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# PAPAKĀINGA HOUSING HANDBOOK



**Holland Beckett**

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LAWYERS

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## **PAPAKĀINGA HOUSING ON MĀORI FREEHOLD AND GENERAL LAND**

### **INTRODUCTION**

If you are Māori and have aspirations to build housing on your land this brochure is designed to assist you by providing general advice as a starting point. If you would like to investigate your options further Holland Beckett have an experienced team of legal advisers who can provide you with tailored advice that further considers the unique aspects of your particular situation.

Building papakāinga housing is one way to utilise land to provide whānau with affordable, stable, long term housing. When deciding whether to build it is important to be mindful of the pros and cons.

#### ***Pros***

- Often the land is provided at no or minimal cost
- A proactive approach to meeting your housing needs and aspirations for whānau and whenua
- Reconnects whānau with the kainga
- Affordable, stable tenure
- Building costs may be subsidised by local and central government assistance (for example, the Western Bay of Plenty District Council offer a 50% discount on local council fees to Māori land trusts that complete the Papakāinga workshops in the Western Bay of Plenty sub region and Te Puni Kokiri provides grants through the Māori Housing Network fund)
- Improved social, cultural and economic wellbeing
- Opportunities for relationship building with local and central government agencies

**Cons**

- Building on Māori freehold land in particular may provide stable tenure (occupancy) but will not result in significant capital gain in relation to the value of your dwelling/home
- Generally civil construction costs are higher on Māori freehold land because often it is rural and not reticulated (connected) to services like wastewater, storm water, power, phone
- Can be difficult to obtain consent of multiple owners where there is no land trust or administrative body in place
- Numerous consents may be required (for example, to partition lands, provide for easements, create leases)
- Can be difficult to obtain lending when building on Māori freehold land

Developing papakāinga housing involves a number of stages. The Māori Housing Toolkit (**Toolkit**) sets out five stages. The Toolkit is available on the Western Bay of Plenty District Council website and also in hard copy from its offices. For our purposes, from a legal perspective, there are three key stages:

**Stage 1** Gaining the consent of owners

**Stage 2** Gaining the consent of relevant local and central government authorities (for example, resource consents from district or city councils, as well as from regional council; archaeological authorities from Heritage New Zealand where there are heritage sites; and Housing New Zealand and Kiwibank where lending is involved)

**Stage 3** Obtaining finance and government assistance

## **GAINING CONSENT OF OWNERS**

Te Ture Whenua Māori Act 1993 (the **Māori Land Act**) sets out the different ways that you may obtain the consent of the other owners to build a home and will differ depending on the status of your land and the nature of your ownership.

### **Individual owners**

If you are a sole owner of either General land or Māori freehold land you may build on your land in the usual way. However if you take out a mortgage against the land you will need consent from the Māori Land Court.

### **Multiple Owners**

Where you are one of many owners (multiple ownership), you will need to seek the consent of the other owners to build your home. For Māori freehold land, collective ownership can present a real challenge to land utilisation, particularly when many owners are unknown or uncontactable. Of the approximately 2.3 million ownership interests in Māori land, anecdotal evidence indicates that about half of these interests are held by deceased persons; many land interests are owned by the same person under multiple names; and many owners live far from their land and, in some cases, do not know they are owners of Māori land at all.

Where land is not administered by a Māori land trust or Māori incorporation you must engage directly with the land owners to go through a process of ownership consent. The Māori Land Act sets out that process and we can assist you to ensure that you follow the correct process to obtain the required consents.

We also suggest that it may be a sensible and efficient option for you to consider establishing a land trust or incorporation to administer the land, and to help plan for and implement multiple housing. You can find out more about the various types of entities below under Administrative Bodies.

Where your land is administered by a Māori land trust or Māori incorporation, that entity must consent to the housing development on behalf of the other owners. The entity must have the power to consent to you building a home and those powers are found in the trust's deed or the incorporation's constitution. Again, we can assist you to navigate through this process.

### ***Occupation Order***

An occupation order is the appropriate authority to use where no land trust or incorporation exists over your land block. If there is no administering body you will need to seek agreement from all of the owners.<sup>1</sup> If you can't locate all of the owners you can apply to the Māori Land Court to call a meeting of "assembled owners" to determine the matter.<sup>2</sup>

An order is granted by the Māori Land Court. The applicant does not own the site outright but is granted exclusive rights of use and possession. The order can be passed through succession (in your Will) to whanau, however a spouse will need to seek a determination of the Court if his/her continued tenure of the home (which is located on the land subject to the occupation order) is challenged.

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<sup>1</sup> Section 150C(1)(c) Te Ture Whenua Māori Act 1993.

<sup>2</sup> Section 173 Te Ture Whenua Māori Act 1993.

In deciding whether to grant an occupation order the Court must take into account:<sup>3</sup>

- The opinions of the owners as a whole
- The effect that the order will have on the other owners
- The best overall use and development of the land

The Court can't make the order unless it is satisfied that:<sup>4</sup>

- The owners have had enough time to consider your application and discuss it.
- The owners understand that this order may be passed through succession and that it may also be for a specified term or until a particular defined event occurs (for example, the death of the person who is granted the occupation order)
- There is sufficient support for the application
- That the extent of the applicant's beneficial interest in the land justifies the occupation order

It is important to note that occupation orders may not attract lending from Kiwibank under a kāinga whenua loan. Experiences differ from region to region but the general view of Housing New Zealand (who guarantee kāinga whenua loans) is that they are reluctant to guarantee loans against an occupation order and prefer instead a licence to occupy.

### ***Licence to Occupy***

A licence to occupy is very similar to an occupation order, however it cannot pass by your Will to other whanau. It can only be granted to you by a Māori land trust or incorporation that has the power to do

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<sup>3</sup> Section 329 of Te Ture Whenua Māori Act 1993.

<sup>4</sup> Section 329 of Te Ture Whenua Māori Act 1993.

so in its deed or constitution and does not require approval from the Court. A licence to occupy must however be “noted” in the Māori Land Court once your trust or incorporation has granted it (noting is for record keeping at the Court).

As with an occupation order, a licence to Occupy does not take ownership of the land, but instead confers exclusive rights to occupy a specified site for a definite period of time.

A licence to occupy does provide good security for Kiwibank and Housing New Zealand to support a kāinga whenua loan.

### ***Leasing***

A significant proportion of Māori freehold land in New Zealand is leased, with the majority of those leases being leases of rural land. Some land trusts and incorporations utilise long term leases to provide for housing (for example, the Wellington Tenths Trust and Mangatawa Papamoia Blocks Incorporated).

Certain leases require the consent of the owners or, where one exists, the consent of the land trust or incorporation. Depending on the term of the lease (length of time of the lease) Māori Land Court approval is also required (for example, a lease from an Incorporation exceeding 52 years<sup>5</sup>).

Long term leases (for example, for more than 52 years) are often viewed favorably by lending institutions and can be useful for raising finance by means of a mortgage secured against the lease.

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<sup>5</sup> Section 150B(1)(b) of Te Ture Whenua Māori Act 1993.

We have experience and expertise in relation to using long term leases of Māori freehold land for housing and industrial land developments and can assist you to choose which option best meets your needs. In addition, we can guide you through the various council consent processes from inception to completion.

### ***Partition***

Another option is to apply to the Māori Land Court for a ūū partition for a separate title in your own name. You can then deal with that land as a sole owner within the requirements of the Māori Land Act and any conditions set by the Māori Land Court.

An individual owner, trust or incorporation may apply to the Court to partition Māori freehold land for the purpose of providing a dwelling site for housing.<sup>6</sup>

A hapū partition has certain advantages:

- It creates a separate title and you become a sole owner.
- It is generally an accepted practice of the Court so as to enable housing (compared to partitioning for its own sake).
- It is not considered in legal terms to be a subdivision so the subdivision requirements under the Resource Management Act 1991 (**RMA**) and council rules do not apply.
- As a result is comparatively inexpensive.

The Māori Land Court has exclusive discretionary jurisdiction to grant a partition of Māori freehold land and will be very cautious in approving the fragmentation of Māori land holdings, even where all

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<sup>6</sup> Section 296(1) Te Ture Whenua Māori Act 1993.

owners agree. While the Court has generally approved hapū partitions, the application requirements are stringent.

The applicant must show that there is significant support for the partition amongst the owners and that there is no reasonable alternative to partition (in other words, an occupation order or licence to occupy is unattainable or unrealistic and cannot be achieved). You may therefore be wise to view partition as a last resort.

Below is a brief summary of the key matters to be considered.

#### Significant Support Amongst Owners

Where an application for partition is brought by an individual or a trust the Court must be satisfied that:

- The owners have had sufficient notice of the application and have had sufficient opportunity to discuss and consider it<sup>7</sup> and
- There is sufficient support among the owners having regard to the nature and importance of the matter.<sup>8</sup>

In the case of land owned by a Māori incorporation the Court must be satisfied that:

- The incorporation has the power to partition the land under its order of incorporation or the general powers afforded to it at law; and
- The shareholders of the incorporation have been given express notice of the application and have passed a special resolution supporting the application.

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<sup>7</sup> Section 288(2)(a) Te Ture Whenua Māori Act 1993.

<sup>8</sup> Section 288(2)(b) Te Ture Whenua Māori Act 1993.

The Court must then address the following mandatory considerations:<sup>9</sup>

- The opinion of the owners as a whole; and
- The effect the partition will have on their interests; and
- The overall best use of the land.

### Reasonable Necessity

The Court will then go on to consider whether the partition is reasonably necessary to facilitate the effective operation, development and utilisation of the land.<sup>10</sup> When considering whether or not a partition is necessary, an assessment of reasonable alternatives will be considered.<sup>11</sup> You must be able to demonstrate why the partition is necessary rather than simply desirable or expedient.

Finally, the Court must assess whether or not granting the partition would facilitate the use and occupation of the land by the owners by rationalising particular landholdings.<sup>12</sup>

If a partition is granted the Court may require that a restriction be put on the ability to sell the land outside of the hapū.<sup>13</sup>

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<sup>9</sup> Section 288 Te Ture Whenua Māori Act 1993.

<sup>10</sup> Section 288(4)(a) and (b) Te Ture Whenua Māori Act 1993.

<sup>11</sup> For example, an agreement between owners, agreement with the trustees of the trust, occupation orders and so on.

<sup>12</sup> Section 286 Te Ture Whenua Māori Act 1993.

<sup>13</sup> Section 304 Te Ture Whenua Māori Act 1993.

### The Position of Spouses

The Court can order that title to the newly partitioned block vest in a married couple, civil union partners or de facto partners, provided at least one of the persons fits within the preferred class of alienee (have a whakapapa connection to the land).<sup>14</sup> Ownership of improvements can be determined by the Court.<sup>15</sup>

In the case that ownership does not vest in the couple, provision can be made for spouses to have a life interest in the land.<sup>16</sup> If granted, the spouse must hold the land as a kaitiaki (guardian) in accordance tikanga Māori and cannot deal with the land without the consent of those persons entitled to the land by succession.<sup>17</sup>

### **Administrative Bodies**

Holland Beckett can advise you on a land administration structure that can best meet your needs. We can assist to establish the structure or review the terms of an existing entity to promote your aspirations for housing development.

### ***Ahu Whenua Trust***

Ahu whenua trusts are used to administrate entire blocks of land as opposed to whānau trusts, for example, which consolidate the shares of a common tipuna within a block. Ahu whenua trusts are often used for commercial purposes enabling the trustees to incorporate business ideology, as well as cultural values in their approach to administration.

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<sup>14</sup> Section 296(3) Te Ture Whenua Māori Act 1993.

<sup>15</sup> Section 18(1)(a) Te Ture Whenua Act 1993.

<sup>16</sup> Section 109(2) Te Ture Whenua Act 1993.

<sup>17</sup> Section 150D Te Ture Whenua Māori Act 1993.

An ahu whenua trust is the most flexible type of Māori trust, with limited legal restrictions on its operations. In addition, ahu whenua trusts can hold both Māori freehold and General land making them the preferred administrative structure for developing papakāinga housing.

### ***Whānau Trust***

Whānau trusts consolidate the shares of a common tipuna under one administrative body. Once combined, the shares will no longer be fragmented through succession. A whānau trust is useful when nuclear families wish to pool their shareholdings in a block which is also owned by other extended whānau members. A whānau trust may also be created by a testator to secure their land for all of their descendants.

### ***Whenua Tōpū Trust***

Whenua tōpū trusts are used to manage land on behalf of iwi or hapū, for example, land returned by the Crown as part of a Treaty settlement.

### ***Māori Incorporations***

A Māori incorporation is a structure that is similar to a company and, as such, is seen as the most commercial option of the various Māori land administration structures.

Māori incorporations are governed by the Māori Land Act and the Māori Incorporations Constitution Regulations 1994 (**Regulations**). There will also be an order of incorporation which must adhere to the Act and the Regulations.

A Māori incorporation is run by a committee of management. The committee consists of people who are nominated and elected by the shareholders.

### **Te Ture Whenua Māori Bill 2016**

Under the proposed Te Ture Whenua Māori Bill 2016 the Māori Land Court's involvement in establishing rights over Māori land will be somewhat reduced.

For rights in Māori land that are less than a partition (such as occupation orders), Māori Land Court confirmation is generally only be required if the decision is made by the governance body for that land block. By contrast, if the decision is made by owners that hold more than 50% of the shareholding in the land block, then Māori Land Court confirmation will not be required.

For a partition of Māori land, Māori Land Court confirmation will be required for decisions made by both the governance body and owners that hold more than 50% of the shareholding.

In circumstances where there is no governance body for a land block and owners are unable to meet the required threshold, owners will not be able to refer the decision to the Māori Land Court (as is possible under the current Act). Provision is however made for second-chance meetings of owners to enable some decisions to be approved even though the required threshold has not been met.

The Bill also changes the land administration structures that can be set up. Instead of trusts or incorporations, entities which are termed "governance bodies" will be introduced and are intended to

be more flexible than those that are available under the current Act. The requirements for establishing these governance bodies also differ from the current Act.

If the Bill is passed into law, we will update this handbook to accord with the new requirements under the new legislation.

## **GAINING CONSENT OF COUNCILS**

### **Collaboration with Council**

You will need to understand the local and regional council planning rules that relate to your land and what consents you may need. Our team can provide specialist advice in terms of the resource management matters as they relate specifically to Māori freehold land and planning rules.

### ***Specifically designed planning rules for papakāinga***

Here in the Tauranga City and the Western Bay of Plenty District there are planning rules specifically designed for papakāinga development.

In addition to the city or district plan rules, the relevant Bay of Plenty regional plan contains special rules for onsite wastewater systems for housing in these areas. We assisted tangata whenua representatives in achieving the development of these provisions. The various rules are summarised in Figure 1 below.

\*Permitted means no resource consent is required. Controlled means that resource consent is required but cannot be declined. Restricted Discretionary and Discretionary means that resource consent is required and can be declined.

**Figure 1 – Specifically designed planning rules for papakāinga**

<b>Rule / Status</b>	<b>Activity</b>
<b>Western Bay of Plenty District Plan – Rural Zone</b>	
Rule 18.3.1(d) Permitted	One dwelling per lot. Community facilities of up to 200m <sup>2</sup> (cumulative) when associated with a Controlled Activity of 5 dwellings. Community facilities of up to 400m <sup>2</sup> (cumulative) when associated with a Controlled Activity of 10 dwellings.
Rule 18.3.2(e) Controlled	Up to a maximum of 5 dwellings on Māori land when accessed from an unsealed road maintained by Council. An average of at least 2000m <sup>2</sup> of net land area per dwelling required (including those provided for as a permitted activity).
Rule 18.3.2(f) Controlled	Up to a maximum of 10 dwellings on Māori land when accessed from a sealed road maintained by Council. An average of at least 2000m <sup>2</sup> of net land area per dwelling required (including those provided for as a permitted activity).
Rule 18.3.3(c) Restricted Discretionary	11-30 dwellings on Māori land accessed from a sealed road. An average of at least 2000m <sup>2</sup> of net land area per dwelling required (including those provided for as a permitted activity).
Rule 18.3.4(n) Discretionary	Development of 30 dwellings or more on Māori land accessed from a sealed road maintained by Council subject to there being an average of at least 2000m <sup>2</sup> of net land area per dwelling (including those provided for as a permitted activity).

<b>Rule / Status</b>	<b>Activity</b>
<b>Tauranga City Plan – Rural and Future Urban Zones</b>	
Rule 16A.8.1 Permitted	Two independent dwellings per site
Rule 16A.9 Controlled	Up to a maximum of 10 independent dwellings with an average of at least 2000m <sup>2</sup> site area per unit. One communal building up to of up to 200m <sup>2</sup> .
Rule 16A.10c); Rule 16A.10.1 Restricted Discretionary	Up to a maximum of 30 independent dwellings with an average of at least 2000m <sup>2</sup> site area per unit. One communal building up to of up to 200m <sup>2</sup> .
Rule 16A.11f) Discretionary	Activities not complying with Rule 16A.10.1
<b>On-site Effluent Treatment Plan – Outside urban areas</b>	
Rule 5.10.24 Permitted	Up to 10 dwellings for papakāinga and associated Community Facilities on multiple-owned Māori land. Discharge of up to 2 cubic metres per day of wastewater from new individual septic tank or aerated systems. Each dwelling must have its own land application area of not less than 1200 m <sup>2</sup> .
Rule 5.10.25 Controlled	Up to 10 dwellings for papakāinga and associated Community Facilities on multiple-owned Māori land. Discharge of up to 2 cubic metres per day of wastewater from new shared septic tank or aerated systems. The land shall have an average of at least 2000 m <sup>2</sup> per dwelling.
Rule 5.10.26 Discretionary	For more 10 dwellings for papakāinga and associated Community Facilities on multiple-owned Māori land.

Within the other districts of the Bay of Plenty, papakāinga is provided for in some cases, but to a much lesser extent than in Tauranga City and the Western Bay of Plenty District.

### **Subdivision of General land owned by Māori**

We get enquiries from owners of “General land owned by Māori” (this is a legal term defined in the Māori Land Act). While fewer restrictions may apply to this status of land, the subdivision process to build multiple homes on this type of land can be lengthy and costly. In summary, a subdivision involves:

- Obtaining subdivision consent from the local city or district council
- Regional council consents may also be required (for example, for wastewater and earthworks)
- Preparing a survey plan to be sealed by your local council and approved by Land Information New Zealand (**LINZ**)
- Lodging the new titles with LINZ

The district plan will specify the minimum area for the newly subdivided lots and other requirements to be met. If you are considering subdividing, you should have particular regard to the time and cost involved and the need for reliable legal and/or planning advice.

### **Heritage New Zealand**

Along with the RMA, the Heritage New Zealand Pouhere Taonga Act 2014 (**Heritage Act**) also controls work affecting historic heritage and archaeological sites (including sites of significance to Māori). The Heritage Act contains a consent (authority) process for any work affecting archaeological sites. The process applies to sites on land of all tenure including Māori land. We can help you identify if this type of consent is required as part of your development.

## **FUNDING AND FINANCE**

### **Funding**

#### ***Māori Housing Network***

The Māori Housing Network manages funds to support projects to improve housing outcomes for Māori. The funding focus is on projects that improve the quality of housing, build capability and capacity in the sector, and increase the supply of affordable housing.

Te Puni Kokiri has access to number of funds through the Network. These funds are as summarised below.

#### Special Housing Action Zones

Supports Māori organisations and communities to build, ability to deliver affordable housing solutions and a focus on community initiatives rather than individual households.

#### Kāinga Whenua Infrastructure Grants

Funds for infrastructure (power, water, sewerage system, roading, gas, telecoms) for housing on Māori land and can assist individual households and land trusts developing papakāinga, social and affordable housing on Māori land.

#### Māori Housing Fund

Assists Māori organisations and communities increase new housing, especially on land with multiple owners.

#### Whānau Housing Response Fund

Supports community housing repair programmes and supports emergency housing pilots for whānau with housing crises.

### Whānau Housing Support Fund

Purchase of specialist practical and technical advice to advance whānau and Māori organisations' housing aspirations.

Māori Housing Network Regional Advisors are available through your local Te Puni Kōkiri office to help you identify which of these funds suit your project.

## **Finance**

### ***Kāinga Whenua Loan Scheme***

The Kāinga Whenua Loan Scheme is an initiative between Housing New Zealand and Kiwibank to help Māori achieve home ownership on their multiple-owned land.

The first step is to register your interest in applying for a loan by filling in a Registration of Interest form. Completing the form is not a formal application. It will allow Housing New Zealand to review and understand your plans, do an initial assessment of your financial eligibility and ensure your application takes advantage of any recent policy changes. Once your housing development proposal passes this initial screening, it will then proceed to the formal loan application process with Kiwibank.

Under the Kāinga Whenua Loan Scheme you can borrow up to \$200,000 for each proposed dwelling. The approved loan value must include a 10 percent contingency amount – or 5 percent if a Master Build Guarantee is provided. Market interest rates will apply to the loan.

Housing New Zealand takes security over the dwelling by an agreement between the trust and Housing New Zealand. The houses must be able to be removed from the site if necessary.

### **How we can help with funding applications**

Our team has assisted in a legal capacity the project control groups of many papakāinga in the Western Bay sub region including:

- Mangatwa Papamoa Blocks Inc (36 homes)
- Nga Potiki a Tamapahore Trust (80 homes pending)
- Pirihima Trust (6 homes)
- Pukekohatu Trust (3 homes)
- Ngati Kahu Te Pura Trust (12 homes)
- Key legal adviser to Papakāinga Solutions Limited

We have provided advice to clients on government funding contracts, developed specific contracts to suit the clients of each papakāinga, assisted in the kāinga whenua loan processes with advice to trusts and individuals, developed licence to occupy templates and participated in developing new legal arrangements using kāinga whenua lending to enable building on concrete floor.

### **OUR ROLE**

Holland Beckett can assist you with all of the matters set out in this information sheet and ensure you achieve your aspirations. It is best to talk to us as early as possible in the process so that we can steer you in the right direction.

## OUR TEAM



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