

# Internal Memo

To: Jerome Sheppard  
Deputy Chief Executive Crown Property

From: April Hussey  
Senior Portfolio Manager

Date: 23 November 2018

File Ref: PRY-A30-19276-DIS-Z/01, PRY-A30-3203196-DIS-Z/01

Subject: **DETERMINATION OF APPLICATION FOR THE GRANT OF AN INTEREST IN RECLAIMED LAND – SULPHUR POINT, TAURANGA**

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**Purpose** To seek your determination of an application for the granting of an interest in reclaimed land under s36 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) for Section 1 SO 59443 and Section 1 SO 464237, comprising 1.2 hectares, situated at Sulphur Point in Tauranga Harbour.

**Reference** New matter.

**Background** The Port of Tauranga Limited (PoT) application for the freehold vesting of Section 1 SO 59443 comprising 8,000m<sup>2</sup> (southern reclamation) was first received by the Department of Conservation (DOC) in October 1997. An error with the survey and approval was discovered during processing of the application, resulting in delays with the s245(5)(a) certificate under the Resource Management Act 1991 (RMA). This was eventually issued by DoC on 24 April 2007.

On 22 August 2011, PoT made a request to DOC under s41(4) of the Act that its pending application, made under the RMA for the vesting of freehold title for coastal reclamation, being Section 1 SO 59443 at Sulphur Point, be referred to the Minister for Land Information.

On 6 February 2012 the Minister of Conservation referred the application for an interest under the Act to the Minister for Land Information for consideration and determination.

On 3 April 2013 a request was made to the solicitor acting for PoT for a fresh application to be completed under s36 of the Act and to provide the information as set out in the LINZ 'Guide to Reclaimed Land'. This was received by LINZ, along with the application fee, on 16 March 2016. The new application included the area from the initial application, as well as a newly reclaimed area to the north, Section 1 SO 464237 (northern reclamation). The northern reclamation comprises 4,000m<sup>2</sup>.

The total area of the southern and northern reclamations is 1.2 hectares.

The determination of the application has been fully investigated. The attached report provides the information required in terms of the criteria

under s36 of the Act. Iwi has been consulted, the applicant has provided their views and comments and LINZ has completed its analysis and recommendations.

**Action  
Required**

To make a determination on the attached report.

April Hussey  
Senior Portfolio Manager

DRAFT  
Released under the Official Information Act 1982

## DETAILS OF THE LAND AND OCCUPATION

<b>Location and Legal Description</b>	<p>Located at Sulphur Point, Tauranga Harbour on the eastern side of the Port of Tauranga's container terminal and described as Section 1 SO 59443 and Section 1 SO 464237 (refer to Attachment 1).</p> <p>SO Plan 59443 was approved as to survey on 20 November 1992 and SO Plan 464237 was approved on 26 January 2013. The applicant owns the adjoining freehold land held in CFR SA69/122, SA67D/525, SA46B/265 and SA44B/46.</p>
<b>Area</b>	1.2 hectares (both southern and northern reclamations).
<b>Land Status</b>	<p>Section 1 SO 59443 (southern reclamation) was, immediately prior to the commencement of the Act, part of the public foreshore and seabed under the Foreshore and Seabed Act 2004. Section 1 SO 464237 (northern reclamation) was tidal water prior to the reclamation being constructed and therefore has always been considered to be in the ownership of the Crown by common law doctrine. Both the Foreshore and Seabed Revesting Act 1991 and the Foreshore and Seabed Act 2004 confirmed that ownership.</p> <p>On 28 March 2013 the Manager Crown Property approved of Section 1 SO 59443, and on 31 May 2016 the Group Manager Crown Property approved of Section 1 SO 464237, being vested in the Crown in terms of s31 of the Act and signed the required certificates accepting ownership of the reclaimed land under s33(2) of the Act (refer to Attachments 2(a) and 2(b)).</p> <p>Consequently, the current status of both pieces of land is Land of the Crown under the Act. Both areas have been added to the LINZ balance sheet.</p>
<b>Plan/Cadastral Information</b>	Attached are the survey plans and aerial photographs depicting the reclaimed land subject to this application, together with a wider aerial photo of PoT's other land, which makes up their wharf complex (refer to Attachments 1 and 3).
<b>Occupier and Current use</b>	The applicant has constructed two reclamations. The southern reclamation and surrounding areas of land owned by PoT, currently operate as the Port's container terminal. The northern reclamation is part of land used for general Port related activities.
<b>Structures and Improvements</b>	Both reclamations and the wider Sulphur Point area is developed as a shipping container terminal. The main structure on both areas is wharf foundations and pavement. The land is sealed.
<b>Zoning</b>	The current zoning for the land is port industry under the Tauranga City District Plan, which covers the operational areas of PoT (refer to Attachment 4).
<b>Contamination/Contingent Liabilities</b>	<p>PoT advise that they are not aware of any contamination issues.</p> <p>A small amount of contaminated sawdust is known to be located on other land vested in PoT and within the wider Sulphur Point area, but the reclamations are not affected.</p>

## DETAILS OF THE APPLICANT

<b>Name of Applicant</b>	Port of Tauranga Limited (PoT)
<b>Address</b>	Salisbury Avenue Mount Manganui

Private Bag 12504  
Tauranga 3143

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**Solicitor** Georgina Smith  
Hobec Lawyers  
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**Legal Status** PoT is a port company within the meaning of s2(1) of the Port Companies Act 1988.

**Eligibility status of applicant** PoT is the developer of the reclamations and is therefore an eligible applicant in terms of s35(1) of the Act to apply for a freehold interest in the land. PoT hold resource consent for the northern reclamation (refer to Attachment 5), while the southern reclamation was carried out pursuant to an authority that was gazetted.

PoT is a port company as defined under s37(2)(a) of the Act and is a person that can be granted a freehold interest in the reclaimed land. Under s37 a port company is one of the parties for which there is a presumption that it can be granted a freehold interest in the reclaimed land, unless the port company does not want such an interest, or the Minister, or delegate, determines that good reason exists not to grant a freehold interest.

**Date of Application** The application was received on 16 March 2016.

**Fee** The prescribed application fee of \$3,100 was received on 16 March 2016.

#### **APPLICATION**

**Interest Sought** PoT seeks a freehold interest due to the importance of the reclamations to port operations. Both reclamations form part of the larger Sulphur Point area which is already owned by PoT and upon which PoT's container operations are based. Tauranga's Sulphur Point port is New Zealand's largest export port and in the year ended 30 June 2018 the container throughput was 1.2 million twenty-foot equivalent units (TEU's).

**Purpose for the Interest** For operational reasons the applicant wishes to acquire legal ownership of the land and retain it for the long term.

**Criteria - s36(2) MACAA** (a) **Minimum interest in the reclaimed land that is reasonably needed to allow the purpose of the grant to be achieved - s36(2)(a)**

The applicant currently does not own the reclamations and therefore has no authority to use them. The land is a valuable asset and forms a critical part of the land used by PoT for their operations. Freehold title will allow PoT to own and continue to use the reclamations and will enable maximum potential of the land to be reached.



**(b) Public interest in the reclaimed land, including existing or proposed public uses - s36(2)(b)**

PoT is not aware of public interest in the reclaimed land. The reclamations physically form part of the operational port site and have no frontage to legal road – they are landlocked. There is currently no public access available to the reclaimed areas. To require or allow public access to the reclamations would present a significant health and safety risk and would have serious implications for PoT and their operations.

**(c) Extent of public benefit from the use or proposed use of the reclaimed land - s36(2)(c)**

It is noted that at the time the reclamations were constructed, jobs were generated through the construction contracts. This public benefit, though significant, was not recent and was relatively short lived. It also is not relevant to the use of the reclamations now.

Using the reclamations enables PoT to operate a competitive and successful business, with facilities that will continue to meet the growing needs of the shipping industry and the local, regional and national population. As part of running a successful business, the port are able to capitalise on skills sourced from the local population and can provide employment opportunities to a wide range of people. Port operations that run efficiently and effectively, using the land and labour, encourage the retention and growth of business, which ultimately benefits the regional economy and that of New Zealand as a whole.

**(d) Any conditions or restrictions imposed on the resource consent that authorised the reclamation - s36(2)(d)**

The resource consent imposed no conditions or restrictions upon the construction of the northern reclamation (refer Attachment 5) and there are no conditions that need to be carried through regarding the grant of freehold title.

**(e) Historical claims under the Treaty of Waitangi Act 1975 in respect of the reclaimed land, or any pending application under Part 4 of the Act - s36(2)(e)**

The Office of Treaty Settlements (OTS) advised on 21 November 2016 that there are no historical treaty claims or pending claims over the land. Additionally, the land is not currently being considered as potential redress in any settlement of historical Treaty of Waitangi claims (refer to Attachment 6).

OTS had initially confirmed that no applications for customary marine title had been received in relation to the common marine and coastal area abutting the reclamations. Since this advice, PoT have advised (on 11 May 2017, 19 July 2017 and 12 December 2017) that a number of applications have been filed in the High Court for orders recognising customary marine title and protected customary rights in relation to Tauranga Harbour. None of these applications appear to include the reclaimed land and seek rights in the common marine and coastal area, of which the reclaimed land is not a part.

Even if subsequent applications were to be made that did include the areas of reclaimed land, it is not anticipated that they would be accepted due to the requirement under section 58(1)(b)(i) of the Act for

the applicants to show that they have "*exclusively used and occupied it [the reclaimed land] from 1840 to the present day without substantial interruption*". The subject land has been reclaimed since 2013 (northern reclamation) and 1992 (southern reclamation) and it is unlikely that an applicant could provide sufficient evidence to demonstrate that they have used and occupied the areas without substantial interruption.

Therefore, the existence of these applications should not prejudice the grant of freehold interest in the reclaimed land.

**(f) Cultural value of the reclaimed land and surrounding area to tangata whenua - s36(2)(f)**

Sulphur Point sits within the rohe of Ngāi Tamarawaho, a hapu of Ngāti Ranginui, and intersects with its cultural and environmental values.

PoT consulted with Ngāi Tamarawaho in respect of the cultural values associated with the land. A Cultural Values Assessment Report was completed by Buddy Mikaere for the Ngāi Tamarawaho Environmental Unit (refer to Attachment 7). This sets out the traditional historic relationship between the hapu and the Sulphur Point area, the examination of the hapu values and how these might be affected by on-going port operations utilising the reclamation areas.

Ngāi Tamarawaho is supportive of the PoT application and appreciated that the applicant took the initiative to consult them and seek the preparation of the report. The support is however conditional on Ngāi Tamarawaho's cultural and environmental values being properly considered and provided for, in line with the PoT objectives. PoT is engaging with Buddy Mikaere in relation to the mitigation measures set out in the report, which will address the hapu's concerns. As such, LINZ does not need to make any grant of freehold interest conditional upon this occurring.

**(g) Financial value of the reclaimed land to the Crown (s.36 (2) (g))**

The applicant submits that the total cost directly associated with the northern reclamation of 4,000m<sup>2</sup> was [s 9(2)(b)] and based on the same cost per m<sup>2</sup> the estimated cost of the southern reclamation, being 8,000m<sup>2</sup>, is estimated at [s 9(2)(b)].

A valuation of the Crown's interest in the seabed area for the subject reclaimed land was completed by Gribble Churton Taylor Limited and the final valuation report was received on 18 July 2018. The values contained in the report form the basis of the consideration to be paid by PoT, minus any discount for encumbrances that the new freehold title may be subject to.

In this case the only encumbrance to consider at this stage is the restriction on future sale, as pursuant to s44 and s45 of the Act, for which a 5 percent discount is often agreed to. Given that these reclamations are an integral part of PoT's operations, it is unlikely that they would be sold in their own right. On this basis, a reduction in the consideration amount for this sale is not considered justified.

Therefore, the consideration for the northern reclamation will be [s 9(2)(b)] plus GST, if any, and the consideration for the southern reclamation will be [s 9(2)(b)] plus GST, if any (refer to Attachment 8).

The valuation was completed in accordance with the valuation methodology for reclaimed land (developed on advice from the Valuer-General) (refer to Attachment 9) and was reviewed by the Valuer-General.

**(h) Natural or historic values associated with the reclaimed land - s36(2)(h)**

PoT is not aware of any other natural or historic values associated with the two reclamations.

Heritage New Zealand advised on 16 March 2017 that there are no significant known heritage values in the area of the reclamations that require protection. The report states that there are no historic places, historic areas, wahi tupuna or wahi tapu areas entered in the New Zealand Heritage Pouhere Taonga List, either on or in the immediate vicinity of the reclamations, nor are there applications or proposals to enter such places or areas on the list. Additionally, no NZAA recorded archaeological sites have been identified in the immediate vicinity of the reclamations (refer to Attachment 10).

**(i) Potential public access, amenity and recreational values of the reclaimed land - s36(2)(i)**

PoT does not consider the reclamations have any potential public access, amenity or recreation value. This is because they form part of the operational port site at Sulphur Point and so access is restricted for health and safety and operational reasons. Public access to, from or along the coastal marine area, will not be provided for over the reclaimed land.

**(j) Special circumstances of the applicant (s.36 (2) (j))**

PoT advises that the vesting of the seabed to them in the form of freehold title is the most appropriate legal arrangement for the reclamations. This would give PoT the greatest degree of security of tenure.

PoT also advises that they have made an exceptional commitment to the land by developing the wharf structures. The level of investment in the northern reclamation is approximately [s 9(2)(b)] and in the southern reclamation [s 9(2)(b)]. PoT wish to continue using the land for company benefit and, aside from wharf maintenance, does not intend to invest further significant capital in the reclamations.

**History of Reclaimed land**

The northern reclamation was authorised by resource consent 61134, granted by the Minister for Conservation as a restricted coastal activity on 26 February 2002. The certificate completed by the Bay of Plenty Regional Council under s245(5)(a)(ii) of the RMA was signed on 11 September 2013 (Refer to Attachment 11(a)).

The southern reclamation was carried out under the authority of an Order in Council made pursuant to s175(3) of the Harbours Act 1950 (NZ Gazette 1991, p.126) (refer to Attachment 11(b)). The Minister of Conservation subsequently completed the certificate under s245(a) of the RMA on 24 April 2007 (Refer to Attachment 11(c)).



All relevant conditions were complied with and would have formed part of the Minister of Conservation and Bay of Plenty Council's considerations before the issuing of the certificates.

On 22 August 2011, PoT requested that DoC transfer their application to LINZ, pursuant to s41(4) of the Act. The transfer was completed on 6 February 2012.

## Analysis

PoT is eligible to apply for an interest in the reclaimed land as it is the developer of the land. In terms of s37(2) of the Act there is also a presumption that PoT, as a port company, is entitled to be granted a freehold interest in such lands unless otherwise determined by the Minister (or delegate).

PoT seeks a freehold interest as both reclamations form an important part of the company's container and port operations. The wider Sulphur Point area is land already vested in PoT. It is noted that the container and port operations constitute a vital part of New Zealand's trade infrastructure.

OTS has advised that the reclaimed land is not being considered for use as potential redress in any historical Treaty claims settlement. We are aware that a number of applications have been filed for orders recognising customary marine title and protected customary rights in relation to the Tauranga Harbour. However, the reclaimed land does not form part of the common marine and coastal area, the land to which these claims refer and, as discussed in section (e), it is unlikely that any claims in relation to the reclamation areas would not be able to satisfy the test in s58(1)(b)(i).

If a freehold interest is granted, there is a statutory obligation under s45 of the Act that if the reclaimed land is later intended for sale, the applicant is required to reoffer the land to the Crown first, followed by iwi and the public. In view of this condition, LINZ often agrees to an adjustment of the market value. Given that these reclamations are an integral part of PoT's operations it is unlikely they would be sold in their own right. On this basis, a reduction in the consideration amount for this sale is not considered justified.

In accordance with the financial information provided at paragraph (g) of this report, the freehold values of the reclaimed land to be paid by the applicant have been determined to be [s 9(2)(b)] plus GST, if any and [s 9(2)(b)(ii)] plus GST, if any.

The conclusion is that the statutory test has been met for the application to proceed.

## Conclusions

In light of the above, it is submitted that there are no good reasons not to grant the freehold interest applied for.

It is considered that PoT could be granted a freehold interest for Section 1 SO 59443 and Section 1 SO 464237, subject to the following conditions:

1. That the consideration of [s 9(2)(b)] plus GST, if any and [s 9(2)(b)] plus GST, if any, be payable to the Crown for the freehold interests to be granted.
2. That a separate new Computer Freehold Register (title) be issued in respect of each of the two reclamations, with a memorial registered on them recording that the areas of land have no frontage to a legal road.
3. The deposition of the freehold interest being restricted by s45 of the Act and that restriction being recorded as a memorial on the new Computer Freehold Registers to be issued.



**Comments of Applicant** On ..... 2018 LINZ sought the views of PoT on the proposed determination under s38(2) of the Act. The response from PoT was received on ..... 2018 (refer to Attachment 12).

**Final Analysis** The required consultation has been completed and the issues raised by the applicant do not impact on our proposed determination.

**Recommendation** I recommend that:

You agree, under your delegation from the Minister, to grant a freehold interest in the land described as Section 1 SO 59443 and Section 1 SO 464237 to Port of Tauranga Limited under s36 of the Marine and Coastal Area (Takutai Moana) Act 2011, subject to the above conditions.

## Signoffs

**Peer reviewed by:**

\_\_\_\_\_  
Bart van Stratum  
Senior Portfolio Manager

/ /2018

\_\_\_\_\_  
Stephanie Forrest  
Group Manager Land & Property (Wellington)

/ / 2018

**Recommendation Approved/Declined**

\_\_\_\_\_  
Jerome Sheppard  
Deputy Chief Executive Crown Property  
(under delegation)

/ / 2018