consequential potential effect on potential building density.

6.9. Covenant has become unenforceable.

The owner of 36 Ōhiwa Parade has confirmed that the encumbrance remains enforceable by Council.

6.10. Option 1 [Decline both applications] – preferred option

As assessed above, none of the criteria for variation as listed in the Property Law Act 2007 and within the encumbrance itself have been met. There is therefore no legal basis to vary the encumbrance.

It is noted that there is also an expectation by other landowners in the Ōhiwa Parade subdivision for Council to enforce the covenant restricting further subdivision as it is a known feature of this development and contributes significantly to the amenity of the area.

6.10.1. Advantages

- Council meets its legal obligations as Encumbrancee.
- The amenity of the Harbour margins remains protected to the level anticipated under the original subdivision, accepting the change resulting from Council's two previous decisions to grant variation of the encumbrance.

6.10.2. Disadvantages

- The two applicants remain unable to further subdivide their properties.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

6.11. Option 2 [Approve both applications]

This option is only legally available to Council if it disagrees with the assessment of any of the criteria listed above. If that is the case, then Council is required to fully detail the reason for the change in assessment, especially given the feedback from other affected residents.

6.11.1. Advantages

- The two applicants are able to further subdivide their properties.

6.11.2. Disadvantages

- Council will risk failing in its legal obligations as Encumbrancee.
- Council will suffer injury to its reputation.

7. Significance and Engagement Assessment - *Aromatawai Pāhekoheko*

7.1. Assessment of Significance

(a) Level of Community interest

High - as evidenced by the feedback received and community response to previous decisions.

(b) Level of impact on current and future wellbeing

Low – any consequential effect should the decision be to grant the variation, this is considered as a part of any consequential subdivision.

(c) Rating Impact

Low – there is no rating impact.

(d) Financial Impact

Low – there is no financial impact.

(e) Consistency

Low – although there are previous decisions, each one must be made on its own merits.

(f) Reversibility

Low – a decision for either option could be reversed, either in response to a further application or the use of an equivalent mechanism as a part of a subdivision consent.

(g) Impact on Māori

Low – noting that any subdivision application would require written approval of Iwi due to a Statutory Acknowledgement for the Ōhiwa Harbour.

(h) Impact on levels of service

Low – there is no impact on Council's level of service.

3.1 Assessment of Applications to Vary Encumbrances – 14 and 36 Ōhiwa Parade(Cont.)

(i) Impact on strategic assets

Low – there is no impact on Council’s strategic assets. Any consequential effects from further subdivision are managed through that process.

Although there is a significant community interest in this decision, the matter for decision is restricted legally to being between Council as Encumbrancee and the two landowners as Encumbrancers.

The decisions and matters of this report are assessed to be of low significance, in accordance with the Council’s Significance and Engagement Policy.

7.2. Engagement and community views

The matter for decision is restricted legally to being between Council as Encumbrancee and the two landowners as Encumbrancers. Engagement has been carried out with other landowners in the Ōhiwa Parade subdivision area, but the scope of that engagement was restricted to assisting in the assessment of the ongoing relevance of the encumbrance. No further engagement is required in respect of the decision.

8. Considerations - *Whai Whakaaro*

8.1. Financial/budget considerations

There are no financial or budget considerations resulting from this decision.

8.2. Strategic alignment

This decision is solely a result of Council’s legislated role as an encumbrance.

8.3. Climate change assessment

This decision is solely regarding the terms of the encumbrance. Any climate change implications from the decision would be required to be assessed as a part of any subdivision application if the decision is to grant the variation.

Based on this climate change assessment, the decisions and matters of this report are assessed to have low climate change implications and considerations, in accordance with the Council’s Climate Change Principles.

8.4. Risks

The prime risk to Council is reputational. If the variation is agreed to then there will be a risk of negative feedback from the other landowners in the subdivision. If the variation is declined there will be a risk of negative feedback from those landowners (three identified) who wish to subdivide.

There is also a risk that the applicants will take the matter to the Court under the Property Law Act 2007. However, in that case Council is only involved as an interested party, i.e., as encumbrancee.

3.1.1 Hearing Panel Report - Variation of Encumbrance - Appendix 1 - Encumbrance Variation Application - 14 Ohiwa Parade

Attached to this report:

- Appendix 1: Application from owner 14 Ōhiwa Parade
- Appendix 2: Application from owner 36 Ōhiwa Parade
- Appendix 3: Encumbrance B159002.16
- Appendix 4: Consultation letter to landowners
- Appendix 5: Responses from landowners

3.1.1 Hearing Panel Report - Variation of Encumbrance - Appendix 1 - Encumbrance Variation Application - 14 Ohiwa Parade

3.1.1 Hearing Panel Report - Variation of Encumbrance - Appendix 1 - Encumbrance Variation Application - 14 Ohiwa Parade(Cont.)

Hamertons
LAWYERS LIMITED

LEGAL SOLUTIONS

Our Ref: 22209/3

1 February 2023

Whakatane District Council
14 Commerce Street
WHAKATANE 3120

BY EMAIL

Email: Vanessa.Fergusson@whakatane.govt.nz

14 Ohiwa Parade, Ohope – Application to surrender encumbrance and register replacement encumbrance or Consent Notice

We advise that we act for the owners of 14 Ohiwa Parade (The Nako Trust) "The Owners".

The Owners have applied to the Whakatane District Council for a resource consent to subdivide the property, and we are advised by the Owner's planner, Mr Tim Fergusson, that the resource consent has been placed on hold until such time as an application to vary encumbrance B159002.16 has been approved by the Council under a separate application.

This letter now formally requests the variation of encumbrance B159002.16 as set out below;

1. Background

- (i) 14 Ohiwa Parade "the property" is comprised in one record of title, SA52D/472. The title is held by Facility Christian Holden and Jarle Raimon as Trustees of the Nako Trust. A copy of record of title SA52D/472 is **attached** to this application and marked with the letter "A";
- (ii) The property has a main home, and an "annex" constructed upon it. Both the dwelling and the annex are properly consented and, in every respect, compliant with the Building Act and Resource Management Act. The home and the annex can be separated by removing a small carport which is presently constructed between the two structures.
- (iii) The owners have applied for a resource consent to subdivide the property into two lots, so that the dwelling and annex will each have their own title. A copy of the application is **attached** and marked "B;"

hamertons.co.nz

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MEMBER - FAMILY SPECIALIST
PANEL OF MEDIATORS
NEW ZEALAND LAW SOCIETY



MEMBER 1010/21



MEMBER

3.1.1 Hearing Panel Report - Variation of Encumbrance - Appendix 1 - Encumbrance Variation Application - 14 Ohiwa Parade(Cont.)

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- (iv) The record of title for the property is subject to encumbrance B159002.16 in favour of the Whakatane District Council. A copy of the encumbrance is **attached** and marked "C;"
- (v) The encumbrance places restrictions upon the property including;
 1. The restriction that the Land not be subdivided, and no further houses be built upon any subdivided land;
 2. Various protections to the vegetation and wetland areas marked "B," "C" and "D" on Deposited plan S.64756;
 3. Not graze stock upon the land.
- (vi) The encumbrance records that the encumbrance terminates upon the Council being satisfied that the covenants have become obsolete, unnecessary, or no longer enforceable.

2. Why the encumbrance should be varied:

- (i) The applicant submits that;
 - The encumbrance is reflective of its time and the District Plan as it existed at that time.

Both the District Plan and the surrounding built environment are now different from those which existed in 1993.
 - The restrictions imposed by the encumbrance would today be created by "Consent Notice" under the Resource Management Act 1991. Consent Notices are able to be varied by application to the Council where planning rules and circumstances have changed over time. It is submitted that a variation of the encumbrance is therefore similar to a variation of the terms of a consent notice.
 - The proposal will not result in an increase in the intensity of buildings upon the land, as the "annex" already exists. The applicant is happy to have the "footprint" of the annex or any possible future extension of the annex limited by a defined "building envelope" to be approved by council as part of the subdivision consent application.
 - All of the protections for vegetation, wetlands and the environment contained within the encumbrance will not be varied, and will be retained without amendment.
 - The encumbrance, at the 5th Schedule, anticipates it's future Termination "upon the Council being satisfied that the covenants of the Fourth Schedule have become obsolete unnecessary or no longer enforceable". The document therefore anticipated that it might one day require change or removal.

**3.1.1 Hearing Panel Report - Variation of Encumbrance - Appendix 1 - Encumbrance Variation Application
- 14 Ohiwa Parade(Cont.)**

3

- Whilst past approvals do not create any binding precedent upon the Council, and any applications must be considered on their own merits, we note that the Council has granted consent for a similar application in the past.
- Any notice to neighbours will be given proper and lawful consideration within the subdivision consent application under the Resource Management Act 1991.

3. Application

Accordingly, the applicant applies for the Councils' consent to;

1. Discharge encumbrance B159002.16 as it relates to Record of Title SA52D/472 and,
2. Register a new encumbrance upon exactly the same terms as B159002.16 upon both of the new titles created. **Or**
3. Register a new consent notice to record the same restrictions contained within encumbrance B159002.16 upon both of the new titles created if the subdivision consent is granted to allow the new lots to be created.

We thank the Council for its consideration and in due course look forward to hearing from you.

Yours faithfully
Hamertons Lawyers Limited

Brian Carter
Director
Email: j.stack@hamertons.co.nz

22209 /3 - 1015838 – BNC/ JES

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade**

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance
Variation Application - 36 Ohiwa Parade**

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

IN THE MATTER

BETWEEN

**JASON MATHEW McCLEARY,
ELIZABETH JANE McCLEARY
and BBT LAW TRUSTEES LIMITED
as Trustees of the McCLEARY
TRUST**

("The Applicants")

AND

**WHAKATANE DISTRICT
COUNCIL**

("The Covenantee")

**APPLICATION FOR VARIATION OF MEMORANDUM OF ENCUMBRANCE
NUMBER B1590021.16 RE: 36 OHIWA PARADE, OHOPE**

Dated this *18th* day of *May* 2023

Presented for
filing by:

**BUDDLE McCLEARY KENNEDY
SOLICITORS
WHAKATANE**

Counsel: JM McCleary
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3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

Introduction

1. 36 Ohiwa Parade, Ohope being Lot 2 DP502478/Lot 2 DP493445, certificate of title 00/753641 is a large 10,644 square metre property located on the edge of Ohiwa Harbour in Ohope (“the Property”). A copy of the title for the Property is *attached* and marked “A”.
2. The Landowners and Applicants are the trustees of the McCleary Trust (“the Landowners”).
3. The Landowners wish to subdivide the Property into two lots. Lot 1 will be approximately 3,300 square metres which will represent the existing dwelling on the Property and curtilage. Lot 2 will be the remainder of the Property being approximately 7,300 square metres. A draft subdivisional plan is *attached* and marked “B”.
4. The Landowners will seek to build a new dwelling on Lot 2, for themselves.
5. Registered against the title of the Property is memorandum of encumbrance B159002.16 which provides, inter alia, a prima facie prohibition on future subdivision (“the encumbrance”). However, the encumbrance provides for circumstances where the covenants created pursuant to the encumbrance (such as prohibiting subdivision) may be terminated by a Council.
6. Council’s legal capacity in respect of the encumbrance is as covenantee. Council’s legal status in respect of the encumbrance is not as consenting authority.
7. The Landowners seek Council’s consent (as covenantee) to vary the encumbrance to permit the Landowners to apply to Council (in its capacity as consenting authority) for subdivision.
8. The variation is sought in consideration of the termination provisions in the fifth schedule of the encumbrance.

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

9. The Council has granted permission for the encumbrance to be varied on two previous occasions, in 2014 and in 2015

The Memorandum of Encumbrance

10. The original development of the entire Ohiwa Parade area was undertaken by the Munro Family Trust. The original application was made on or about 1988 and resource was ultimately granted on 3 April 1992.
11. Following the granting of resource consent, a memorandum of encumbrance was registered against the new titles of 19 Ohiwa Parade properties. A copy is *attached* and marked "C".
12. The encumbrance has five schedules which are as follows:
- a) The First Schedule
The first schedule of the encumbrance relates to the legal relationship between the Council as title holder, which establishes Council's legal status as Conventantee.
 - b) The Second Schedule
The second schedule describes the land that the encumbrance affects.
 - c) The Third Schedule
The third schedule states that the restrictive covenants are offered having regard to the potential environmental impacts of development of the land.
 - d) The Fourth Schedule
The relevant part of the fourth schedule (in terms of this application) states that no further subdivision of the land shall be requested.
 - e) The Fifth Schedule (events for termination)
The fifth schedule provides that the covenants of the encumbrance may be terminated: "*Upon the Council being satisfied that the covenants of the*

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

fourth schedule have become obsolete, unnecessary or no longer enforceable”.

13. Because of the inclusion of the fifth schedule, the restrictive covenants were not created in perpetuity. In 1992, the Council and the Munro Family Trust must have recognised that circumstances could change over time and a mechanism was required to enable the covenants to be terminated. It follows that no party could ever rely on such covenants creating an ongoing restriction in perpetuity.

Legislative History and Changes

14. At the time that resource consent was granted to the Munro Family Trust, the relevant legislation that Council decision making was governed by was:
- The Local Government Act 1974
 - The Town and Country Planning Act 1977
 - The Reserves Act 1977
15. The Local Government Act 1974 was repealed upon the enactment of the Local Government Act 2002. The Town and Country Planning Act 1977 was repealed following the enactment of the Resource Management Act 1991.
16. The most significant change in legislation was of course the Resource Management Act 1991. Since then, the requirements of the Resource Management Act and guiding provisions of an “effect-based” approach have replaced both the Local Government Act and the Town and Country Planning Act requirements for subdivision. The subdivision of land used to be governed by district schemes under the Town and Country Planning Act 1977 and by the scheme plan approval procedures under parts XX and XXI of the Local Government Act 1974. This involved an assessment of compliance with the proposed or operative district schemes.
17. Since the enactment of the Resource Management Act, considerations in respect of land development and subdivision have changed significantly. The legislation and case law relied upon by Council at the time it granted consent for the Munro Family

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

Trust subdivision focused on tests such as the necessity of subdivision and the preservation of the natural character of the coastal environment. Pursuant to the Resource Management Act, the focus is on sustainable management, environmental effects and recognition of the existing character of an area where it has been modified through development over time. Put simply, consenting pursuant to the Town and Country Planning Act 1977 was rigid, lacked flexibility and foresight and was arguably non-progressive. Consenting pursuant to the Resource Management Act by comparison was intended to be dynamic and has consequently evolved significantly in the last 32 years.

18. There can be no realistic comparison between the legal framework that existed when the encumbrance was registered, and the legal framework that exists in 2023. The old legal framework from 32 years ago is obsolete.
19. Resource Management Act considerations in respect of land developed now include (but are not limited to):
 - Landscape and visual impact
 - Natural character
 - Residential amenity
 - Natural hazards
 - Cultural value
20. In addition to the Resource Management Act, specific policies have also been developed, particularly in terms of coastal development. These policies must also be considered in respect of any coastal land development. They are:
 - The New Zealand Coastal Policy Statement
 - The Bay of Plenty Regional Council Policy Statement
 - The Bay of Plenty Regional Council Coastal Environment Plan
 - The Whakatane District Plan

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

21. The consequence of the significant legislative and policy framework that exists today ensures that applications for land development are considered comprehensively, and consistently, with appropriate safety nets as required.

Previous Modifications of the Encumbrance

22. The Council has modified the encumbrance twice before to enable subdivision to be applied for. The first modification was in respect of 36 Ohiwa Parade, Ohope pursuant to an extraordinary Council meeting held on 26 June 2014 (Council as covenantor) file reference 11.7.3-A448226 (copy *attached* and marked “D”). Council permitted a subdivision application to be made. As a consequence, resource consent was granted for a two lot subdivision.
23. The second modification of the encumbrance was in respect of the property at 34 Ohiwa Parade, pursuant to a Council meeting on 3 March 2016 (Council as covenantor) file reference A1063538 (copy *attached* and marked “E”). Following that, resource consent was granted for a boundary adjustment.
24. *Attached* and marked “F” is a copy of a report dated 17 December 2015 from David Bewley to Council. The report provides a useful summary in terms of the legal status of the encumbrance and the options available to Council. This is relevant in terms of the current councillors having some reassurance in terms of the correct approach to deal with this application, together with outcome. In particular, refer to the headings titled “4. Discussions” and 7. Risks”.

Forth Schedule Encumbrance Termination Triggers

25. As discussed above, the termination triggers of the fourth schedule encumbrance covenants are found in the fifth schedule. There are three scenarios that Council can rely on to terminate the covenants. Council only needs to be satisfied that one of these scenarios exists. The scenarios are that the covenants have become:
- a) Obsolete, or
 - b) Unnecessary, or

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

- c) No longer enforceable.

Obsolete

26. As discussed, the Town and Country Planning Act 1977 has been repealed for 32 years and the law has developed and changed significantly since that time.

27. Furthermore, post the Munro subdivision and the registration of the encumbrance, there has been significant harbourside development being:

- Liddon Cove (adjacent to Ohiwa Parade) 1996
- Ohope Waterways 1998
- Waimana Trust 1993 - 1998
- Waiotahi (Te Horo Drive) 1998
- Waiotahi subdivision (Harbour Road) 2003
- Port Ohope Apartments 2007
- Rangitukehu Street Extension 2015

28. All of these post 1992 harbour side developments have cumulatively, and in some cases individually, changed the coastal character of the Ohiwa Harbour edge in Ohope.

29. As discussed above, the subject property itself has also had further development and subdivision in 2013 and 2016. Both of those subdivisions were approved by the Council following a variation of the encumbrance.

30. It follows that with such:

- a) significant change in the legal and consenting landscape,
- b) significant post encumbrance subdivision on the edge of Ohiwa Harbour in Ohope and
- c) previous variations of the encumbrance itself,

the encumbrance has now rendered itself obsolete.

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

Unnecessary

31. As set out above, the legal framework to govern land use and development is now comprehensive. The “protection” offered by the encumbrance is unnecessary. Environment and coastal development protection is now found within the current legal framework and policies. Council no longer needs to seek protection from the encumbrance as a result of the comprehensive processes and safety nets that now exist. As set out in David Bewley’s report (annexure “F”) *“The RMA process will allow the significant environmental concerns to be considered”*. For this reason, the encumbrance is now unnecessary.

No Longer Enforceable

32. The covenants are currently enforceable but only by virtue of their mere existence. Given however, the provisions of section 317 of the Property Law Act 2007, it is highly likely that the Court would modify or extinguish the encumbrance.

Section 317 of the Property Law Act 2007

33. Section 317 states:

- (1) *On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the **easement or covenant**) if satisfied that—*
- (a) *the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:*
 - (i) *the nature or extent of the use being made of the benefited land, the burdened land, or both;*
 - (ii) *the character of the neighbourhood;*
 - (iii) *any other circumstance the court considers relevant; or*
 - (b) *the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or*

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

- (c) *every person entitled who is of full age and capacity—*
 - (i) *has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or*
 - (ii) *may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or*
- (d) *the proposed modification or extinguishment will not substantially injure any person entitled; or*
- (e) *in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or*
- (f) *in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.*
- (2) *An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.*

34. The Landowners would be entitled to apply to the Court to have the encumbrance modified or extinguished. The terms of section 317 are capable of being satisfied. The relevant subsections that apply to this property and encumbrance are:

- a) Section 317 (1)(a)(ii) – “a change in the character of the neighbourhood”.

The “character of the neighbourhood” has changed dramatically since 1992 when the covenant was created. As set out above, there has been significant harbourside land development on a large scale in the last 32 years. Additionally, single lot sections throughout Ohope have been subdivided and subdivided again. Ohiwa Parade itself also has some small subdivided lots (numbers 13, 15A and 3 are all less than 500 square metres sections). The general character of the wider Ohope harbour front coastal character has changed significantly.

- b) Section 317(1)(a)(iii) – “a change in any other circumstances”

The main change in “other circumstances” is the significant change in the legislative and policy framework that now governs development

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

generally, and specifically coastal development. The Court would be justified in relying on this point without making any specific enquiry with respect to the specific/neighbourhood/coastal character. This is because the current legislation and policies all have the relevant environmental safety nets in place. The change in the law is a change in circumstances that would permit the Court to extinguish or modify the encumbrance.

- c) Section 317(1)(b) – “Impeding the reasonable use of the land”
The continuation in force of the encumbrance in its current form impedes the reasonable use of the burdened land in a different way and to a different extent from that which could have been reasonably foreseen at the time of its creation. That is the test pursuant to section 317(1)(b). The property is 10,644 square metres within a built-up urban environment. The subdivision that will be applied for will seek a 3,300 square metre lot and a 7,300 square metre lot. The encumbrance in its current form impedes such reasonable use.
- d) Section 317(1)(d) – “No substantial injury to any person entitled”
The proposed modification of the covenant will not substantially injure any person entitled. The encumbrance is in favour of the Council only and is not mutually enforceable by other landowners like a traditional one. That means that the Council is the only party that can be considered under this section. The Council will not be injured.

35. Only one of the s317(1) subsections needs to be satisfied for the legal threshold to be met, not all of them.

The Correct Process

36. In both prior applications for variations of the encumbrance, the process has been:
- a) Firstly:
The Council as covenantor made a determination to permit a subdivision application to be made, effectively as a single purpose modification of

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

the encumbrance. The encumbrance itself was not removed from the title and in both previous matters, the encumbrance remained on the parent title post subdivision.

- b) Secondly:
Upon Council (as covenantor) granting permission for a subdivision application to be made, application was then made to Council (in its capacity as consenting authority) for subdivision.

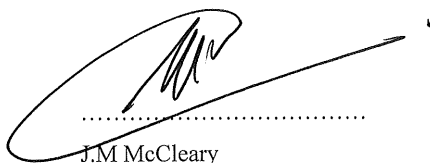
37. Council is invited to follow the same process as it has twice before.

Determination Sought

38. The Landowners seek a variation of the encumbrance whereby permission is granted to make an application to subdivide the property into two lots.

Appearance

39. Counsel is available to be heard and questioned on this application, at a meeting of Council, if the Councillors so require.



J.M McCleary
Counsel for the Applicants

**3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)**

"A"

"A"



**RECORD OF TITLE
UNDER LAND TRANSFER ACT 2017
FREEHOLD
Search Copy**



R. W. Muir
Registrar-General
of Land

Identifier **753641**
Land Registration District **South Auckland**
Date Issued 23 February 2017

Prior References

719616 SA52D/490

Estate Fee Simple
Area 1.0644 hectares more or less
Legal Description Lot 2 Deposited Plan 502478 and Lot 2
Deposited Plan 493445

Registered Owners

Jason Matthew McCleary, Elizabeth Jane McCleary and BBTLAW Trustees Limited

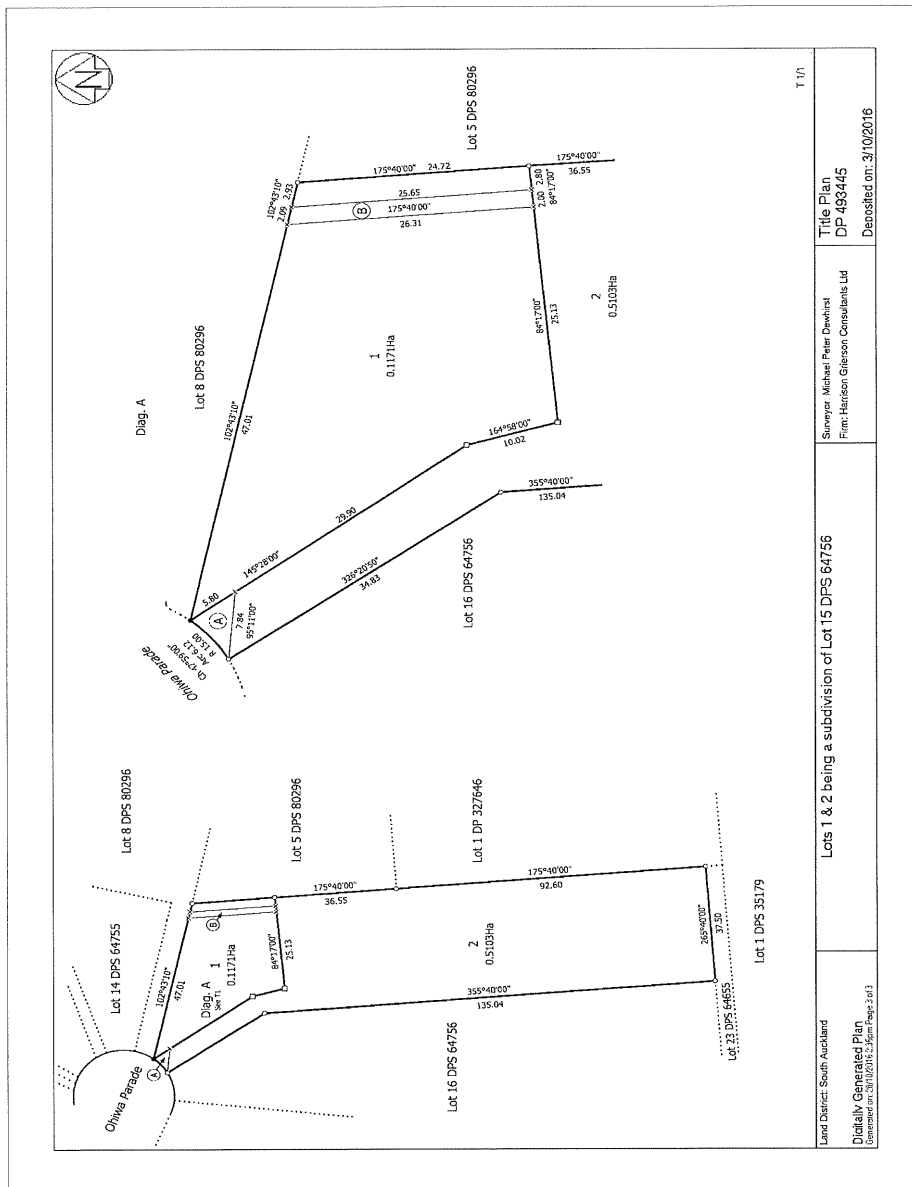
Interests

B159002.16 Encumbrance to Whakatane District Council - 3.9.1993 at 9.01 am
Subject to a right of way and a right to convey water, electricity, telecommunications and computer media over part Lot 2 DP 493445 marked A on DP 493445 created by Easement Instrument 10582207.3 - 3.10.2016 at 4:38 pm
Appurtenant to Lot 2 DP 493445 is a right to drain sewage created by Easement Instrument 10582207.3 - 3.10.2016 at 4:38 pm
The easements created by Easement Instrument 10582207.3 are subject to Section 243 (a) Resource Management Act 1991
Land Covenant in Easement Instrument 10582207.3 - 3.10.2016 at 4:38 pm
Subject to Section 241(2) Resource Management Act 1991 (affects DP 502478)
Subject to a right to convey water and a right to drain sewage over part Lot 2 DP 502478 marked A on DP 502478 created by Easement Instrument 10708077.5 - 23.2.2017 at 2:25 pm
The easements created by Easement Instrument 10708077.5 are subject to Section 243 (a) Resource Management Act 1991
Land Covenant in Easement Instrument 10708077.5 - 23.2.2017 at 2:25 pm
12194922.1 Mortgage to Westpac New Zealand Limited - 9.8.2021 at 11:59 am

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

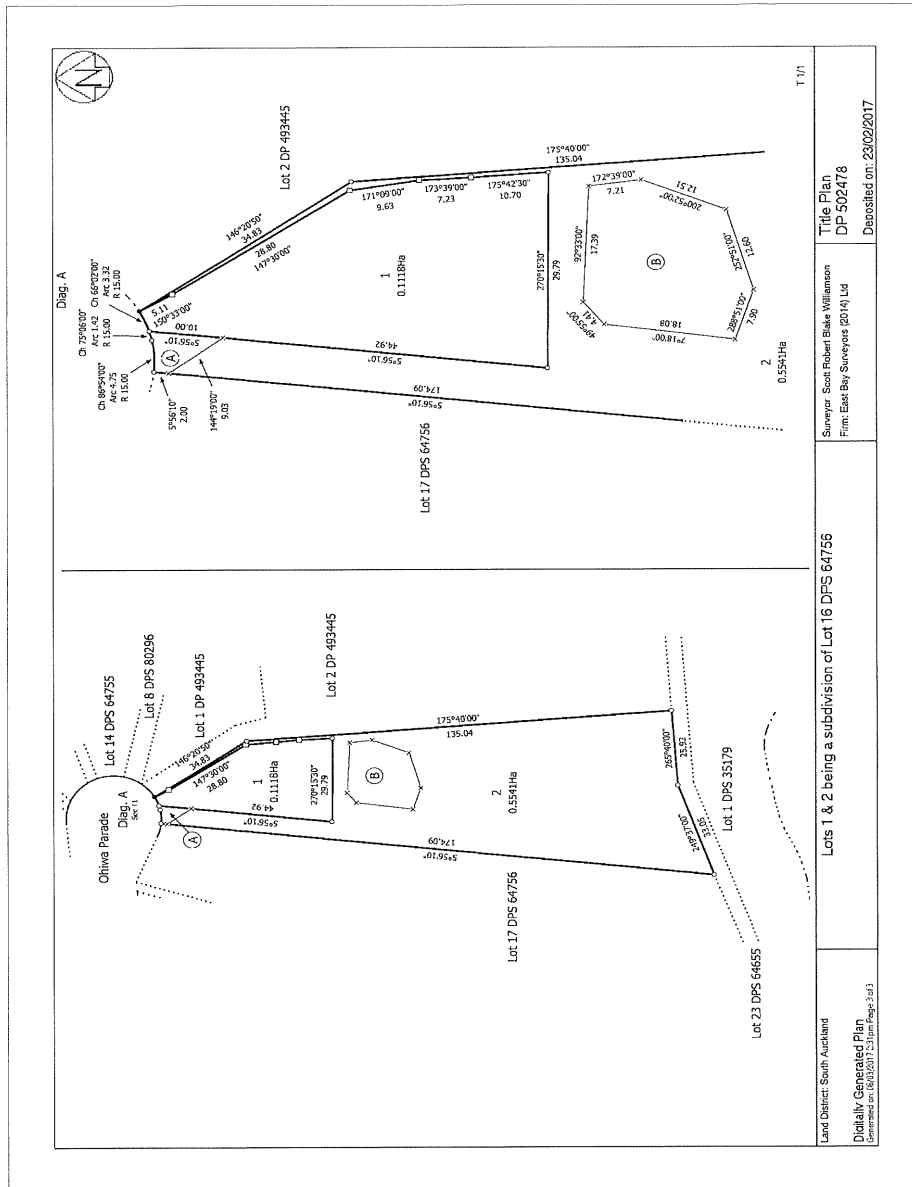
Identifier

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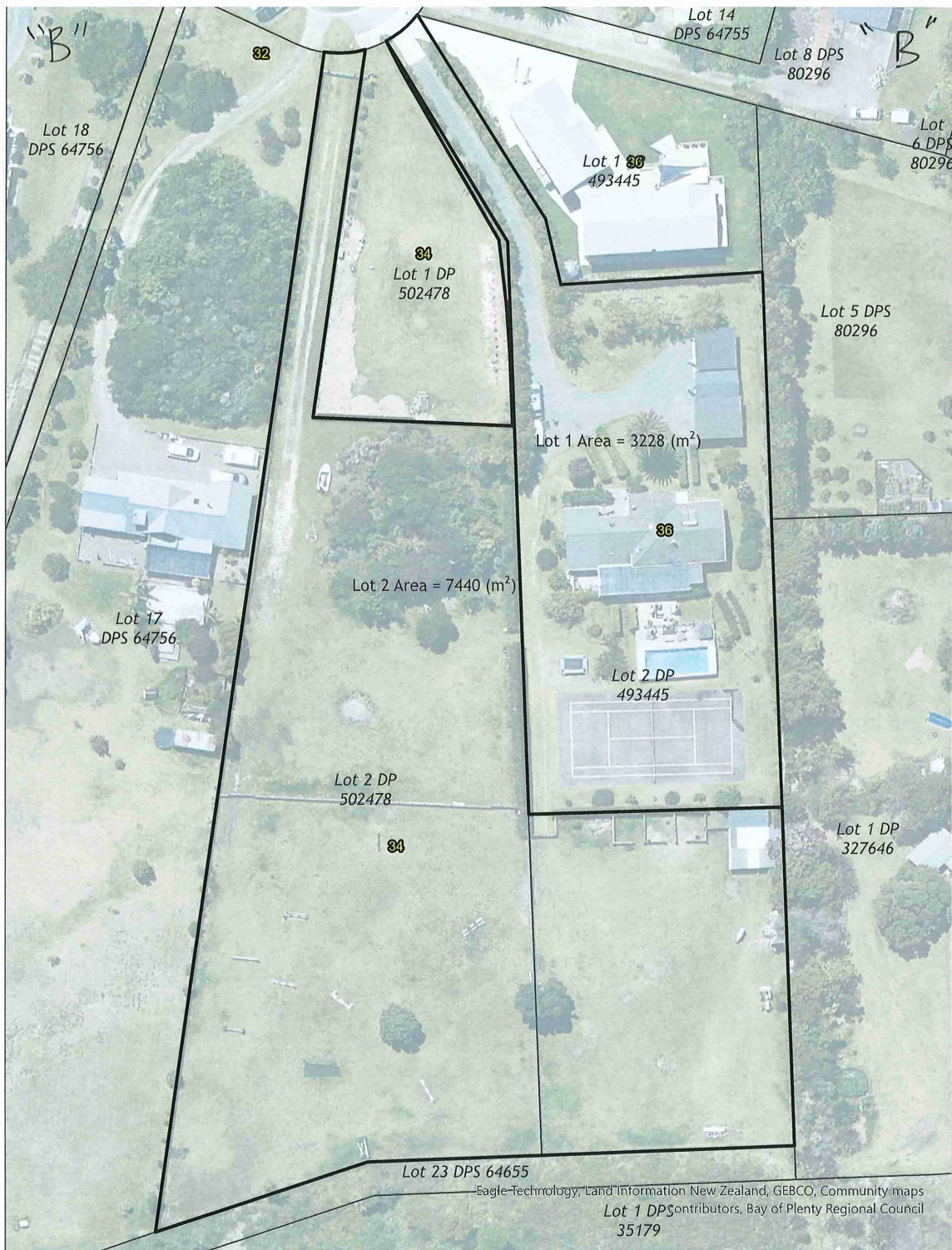


3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

Identifier **753641**

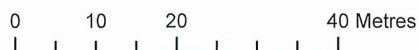


3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)



DATE 17/05/2023
PLAN REF: SP-21-025

PROPOSED SUBDIVISION OF LOT 2 DP 493445



3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

"C"

FROM: OSBORNE GRAY

FAX NO.: + 07 3671052

24-05-02 01:28P P.06

"C"



MEMORANDUM OF ENCUMBRANCE

M T K GRAY B J W BANBURY Encumbrancer

THE WHAKATĀNE DISTRICT Council

059002-17 Memorandum giving within mortgage
priority over Mortgage No. 1169964-2
produced 3-7-1985 at 9.010x

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PARTICULARS ENTERED IN REGISTER
LAND REGISTRY SOUTH ISLAND
ASST. LAND REGISTRAR



Brookfields
MORTGAGE
LTD



3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

FROM: OSBORNE GRAY

FAX NO.: 07 3621833
07 3621833

24-05-02 01:26P P.01

(Approved by the District Land Registrar, Auckland, No. 430683)

MEMORANDUM OF ENCUMBRANCE

Encumbrancer: MAXWELL THOMAS KIMBALL GRAY solicitor and
JOHN WILLIAM BANBURY accountant both of
Whakatane

(In this Memorandum called "the Encumbrancer")

Council: THE WHAKATANE DISTRICT COUNCIL

(In this Memorandum called "the Council")

B159002.16 ENC

WHEREAS:

- (1) The Encumbrancer is registered as proprietor of an estate in fee simple in the land described in the *Second Schedule*.
- (2) The land is situate in the district of the Council
- (3) As a result of the circumstances disclosed in the *Third Schedule* the Encumbrancer has agreed:—
 - (a) to grant and make the rent charge with the Council as set out, and subject to the conditions expressed, in the *First Schedule* and
 - (b) to enter into the covenants in the Council's favour as set out in the *Fourth Schedule*.

NOW THIS MEMORANDUM WITNESSES that the Encumbrancer ENCUMBERS the land for the benefit of the Council as set out in the *First Schedule* AND COVENANTS with the Council as set out in the *Fourth Schedule*.

IN WITNESS WHEREOF this Memorandum has been executed this
6 day of July 1992

SIGNED by
~~THE COMMON SEAL~~
MAXWELL THOMAS KIMBALL
GRAY and JOHN WILLIAM
BANBURY

~~MAXWELL THOMAS KIMBALL GRAY~~
in the presence of:—

Legal Executive
to Osborne Gray & Partners
Solicitors
Whakatane

Correct for the purposes of
the Land Transfer Act 1952

Director for the
Encumbrances Council

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

FROM: OSBORNE GRAY

FAX NO.1 + 07 3071052

24-05-02 01:27P P.04



FIRST SCHEDULE
(Terms and Conditions of Encumbrance)

1. The term of the Encumbrance is 999 years commencing from the date hereof subject to earlier determination in the events provided in the *Fifth Schedule*.
2. The rent charge is ONE DOLLAR (\$1.00) to be paid to the Council by the 1st day of January in each year if demanded by that date. The first payment if so demanded is due on or before the 1st day of January next succeeding the date of this Memorandum.
2. ~~The annual rent charge is \$~~ to be paid to the Council on the _____ day of _____ in every year thereafter ~~PROVIDED ALWAYS that if during the period of 12 months immediately preceding the first day of _____ in each year there shall have been no breach by the Encumbrancer of any of the obligations, covenants or agreements herein contained then the annual rent charge payable hereunder shall be deemed to have been paid and the Encumbrancer shall be entitled to an acknowledgement from the Council to that effect.~~
3. The covenants of the *Fourth Schedule* shall be enforceable only against the owners and occupiers for the time being of the land and not otherwise against the Encumbrancer and his successors in title.
4. Section 104 of the Property Law Act 1952 applies to this Memorandum of Encumbrance but otherwise (and without prejudice to the Council's rights of action at common law as a rent-chargee):
 - (a) The Council shall be entitled to none of the powers and remedies given to Encumbrancees by the Land Transfer Act 1952 and the Property Law Act 1952; and
 - (b) No covenants on the part of the Encumbrancer and his successors in title are implied in this Memorandum other than the covenants for further assurance implied by Section 154 of the Land Transfer Act 1952.
5. Insofar as the exercise of its discretion by the Council in the circumstances set out in the *Third Schedule* may amount to moneys worth provided by the Council within the meaning of Section 3(1)(a) of the Credit Contracts Act 1981 then the moneys worth so provided equates or exceeds the aggregate of the annual rent charge payable by the Encumbrancer during the term hereof.
6. The Encumbrancer shall further pay to the Council forthwith upon demand an amount equal to any output tax payable by the Council under the Goods and Services Tax Act 1985 or any Act in amendment or substitution thereof in respect of taxable supplies made to the Encumbrancer directly or indirectly attributable to matters referred to in, or arising from, this Memorandum of Encumbrance.
7. In this Memorandum and its Schedules:—
 - (a) "the land" refers to that described in the *Second Schedule* and any part of it.
 - (b) "Schedule" refers to the several Schedules attached to this Memorandum.
 - (c) Words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender.

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

FROM: OSBORNE GRAY

FAX NO.: + 07 3071052

24-05-02 01:28P P.05

3

Handwritten initials/signature

X

Handwritten initials/signature

SECOND SCHEDULE (The Land)

4.4733 hectares more or less being Lots 1-14 on Deposited Plan S. 64 75-5, 15-19 on Deposited Plan S. 64 75-6 and Lots 20 and 21 on Deposited Plan S. 64 65B (all inclusive), being part Allotment 25 Parish of Waimana and also being all the land comprised and described in Certificates of Title Nos.

(Hamilton Registry) SUBJECT TO Mortgage H699964.2. Lots 6 & 7 being subject to Ewage & Stanniter Disposal Easements created by Transfer B. and Lots 2, 3, 6, 7, 10 & 11 being subject to easement shown in Easement Certificate B. and Lot 17 being subject to Stanniter Easement created by Transfer B.

THIRD SCHEDULE (The Circumstances)

Application has been made to the Council for approval of the subdivision shown on Land Transfer Plans S. 64 75-5, S. 64 75-6 and S. 64 65B and in support of such application the Encumbrancer has offered to enter into this Memorandum and the covenants of the Fourth Schedule which are desirable having regard to the potential environmental impact of development or consequent upon this further subdivision of the land.

FOURTH SCHEDULE (The Covenants)

THAT no more than one household unit shall be erected, constructed or placed on any one of those Lots numbered 1-21 inclusive of the Deposited Plans referred to in the Second Schedule and no further subdivision of the land subsequent to that shown in those Deposited Plans shall be requested by or on behalf of any owner of the land as a consequence of which a further household unit could be erected on the land.

Handwritten initials/signature

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

FROM: OSBORNE GRAY

FAX NO.: + 87 3871052

24-05-02 01:27P P.02

- 2 -

2. THAT the Encumbrancer shall:

- (a) Not cut trim top fell main or injure any tree or plant growing within the area of native vegetation and wetlands/ ~~shown as areas on the "D" on Deposited Plan S.64855 & "J" on the "D" on Deposited Plan S.64750~~ ~~and the enclosed diagram marked appropriately for preservation~~ except where such plants are noxious plants within the meaning of the Noxious Plants Act 1978; and
- (b) Not cause permit or suffer any stock to be or graze within the aforementioned areas of native vegetation or wetlands; and
- (c) Erect and at all times thereafter retain and maintain in good visible positions adequate marker posts or pegs identifying the perimeter of the aforementioned areas of native vegetation and wetlands; and
- (d) Not cause or permit or suffer to be lit any fire within the aforementioned areas of native vegetation and wetlands or on any adjacent land owned or occupied by the Encumbrancer or under the Encumbrancer's control when there may be a risk of fire spreading into the aforementioned area of native vegetation and wetlands; and
- (e) Not cause or permit or suffer, rubbish or disused articles of any description or kind, or earth sand rock shingle or similar materials to be deposited in any way and allowed to remain upon the aforementioned areas of native vegetation and wetlands or any part of them; and


3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application
- 36 Ohiwa Parade(Cont.)

FROM: OSBOENE GRAY

FAX NO.: + 07 3671052

24-05-02 01:27P P.03

- 3 -

 (5)

(f) Permit the inspectors or other staff or officers of the Council to enter at any reasonable time upon the land so as to ascertain whether the covenants of this Memorandum of Encumbrance are being fulfilled observed and performed.

3. THAT the Encumbrancer shall pay all legal costs and disbursements directly or indirectly attributable to the preparation execution registration enforcement and ultimate discharge of this Memorandum and its covenants.

FIFTH SCHEDULE (Events for Termination)

Upon the Council being satisfied that the covenants of the Fourth Schedule have become obsolete unnecessary or no longer enforceable.

J2585s



The Encumbrancer the said MAXWELL THOMAS KIMBALL GRAY and JOHN WILLIAM BANBURY enter into and execute this Memorandum of Encumbrance as Trustees of the MUNRO FAMILY TRUST created pursuant to a Deed dated the 12th day of June 1992 and the liability of the said MAXWELL THOMAS KIMBALL GRAY and JOHN WILLIAM BANBURY shall not be an unlimited personal liability but shall be limited to the assets of the Trust from time to time.




3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ōhiwa Parade(Cont.)

"D"

"D"

Action Sheet – Extraordinary Council Meeting 26 June 2014

 <p>WHAKATĀNE District Council</p>	Resolution or Recommendation	Resolution
	If Recommendation – adopted by:	
	To be confirmed as a true and correct record at:	Whakatane District Council Meeting 31 July 2014
	File Reference:	11.7.3 - A448226

1.3 Variation of Encumbrance: McCleary Trust, 36 Ōhiwa parade, Ōhope

Refer to pages 39-62 of the agenda.

Discussion ensued on the report. It was noted that the request being made at this point was only to lift the encumbrance from the property and that a resource consent application would need to be submitted if subdivision of the property was to be sought.

RESOLVED:

1. **THAT** the Variation of Encumbrance: McCleary Trust, 36 Ōhiwa Parade, Ōhope report be received; and
2. That Council agrees to a variation of the encumbrance affecting 36 Ōhiwa Parade to permit the application for the two lot subdivision to be considered.

Orr/Pullar
CARRIED

AFTER MEETING ACTION:


	Position	Date
1.	General Manager Strategy and Planning	27 June 2014
2.	File	27 June 2014

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

"E"

"E"

Action Sheet – Council 17 December 2015

 WHAKATĀNE District Council	Resolution or Recommendation	Resolution
	To be confirmed as a true and correct record at:	Council 3 March 2016
	File Reference:	A1063538

1.1 Variation of Encumbrance – 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ōhope

Refer to pages 135-160 of the agenda.

RESOLVED:

1. **THAT** the report "Variation of Encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ohope" be received; and
2. **THAT** the Council agree to a variation of the encumbrance registered against the title of Lot 16 DPS 64756 (34 Ōhiwa Parade, Ōhope) to allow an application for subdivision to be lodged and considered by the Council.

Pullar/Orr
CARRIED

AFTER MEETING ACTION:

	Position	Date
1	General Manager Planning, Regulatory and Corporate Services	22 December 2015

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

WHAKATĀNE DISTRICT COUNCIL
COUNCIL - AGENDA

THURSDAY, 17 DECEMBER 2015

" F "

11.6 Variation of encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ōhope

11.6 Variation of encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ōhope



VARIATION OF ENCUMBRANCE: 34 ŌHIWA LTD,
Subject: 34 ŌHIWA PARADE, ŌHOPE
To: WHAKATĀNE DISTRICT COUNCIL
Meeting Date: THURSDAY, 17 DECEMBER 2015
Written by: GENERAL MANAGER PLANNING, REGULATORY AND CORPORATE SERVICES
File Reference: A5896739673

1. REASON FOR THE REPORT

The Council is asked to consider an application to vary an encumbrance affecting a property at 34 Ōhiwa Parade, Ōhope. The purpose of varying the encumbrance is to then allow a subdivision application to be lodged and considered.

2. BACKGROUND

34 Ōhiwa Ltd is the registered owners of a 6,659m² property at 34 Ōhiwa Parade, Ōhope (being lot 16 DPS 64756).

An encumbrance was registered on the Certificate of Title as part of a subdivision process by the Munro Family Trust in April 1992. The encumbrance is also registered on 19 other titles. The subdivision was the second stage of a larger site was progressively subdivided and that originally encompassed all of Ōhiwa Parade and Liddon Cove.

In June 2014, the Council considered a similar application to vary an encumbrance on the adjoining lot at 36 Ōhiwa Parade, owned by the McCleary Trust. That application was approved, and the subdivision application that followed was also approved by the Hearings Committee.

The purpose of this application is to allow the approved building site on 34 Ōhiwa Parade to be contained in a lot of 1115m² that can then be sold; the balance area will be amalgamated with Lot 2 DP 493445, which is the balance of the land at 36 Ōhiwa Parade, owned by the McCleary Trust. The subdivision is technically a boundary adjustment.

3. ENCUMBRANCE

The original application that created Ōhiwa Parade was granted under the Local Government Act 1974, with consideration of the Town and Country Planning Act 1977. That legislation had a different focus and different assessment criteria than that of the current Resource Management Act 1991 (RMA). The main issues raised through the subdivision process related to:

- Potential inundation and sea level rise;
- Effect on the natural character of the coastal environment;

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

WHAKATĀNE DISTRICT COUNCIL
COUNCIL - AGENDA

THURSDAY, 17 DECEMBER 2015

11.6 Variation of encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ohope (Cont.)

- Effect on the ecological values of the harbour and wetland areas; and
- The necessity for the development.

An encumbrance was registered on each title having regard to the impact on natural character of residential subdivision in this location, particularly because of its low lying nature and the understanding of climate change (sea level rise) at the time. The encumbrance was to limit the intensification of development in this low lying area and to locate houses away from the sensitive harbour margins. A copy of the full encumbrance is attached as Appendix 1.

The owners would like to subdivide the property as described, but are currently prevented from doing so under the Fourth Schedule of the Encumbrance that states:

That no more than one household unit shall be erected, constructed or placed on any one of those Lots numbered 1-21 inclusive of the Deposited Plans referred to in the Second Schedule and no further subdivision of the land subsequent to that shown in those Deposited Plans shall be requested by or on behalf of any owner of the land as a consequence of which a further household unit could be erected on the land.

The applicant has applied to vary the covenant. A copy of the application is included as Appendix 2.

If agreed to, the Fourth Schedule requirement as it affects Lot 16 DPS 64756 will be discharged to allow the subdivision to be lodged and considered. It will then be reinstated on the new allotments. This process could also allow the covenant to be discharged on the title but reinstated in the form of a consent notice under the provisions of the RMA.

4. DISCUSSION

4.1. Legal Status of Encumbrance

The encumbrance is a binding legal agreement between the individual landowners of each lot and the Council. It is a form of covenant similar to a consent notice which is the process used now under the RMA to restrict or manage the future use of land.

The encumbrance is only enforceable by the Council. The other land owners cannot enforce the encumbrance through the court system. It is a matter covered by the Property Law Act and not the RMA.

If the covenantee (in this case the Council) does not willingly agree to modify or extinguish an encumbrance, the property owner has the ability to apply to the Court under Section 317 of the Property Law Act 2007 to have the encumbrance modified or extinguished. The Act provides that the covenant can be modified or extinguished because of a change since its creation in any or all of the following:

- i. The nature or extent of the use being made of the benefited land, the burdened land, or both
- ii. The character of the neighbourhood
- iii. Any other circumstances the court considers relevant

In this case the encumbrance itself also sets out three situations in which the covenants may be terminated i.e. that the Council being satisfied that the covenant is:

- i. Obsolete

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

WHAKATĀNE DISTRICT COUNCIL
COUNCIL - AGENDA

THURSDAY, 17 DECEMBER 2015

11.6 Variation of encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ohope (Cont.)

- ii. Unnecessary or
- iii. Unenforceable

Any consideration of whether the encumbrance is obsolete, unnecessary or unenforceable needs to be made in the context of why it was imposed in the first place. This suggests the resource management issues associated with the previous and new subdivision applications are linked to the decision making process for the encumbrance.

In June 2014, the Council considered a very similar request. The Council, having regard to the encumbrance, felt it was obsolete and/or unnecessary having regard to the subdivision process that would safeguard the intent of the encumbrance, allow the environmental issues to be reconsidered in light of the subdivision proposal, and provide an opportunity to reinstate a "modern" form of covenant to protect those values. The same considerations can apply to the latest application.

The proposed subdivision will create a lot near the road that contains the approved building platform, away from the more sensitive coastal margin and low lying area. The low lying and more sensitive coastal margin (which constitutes the majority of the property) is proposed to be amalgamated with the adjoining property, which is already developed. While this application is not intended to pre-judge the outcome of an application for subdivision, the key environmental effects intended to be protected by the encumbrance are unlikely to be adversely affected by this proposal.

5. ASSESSMENT OF SIGNIFICANCE

A decision to vary the encumbrance to allow a subdivision to be lodged is not in itself a significant decision within the Councils Significance and Engagement Policy.

6. OPTIONS

The Council can decide to uplift the encumbrance, or not uplift it. It could alternatively give delegated authority to the Hearing Committee to hear both the encumbrance and the application for subdivision together.

The latter two options would be contrary to the Councils earlier decision in June 2014. The protections available through the RMA process will allow the significant environmental effects to be considered further, and alternative legal mechanisms used to protect the critical elements of the 1991 decision.

If the Council decided not to uplift the encumbrance, the applicant may decide to take the matter directly to the District Court to be determined under the Property Law Act. The Council would need to establish its position and provide evidence to the Court.

7. RISKS

The risks associated with this decision are considered low. It simply uplifts the encumbrance to allow a subdivision application to be received (and processed). The RMA process will allow the significant environmental concerns to be considered. Those values considered important in 1992 will not be lost through a variation of the encumbrance, and will be just as important for the subdivision application. A similar decision was made in 2014.

8. FINANCIAL BUDGET IMPLICATIONS

The property owner appears to be liable for all legal and processing costs associated with the encumbrance under item 3 of the Fourth Schedule of the Encumbrance.

3.1.2 Hearing Panel Report - Variation of Encumbrance - Appendix 2 - Encumbrance Variation Application - 36 Ohiwa Parade(Cont.)

WHAKATĀNE DISTRICT COUNCIL
COUNCIL - AGENDA

THURSDAY, 17 DECEMBER 2015

11.6 Variation of encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ohope (Cont.)

9. COMMUNITY INPUT

No consultation has occurred in regard to the application to uplift the encumbrance. That is because the coventee (the Council) is the only body able to enforce the encumbrance and the legal agreement is therefore between the Council and each landowner. The RMA process will require an assessment of whether there are affected parties who should be involved in the consideration of any subdivision application that is lodged.

10. CONCLUSION

34 Ōhiwa Ltd owns a property at 34 Ōhiwa Parade. The owners have requested that Covenant 1 of the Fourth Schedule on the Memorandum of Encumbrance be varied to allow a boundary adjustment to be considered.

The matters that are relevant to the consideration of the proposed subdivision are those that will be considered through the consent process under the RMA and under the provisions of the District Plan (inundation, natural character of the coastal environment, ecological values of the harbour).

A similar application in June 2014 was agreed to by the Council and there is very little to distinguish the two in terms of the criteria in the encumbrance. For these reasons, the Council is asked to agree to the variation of the encumbrance.

RECOMMENDATIONS:

1. **THAT** the report "Variation of Encumbrance: 34 Ōhiwa Ltd, 34 Ōhiwa Parade, Ohope" be received; and
2. **THAT** the Council agree to a variation of the encumbrance registered against the title of Lot 16 DPS 64756 (34 Ōhiwa Parade, Ohope) to allow an application for subdivision to be lodged and considered by the Council.

Attached to this report:

- Appendix 1 – Encumbrance Document
- Appendix 2 – Application to Vary Encumbrance
- Appendix 3 – Subdivision Plan

Report Authorisation

Report writer:	David Bewley	General Manager Planning, Regulatory and Corporate Services
Final Approval:	Marty Grenfell	Chief Executive

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

(Approved by the District Land Registrar, Auckland, No. 4304/02)

MEMORANDUM OF ENCUMBRANCE

Encumbrancer: MAXWELL THOMAS KIMBALL GRAY solicitor and
JOHN WILLIAM BANBURY accountant both of
Whakatane

(in this Memorandum called "the Encumbrancer")

Council: THE WHAKATANE DISTRICT COUNCIL

(in this Memorandum called "the Council")

B159002.16 ENC

WHEREAS:

- (1) The Encumbrancer is registered as proprietor of an estate in fee simple in the land described in the *Second Schedule*.
- (2) The land is situate in the district of the Council
- (3) As a result of the circumstances disclosed in the *Third Schedule* the Encumbrancer has agreed:—
 - (a) to grant and make the rent charge with the Council as set out, and subject to the conditions expressed, in the *First Schedule* and
 - (b) to enter into the covenants in the Council's favour as set out in the *Fourth Schedule*.

NOW THIS MEMORANDUM WITNESSES that the Encumbrancer ENCUMBERS the land for the benefit of the Council as set out in the *First Schedule* AND COVENANTS with the Council as set out in the *Fourth Schedule*.

IN WITNESS WHEREOF this Memorandum has been executed this
8 day of July, 1993

SIGNED by
~~THE COMMON SEAL of~~

MAXWELL THOMAS KIMBALL
GRAY and JOHN WILLIAM
BANBURY

~~was given here~~
in the presence of:—

Legal Executive
to Osborne Gray & Partners
Solicitors
Whakatane

Correct for the purposes of
the Land Transfer Act 1952

Solicitor for the
Encumbrance Council

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

FIRST SCHEDULE
(Terms and Conditions of Encumbrance)

1. The term of the Encumbrance is 999 years commencing from the date hereof subject to earlier determination in the events provided in the *Fifth Schedule*.
2. The rent charge is ONE DOLLAR (\$1.00) to be paid to the Council by the 1st day of January in each year if demanded by that date. The first payment if so demanded is due on or before the 1st day of January next succeeding the date of this Memorandum.
2. ~~The annual rent charge is \$ _____ to be paid to the Council on the _____ day of _____ 19 _____ and on the like day of _____ in every year thereafter PROVIDED ALWAYS that if during the period of 12 months immediately preceding the first day of _____ in each year there shall have been no breach by the Encumbrancer of any of the obligations covenants or agreements herein contained then the annual rent charge payable hereunder shall be deemed to have been paid and the Encumbrancer shall be entitled to an acknowledgement from the Council to that effect.~~
3. The covenants of the *Fourth Schedule* shall be enforceable only against the owners and occupiers for the time being of the land and not otherwise against the Encumbrancer and his successors in title.
4. Section 104 of the Property Law Act 1952 applies to this Memorandum of Encumbrance but otherwise (and without prejudice to the Council's rights of action at common law as a rent-chargee):
 - (a) The Council shall be entitled to none of the powers and remedies given to Encumbrancees by the Land Transfer Act 1952 and the Property Law Act 1952; and
 - (b) No covenants on the part of the Encumbrancer and his successors in title are implied in this Memorandum other than the covenants for further assurance implied by Section 154 of the Land Transfer Act 1952.
5. Insofar as the exercise of its discretion by the Council in the circumstances set out in the *Third Schedule* may amount to moneys worth provided by the Council within the meaning of Section 3(1)(a) of the Credit Contracts Act 1981 then the moneys worth so provided equates or exceeds the aggregate of the annual rent charge payable by the Encumbrancer during the term hereof.
6. The Encumbrancer shall further pay to the Council forthwith upon demand an amount equal to any output tax payable by the Council under the Goods and Services Tax Act 1985 or any Act in amendment or substitution therefor in respect of taxable supplies made to the Encumbrancer directly or indirectly attributable to matters referred to in, or arising from, this Memorandum of Encumbrance.
7. In this Memorandum and its Schedules:—
 - (a) "the land" refers to that described in the *Second Schedule* and any part of it.
 - (b) "Schedule" refers to the several Schedules attached to this Memorandum.
 - (c) Words importing the singular number of plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender.

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

SECOND SCHEDULE (The Land)

4.4733 hectares more or less being Lots 1-14 on Deposited Plan S. 64-75-5, 15-19 on Deposited Plan S. 64-75-6 and Lots 20 and 21 on Deposited Plan S. 64-65-5 (all inclusive), being part Allotment 25 Parish of Waimana and also being all the land comprised and described in Certificates of Title Nos.

(Hamilton Registry) SUBJECT TO Mortgage H699964.2. Lots 6 & 7 being subject to Sewage & Stormwater Disposal Easements created by Transfer B. and Lots 2, 3, 6, 7, 10 & 11 being subject to the easement shown in Easement Certificate B. and Lot 17 being subject to Stormwater Easement created by Transfer B.

THIRD SCHEDULE (The Circumstances)

Application has been made to the Council for approval of the subdivision shown on Land Transfer Plans S. 64-75-5, S. 64-75-6 and S. 64-65-5 and in support of such application the Encumbrancer has offered to enter into this Memorandum and the covenants of the Fourth Schedule which are desirable having regard to the potential environmental impact of development or consequent upon this further subdivision of the land.

FOURTH SCHEDULE (The Covenants)

1. THAT no more than one household unit shall be erected, constructed or placed on any one of those Lots numbered 1-21 inclusive of the Deposited Plans referred to in the Second Schedule and no further subdivision of the land subsequent to that shown in those Deposited Plans shall be requested by or on behalf of any owner of the land as a consequence of which a further household unit could be erected on the land.

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

- 2 -

2. THAT the Encumbrancer shall:

- X / B / R
- (a) Not cut trim top fell main or injure any tree or plant growing within the area of native vegetation and wetlands/^{shown as areas} ~~shown on "B", "C" & "D" on Deposited Plan S.64655 & "I" & "J" on the attached diagram marked appropriately Deposited Plan S.64756 for preservation~~ except where such plants are noxious plants within the meaning of the Noxious Plants Act 1978; and
 - (b) Not cause permit or suffer any stock to be or graze within the aforementioned areas of native vegetation or wetlands; and
 - (c) Erect and at all times thereafter retain and maintain in good visible positions adequate marker posts or pegs identifying the perimeter of the aforementioned areas of native vegetation and wetlands; and
 - (d) Not cause or permit or suffer to be lit any fire within the aforementioned areas of native vegetation and wetlands or on any adjacent land owned or occupied by the Encumbrancer or under the Encumbrancer's control when there may be a risk of fire spreading into the aforementioned area of native vegetation and wetlands; and
 - (e) Not cause or permit or suffer, rubbish or disused articles of any description or kind, or earth sand rock shingle or similar materials to be deposited in any way and allowed to remain upon the aforementioned areas of native vegetation and wetlands or any part of them; and
- B / R

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

- 3 -

(f) Permit the inspectors or other staff or officers of the Council to enter at any reasonable time upon the land so as to ascertain whether the covenants of this Memorandum of Encumbrance are being fulfilled observed and performed.

3. THAT the Encumbrancer shall pay all legal costs and disbursements directly or indirectly attributable to the preparation execution registration enforcement and ultimate discharge of this Memorandum and its covenants.

FIFTH SCHEDULE (Events for Termination)

Upon the Council being satisfied that the covenants of the Fourth Schedule have become obsolete unnecessary or no longer enforceable.

*

J2585s

The Encumbrancer the said MAXWELL THOMAS KIMBALL GRAY and JOHN WILLIAM BANBURY enter into and execute this Memorandum of Encumbrance as Trustees of the MUNRO FAMILY TRUST created pursuant to a Deed dated the 12th day of June 1992 and the liability of the said MAXWELL THOMAS KIMBALL GRAY and JOHN WILLIAM BANBURY shall not be an unlimited personal liability but shall be limited to the assets of the Trust from time to time.

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

MEMORANDUM OF ENCUMBRANCE

M T K GRAY & J W BANBURY Encumbrancer

THE WHAKATANE DISTRICT Council

B159002.17 Memorandum giving within mortgage
priority over Mortgage No. H609964.2
produced 3.9.1995 at 9.010x

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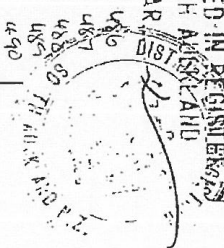
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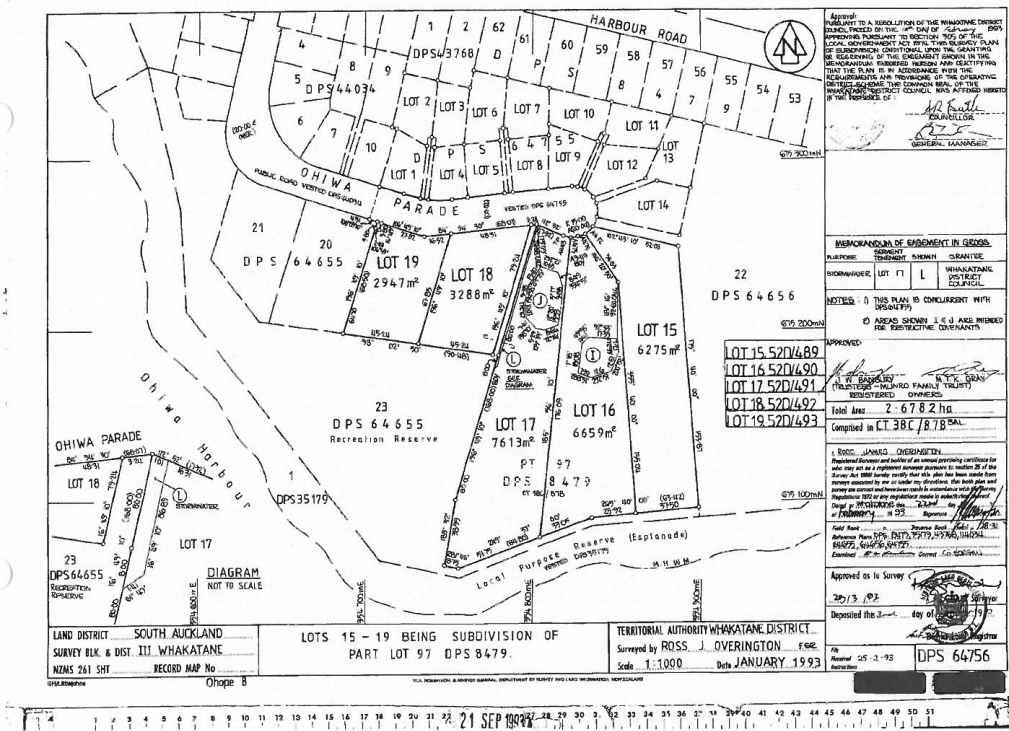
ARTICULARS ENTERED IN REGISTER
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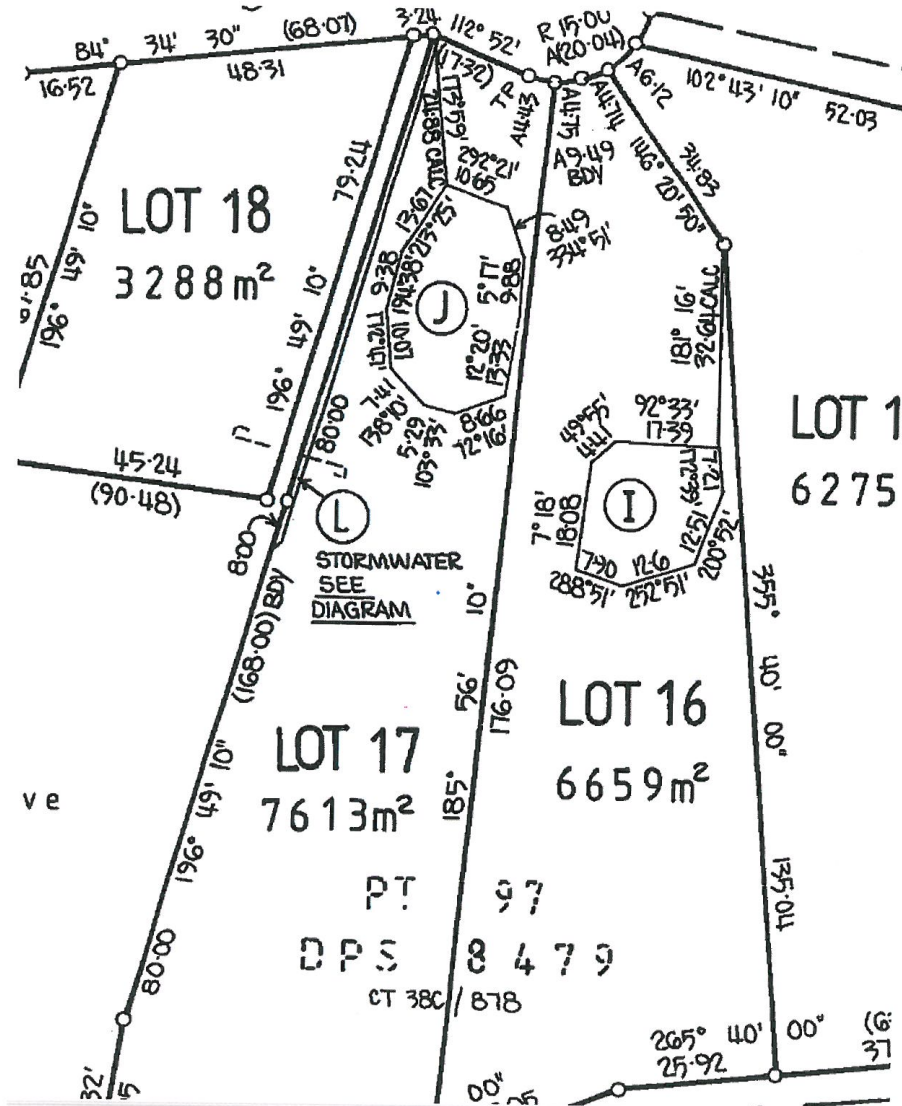


3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)



3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)



3.1.3 Hearing Panel Report - Variation of Encumbrance - Appendix 3 - Memorandum of Encumbrance(Cont.)

3.1.4 Hearing Panel Report - Variation of Encumbrance - Appendix 4 - Request for resident feedback

3.1.4 Hearing Panel Report - Variation of Encumbrance - Appendix 4 - Request for resident feedback

3.1.4 Hearing Panel Report - Variation of Encumbrance - Appendix 4 - Request for resident feedback(Cont.)



16 June 2023

Tēnā koe Sir/Madam

**REQUEST TO VARY ENCUMBRANCE – B159002.16 – ŌHIWA PARADE, ŌHOPE
PROPERTY LAW ACT 2007**

The Whakatane District Council has recently received two applications for the variation of the Encumbrance B159002.16 which is registered on the titles of 25 properties on Ohiwa Parade, Ōhope, and including your property. The requested variations are to remove the prohibition on further subdivision from each of the two applicant titles and, in one of the requests, to allow for this to be reinstated onto titles resulting from subsequent subdivision of that property.

The variation sought in each case is in respect of the following clause (emphasis added in bold):

1. **THAT** no more than one household unit shall be erected, constructed or placed on any one of those Lots numbered 1-21 inclusive of the Deposited Plans referred to in the Second Schedule and **no further subdivision of the land subsequent to that shown in those Deposited Plans shall be requested by or on behalf of any owner** of the land as a consequence of which a further household unit could be erected on the land.

The encumbrance has been subject to a similar variation on two previous occasions.

The encumbrance does allow for its termination in the event that the covenants become obsolete, unnecessary or unenforceable, as provided for in the Fifth Schedule of the Encumbrance. As a part of its deliberations as to whether or not the covenant restricting further subdivision is obsolete or unnecessary, Council is seeking the views on this from the owners of those properties affected by the covenant.

I would be grateful if you could please respond to this request for your view of the relevant covenant by either emailing or sending a response letter to me by 30 June 2023.

Ngā mihi

Mike Avery
Resource Consents Manager
Ph: 021 778 670
Email: mike.avery@whakatane.govt.nz

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses(Cont.)

APPENDIX 5 – RESPONSES TO COMMUNITY CONSULTATION

1. I have no issue with changes to existing dwellings and long as any subdivision of individual titles as only 1 extra dwelling as I read it [that.is](#) ok by me as well.
2. Just following up on your letter and request to vary encumbrance B159002.16 Ohiwa Parade, Ohope. Both my wife & I wish to oppose any removal of the encumbrance that would see any further development and subdivision of vacant land. My understanding is that the Council placed the encumbrance on properties in Ohiwa Parade to protect the Harbour, surrounding wetland area associated with the ebb & flow of the tides and natural water run off, plus, for the benefit of the wildlife in this area.
Since the Harbourside trail walkway has been developed, we have noticed a considerable decline in both Quail & Pheasants. Any further reduction of open land due to development will only exacerbate the issue.
Should you wish to further discuss this matter, I would be more than happy to arrange a meeting.
3. We are opposed to removing the restriction for further subdivision along Ohiwa Parade.
When we purchased our property we were aware of the covenants imposed on it and this was one of the benefits as it guaranteed the street would not be further developed. We ensured we abided by these restrictions when making some considerable and costly changes recently.
It is a very quiet street and affords privacy – which makes it sought after. It was one of the reasons we purchased our property. Not only will further subdivision affect this – it will also affect the resale value (and attractiveness) of our own property. Having the street more heavily populated by adding additional dwellings we feel will encroach on our privacy and quality of enjoyment of our property. It will have a damaging effect on the integrity of our street.
There are no restrictions on the quality/type of dwelling that would be added. As the properties could not be subdivided it was not necessary. This could also further affect the tone and value of the neighbourhood.
As I understand it number 14 is not adding any dwellings to the property, they are simply dividing the property in half to have it on two titles. (We were approached some time ago by them to discuss their plans). We do not have any issues with this.
I note your letter is not in relation to the two requests you have received – but is in regards to terminating the encumbrance in full. I do not understand why we are not being approached about the individual requests?
We are opposed to the termination of the encumbrance in full for the reasons mentioned above.
4. We have given much thought to this request and have decided:-
against the removal of this encumbrance thereby we refuse our support.
Our reasoning is:-
 1. The larger titles within this encumbrance are, in fact, the actual reasons the owners bought them knowing the land is safe from pack housing.
 2. Most titles, if not all, are subject to inundation as stated in our titles.

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses(Cont.)

3. We note the applicant has applied to remove the encumbrance during sale then requires it to be reinstated after purchase. This appears to remove the inundation warning from the title thereby negating the warnings on all other titles or just for the seller in the short term for his/her financial benefit
4. This encumbrance should not be allowed to become obsolete as the safety of those
5. living in the Parade should be paramount against the addition of more housing on land that already shows inundation possibilities. Should covenants become obsolete the land would be better planted as a continuation of the present reserve.

5. We are very concerned about the short notice we have been given to do any proper considerations.
When we bought our property, the LIM report said that no further development would be allowed. This was an important factor in our purchase.
Since we bought, 2 further properties were developed without any reference to us. One has to ask the question, "does our response make any difference or is it already a fait accompli."
Deep concerns about anyone who is able to change and adapt to rules for their own gain without any concern about what the community feels.
The quiet street that we and many others had bought into has already become a lot busier and less "child friendly".
As more properties are developed, services will ultimately have to be upgraded for which we will all have to pay.
So we feel strongly that no further subdivision should be allowed.

6. We're also interested in subdividing our property, creating 2 additional sections so we too support the variation.

7. With regards to your email about further subdivision on Ohiwa Parade. My property #xx is currently rented and I will be selling my property in December 2025. I have no problem with neighbours subdividing their big sections.

8. I do not agree to have the encumbrance lifted.

9. Can you please confirm the addresses of the requested properties looking to subdivide please as this may effect my decision.
As it stands my vote is not to allow further subdivision or more than one household per property. This may change depending on the location of the properties.
Thank you for your email requesting feedback from the residents regarding requests to sub divide.

10. We object to any variation of the encumbrance that will remove any prohibition to sub divide.
We note also as stated that there has been approval of previous requests, whereby this has removed such a prohibition, against resident's wishes I may add. Also because there have been two previous cases where leniency has been shown by the council we expect this not be taken as

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses(Cont.)

any precedent to vary this encumbrance at will. It also should be noted that a result of the previous subdivision being allowed at least one property has lost its uniqueness and as a consequence would have dropped in financial value.

We object for a number of reasons, but primarily the following:

1. Lack of information:

We have not been provided with any detailed information of what these two requests may entail.

2. Recreation:

We originally purchased in this street for the express purpose that it had low volume housing and large sections creating to some degree a rural feel albeit in an urban area. Before our purchase we noted that these properties were unable to be sub divided (Proudly announced by any Real Estate Agent of the time). That contributed to the value of the properties and appeal of the street. With this in mind we invested in this street for some surety of future values of recreation and property appeal.

3. Flooding:

As recent weather events have proven that the street is very vulnerable to flooding, worse at the cul-de-sac end, and as Council is already following policy on climate change we require that same thought process to be applied to this situation. Sub division will necessarily bring with it additional building pads and consolidation of land. As buildings progress, so will the desire for landscaping requirements together with increased strain on sanitary and storm water resources. Storm water cannot cope now, in times of heavy rain. The consequence of this will be to push further water into the street and /or other properties resulting in unnecessary risk of future flooding damage.

4. Unfair Advantage:

For many years the opportunity to purchase property in the area with the idea of future subdivision has been denied to, not only me, but other potential purchasers as the rules for sub division have been clearly defined by council and readily underpinned by Real Estate Agents as an advantage /disadvantage depending on what you wanted.

The fact that this rule has been abrogated has shown an unfair advantage to who was able to negotiate around this regulation. Sadly appears the rules are trying to be varied yet again and being sold as another one off. The encumbrance was put on these Titles for a reason lets keep it this way.

11. I strongly object to any further subdivisions in Ōhiwa parade and the ones that have gone ahead should never have been allowed. I quote, no further subdivision of the land shall be requested by or on behalf of any owner.

12. In reply to your email dated 16.06.2023 we strongly object to any to any further applications being approved in regard to the subdivision for/and or the erection of any new dwellings in Ohiwa Parade.

We are not objecting to the re-zoning of existing dwellings to be registered on separate titles.

3.1.5 Hearing Panel Report - Variation of Encumbrance - Appendix 5 - Collated Landowner Responses(Cont.)

We feel that Ohope, in general, has become inundated with infill housing without any further amenities provided to cope with this.

Thank you for allowing us to have a say in regard to our street and we hope the opinions of the residents will be given serious consideration. We assume that the decision by Council has not yet been made approving any subdivision of properties in this street.

We hope that the email we received from you is not just a token gesture sent only to appease the residents and our replies will not be ignored by those in Council who are making the decision regarding these applications.

13. I would like to formally and strongly object to this.

Firstly when I purchased in Ohiwa parade, I was told that the Encumbrance was there and there would be no further development or subdivision. I have been very upset since the last, and I believe wrongly lifting of the Encumbrance.

I have completely lost my privacy and views from 43 Ohiwa parade, and was Not even consulted as my views of the estuary were replaced with a direct view of the new enormous house opposite, I have clear unobstructed views into their living, kitchen and bedroom . Not to mention the deck! It's is awful for me, and cannot be pleasant for them! This has made my house very difficult to sell, deprecated the value, and made it no longer my forever home. Whist the financial gain went to the sub divider! It appears unless you can afford an expensive lawyer or are one, you are unable to lift the Encumbrance? This is completely Unfair.

The flood risk, of course increases with more properties, the more concrete the less drain off, we are already in high flood risk. (Despite what the highly paid experts may have been paid to write). There is of course the general congestion within in the cul de sac. More traffic much travelling too fast when there are young children residing there.

I object for all of these points, all properties in Ohiwa parade were initially on a well considered, well planned subdivision, this is being eroded by the squashing in of more condensed housing, which is not appropriate for the area, and is solely for financial gain of the Encumbrance lifter. Please keep me informed of further developments

