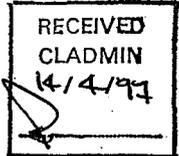


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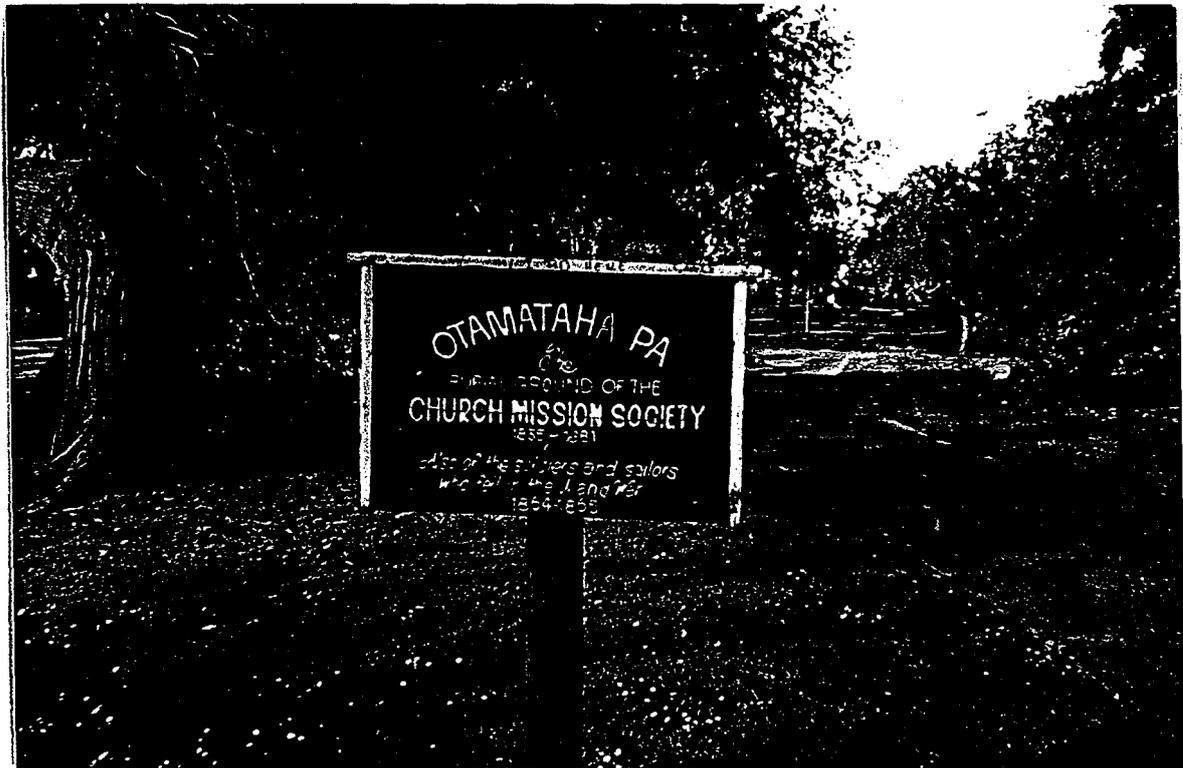
WAI 580-A1



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WAI 215-A43

OTAMATAHA



By Rachael Willan

A report commissioned by the Waitangi Tribunal for Wai 580
March 1997

All opinions expressed are those of the author only

OTAMATAHA

(Wai 580)

Cover Photograph: R Minhinick, 1996

The photograph was taken at the current entrance to the former Otamataha Pa site, where 500 people were killed in 1828. Additionally, two Maori leaders of Gate Pa and Te Ranga are buried on the site, as well as other Maori victims of the battle. The sign makes no mention of these significant facts.

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Acknowledgements

As with all research, this report could not have been completed without the help of others. I would like to thank the representatives of the Wai 580 claimants who were willing to meet with me and discuss their claim. While this report is essentially a background report for the Tribunal on the claim, I hope that they find this report useful when preparing their own submissions on Wai 580.

Thanks also to the staff of the Tauranga District Council who went out of their way to provide information for the report. Special thanks to Gary in the records department. Finally, thanks to Anita Miles, Grant Phillipson, for and Ian Shearer at the Waitangi Tribunal for assessing and proof reading the drafts of the report.

Summary

This report examines the history of an area claimed by four Tauranga hapu, Ngai Tamarawaho, Ngati Tapu, Ngati Kuku, and Ngai Tukairangi, in their Wai 580 statement of claim. These four hapu know the area as Otamataha. Otamataha is near the centre of Tauranga city, on the eastern side of the Te Papa Peninsula. Otamataha was the landing place of the Takitimu canoe, and it was also a pa site. The harbour bordering Otamataha was a source of kaimoana for local hapu. Today, although the Otamataha claim only covers a very small area, there are six types of land: a railway, council reserves, reclaimed land, a road, the foreshore, and property owned by the New Zealand Mission Trust. This report examines the development of this area.

During the early nineteenth century, Maori began to lose rangitiratanga over Otamataha. According to European law, Maori lost Otamataha through sale to the Church Missionary Society during the 1830s. Otamataha was part of the Church Missionary Society's purchase of the Te Papa Peninsula. In 1844, the Land Claims Commission confirmed the purchase despite Maori concerns about its legitimacy. Later, in 1867, the Crown bought most of Otamataha from the Church Missionary Society- a purchase that opened up Te Papa for Pakeha settlement. By 1915, when the Crown vested Otamataha's foreshore in the harbour board, Maori had so little control over the area that they were not even consulted about the Tauranga Foreshore Vesting and Endowment Act. This report argues that the lack of consultation continued throughout the twentieth century.

The body of the report is in three chapters. Chapter One deals primarily with the nineteenth century. It begins by examining the traditional history of Otamataha and shows that Otamataha is waahi tapu. Chapter One also examines the Church Missionary Society's purchase of Te Papa and the Old Land Claims Commission's investigation of the purchase. The following conclusions are made about these transactions:

- that some Maori who were entitled to may not have received payment for the CMS purchase of Otamataha;
- that there was some Maori opposition to the Church Missionary Society's purchase;
- that the Land Claims Commission favoured the Church Missionary Society's evidence over the evidence of some Maori vendors;
- that the Maori concept of the "sale" may have differed from the European legal concept of sale.

Chapter One also demonstrates that the Crown purchased four-fifths of Te Papa from the Church Missionary Society in 1867. The Crown assumed ownership by purchase rather than by raupatu, because the Crown considered that Otamataha had already been alienated from Maori.

Chapter Two examines the twentieth-century history of Otamataha. It argues that development

of Otamataha, until very recently, ignored Maori interests. It also illustrates that in several instances the Crown failed to protect Maori interests. Chapter Two covers the following issues:

- the development of the East Coast Main Trunk Railway;
- the English common law assumption that the Crown owned the foreshore and seabed;
- the transfer of the foreshore from the Crown to the Tauranga Harbour Board;
- the reclamation and recontouring of the Otamataha waterfront;
- the failure of the Tauranga Harbour Board to obtain title to reclaimed land on the waterfront;
- the legislative transfer of harbour board property to the Tauranga City Council;
- the lack of adequate protection for waahi tapu and taonga within the claim boundary.

The final chapter of this report draws together conclusions in the previous chapters. It concludes by highlighting the main issues.

The report has some limitations. Some details about contemporary developments were omitted because the author felt that the claimants were far more knowledgeable on these issues. It is hoped that these issues will be raised in oral evidence and other claimant submissions to the Waitangi Tribunal.

For background information readers should also consult, Evelyn Stoke's, *Te Raupatu O Tauranga Moana* (Wai 215: A33); Vincent O'Malley's, "The Te Papa Block: A History of Church Missionary Society and Crown Dealings" (Wai 215: A29); and Stokes', *A History of Tauranga County*.¹ Dr Giselle Byrnes' report, "A Preliminary Report On The Use, Control And Management of The Tauranga Harbour" (Wai 215: A 36) is an excellent source of information on the Tauranga Harbour Board.

This report is intended as a paper on the history of the alienation and development of Otamataha. The views expressed in this report are the views of the author only, and the author does not claim to speak for Maori. The author acknowledges that others may have a different perspective on issues and events covered in the report. While the report touches on legal issues the author does not claim sufficient legal knowledge to examine these issues in depth.

1. Dumore Press, Palmerston North, 1980

Introduction

Personal

My name is Rachael Willan. I completed a Bachelor of Arts with Honours, majoring in history, at Victoria University of Wellington in 1995. I have worked on several historical projects. In November and December 1995, I worked for the University of Newcastle, Australia, assisting Professor Alan Ward. I researched New Zealand's involvement in Tahiti during World War Two. From January 1996 to April 1996, I worked for the Crown Forestry Rental Trust, compiling a profile of Maori land sales from 1900 to 1930. From April 1996, to October 1996, I worked as a commissioned researcher for the Waitangi Tribunal. I wrote four research reports for the Tribunal on various aspects of several Tauranga claims, including Wai 42 (Wairoa River and Katikati Railway Station), Wai 362 (blocks taken for waterworks and land taken for hydroelectricity purposes), Wai 503 and Wai 336 (both claims about hydroelectricity on the Wairoa River). I have been a staff member at the Waitangi Tribunal since October 1996.

The Claim - Wai 580

The Waitangi Tribunal commissioned this report to investigate aspects of the Wai 580 claim. This claim was lodged by Toa Haere Faulkner on behalf of four hapu, Ngai Tamarawaho, of Ngati Ranginui iwi, and Ngati Tapu, Ngati Kuku, and Ngai Tukairangi, all of Ngai Te Rangi iwi. These four hapu all have other claims involving the waterfront, harbour, or the Te Papa peninsula. The statement of claim outlines the area claimed by the four hapu. It states:

The area of the claim in detail, is covered in the attached schedule. Location is in the area of Otamataha, Street [sic] vicinity of Dive Crescent, The Strand, and Cliff Road, Tauranga B O P. These streets are adjacent to the Tauranga wharf and present Railway line.²

As the extract shows, the area is known to the four hapu as Otamataha. Otamataha is located on the eastern side of the Te Papa peninsula, Tauranga City. The claimants believe that Otamataha is historically and culturally significant. According to the statement of claim, Wai 580 is a raupatu claim for lands confiscated in Tauranga. It is also a claim for land taken by legislation. The four hapu say these actions are in breach of the articles of the Treaty of Waitangi.³ They also say that in the past, local bodies, the Crown, and private developers did not consult Maori about

2. For further details including Certificate of Title and Allotment Numbers see: Wai 580, statement of claim, 6 February 1996 at Appendix 2

3. For further details see the statement of claim in Appendix 2

the development of the waterfront. The claimants want to be actively involved in any future development of Otamataha, because they believe that future development must acknowledge Otamataha's cultural and historical significance.⁴

Contemporary Background

There is also a contemporary background to the claim. In 1995, Ngai Tamarawaho, Ngati Kuku, Ngati Tapu and Ngai Tukairangi reached an agreement with Civenco, a private development company. Under the terms of this agreement, Civenco will consult the four hapu when it builds a hotel at 51 Dive Crescent. There is also a possibility that the hapu will eventually control 51 Dive Crescent, as they are negotiating with the owners, the New Zealand Church Mission Trust Board to assume trusteeship.⁵

Aside from Civenco's proposal, the Tauranga District Council plans to develop the entire area covered by the Wai 580 claim. Proposals include shopping complexes, and moving the Tauranga Historic Village to the waterfront site. The four hapu are concerned that the proposals will compromise Otamataha's historical and cultural importance.⁶

The Report

This report is a background paper, discussing the history of Otamataha. It focuses on the history of those lands identified in the Wai 580 statement of claim. It does not cover current negotiations with the Tauranga District Council or Civenco. The author felt that the contemporary nature of these negotiations lent themselves to claimant submissions, as the claimants are directly and actively involved in negotiations.

Otamataha has a long history. It was the landing place of the ancestral waka of Ngati Ranginui, Takitimu. It was also a landing place for fishing waka. The harbour contained fish and shellfish resources. The headland of Otamataha, now the old mission cemetery, was once the site of the Otamataha Pa. The people of Tauranga Moana say that Otamataha is waahi tapu. In 1828, around 500 people were killed in a battle with Hauraki iwi on this site. The area includes also an urupa, known to Pakeha as the Church Mission Cemetery. Two important tuupuna, Hori Ngatai and Reweti Puhirake are buried at the urupa. Additionally, fourteen other Maori victims of the battles of Gate Pa and Te Ranga are buried there in a mass grave. Prior to Pakeha settlement, the urupa was the Otamataha Pa.⁷ This part of Otamataha's history is covered in Chapter One.

During the 1830s, the Church Missionary Society purchased all of the Te Papa Peninsula, including Otamataha. In 1844, the Land Claims Commission re-examined the purchase, and

4. As per meeting with Wai 580 claimants, Ngai Te Rangi Iwi Office, 7 November 1996

5. Ibid

6. Ibid

7. Ibid

despite several Maori witnesses expressing concerns about the sale, the Crown issued a grant to the Church Missionary Society in 1852. In 1867, the Crown purchased most of the Church Missionary Society's land. From 1867, Te Papa became predominantly a Pakeha settlement. As a result, Maori were never consulted about the development of Otamataha. Chapter One also covers these transactions.

Twentieth-century development included parks, sports facilities, a railway, a road, a wharf, reclamations, industrial, and commercial development. This report profiles these developments. It highlights the lack of consultation with Maori and questions legislation that allowed the Tauranga Harbour Board and Public Works Department to reclaim part of the harbour bed. It also questions the legislative transfer of land along the Otamataha waterfront from the Tauranga Harbour Board to the Tauranga District Council in 1989. Finally, the report examines the extent to which the Resource Management Act 1991 protects waahi tapu and taonga in the Wai 580 claim. Chapter Two deals with these twentieth-century issues.

CHAPTER 1

The Nineteenth Century: Alienation

1.1 Introduction

This chapter briefly outlines the traditional significance of Otamataha, and also examines four events of the nineteenth century. They are:

- the 1828 battle between local Maori and Hauraki iwi;
- the sale of Te Papa to the Church Missionary Society in the 1830s;
- the investigation of the Te Papa purchase by the Land Claims Commission, and;
- the Crown's purchase of four-fifths of Te Papa in 1867.

Each of these events was significant; the first because after the 1828 battle, Otamataha was waahi tapu, the other three because they established Pakeha settlement and control of Otamataha and perpetuated the loss of rangatiratanga for Maori. For further details about Church Missionary Society and Crown activities in Te Papa, readers should consult Vincent O'Malley's report on Te Papa (Wai 215 A29).

This chapter will demonstrate that there is some doubt that the Church Missionary Society paid all Maori who had interests in Te Papa. The Otamataha lands are located within the Te Papa old land claim. This land was purchased by Archdeacon Brown during the 1830s. The Crown validated the purchase when, during the 1840s, the Land Claims Commission confirmed the Church Missionary Society's claim. It appears that the commission ignored a number of concerns raised by those Maori who gave evidence at the hearing. After the New Zealand wars, four-fifths of Te Papa passed to the Crown. It was this purchase that opened up Tauranga Town for settlement. No reserves were given to Maori within the area under claim in Wai 580.

1.2 Traditional History

1.2.1 Waka, Kaimoana, And The Foreshore

Otamataha is significant to both Ngati Ranginui and Ngai Te Rangi iwi. Several sources state that Otamataha was the landing place of the Takitimu waka, in about 1350. Takitimu brought the tuupuna of Ngati Ranginui to Tauranga Moana. In 1994, Gregory Tata of Ngai Tamarawaho, a hapu of Ngati Ranginui, said that:

This site is of immense significance to Ngai Tamarawaho, Ngai Tukairangi and Ngati Tapu in that our sacred waka landed there- Otamataha is our beachhead and Te Papa is our beacon.⁷

Otamataha was also a place where people launched fishing expeditions. Tata said that:

In my lifetime I was told our people traditionally departed from there out past Panepane [sulphur point] into the open sea.⁸

Although Ngati Ranginui have been in Tauranga Moana for a longer period, Ngai Te Rangi iwi also claim Otamataha. In 1993, Brian Dickson outlined Ngai Te Rangi's claim. He said that:

From the 17th Century Ngaiterangi Iwi occupied the coastal inland areas from Katikati to Papamoa against all attacks by other tribes. Although some Pa of individual hapu were defeated the Ngaiterangi Iwi as a whole were never conquered.⁹

Stockman and Ellis cite the following:

As early as 1820 there is written evidence that the pa of Otamataha was occupied by the hapu of Ngai Tukairangi, Ngati Tapu and Ngai Tamarawaho. Our traditions say that this pa was occupied from long before the time of the Pakeha. Our traditions say that this area was a waka landing site and kaimoana gathering area.... For Ngai Te Rangi, Otamataha was also a place for launching waka, and its harbours were a source of kaimoana.¹⁰

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7. Gregory Tata, Statement of evidence of Gregory Tata, P 16000, Planning, Dive Crescent, Tauranga District Council
 8. Ibid
 9. Brian Dickson, Ngaiterangi Iwi Society to Rod Cameron, 8 May 1993, P1600, Planning, Dive Crescent Tauranga District Council
 10. Joint Statement of Tureiti Stockman of Ngati Tapu and Matiu Ellis of Ngai Tukairangi, P1600, Planning, Dive Crescent Tauranga District Council

There is further evidence that supports the claim that the harbour bordering Otamataha, like the rest of Tauranga Harbour, was a source of kaimoana. In 1885, the Ngai Te Rangi tupuna, Hori Ngatai, made a speech to the Minister of Native Affairs. This famous speech illustrates the significance of the foreshore, harbour and their resources. It is cited by others as indicative of the traditional significance of the foreshore resources.¹¹ Ngatai said:

Now with regard to the land below high watermark immediately in front of where I live, I consider that as part and parcel of my own land...part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea. Te Maere was a fishing ground of mine. Onake, that is a place from which I have from time immemorial obtained pipis. The Rona is another pipi bed, Te Karaka is another place. I am now speaking of the fishing grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them and no tribe is allowed to come here and fish without my consent being given. But now in consequence with the work of the Europeans that all the land below high water mark belongs to the Queen, people have trampled on our ancient Maori customs and are constantly coming over here whenever they like to fish. I ask that Maori custom shall not be set aside in this manner, and that our authority over these fishing grounds may be upheld. *The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of rights within the Tauranga Harbour have been apportioned among our different people; and so with the fishing grounds inside the heads: those are only small spots.* I am speaking of the fishing grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors. *This Maori custom of ours is well established and none of the inland tribes would dare go and fish on those places without obtaining the consent of the owners.* I am not making this complaint out of any selfish desire to keep all the fishing grounds for myself; I am only striving to retain the authority which I inherited from my ancestors. [emphasis added]¹²

The highlighted parts of Ngatai's speech illustrates that Tauranga Maori held customary ownership rights to the foreshore. As Chapter Two shows, later development of the Otamataha foreshore failed to recognise these rights.

1.2.2 The Battle With Hauraki Iwi, 1828

According to the evidence, the urupa was once the site of the Otamataha Pa. Matiu Ellis, of Ngai Tukairangi, and Tureti Stockman, of Ngati Tapu, described Otamataha as:

...an area stretching from the end of Brown Street northward to Merilees Street. The eastern side is bounded by the harbour and the west by the Waikareao Estuary. This is

11. See Richard Boast Rangahaua Whanui National Theme Q, "The Foreshore", First Release November 1996, Waitangi Tribunal p. 22
12. Hori Ngatai, Speech to John Ballance, Whareroa Marae 1885, *Appendices to the Journal of the House of Representatives*, G1, 1885

important Otamataha is not just the promontory known as the Mission Cemetery. It covers a much wider area that was formerly a pa site and battle ground.¹³

Prior to 1828, Otamataha was one of the main Maori settlements in the Tauranga district. O'Malley cites the journal of an early missionary explorer, George Clark Snr, who estimated that Otamataha Pa had a population of around five to six hundred people.¹⁴ In 1828, invaders from Hauraki stormed the Pa. As Gregory Tata says, "a great battle was fought there where my tipuna were slain in their hundreds".¹⁵ In his journal, the missionary A N Brown recounted the following account of the aftermath of this battle. Brown said:

Early in 1828 when the Herald was on its way to Whakatane, the brig 'Haweis' was spoken to off Motiti Island. This ship was busily trading with the Tauranga people for the arms that they craved. The Maoris were no longer interested in blankets and axes, and Williams [a missionary] was not even offered a basket of potatoes. When the Herald returned from Whakatane, the Maoris were insolent and at times abusive; and no potatoes or pigs were offered.

Williams was told by the Mayor Island people that the Ngati Maru had been to Tauranga and had sacked Te Papa Pa. Te Rohu, the Chief of the Ngati maru, [sic] had first attacked Maungatapu Pa but that pa was too strong. He had then made a night attack on Te Papa. At the height of the fighting Koraurau's, [other accounts say Korourou] wife had plunged into the harbour with her infant son on her back. In the light of the blazing pa she was seen and shot at, her back being pierced by a heavy musket ball. Though badly wounded, she managed to reach the opposite shore near Whareroa, but the effort killed her. Twenty-five others managed to slip away in the darkness but the rest including Koraurau, fell before the muskets and patus of Te Rohu's bloodthirsty warriors. Otumoetai would have shared Te Papa's fate had not one of Te Rohu's wives persuaded him to spare it.

The scene which Williams and Mair looked upon when they landed at Te Papa equalled in horror those described in the Bible and elsewhere, in tales of the sacking of ancient cities. The Pa had been overwhelmed only a few days before; its 500 inhabitants had been annihilated. "In every direction lay the bodies of the dead. Some had been cut to pieces. Of others only the bones remained. To the horrors of the slaughter, had been added those of cannibalism. On many of the trees were to be seen the flesh of men, pigs and dogs all strung up together...Of the pa itself only the ashes of the houses and the blackened stumps of the palisade remained." As Mr Vennell remarked, "It is little wonder that Williams, after seeing such a spectacle, had no desire to linger at Tauranga a place which had proved of so little promise."¹⁶

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13. Tureti Stockman and Matiu Ellis submission to the planning tribunal, P 1600, Properties - Dive Crescent, Tauranga District Council
 14. O'Malley, "Te Papa Block: A History of Church Missionary Society and Crown Dealings, 1838-1867," A Report for the Crown Forestry Rental Trust, November 1996 (Wai 215 A29)
 15. Tata, Statement of evidence.
 16. Rev A.N. Brown as quoted in, Tauranga Historical Society Journal No. 40

Stockman and Ellis say:

Otamataha is a wahi [sic]tapu because it is a pa site. It was occupied right up to 1828 when Otamataha was attacked by Ngati Tamatera of Hauraki. The battle was fierce and many of our tupuna were slain. Ko Rōrou was the leader of the pa at the time. He was killed there and his blood was spilt. Our people fled from the pa and took refuge in other parts of Tauranga Moana. From that day to this that area has remained unoccupied by us and has been seen by us as a place of the most extreme tapu.¹⁷

Although the two accounts, over one hundred years apart, attribute the fighting to different Hauraki Iwi, they are essentially similar. The author understands that as a consequence of this battle, Ngati Tukairangi and Ngati Tapu fled Te Papa and relocated to the Matapihi and Whareroa areas. From an outsider's point of view, the situation of some hapu after the battle is unclear. Some, such as Brian Dickson in a submission to the district council, state that Ngati Tapu continued to live in the Otamataha area and at Matapihi.¹⁸ Tangata whenua may have a clearer idea, and oral evidence would be of assistance in clarifying this point.

According to O'Malley, evidence from the early phases of Missionary-Maori interaction, demonstrates that Otamataha is waahi tapu. He cites an instance where one chief expressed his concerns at Brown consenting to potatoes being planted on "sacred" land.¹⁹

In a submission for the Planning Tribunal, Enoka Ngatai, Tauranga Moana Maori Trust Board Chairman, said that Otamataha was waahi tapu for three reasons, including the 1828 battle. Ngatai said:

...Otamataha is wahi [sic]tapu because it is a place which is inhabited by our ancestors and carries their foot prints.

...Otamataha is wahi [sic]tapu because in the battles that occurred the blood of our ancestors and their enemies was spilt. It is said by our kaumatua that the land is still wet with blood. I say again, that includes not just the cemetery at the top of the promontory but the entire area including the application site.

...Otamataha is wahi [sic]tapu because two of our greatest ancestors Rawiri Puhirake and Hori Ngatai are buried there. [emphasis on Otamataha in original]²⁰

17. Stockman and Ellis, Submission to planning Tribunal, P 1600, Properties - Dive Crescent, Tauranga District Council

18. Brian Dickson, Ngai Te Rangi Iwi Incorporated society to Rod Cameron Civenco Construction, 8 May 1993, P 1600, Properties Dive Crescent,

19. O'Malley, p.8

20. Enoka Ngatai submission to the Planning Tribunal, P 1600, Properties Dive Crescent, Tauranga District Council

Although most of the evidence suggests that Otamataha was waahi tapu, not all people of Tauranga Moana agree. In submissions to the Tauranga District Council, representatives of the four Wai 580 hapu claimed the site was waahi tapu. However, Pirirakau kaumatua Tipi Faulkner said, in a submission for Civenco Construction, that if the site was waahi tapu the issue would have been raised when railways cut through Otamataha in the 1920s. Although the author did not uncover any evidence from the 1920s, Stockman and Ellis cite the following example:

During the roading excavations in the 1950's and realignment of Brown Street and Chapel Street in the 1980's, earthly remains of our ancestors who had fallen in that and other battles were unearthed by excavators. This was an indignity to our tupuna and to ourselves. We were forced to collect these remains and with proper ceremony reinter them at Te Tii urupa on Matapihi...This in our view is all the proof needed that this place is a waahi tapu of immense importance to our three hapu [Ngai Tamarawaho, Ngai Tukairangi, and Ngati Tapu] and indeed to the history of Tauranga Moana.²¹

Although he did not believe the area was waahi tapu, Mr Faulkner did support the claim of other hapu that the urupa was of historical value to Maori.²²

1.3 The Church Missionary Society Purchases

During the 1830s, some Maori sold the Te Papa Peninsula to the Church Missionary Society (CMS). The society was represented by Archdeacon Alfred Nesbit Brown. Brown established his mission on the northern tip of Te Papa. This section of the report is only a brief outline of the purchase. For a detailed account, readers should also consult Vincent O'Malley's report on the Te Papa purchase.

1.3.1 The 1838 Purchase

Evelyn Stokes says that for the CMS, Te Papa was strategically important. It could be easily accessed by sea, and it had a large Maori population because it was close to pa at Otumoetai and Maungatapu. Additionally, Te Papa was located between the Thames Valley and Rotorua districts.²³

In 1838, Brown purchased 30 acres from 17 sellers for a mission site. The land was approximately where the Church Missionary Society (CMS) had established a mission station during the 1820s.²⁴ An English translation of the deed says:

21. Stockman and Ellis

22. "Submission on behalf of Civenco Construction Ltd by Tipi Frederick Faulkner", Joint Hearings of Tauranga District Council and Bay of Plenty Regional Council, P 1600, Properties Dive Crescent, Tauranga District Council

23. Evelyn Stokes, *Te Raupatu Vol. 1* p.6.

24. Vincent O'Malley and Alan Ward, "Draft Historical Report on Tauranga Moana Lands," Crown Congress Joint Working Party, June 1993 pp.19-20

Know all men by this deed that we, Tare, Tamakaipi etc. rangatiras of Tauranga do let go and sell to the Rev. A N Brown ("Te Paraone") on behalf of the Church Missionary Society, and their heirs or assigns for ever, the lands belonging to our fathers and to us also.

This is the boundary: the beginning the Taatuakahawai, going on to Herekura, and thence to the Kauere, going on to the seaside (of the inlet) to the narrow where you can cross, the inlet of the sea on each side being the boundary of the Papa and also from thence to the sandbanks called Maruru and Aopo, and whatever may be found growing thereupon or deposited therein.²⁵

According to the purchase deed presented to the Land Claims Commission, the CMS paid the following for the land:

This is the payment which we have received Twenty Blankets, 10 spades, 10 Axes, 10 hoes, 10 Iron Pots [sic]. In witness thereof we have written our signs "hei tohu" of our having let go or agreed, to this selling on the 30th day of September 1838.²⁶

The Land Claims Commission estimated that this payment was equivalent to £24.²⁷

1.3.2 1839 Purchase

In 1839, Brown purchased a much larger block, "extending over the rest of the Te Papa peninsula as far as Pukehina", approximately 1000 acres.²⁸ Twenty-seven Maori signed the deed. They received:

One Calf, Forty adzes, sixty large Blankets, forty axes, forty hoes, Forty Shirts, Forty trousers, Twelve spades, One Hundred Pipes, Seventy Pounds of Tobacco, Twenty Four Scissors, Twenty four Razors, Twenty Four Plane irons, & One Hundred Fish hooks.²⁹

Under European law, the Te Papa purchase is the point where Otamataha was alienated. Included in the purchase was the urupa, what is now the Cliff Road reserves, and the Monmouth Redoubt.

1.3.3 Problems

Later, at the Land Commission hearing in 1844, Brown claimed that, "[t]he Mission have been in undisputed possession of this Tract since the purchase". Alan Ward and Vincent O'Malley, in their report for the Crown Joint Congress Working Party, argue that Archdeacon Brown did not have undisputed possession of Te Papa.³⁰ Brown's own journal reveals that payment was problematic. By early 1839,

25. H H Turton and F D Bell *Maori Deeds of Old Private Land Purchases in New Zealand*, Wellington, Government Printer 1882, pp.378-379.

26. Ibid

27. Edward Godfrey, Claim no. 444c, 29 August 1844, OLC 689-690, National Archives Wellington

28. O'Malley and Ward p.20

29. No. 444 D document No. 1, 2 July 1844, OLC 689-690, National Archives Wellington

30. O'Malley and Ward p.23

vendors were beginning to vent their frustration at not having received payment.³¹ When the deed was signed Brown noted that, "much dissatisfaction was expressed, and a small additional portion of Trade [sic] will probably have to be paid by us on a future occasion".³² In August, more names were added to the deed to satisfy "troublesome" claimants, and as late as 1848, Brown dealt with Tarawera claimants.³³

1.4 The Old Land Claims Commission

During the 1840s a commission was set up to investigate pre-1840 land purchases. This commission was known as the Land Claims Commission. The Land Claims Commission investigated the Te Papa purchases on 29 August 1844. This section of the report demonstrates that the commissioners ignored Maori concerns in favour of Archdeacon Brown's evidence.

The activities of the Land Claims Commission are well documented in other sources. In a submission for the Muriwhenua claim, David Armstrong argued for the Crown that the commission placed the most weight on Maori evidence. He says that:

No titles were to be recognised as valid except in cases where an investigation indicated that the land had been acquired from Maori on "equitable conditions" and on a scale not "prejudicial to the interests of the community". It was freely acknowledged that such an approach was likely to meet with stern opposition from the [Pakeha] claimants.

It is clear that the Commissioners were not expected to base their decisions merely on an examination of the deeds. Their instructions and the Act itself stressed that they were to be guided in their adjudications by "the real justice and good conscience of the case without regard to legal forms and solemnities", and their decisions were to be based on the "best evidence" available. As Gipps stated, when asked aspects of the Commissioners' instructions, they were required to establish "proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants". Gipps in his despatch to Hobson of November 1840, strongly implied that the validity of the pre-treaty transactions was determined with reference to the vendors themselves, and furthermore, he was clearly of an opinion that the procedures laid down would be significantly rigorous to allow proper determination to be to be arrived at.³⁴

Armstrong alleges that the Commissioners acknowledged hapu politics and were aware that there were often conflicting land claims. Most importantly, he also claims that:

31. Ibid p. 24

32. Brown, Journal, 30 March 1839, as quoted in Ward and O Malley p. 24

33. Ibid

34. David Armstrong, "The Land Claims Commission: Practice and Procedure, 1840-1856", Wai 45, Doc I4, p. 23

The evidence indicates quite clearly that the Commissioners were of the view that in order to for a claim to be deemed valid, "according to the rules and custom of the country and in a manner deemed valid by the inhabitants", the claimants [purchaser] version of the transaction required the support of the vendors [Maori]. The testimony of the vendors was clearly sufficient to override any written deed- no matter how grandiose, or clearly expressed, in English or Maori- as well as the word of any number of European witnesses.³⁵

Although this may generally be true of the commission as a whole, in the Te Papa case the testimony of some Maori was ignored in favour of the CMS. There are several examples of this in Commissioner Godfrey's report. However, it is impossible to ascertain the validity of Maori complaints without knowledge of how rangatira decided who was entitled to payment. These issues are discussed below.

1.4.1 1838 Purchase Investigation

At the hearing before Commissioner Godfrey, in August 1844, Maori questioned the nature of the purchase. Ward and O'Malley cite a number of issues. They note that Brown failed to notice that the Commissioners gave the deed the wrong date, 30 September 1838 instead of 30 October.

Another witness, Tare noted that although his mokopuna, Te Toahaere, was willing to give up his claim, he had not received a portion of the payment.³⁶ Tare told the Commissioner that:

The land described in the deed now shown to me was sold by me and others to Mr Brown for the mission several years ago- and we received the payment as stated in the deed. The names of the persons (Natives) attached to the deed had a principal right to sell the land- They all consented to the sale of the land and received the payment, Te Toahaere (my mokopuna) was absent at the time of the sale - he had a right to a small part of the land which we sold to Mr Browne [sic], I told Mr Browne [sic] that I had a right to act for Te Toahaere- but on distribution of the payment nothing remained to give to him.³⁷

Te Toahaere said that he received "no part of the payment", but at the hearing, he gave the land up to Brown.³⁸

1.4.2 1839 Purchase Investigation

Even more controversial were the circumstances surrounding the 1000 acre block which was purchased in 1839. According to the evidence, several Maori were excluded from the sale. One witness, Haharia, pointed out that he was entitled to a share of the payment as both his parents were dead. Haharia claimed that he was not

35. Ibid p.143

36. Ibid pp.20-21

37. Commissioner Godfrey, Report, 2 July 1944, OLC 1 689-690

38. Ibid.

present at the sale and had received no payment for the goods. He also believed that several others were in the same predicament.³⁹ Godfrey dismissed these claims. His report said:

Some natives have objected that they did not receive a payment for this Land [sic] but they appear to have been very young persons at the period of the sale and their profession of any immediate interest in it very questionable. The principals of the tribe (Reretuwariua and Ngapipi) having undertaken to divide the payment it is presumed that they did not omit satisfying everyone whom they considered a holder of any legislative right in the land.

And also taking into consideration that the [church missionary] society have been for five years in undisturbed possession and occupation of the land.⁴⁰

Ward and O'Malley criticise Godfrey's approach. Their report notes:

Godfrey's assertion, for example, that 'the principles [sic] of the tribe' would have ensured an orderly and correct distribution of payment ignores that possibility that there may have been others outside the immediate hapu with recognised rights in the area. Unless informed about such hearings by Europeans (who in all probability would only inform groups supportive of their claims) these Maori were unlikely to be aware of the Commissioner's proceedings. Thus the onus was clearly on the Commissioners to make a thorough and systematic investigation of customary Maori rights in respect of particular blocks before recommending that a Crown Grant be issued to the claimants.

Ward and O'Malley conclude that:

Godfrey's investigation of the CMS purchases at Tauranga was at best perfunctory and at worst papered over obvious inconsistencies in the evidence presented.⁴¹

O'Malley's Te Papa Report claims that Godfrey's decision was politically motivated because:

in the case of Te Papa, even when Maori witnesses did dispute the bona fides of the transaction and contradicted the evidence of Brown on crucial points their evidence was essentially ignored. It is difficult to escape the conclusion that Godfrey bent over backwards to ensure a favourable recommendation for the CMS with respect to the Te Papa purchases. This may have reflected the increasing pressure which Godfrey was coming under from the new Governor, Robert Fitzroy, who, highly sympathetic to the missionaries, had overturned several of the Commissioners' recommendations with respect to their claims and extended the areas to be granted to them.⁴²

39. Ibid

40. Ibid

41. O'Malley and Ward, p.23

42. O'Malley, p.43

O'Malley points out that, in the period after payment, Brown was confronted by a number of Maori, who claimed to have been entitled to a share of the payment and not to have received any proportion of the money. He says that two days later Brown had to deal with a party of Maori who claimed that they had not been paid.⁴³ O'Malley cites several instances during the six months after the purchase where Brown met with Maori opposition.⁴⁴ In 1842, one group fenced off 50 acres, claiming that they had received no payment.⁴⁵

In conclusion, it is fair to say that the Land Claims Commission based its decision on Brown's evidence and ignored Maori concerns. Brown claimed that the vendors would have ensured that all parties received payment, and he claimed undisputed possession of the property. It is difficult to ascertain the validity of opposition to Brown, as it may well have been that rangatira distributed payment to all those who they believed were legitimate owners. Certainly, it is unlikely that younger members of any iwi or hapu would have had much say in the payment distribution. However, it is impossible for this author to speculate on iwi decision making processes on the basis of available evidence. Therefore, it is difficult to say which version is more legitimate, Brown's or that of Maori who objected. Nevertheless, there was Maori opposition to the Church Missionary Society's claim, and this is an issue that should have been more thoroughly investigated. Furthermore, after the purchase there were several protests from Maori regarding payment, and as the next part of this report demonstrates, there were also protests from Maori after the Crown Grant was issued.

1.4.3 The Crown Grant

In 1852, the CMS received a Crown Grant of 1333 acres, an area which covered the whole of the Te Papa Peninsula, as far as Gate Pa.⁴⁶ Apparently a survey of the area had revealed that it was 1333 acres rather than the original 1030 acres claimed by the CMS.⁴⁷ Although the grant included all of the other land, the Church Missionary Society did not acquire the foreshore. The Commissioner's report recommended that the grant include all land except 100 feet from the high water mark.⁴⁸ This may have been because the Crown assumed that it had a common law title to the foreshore.⁴⁹ The Crown Grant specifically mentions all land except for a road, and one hundred links in the plan were reserved for public use forever.⁵⁰ Although it is not entirely clear, this 100 links may refer to the foreshore. What is clear, however, is that the foreshore was not explicitly part of the grant.

43. O'Malley, pp.21-22

44. Ibid pp.21-25

45. Ibid p.26

46. Stokes, *Te Raupatu...* vol. 1 p.52

47. O'Malley and Ward, p. 26

48. Commissioner Godfrey's Report, 29 August 1844, OLC 1 689-90, Repro 95, Church Mission Society, National Archives, Wellington

49. For further details of the Common Law title see Chapter 2

50. Crown Grant to Te Papa, O'Malley Fig 2, taken from H J Jenks, *Forgotten Men: The Survey of Tauranga Town and District 1864-1869*, Tauranga Historical Society, n.d.

1.4.4 Later Claims

Four years after the Land Commission hearing, a party from Tarawera staked their claim to Te Papa, and said that they too had missed out on payment.⁵¹ Twenty-two years after Godfrey's investigation, Maori still complained about the purchase. In 1866, Te Hiahia, Ngamanu and three others wrote to Frederick Whitaker, requesting that Whitaker:

make known to us the decision regarding our land which was purchased clandestinely by Archdeacon Brown formerly we were not present at the sale it was clandestinely sold...and we ask you now to give up this our land Te Papa to us. In relation to the property given to Archd [sic] Brown it can be paid for by his own land at Hinekina. And the land that belongs to us let it be given back to us because there are no good grounds on which to base the sale of our lands by others, but let us have the arrangement respecting our own lands.⁵²

The evidence of ongoing protest suggests that it is unlikely that all those who believed that they had claims to Te Papa agreed to its sale. This, and the fact that other concerns were expressed, casts serious doubts on the legitimacy of the purchase.

The Te Papa purchase also raises other questions. The "sale" to the Church Missionary Society may well have been intended to include Brown in local hapu groups. Traditional concepts of land tenure have been the subject of considerable scholarly attention. Judge E T Durie, in the 1996 F W Guest Memorial Lecture, points out that Maori often allocated land rights to include missionaries and other Pakeha within the hapu. Judge Durie says:

...[I]and allocations to these persons should not be seen as the sale of land but the acquisition of people. A rangatira who allocated land to an individual did not augment the receiver but the community. Thus some settlers complained of virtually being bled to death. Others fitted into the Maori law. Those who stored wealth for themselves were subjected to muru or plunder, for it was central to the Maori way that wealth should not be individually aggregated but distributed through the community.⁵³

Durie also demonstrates that property rights tended to only have been use rights, and that ownership always remained with the people.⁵⁴ Ward and O'Malley note that there were only seven other "old land claims" in the Tauranga District. There were three "half caste" claims, and four other claims. Only one of these claims was upheld, the rest were either dismissed because of Maori opposition or the fact that

51. O'Malley p.27

52. Te Hiahia, Ngamanu and others to Frederick Whitaker, 25 March 1866, DOSILI Hamilton File 1/3 as reproduced in Waitangi Tribunal, *Raupatu Document Bank*, vol 124 p.47634

53. Judge E T Durie, F W Guest Memorial Lecture 1996 p. 8

54. Ibid p. 9

claimants did not pursue their claims before the Land Claims Commission.⁵⁵ It seems likely, given the fact that Maori did not have any contact with European officialdom until 1840, (with the signing of the Treaty of Waitangi), and that the missionaries had only been at Te Papa since 1835, that traditional concepts of ownership would have been the one that sellers applied.⁵⁶ O'Malley argues that the sale to the Church Missionary Society should be seen as consistent with its status as *waahi tapu*, and he also suggests that the selection of the Otamataha Pa as the cemetery, "was more than coincidental".⁵⁷ O'Malley's report demonstrates that Maori believed they had property rights in Te Papa long after the Church Missionary Society's purchase. He argues that there are numerous instances of Maori asserting use rights. For example, although Brown objected to Maori cultivations and fishing without his permission, he was willing to let Maori establish a Pa on CMS land. Furthermore, O'Malley's report says that Maori asserted their property rights by occupying a piece of land in front of the mission station and continuing to collect shellfish from the harbour.⁵⁸ He concludes that :

[c]learly many Tauranga Maori believed they continued to maintain some kind of rights over or interests in Te Papa long after the block had been sold to the CMS, a belief which Brown had, whether intentionally or not, helped to foster.⁵⁹

O'Malley believes that the "sale" can be viewed as an attempt by Maori to establish a "reciprocal relationship" with Brown, who, in exchange for land to live on would offer religion and education.⁶⁰ However, regardless of the Missionaries' actions or Maori concepts of land tenure, under European law, the Te Papa purchase was adjudged to be an absolute alienation.

1.5 The War and Crown Purchase

In 1861, the CMS organised a Land Committee to manage its land interests. In 1864, a member of that Committee, Reverend Burrows, singlehandedly leased Te Papa to the Crown for £200 per year. During the last phases of the Waikato War, and throughout the Bush Campaign that followed, the military set up camp along the cliff behind the Mission Cemetery. By 1865, Otamataha was transformed into a military camp, including Monmouth Redoubt, a specific part of the Wai 580 claim. Initially, the land was occupied by Imperial Troops, but these troops were later replaced by the first Waikato regiment.⁶¹ Other groups also used Otamataha lands. The beach became an important waka landing place for Pakeha. Stokes notes that

55. Ward and O'Malley p.28-31

56. Stokes, *Te Raupatu*. Vol 1, p. 7

57. O'Malley, pp.8-9

58. O'Malley, p.28

59. *Ibid*, p.29

60. *Ibid*, p.96

61. Stokes, *Te Raupatu*, p.47

during this period, traders deposited their goods below Monmouth Redoubt at low tide.⁶²

When the Crown confiscated the entire Tauranga District under the Tauranga District Lands Act 1867, the Church Missionary Society's land was included in the confiscation boundary.⁶³ However, unlike Maori land owners, the CMS land was not confiscated. The CMS owned Te Papa until 1867 when it was purchased by the Crown. O'Malley argues that the decision to sell was influenced by a belief that the Crown would confiscate the Church Missionary Society's land to obtain Te Papa.⁶⁴ The CMS retained every fifth acre, resulting "in haphazard scattering of CMS reserves over the Peninsula".⁶⁵ According to Gifford and Williams, most of these lots were later sold.⁶⁶ After the war, military settlers were offered one acre sections in the new town and a farm section.⁶⁷ However, this was later changed to 3/4 acre sections.⁶⁸ By contrast, a few Maori were granted reserves in the vicinity of Otamataha. The majority of grants were around 1 rood, or a quarter acre, an area less than the 3/4 acre sections granted to military settlers.⁶⁹ None of these reserves were within the geographical area covered by the Wai 580 claim.

15.1 Pakeha Settlement

Following the Crown's acquisition of Te Papa, Pakeha settlers established themselves in Tauranga Town. Evelyn Stokes says of early settlement:

By the early 1870's, the military camp of redoubts, tents and temporary raupo and timber huts at Te Papa had developed into the nucleus of a small country town called Tauranga. The old name survived only in land appellations as Parish of Te Papa. The beach frontage, now called the Strand, was the main street and contained, "two large and commodious hotels" and several shops. The old mission school house had been converted into government offices- Post and Telegraph, Public Works and Resident Magistrate's Court. A Mechanics Institute consisting of three rooms, a public reading, room library and chess room, was organised during 1872. The barracks in Monmouth Redoubt were used as a hospital and a government store. There were two places of worship, the chapel at Archdeacon Brown's Mission station and a Roman Catholic chapel in Cameron Road. A School had been built on a reserve of 1.6 hectares near the town. Many of the military settlers had built wooden bungalows on their town sections and most of the Te Papa peninsula between Tauranga and Greerton had been fenced in and grassed.⁷⁰

62. Ibid, p.50

63. See schedule: Tauranga District Lands Act 1867,

64. O'Malley, p.69

65. Stokes, *Te Raupatu* p.53

66. Gifford and Williams, *A Centennial History of Tauranga*, pp. 253-261. (Reference from Stokes.)

67. Stokes, *Te Raupatu Vol 1* p.46

68. Stokes *Te Raupatu Vol 1* p.54

69. See Evelyn Stokes *Te Raupatu Vol. 1* p. 54. See also, "Mr Clarke's schedule No. 2, List of Crown Grants", DOSLI Auckland Files, Reproduced in RDB pp.49091

70. Stokes, *Te Raupatu, Vol 1*, p 181

By 1878, Tauranga's Pakeha population had grown to 793, comprising 425 males and 368 females.⁷¹ In 1882, Tauranga was large enough to be declared a borough.⁷²

1.5.2 Allotments in the Wai 580 Claim

The allotments in the Wai 580 claim, 247, 296, 297, and 298, were included in both the Te Papa purchase and the transfer of land to the Crown. After the purchase these allotments remained the centre of the military camp. A plan of these sections, dated 1878, shows the Monmouth Redoubt and military stores on section 247, an armed constabulary mess and gymnasium on allotment 296, and stables on allotment 297.⁷³ Later, these allotments became council endowments.

1.6 Summary

Some conclusions can be made about the traditional and nineteenth-century history of Otamataha. They can be summarised as:

- Otamataha was the landing place of the Takitimu canoe, an urupa, and its harbour was a source of kaimoana. Therefore, Otamataha is culturally and historically significant to Maori;
- because many tipuna were killed in a battle in 1828, Otamataha is also waahi tapu;
- the Te Papa Peninsula was purchased during the 1830s by the CMS, and under European law this purchase alienated Otamataha;
- the Land Claims Commission favoured A N Brown's evidence, despite complaints from some Maori;
- there were further complaints to the government after the Crown grant was issued;
- Maori had traditional ownership rights to the foreshore, which were not part of the Te Papa Purchase; possibly because Godfrey assumed that the Crown had title to the foreshore;
- the Crown purchase of Te Papa in 1867 aided Pakeha settlement;

71. Ibid, p. 185

72. Violet Macmillan, "Some Highlights of the Struggling Years Till 1928", *Journal of the Tauranga Historical Society*, No. 17, 1963, p.8

73. Plan of Tauranga Town Section 1, surveyed by A C Turner 1878, M 1 5/15423, National Archives, Wellington

- None of the allotments in the Wai 580 claim area were set aside as Maori Reserves.

CHAPTER 2

The Twentieth Century: Development of the Waterfront

2.1 Introduction

This Chapter discusses significant developments during the twentieth century. These developments include, the East Coast Main Trunk Railway, reclamation, the transfer of harbour board land to the district council and discussions over the waterfront's future. The issues arising from these developments are discussed at the end of this chapter. As most subsequent developments were of a title nature only, they are not discussed in this chapter, instead they are covered in Appendix One.

During the twentieth century, there were some major changes to Otamataha's geography. This chapter examines these changes. Because of the different types of land involved, this chapter is organised thematically rather than chronologically. Most of the land is now owned by the Tauranga District Council or the Crown, but the New Zealand Mission Trust Board retains 51 Dive Crescent, a property beside the urupa.⁷³ In 1907, the Tauranga Borough Council acquired the Cliff Road endowments (allotments 247, 296, 297, and 298) and developed them as recreation reserves and botanical gardens. Monmouth Redoubt is administered as part of this reserve. During the 1910s and 1920s, when the Crown and local bodies reshaped Otamataha's sea frontage to form the East Coast Main Trunk Railway, the Public Works Department removed earth from and placed it over the harbour bed, to form the railway line. This reclamation became allotment 396, section 1 Tauranga Town. Allotment 396 was subdivided into 18 smaller allotments and leased by the harbour board to small businesses. During the 1920s the Tauranga Harbour Board, in conjunction with the Public Works Department, built a wharf on land reclaimed from the harbour bed. There is no legal title to this reclamation, and therefore it is not shown in maps or survey plans of the area. It is located on the eastern side of Dive Crescent.

Throughout the twentieth century, Otamataha was affected by various pieces of legislation, and this chapter examines these Acts. It will be demonstrated that

73. The New Zealand Mission Trust Board is the modern equivalent of the CMS

legislation allowed resources such as the foreshore to be vested in "private" hands without any consultation with tangata whenua. In 1915, under the provisions of the Tauranga Foreshore and Endowment Act, the Crown supposedly relinquished land it owned under English Common Law. However, there is evidence to suggest that the foundations of the Crown's title were rather shaky. Another significant Act was the Local Government Act 1974. In 1989, under the provisions of that Act, the Crown vested reclaimed land owned by the harbour board in the Tauranga District Council.

Neither the Tauranga Foreshore Vesting and Endowment Act or the Local Government Act required developers or land owners to consult with Maori. However, the Resource Management Act 1991, made it compulsory to consult Maori before going ahead with any development. Consequently, during the 1990s, Maori were consulted when private developers and the district council proposed to develop Otamataha for tourism. This report argues that despite some consultation, developers failed to fully grasp Otamataha's historical and cultural significance.

2.2 The East Coast Main Trunk Railway: Reclamation of the Cliff Road Properties

Despite the growth of Pakeha settlement from the late nineteenth century, some public amenities developed rather slowly. Among these amenities was the East Coast Main Trunk Railway. Although residents had discussed the railroad issue as far back as the 1870s, the Public Works Department did not start work on the Waihi to Te Puke section of the East Coast Main Trunk Railway until 1909, when it conducted a trial survey of the route between Tauranga and Waihi.⁷⁴ Construction began on the section between Mount Maunganui and Te Puke in 1910 and Railways completed the entire line in 1928.⁷⁵

The new railway line passed along the Te Papa waterfront.⁷⁶ It cut through the cemetery, the borough reserves on Cliff Road, and along the sea frontage.⁷⁷ The railway is situated on reclaimed land that was taken from Monmouth Redoubt and the Cliff Road Reserves. The Crown and the Tauranga Borough Council struck a deal that allowed the Public Works Department to build the railway without compensation. On 24 September 1917, the council resolved:

74. A deputation visited Wellington in the 1870's to lobby the minister of works to extend the railway

75. For further information on the railway see, Evelyn Stokes *A History of Tauranga County*, Dunmore Press, Palmerston North, 1980, pp.224-225

76. This was not without some debate, apparently according to a letter from the Engineer in Chief of the Public Works Department to the Resident Engineer on 22 September 1916, Mr Adams the Chairman of the Tauranga Chamber of Commerce and a Major Ward met with the Minister of Public Works. The outcome of this meeting was to ask for a report to determine whether the beach front route or an inland route would be preferable. Reference: Engineer in Chief to Resident Engineer, Tauranga 15 December 1916, W-TG 11/35/1, National Archives, Wellington

77. "Schedule Defining the middle line of a further portion of the East Coast Main Trunk Railway- namely, Wairoa Section" W-TG 1 11/3, National Archives, Wellington

[t]hat the Tauranga Borough Council consents to the Government taking portions of lots 247, 296, 297, and 298 Section 1 Town of Tauranga and removing earth therefrom as shown on plan submitted by the Public Works Department a little more or less for the purpose of a railway and low level road and that no claim for compensation shall be made.⁷⁸

There was some concern about the extent that the railway would eat into this endowment land. When the Engineer in Chief allowed reclamation work to begin he advised the Resident Engineer to be careful when cutting through the bank. Workers were advised to cut the slopes of the bank asymmetrically so as not to disrupt the site.⁷⁹

As part of the construction process, the Public Works Department also purchased a portion of the Church Missionary Society's land. In 1922, the Chief Engineer described the CMS land required by the Public Works Department as:

Regarding Lot 1 of Section 1, Town of Tauranga, (owned by the New Zealand Mission Trust Board) I have to point out that in accordance with your predecessor's memorandum dated 13th March, 1920, 11/2, the area required at that time was estimated to be 1 acre 1 rood 5 perches. It was later agreed with the Board to take the balance of the section situated between the aforementioned area and the Cliff Road comprising approximately 1/4 acre and compensation amounting to £1000/0/0 was paid to the Board with respect of 2 acres required. The total area shown on the land plans is 1 acre 1 rood 37 perches, and the plan should be amended to include a further portion of the section to make up the area of 2 acres.⁸⁰

The eventual purchase was less than the initial schedule, and consequently the CMS bought back some of the land. However, a further 1 acre 0 roods 2.9 perches were acquired from the Mission Cemetery in February 1923 for public works purposes.⁸¹

2.3 The Tauranga Foreshore Vesting and Endowment Act 1915

Legislative authority for public and local bodies to acquire the foreshore dates back to the Public Reserves Act 1854. Section 2 of the Act gave the Governor the authority to grant reclaimed land to provincial governments. In 1878, section 147 of the Harbours Act stipulated that grants to the foreshore could only be made by an Act of Parliament.⁸² It was under this legal framework that, in 1913, the Tauranga Harbour Board initiated action that resulted in the board obtaining title to the

78. Acting Town Clerk to Under Secretary of the Public Works Department, 8 November 1917, Tauranga Borough Council Files

79. Engineer in Chief to Resident Engineer, Tauranga, 18 July 1917, W-TG 11/35/1, National Archives Wellington

80. Engineer in Chief to Land Purchase Officer, 12 May 1922, W-TG 12/15, vol 1, National Archives, Wellington

81. *New Zealand Gazette*, 22 February 1923

82. Byrnes, p.23

foreshore.⁸³ Before 1915, the foreshore was supposedly vested in the Crown. In 1915, Parliament passed the Tauranga Foreshore Vesting and Endowment Act. The first schedule of the Act describes the area vested in the Tauranga Harbour Board as:

All the foreshore of the Tauranga Harbour commencing at the north head, Katikati entrance, and thence following the mainland to the headland at Mount Maunganui opposite the Beacon Rock at the Tauranga entrance to the harbour...⁸⁴

Ultimately, the Crown reacquired the foreshore. The Chairman of the Harbour Board, George Vesey Stewart, suggested the following provision be included in the Act:

As our object however is to advance, and not by any means to retard progress, it has occurred to us, that notwithstanding any intents proposed by the Act to be vested in this Board, [sic] power should be given to Government to resume possession of any portion of the foreshore that may be considered necessary in the public interests.⁸⁵

Section 3 vested all of the foreshore in the harbour board with right of resumption by the Crown. It said:

On the passing of this Act the whole of the foreshore of the Tauranga Harbour as described in the First Schedule hereto shall vest in the Tauranga Harbour Board, subject to right of resumption by the Crown hereinafter mentioned.⁸⁶

Section 6 of the Act allowed the Governor to issue Crown grants or certificates of title to the foreshore, subject to a right of resumption by the Crown for public works. Compensation was only to be paid for improvements to the property, not for the land itself.⁸⁷ In 1991, these areas of foreshore vested in Harbour Boards were vested in the Crown by virtue of s 5 of the Foreshore and Seabed Endowment Revesting Act.⁸⁸

2.4 The Harbour Bed Reclamation

This section of the report discusses reclaimed land dredged from the harbour. To prevent confusion with land reclaimed from the Cliff Road endowments for the railway line, the author will call this public work the harbour bed reclamation. The

83. Secretary, Tauranga Harbour Board to George Allport, Marine Department, 10 May 1913, M 1 4/1532, National Archives, Wellington

84. Tauranga Foreshore Vesting and Endowment Act 1915, First Schedule

85. George Vesey Stewart, Chairman of Tauranga Harbour Board to Minister of Marine, M 1 4/1532, National Archives, Wellington.

86. Tauranga Foreshore Vesting and Endowment Act 1915, s 3

87. Ibid s 6

88. See Boast, "The Foreshore" Rangahaua Whanui National Theme Q, First Release, November 1996, p.47

Harbour Board and Public Works Department carried out the harbour bed reclamation in conjunction with the construction of a wharf, commonly known as the Railway Wharf (located approximately opposite Monmouth Redoubt). This gave the board land on the western side of Dive Crescent later known as allotment 396, section 1, Tauranga Town. The Public Works Department reclaimed the harbour bed, but the board was charged for all works outside of the railway bank, including "sheds, approach roads, extra length of any necessary culverts, extra stone pitching as well as the actual wharf."⁸⁹ The harbour board was the driving force behind the reclamation. In 1914, the Tauranga Harbour Board approached the Public Works Department to discuss the following matters:

- (1) To determine what is necessary and the best way to carry out the dredging at the Narrows, and the disposal of the silt
- (2a) In order to facilitate traffic at the wharves to provide a strip of reclaimed land outside the Railway Land, to act as a quay at which light draught vessels may discharge and load and as a means of communication along the waterfront; and
- (2b) To make due provision for Railway Sidings to connect the wharves with the Railway system; also
- (3) To try and arrange for the Public Works Department to carry out such work in conjunction with the proposed railway construction; and;
- (4) That this Board contribute such sums from its funds as may be agreed upon.⁹⁰

The reclamation, located between the railway line and the wharf, was the liability of the harbour board who paid for the reclamation.⁹¹

Initially, the harbour board planned to build a wharf on the Strand. However, after public opposition claiming that the wharf would spoil the view, it was built in front of Monmouth Redoubt.⁹² The District Engineer of the Public Works Department supported the move, claiming:

In my opinion the wharves should be placed to the North of the Monmouth Redoubt, as by doing so the Department saves considerable filling, ballasting and road formation, besides a shorter distance to shunt all goods from the station to the wharf.⁹³

The wharf was built in 1925. In 1989, an Order in Council vested the wharf in the Tauranga District Council.

89. District Engineer to Engineer in Chief, 19 October 1921, W-TG 1 11/35-1, National Archives, Wellington

90. Tauranga Harbour Board, "Resolution Unanimously Adopted at an Ordinary Meeting held 24 November 1914", M 13/6/32, National Archives, Wellington

91. District Engineer to Engineer in Chief, 23 June 1924, W-TG 11/35/1-, National Archives, Wellington.

92. District Engineer to Engineer in Chief, Public Works Department, 17 June 1920, W-TG 11/35-1 National Archives, Wellington

93. District Engineer to Engineer in Chief, 16 September 1921, W-TG 1 11/35-1, National Archives, Wellington

Part of the harbour bed reclamation included the construction of a road, now known as Dive Crescent. For vehicle access between the northern end of the Strand and the Tauranga Railway Station near Sulphur Point, the borough council asked the Government to construct a low level road. The road was to be built in exchange for the council giving part of the Cliff Road endowments for the railway line.

In 1916, the Engineer in Chief of the Public Works Department suggested that the road be formed alongside the railway siding, "using the material in the formation of the banks across the adjacent estuary".⁹⁴ The road, Dive Crescent, passed through both the urupa (owned by the New Zealand Mission Trust) and the railway reserve. However, the Public Works Department suggested that the road level be raised to the level of the railway. This road was constructed from material dredged from the Harbour. The Public Works Department built the road, but it was paid for by the harbour board, and raised to the same level as the railway siding.⁹⁵

Progress on the reclamation was hampered during the First World War, because many Public Works Department employees joined the expeditionary forces. Additionally, the department was occupied with work for the Defence Department.⁹⁶ Another problem was the lack of a suitable dredge. The Tauranga Harbour Board had planned to dredge a channel in the harbour, but the available dredge was too small.⁹⁷ The reclamation appears to have started again during the 1920s. In 1922, surveyors drew up a plan showing reclamation behind the railway wharf. On 14 August 1922, the Secretary of the Harbour Board told the Engineer in Chief and Under Secretary of Public Works that; "[t]he Harbour Board wish your Department to undertake the dredging and swinging basin in conjunction with the building of the wharf".⁹⁸

The Crown vested Dive Crescent in the borough council around 1926, but it was not proclaimed a road until 1928.⁹⁹ Initially there were some problems with title. In May 1930, the Auckland District Land Registrar wrote to Sharpe, Tudhope and Wilson, the borough council's lawyers. He pointed out the necessity for the Council to obtain a proper title and that as reclaimed foreshore the land remained within the harbour board's jurisdiction. The registrar argued:

that there is no proof yet adduced how Dive Crescent acquired the status of a legal public road. The fact of it being described as a road, you may say, indicates that it is, but as far as I am concerned it will have to be established either by dedication by the Harbour Board, if dedication is within its power, or by proclamation.

94. Engineer in Chief to Resident Engineer, 16 March, 1916, W TG 1 11/13, National Archives, Wellington

95. District Engineer to Permanent Head Public Works Department, W-TG 1 11/35/1 vol. 3

96. Ibid

97. Secretary Marine Department to Secretary, Tauranga Harbour Board, 24 October 1916, M 1 3/6/32 pt 1, National Archives, Wellington

98. Secretary, Tauranga Harbour Board to Engineer in Chief and Under Secretary, 14 August 1922, W-TG 1/11/35-1, National Archives, Wellington

99. *New Zealand Gazette* August 1928, p.2425

I gather both from your present letter and prior correspondence that the land was reclaimed by the Harbour Board, and I am afraid that the title will not vest simply by virtue of the Harbours Act, but it is quite possible it forms part of the land in the first schedule to the Acts of 1915, no. 16 (local and personal), and if it does, no doubt a title could be obtained on deposit of a proper plan and on payment of the necessary fees. Note- It seems to me your proper procedure is to arrange for the issue of a warrant title provided of course that this particular land is within the first schedule of the Acts of 1915, No. 16 quoted herein.

Further, the very fact of the Governor General in Council issuing the Order in Council declaring that the control of a particular road shall be under the control of the Tauranga Borough Council, I submit, is an indication that the Crown did not consider this is a street within the Borough boundary.¹⁰⁰

2.4.1 Ownership Of The Reclamation

The reclamation was controversial. Both the borough council, and the harbour board claimed to own a small strip of land next to the wharf. In 1925, the marine secretary told the town clerk that there was no waterfront land other than the railway and Dive Crescent and said that:

on the subject of the proposal to hand over to the Tauranga Harbour Board a piece of land in the vicinity of Monmouth Redoubt. I am now directed to state that the matter has been carefully investigated by the Lands Department, and it is found that a portion lies within the boundaries of a Railway Reserve and the balance is included in a public road.¹⁰¹

This observation excluded a strip of land on the eastern side of Dive Crescent. In 1928, the Public Works Department claimed that this triangular piece of land was inshore from the original high water mark and that its reclamation had not been carried out for the board, nor was it part of the road.¹⁰² However, the Crown Law Office attributed ownership to the harbour board. Their opinion was that, "land vested in the Harbour Board interposes between the sea and the public road proposed to be vested in the Borough Council as a street at every point where the latter approaches the shore".¹⁰³ In other words, any reclamation on the eastern side of Dive Crescent belonged to the harbour board. In 1929, the Secretary of the Tauranga Harbour Board supported this opinion by pointing out that the board had paid for the reclamation, and that the landing strip replaced another that had previously been on the foreshore near Mc Lean St. However, the borough council claimed that land east

100. District Land Registrar to Sharp, Tudhope and Wilson, ABKK W4357 35/369, National Archives Head Office, Wellington

101. Secretary Marine Department to Town Clerk, M 5/1532, National Archives, Wellington

102. Engineer in Chief to District Engineer, 23 May 1928, W- TG 1 11/35-1, National Archives, Wellington

103. Crown Solicitor to Under Secretary of Public Works, 21 July 1928, M 1 5/1532, National Archives Wellington

of Dive Crescent was part of Dive Crescent and under their control.¹⁰⁴ The Public Works Department supported the harbour board's claim, deciding in 1930 that, as the harbour board had paid for the reclamation the board owned the land. The District Engineer told the Permanent Head of the Public Works Department that:

the original proposal was for this Department to form a low level road just outside of the rail reserve. Later, when the Harbour Board wanted some reclamation done, it was decided that the Harbour Board would pay for the reclamation, and give the road at present known as Dive's Crescent in place of the low level road - the area to be filled in to the height of the railway formation.

I consider that the Harbour Board is entitled to the land in question as they paid for the cost of reclamation.¹⁰⁵

Apparently, the issue was resolved when the Minister of Public Works informed the harbour board that they had title to the land because the board had paid for the strip of reclamation.¹⁰⁶

During the 1990s, the legality of the reclamation east of Dive Crescent was again questioned when the district council began investigating proposals for waterfront development. The situation was complicated by the fact that the original survey plans could not be found. Apparently, in spite of having a gazette notice, without the missing plan there was no proof of the harbour board's ownership. In 1991, Alister Christie for Sharpe Tudhope, the council's lawyers, claimed that there were three possible scenarios:

- 1) It is an illegal reclamation retaining the status of the land underneath namely foreshore and seabed. If this argument were correct then it would be owned partly by the Regional Council and partly by the Crown.
- 2) The reclamation has been legalised and was vested in the Harbour Board and therefore it now belongs to the Council. The problem with this option is that we cannot find any evidence of any authority being given for the reclamation.
- 3) The reclamation is an integral part of the Tauranga Wharf and comes within the definition of wharf under the Harbours Act 1950 and therefore pursuant to the reorganisation order is now vested in the Tauranga District Council.

It is our opinion that the third option should be adopted to enable the council to assume ownership and control and so that it does not simply become a wasteland.¹⁰⁷

104. Secretary, Harbour Board to Minister of Public Works, 22 April 1929, W-TG 1/11/35-1, National Archives Wellington
105. District Engineer to Permanent Head, 17 July 1930, W-TG 11/35/1, National Archives, Wellington.
106. Minister of Public Works to Secretary Tauranga Harbour Board, undated (probably November 1929) W-TG 11/35/1, National Archives, Wellington
107. Alasdair Christie, for Sharp Tudhope to The Director Corporate Services, 13 September 1991, P 1100-19-8 Tauranga District Council

Christie qualified this argument by saying that because the land supported the wharf and its structures, the land was actually part of the wharf.¹⁰⁸

However, the Department of Conservation argued that it was an illegal reclamation. Therefore, the land was re-vested in the Crown by virtue of the Foreshore and Seabed Endowment Revesting Act 1991.¹⁰⁹ The department also noted that although the reclamation was Crown land, the Foreshore and Seabed Endowment Revesting Act made no provision for the administration of the land.¹¹⁰ The question was referred to the Department of Survey and Land Information to determine. In 1994, the Tauranga District Council conceded that the land east of Dive Crescent did not have a proper legal title as no vesting had occurred.¹¹¹ The council intended to obtain title to this piece of land and based its claim on the fact that other former Harbour Board land (that was not vested in the Port Company or the Regional Council) was vested in the District Council. Alasdair Christie for Sharpe Tudhope argued that:

I would contend that the beneficial owner of the land is the Tauranga District Council by virtue of the intention of the reclamation, occupation by Harbour Board and subsequent effect of [local government] reorganisation scheme.¹¹²

Christie also argued that an Order in Council dated 7 January 1925, legitimised the reclamation and that the land was no longer foreshore or seabed.¹¹³ The district council appear to have been negotiating with the Crown to legalise the title and assume ownership under section 355 of the Resource Management Act.¹¹⁴ The Tauranga District Council is still in the process of negotiations for this piece of land.¹¹⁵

The question of the ownership of the reclamation has implications for the Wai 580 claim. As this report will later demonstrate, the foundations of Crown title to the foreshore and seabed rest on the assumption that the Crown is the Common Law owner of the foreshore and seabed. However, it may well be that Maori customary title still exists. This issue needs to be taken into consideration when determining title to the foreshore and seabed and consequently, this piece of reclaimed land. At no point did any of the local bodies who claimed to own the reclamation, or the Crown, discuss this matter with the Wai 580 claimants.

108. Ibid

109. The Act does not apply to reclaimed land with a legalised title

110. Grant Bridgewater for Regional Conservator to Sharp Tudhope, Barristers and Solicitors, 22 May 1992, Planning Dive Cres, P1600 S1-2, Tauranga District Council

111. Sharp Tudhope to Property Officer, No. P1600-19-3, Tauranga District Council

112. Ibid

113. Ibid

114. Ibid

115. As per telephone conversation with John Budden, Senior Property Officer, Tauranga District Council, 21 January 1997

2.5 Land Transferred to The District Council

(Harbour Board Land West of Dive Crescent and Allotment 416)

This section of the report discusses land which the Tauranga District Council acquired when the harbour was restructured as a port company. Most of the land is reclaimed land on both sides of Dive Crescent. When Dive Crescent was constructed, the Tauranga Harbour Board also reclaimed land on the western side of the road. The legal description of this land is Allotment 396, Section 1, Town of Tauranga. Section 396 consists of 18 smaller lots. In 1931, Allotment 396 was vested in the harbour board, a total area of "one acre one rood thirteen perches and eight tenths of a perch".¹¹⁶ A certificate of title, numbered 622/260 was issued to the board subject to the provisions of section 6 of the Tauranga Foreshore Vesting and Endowment Act 1915, which allowed the Crown to resume ownership at any time for public works associated with the development of wharf facilities.¹¹⁷ The harbour board, (and later the district council), leased most of these properties to small businesses and community groups. In 1990, these properties were transferred to the Tauranga District Council. The council wish to develop this whole area for shopping and tourism.

2.5.1 The Army Drill Hall

The Defence Department built an army drill hall, a mess, and an office block on allotments 14 to 18. In 1940, the Defence Department took three allotments by proclamation (14,15, and 16) and in 1942, the harbour board donated a further two lots (17 and 18) to the department for patriotic purposes.¹¹⁸ According to a file note from the property officer at the railways department, the defence department exchanged the gifted land for a former rifle range at Sulphur Point.¹¹⁹ The drill hall was built in 1918, the mess in 1925, and the office block in 1970.¹²⁰ Additionally, the defence department leased other land near the Drill Hall from the railways department.¹²¹ The Crown owned allotments 14 to 18 until 1982, when they were declared Crown land pursuant to section 35 of the Public Works Act 1928, because they were no longer required for defence purposes.¹²² The Ministry of Works sold the land back to the Bay of Plenty Harbour Board, because the board were the original owners. Additionally, the harbour board also accepted a transfer of railway leased land, comprising 89 square metres at a rental of \$179.00 per annum.¹²³ These allotments, along with the rest of the land on the western side of Dive Crescent, were

116. Certificate of Title 622/260, South Auckland District Land Registry

117. Ibid

118. Memorandum, Secretary to General Manager, Bay of Plenty Harbour Board, 3 November 1981, Harbour Board File 14/52, Tauranga District Council

119. Property Officer, Harbour Board, 20 August 1981, 14/52, Bay of Plenty Harbour Board, held at Tauranga District Council

120. District Commissioner of Works to Tauranga City Council, Dive Crescent, 20/3/- Tauranga District Council

121. Land Officer, Railways Department to Secretary Railways Department, 25 August 1953, Harbour Board 14/52 held at Tauranga District Council

122. *New Zealand Gazette*, 21 January 1982, p. 177

123. Commissioner of Crown Lands to Secretary Bay of Plenty Harbour Board, 1 December 1981, Dive Crescent, P 14152, Tauranga City Council

transferred to the district council in 1989. Since the council acquired the property, it has, among other things, been used for a foodbank, panelbeaters, and a market.¹²⁴

In 1990, the conversion of harbour boards into port companies led to the Bay of Plenty Harbour Board's land being vested in the Tauranga District Council. Consequently, the council inherited all the harbour board's former properties in the Dive Crescent area. The lands changed hands by way of sections 37ZZT and 37ZZY of the Local Government Act 1974. Lots 1 to 8 changed hands on 14 August 1990. The Certificates of Title for Lots 14 to 18 do not show this transfer. This may be due to section 37ZZY which says:

(1) No Registrar of Deeds or District Land Registrar or any other person charged with the keeping of any books or registers shall be obliged solely by reason of any Order in Council giving effect to a reorganisation scheme to change the name of the transferor to that of the transferee in those books or registers or in any document.¹²⁵

The Council also purchased land from Heatons Transport, consolidating their interests in the Dive Crescent area.

2.5.2 Allotment 416

Unlike other land on the eastern side of Dive Crescent, one piece of reclaimed land associated with the Railway Wharf does have a title. This land is Allotment 416 section 1, Town of Tauranga. The land is located at the southern end of Dive Crescent beside the Railway Wharf. On 20 February 1969, the Tauranga Harbour Board was seized of an estate in fee simple. The title was "pursuant to Section 3 of the Tauranga Foreshore Vesting and Endowment Act 1915". In 1978, part of the land, known as Lot 3 Plan S.19848, was transferred to the City Council.¹²⁶ It is assumed that any of the remaining land was transferred under the Local Government Act 1974.

2.6 51 Dive Crescent: Application for Resource Consent

Recently, New Zealand Mission Trust Land at 51 Dive Crescent was the subject of a dispute between Civenco Construction and the four Wai 580 hapu. Civenco wished to build a large tourist hotel but the four hapu objected. While the author recognises that although the actual property is private land and therefore beyond the Tribunal's jurisdiction in terms of recommendations for its return, the case is illustrative of the lack of adequate protection for waahi tapu.

124. Memorandum, Director of Community Services, Director of Corporate Services to District Strategies Advisory Committee, 11 November 1993, P1600, Properties -Dive Crescent, Tauranga District Council

125. Local Government Act 1974, S 37ZZY (1)

126. Certificate of Title 10a /1343

When the consent application came up before the Tauranga District and Bay of Plenty regional councils, representatives of local hapu gave evidence that clearly demonstrated that Otamataha was waahi tapu. At a meeting to consider resource consent the two councils received opposing submissions from the Ngai Tamarawaho Raupatu Committee, Te Runanga O Ngai Tamarawaho Inc, Ngati Tapu and Ngati Tukairangi hapu, and the Tauranga Moana Maori Trust Board. Much of this evidence is quoted in Chapter One of this report. The submissions noted that the area was a battle site and an important canoe landing place. Many witnesses believed that the consumption of food on the site was culturally offensive. The claimants also told the two councils that the area was subject to a Waitangi Tribunal claim.

One of the reasons that Maori were able to raise these concerns was that under the Resource Management Act 1991, developers must acknowledge the tangata whenua relationship with the land. Section 6 of the Act says:

Matters of National Importance- In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use development, and protection of natural resources, shall recognise and provide for the following matters of national importance:..

(e)The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.¹²⁷

Developers must also acknowledge the principle of kaitiakitanga, defined in the Act as, "the exercise of guardianship: and relation to a resource, includes the ethic of stewardship based on the nature of the resource itself".¹²⁸ Section 7 deals with kaitiakitanga:

Other matters- In achieving the purpose of this Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural resources, shall have particular regard to-

(a) Kaitiakitanga¹²⁹

Section 8 of the Act requires developers to "take into account" the principles of the Treaty of Waitangi, but it does not bind them to act in accordance with treaty principles. As the Waitangi Tribunal said in its *Ngawha Geothermal Resource Report*, "[t]he role or significance of Treaty principles in the decision making process under the Act is a comparatively modest one".¹³⁰

Treaty issues were considered at a Joint Hearings Committee of the Tauranga District and Bay of Plenty Regional Councils. This is evident in the district council's review of the consultation process. The council interpreted their obligations under

127. Resource Management Act 1991, s 6

128. Resource Management Act 1991, part 1

129. Resource Management Act 1991, s 7

130. Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Brooker and Friend Ltd, Wellington, 1993

section 8 as being a duty to consult and to determine whether a resource is taonga. It was noted that Civenco had consulted Maori on four occasions prior to the hearing, but that no consultation had occurred prior to the application.¹³¹ The council also claimed that “the applicants have endeavoured to incorporate features into the development which would be beneficial to tangata whenua. This includes provision for a waka mooring and incorporation of indigenous art into the building.”¹³² The council’s report recommended that on these grounds consent be granted.

These contentions were disputed by Gregory Tata of Ngai Tamarawaho. Mr Tata was concerned that the council had not alerted Ngai Tamarawaho to Civenco’s proposal when the application was first lodged. He also said that Ngai Tamarawaho had not been notified that the property was zoned for waterfront development. The submission notes that the council’s suggestion to “signpost” the waahi tapu and claims that development could incorporate features of benefit to tangata whenua, denied the mana of Ngai Tamarawaho.¹³³

The committee considered Civenco’s application for resource consent. When reviewing the evidence, the district council noted that: “[t]he tangata whenua view is that the ability to exercise kaitiakitanga is dismissed by the development in respect of the Harbour and Otamataha.”¹³⁴ It also acknowledged the significance of Otamataha Pa and the Mission Cemetery, but ignored the significance of the wider area. Although the council acknowledged that, “the site and its environs may be taonga for the reasons set out in the submissions”, it also cited the *Tainui Maori Trust Board vs Attorney General (1989)* case. This case stated that the principles of the Treaty of Waitangi had no effect on private titles with the exception of State Owned Enterprises land.¹³⁵ The district council and Civenco Construction were not bound by treaty principles. This is illustrative of the limitations of the Resource Management Act 1991. The Act does not enable adequate protection of waahi tapu.

There was some acknowledgement of the site’s significance. The council noted that a Department of Conservation site plan demonstrates that at the urupa site, in addition to the grave sites, there are several middens and a suspected palisade hole, indicative of a former Pa site. This is evidence that Otamataha is a significant cultural site.¹³⁶ However, the Council claimed that land outside the urupa did not need protection because:

The New Zealand Historic Places Trust through investigation by the Bay of Plenty Conservancy have identified that the likelihood of unrecorded sites with no surface evidence is not high enough to warrant archaeological monitoring of all ground disturbance.¹³⁷

131. Tauranga District Council Report No: Dc 57, P1600 51-2, Tauranga District Council

132. Ibid

133. Statement of Evidence of Gregory Taite Tata, P1600, Tauranga District Council

134. Tauranga District Council Report No: Dc 57, P1600 51-2, Tauranga District Council

135. Ibid

136. Lyndo Bowers, “Site Description Form”, 21 May 1993, Planning Dive Crescent, Tauranga District Council, P1600-S1-2

137. Tauranga District Council Report No: Dc 57, P1600 51-2, Tauranga District Council

Aside from the Mission Cemetery, the council and the Crown have recognised the significance of other land in Otamataha. Monmouth Redoubt is protected under the Historic Places Act 1993. The Act makes it illegal to destroy or modify a site protected by the Historic Places Trust without the trust's permission.¹³⁸ In 1994, the redoubt became an historic reserve.¹³⁹ However, there was little recognition of the significance of the whole of Otamataha. Legally, there is no obligation for developers to do so, and it is argued that current legislation does not adequately protect waahi tapu such as Otamataha.

The author understands that despite there being no legal obligation to do so, Civenco and the four hapu have come to an agreement about the development of 51 Dive Crescent. According to a press release from Civenco's managing director, the hapu agreed to support the development on the grounds that Civenco acknowledge the importance of the waahi tapu and that construction be delayed for six months to allow Maori and Civenco to make submissions on the council's proposed waterfront development.¹⁴⁰ However, the Wai 580 claimants would probably be able to give more details and may offer a different perspective on this, and other recent developments regarding 51 Dive Crescent. Oral evidence would be of assistance here.

2.7 Issues

The growth of Tauranga coincides with the development of Otamataha. However despite the fact that Otamataha was a site of significance, Maori were largely excluded from these developments. This was mostly because developers, the Crown, and local bodies were not legally required to consult tangata whenua. Most development concerned the foreshore. There is evidence to suggest that Maori had unextinguished interests in the foreshore and the harbour, and that consequently, they should have been consulted. It is also clear that the Crown offered no effective mechanism for protection of waahi tapu. This section highlights these issues.

2.7.1 Issue 1: Title to the Foreshore

While under European law, Maori alienated the Otamataha lands by selling them to the Church Missionary Society, the alienation of the foreshore and the seabed is more complex. One must ask, did Maori cede title to Otamataha's foreshore? The use of the foreshore for reclamation and projects associated with the wharf is indicative of the fact that Maori lost rangatiratanga over the foreshore, but there is no evidence of Maori voluntarily ceding title.

Until 1915, the Crown simply assumed title to the Otamataha foreshore, but no prior grant or legislation had specifically vested the foreshore in the Crown. The Crown simply assumed that it had title to the foreshore. The foreshore was

138. See Historic Places Act 1993, s 11-18 and s 97, 98

139. *New Zealand Gazette*, 1994, p. 3024

140. Geoff Payne, Managing Director, Civenco, Press Release 15 June 1995

specifically excluded in the Commissioner's report, possibly because Godfrey assumed that it belonged to the Crown, and it was also excluded from the 1852 Crown Grant. Despite this, an assumption arose from an English common law principle. As Richard Boast demonstrates:

The foreshore and the sea-bed have always been regraded as exceptional at Common Law. The general principle at Common Law is that the Crown is, by prerogative right, the presumptive owner of the foreshore, the beds of tidal rivers, the seabed, and coastal waters. This is a presumptive title only which can be displaced by proof of a Crown grant or continuous occupation.¹⁴¹

It is likely that the Land Claims Commission applied this principle, and assumed that the Crown already had title to the foreshore. This certainly appears to have been the case in land purchases of the same period. In a study of the Ahipara purchase at Ninety Mile Beach (1859), Boast argues that although there is not sufficient evidence to be certain, it is likely that the Ahipara purchase excluded the foreshore because the Land Purchase Commissioners assumed that the Crown had Common Law title.¹⁴² Prior to 1915, the Crown assumed that it had title to the foreshore. This was implied when the Crown vested the Tauranga Harbour foreshore in the Tauranga Harbour Board in 1915.

Another important question is; what were the implications of the foreshore title for Tauranga Maori? The evidence suggests that there were a number of consequences of the Crown's actions.

Firstly, when the Crown vested the foreshore in the harbour board there was no consultation with tangata whenua. There was also little reaction from Tauranga Maori. Dr Byrnes points out that while Maori petitioned the Crown about confiscation of their land, they did not protest about the harbour board's acquisition of the foreshore.¹⁴³ Another question which can also be asked is; how many Maori knew of the Act and its consequences regarding the ownership of the foreshore? No protest equally might mean Maori assumed they retained ownership of the harbour. Furthermore, lack of official protest does not mean that the Act had no implications for Maori. The effect of the board's acquisition of foreshores was spelt out by A T Ngata in 1924, when he commented on plans to vest the Maketu foreshore in the Tauranga Harbour Board. Ngata told J G Coates, the Native Minister, that:

Two questions appear to be raised - [by vesting the foreshore in the Harbour Board]

(1) Whether, assuming that all foreshores are by law vested in the Crown, it is desirable that this particular foreshore should in turn be vested in the Tauranga Harbour Board?

141. Boast, "The Foreshore", p.25

142. Richard Boast, "In Re Ninety Mile Beach Revisited: The Native Land Court and The Foreshore in New Zealand Legal History", *Victoria University Law Review*, Vol. 23 No. 4, 1993

143. Byrnes p. 41

That is a matter of policy for the Marine Department, which might be reviewed in connection with the Bill to be presented next session. But it might be contended that Native rights of user dating back several centuries are if not acknowledged by the Crown certainly not interfered with in practice. The Natives have been allowed to gather shellfish, to set up rahuis, and to exercise some of the acts of proprietorship, until they are confirmed in the belief that such rights subsist in law as well as in fact. Numerous cases will occur to your mind in the North at Whangarei and other places, and not so long ago it was found advisable to intervene in the case of Te Ane o Muriwai.

It may be possible to make such reservations at Maketu as to preserve the sentiment connected with the historical landing place of Te Arawa Canoe as well as to acknowledge the claims to gather shell-fish etc. without interference.

(2) Whether Native rights to fishing grounds, pipi beds, etc. expressly reserved in the Treaty of Waitangi do exist and can prevail against the Crown? Like many another issue raised by that Treaty, this of Native fishing rights has been avoided in the past. Past legislation has studiously left the question unanswered. But it has become acute in places and must sooner or later be tested.¹⁴⁴

Ngata implied that customary use rights prevailed against Crown title. He also pointed out that these rights were guaranteed by the Treaty of Waitangi and, if not expressly protected, were at the very least tolerated by the Crown. Maori undoubtedly had customary claims to the Otamataha foreshore. Furthermore, there are also issues about fishing rights and customary ownership regarding the seabed. In 1922, when the Public Works Department dredged the harbour to construct the Railway Wharf, there was no statutory provision vesting the seabed in the Crown or the Harbour Board. Prior to the seabed becoming vested in the Crown in 1977, the Crown's title, as with the foreshore, was based on English common law.¹⁴⁵

There is considerable doubt as to whether the Crown extinguished customary title to the foreshore, or for that matter the seabed. Hapu and iwi ownership of resources such as fishing grounds are discussed by the Waitangi Tribunal in the *Muriwhenua Fisheries Report*, which emphasises the fact that Maori had a system of established, customary rights to resources such as fishing grounds. These resources were owned by hapu and iwi rather than individuals.¹⁴⁶ Boast points out that "judges of the [Maori] Land Court have long been of opinion that in terms of Maori custom the foreshore and the coast was "owned" in much the same way as the land."¹⁴⁷ Otamataha Maori had customary title to the foreshore, because the foreshore was used for launching waka, and it was also a source of kaimoana. O'Malley notes that Brown's journal discusses Maori claims that a cockle bed in front of the settlement had not been included in the "sale".¹⁴⁸ Furthermore, in 1885, Hori Ngatai demonstrated that Tauranga Maori clearly believed that they had property rights to the harbour, and it is doubtful that this would have excluded the seabed. Therefore,

144. A Ngata to J G Coates, 7 April 1924, M 1 4/1532, National Archives, Wellington

145. Boast "The Foreshore", p. 48

146. Waitangi Tribunal, *Muriwhenua Fisheries Report*, Waitangi Tribunal Department of Justice, 1988, p.36

147. Boast "The Foreshore" p.17

148. O'Malley, p.25

it seems unlikely that these rights would have been voluntarily ceded by any of the four hapu with interests in Otamataha.

The Crown's title is based on a principle of English common law. In his Rangahaua Whanui report, Boast argues that, "it seems beyond a doubt that there is a customary title to the foreshore, which (arguably) has never been lawfully extinguished".¹⁴⁹ He points out that none of the Acts affecting the foreshore clearly extinguished this customary title, and argues that:

[t]here does not appear to be any statutory provision which explicitly vests ownership of the foreshore in the Crown, although some statutes (for example the Foreshore and Seabed Endowment Revesting Act 1991 and, perhaps, the Conservation Act 1987) appear to be based on an assumption that the foreshore belongs to the Crown. But assumptions are not enough. When it comes to statutory extinguishment of customary title, the extinguishment must be clear and plain.¹⁵⁰

Not only was there no statutory provision extinguishing customary title, the Crown failed to recognise this title when it vested the foreshore in the Tauranga Harbour Board. The Waitangi Tribunal dealt with the issue of the statutory transfer of land to harbour boards in the *Te Whanganui-A-Orotu Report 1995*. In this report, the Tribunal said of the decision to vest part of the foreshore in the Napier Harbour Board:

From the claimant's perspective and in Treaty terms, the harbour endowments amounted to a statutory expropriation of traditional resource that their tipuna used, occupied, and controlled and, in respect of the harbour proper, were knowingly and willingly shared by settlers. The Tribunal concurs with this view.¹⁵¹

This is equally applicable to Otamataha. The foreshore was a taonga for the people of Tauranga Moana, and explicitly protected by the Treaty of Waitangi. The English version of Article Two of the treaty specifically guarantees Maori:

...the full exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession...¹⁵²

Furthermore, a literal translation from the Maori text guarantees Maori "the entire supremacy of their lands, their settlements and all of their personal property"-rangatiratanga over taonga.¹⁵³ The Crown's acquisition of title to the foreshore

149. Boast, "The Foreshore", p.28

150. The seabed was vested in the Crown under S 7 of Territorial Sea and Exclusive Economic Zone Act 1977, Boast, "The Foreshore", p. 48

151. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Brookers, Wellington, 1995, p. 98

152. Claudia Orange, *The Treaty of Waitangi*, Bridget Williams Books Wellington, 1987, p. 258

153. *Ibid*, p.262

through the mechanism of English common law, was an imposition on rangatiratanga. In this case, the Crown undermined rather than protected rangatiratanga. As the Waitangi Tribunal's *Manukau Report* illustrates, for Maori, title to the harbours and their resources was derived from customary law. This report notes:

Maori Customary Law is the antithesis of English Common Law which considers that harbours belong to the Crown. The Maori people believe the Treaty of Waitangi promised them that Maori Customary Law would prevail.¹⁵⁴

In the case of Otamataha customary law did not prevail; instead the Crown presumed ownership of the foreshore. However, there is no evidence to demonstrate that customary title to the foreshore was clearly extinguished. As Boast points out it is unlikely that the process of vesting the foreshore in harbour boards would have extinguished customary title, and he argues that in a modern Court, Maori customary title continues unaffected by the vesting of title in harbours and the re-vesting in the Crown in 1991.¹⁵⁵ In summary, there is no evidence to suggest that the four hapu voluntarily ceded title to Otamataha's foreshore. This appears to be in conflict with the guarantees offered by Article Two.

2.7.2 Issue 2 Consultation

The author found no evidence of consultation during the reclamations. Nor did there appear to be any suggestions that the Otamataha foreshore be reserved for Maori use. This supports Dr Byrnes' thesis that:

[n]owhere in this legislation was provision made to address any Maori interests or concerns. Nor was there any effort to involve local Maori in the planning stages of these projects. The reclamation of land in the Tauranga harbour and the development of port facilities at Mount Maunganui further alienated local iwi and hapu from the foreshores and waterways they had traditionally considered as their own.¹⁵⁶

Nor is there any evidence of consultation when reclaimed land was transferred to the Tauranga District Council or re-vested in the Crown. The Local Government Act 1974 did not require consultation with tangata whenua. Land was simply transferred to the council. Similarly, although section 3 stipulates that all persons exercising powers under the Act shall have regard to the principles of the Treaty of Waitangi, the Foreshore and Seabed Endowment Act 1991 did not consider any customary ownership rights. Section 5 (b) discusses the foreshore as being re-vested, "as if it had never been alienated from the Crown". In the author's opinion, drawing on the

154. Waitangi Tribunal, *Manukau Report*, Waitangi Tribunal, Department of Justice, Wellington, 1985

155. Boast, "The Foreshore", p.47

156. Byrnes, p.28

work of Richard Boast, this is a specific reference to a Crown title that may not have been established by statute or extinguishment of customary title.¹⁵⁷

It is clear that there was no consultation with Maori over the ownership of the foreshore, but is there any evidence of consultation about matters other than the foreshore? A perusal of the archives related to the East Coast Main Trunk Railway indicates that where land was acquired, owners were notified. In the case of the Wai 580 claim area, the borough council owned the land. As this report shows, the council negotiated a deal whereby the Crown took the land in exchange for giving the council land adjacent to the railway. There was no consultation with tangata whenua even though the railway line impacted on the harbour, which was a source of kaimoana and a taonga for Tauranga Maori. It is only since 1991, under the Resource Management Act, that the Crown and Local Bodies have been obligated to consult Maori.

2.7.3 Issue 3: Protection for Waahi Tapu

Despite its provisions for consultation, the Resource Management Act only requires developers to “recognise and provide” for Maori taonga, to have regard for kaitiakitanga, and to consider Treaty principles; it does not adequately protect waahi tapu or taonga. This omission of the Crown was discussed by the Waitangi Tribunal in the *Ngawha Geothermal Resource Report*. The Tribunal’s comments are worth quoting in full:

Our consideration of the provisions of the Resource Management [Act], and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure that the decisionmakers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed.

We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.¹⁵⁸

The Ngawha Tribunal made the following recommendation:

We recommend that an appropriate amendment be made to the Resource Management Act 1991 providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

157. S 5 (b), Foreshore and Seabed Revesting Act 1991

158. Waitangi Tribunal, *Ngawha Report*, Brooker and Friend Ltd, Wellington, 1993, p.154

As Part II of the Resource Management Act is presently worded, those exercising powers and functions which may impact on Maori natural resource taonga are not required to ensure that Maori Treaty rights are accorded their appropriate standing. Accordingly, such rights are at risk of being depreciated or outweighed by other considerations. Maori Treaty Rights are not given the protection that article 2 requires. We see no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act. [emphasis in original]¹⁵⁹

Furthermore, the evidence suggests that developers whether private, local government, or central government, failed to grasp the significance of Otamataha. As Dr Byrnes argues, “progress” was the main concern, and this philosophy ignored traditional rights to the harbour.¹⁶⁰

2.8 Summary

The main issues concerning the development of the Otamataha foreshore are:

- Otamataha hapu had customary title to the foreshore that was established by hapu and iwi use and management of this resource;
- it is doubtful that Maori voluntarily ceded title to the foreshore, and there is evidence that they considered a cockle bed and possibly other fishing resources as excluded from the Te Papa Purchase;
- there is no statutory provision specifically extinguishing customary title and there is evidence to suggest that a customary title may still exist;
- prior to the 1990s, there is no evidence of any consultation with any of the four Wai 580 hapu with regard to reclamations and development;
- developers and the Crown failed to grasp the significance of Otamataha to hapu with a claim to the area;
- current legislation does not adequately protect such waahi tapu and other taonga.

159. Ibid, p.155

160. Brynes, p. 37

CHAPTER 3

Conclusions

Otamataha is an important site for Ngai Tamarawaho, Ngati Tapu, Ngati Kuku and Ngai Tukairangi hapu. Otamataha's cultural significance dates back to the origins of Ngati Ranginui, when their tuupuna arrived in Tauranga Moana in the Takitimu waka. Traditionally, Otamataha was also a launching place for fishing expeditions, and the harbour was a source of kaimoana.

Otamataha is waahi tapu. Up until 1828, its headland was the site of the Otamataha Pa. A battle between local hapu and Hauraki iwi destroyed the Pa. Many people were killed in this battle, and consequently it appears that Ngati Tapu and Ngai Tukairangi left Otamataha for Matapihi, but this does not depreciate its significance. The excavation of the bodies of victims of this battle in the 1950s is further proof that Otamataha is waahi tapu.

Nevertheless, under European law, the C M S purchases of Te Papa during the 1830s were the point at which Otamataha was alienated from Maori ownership. These purchases were problematic. As this report has shown, many Maori who claimed to have an interest in Otamataha were not paid. Furthermore, there were several instances of protest from Maori about the purchase. Government officials ignored these issues. The Crown confirmed the purchase in 1844, at the Land Claims Commission hearing. At the hearing, the Commissioner Godfrey chose to ignore Maori evidence which suggested that all those who had interests in Te Papa had not received payment, and that possession had been disputed.

Under Pakeha law, the purchase was the point where Maori lost rangitiratanga over Otamataha. However, this may not have been the Maori point of view. Essentially, there were two different ideas of land tenure and use. Maori probably believed that the sale to Brown still guaranteed them use rights, but Pakeha would have seen the sale as an absolute alienation and relinquishment of rangitiratanga. At the time of the Te Papa purchase it is unlikely that Tauranga Maori were fully aware of the European system of land sales. Contact with Pakeha was mainly limited to the missionaries and a few traders, and very little land had been sold. Because of this limited contact, it is probably more likely that the Te Papa sale was a transaction according to the traditional pattern of gifting use rights. Under this system, the hapu retain an interest in the land. Therefore, Maori who "sold" the land to the Church

Missionary Society may have expected be able to continue using parts of that land, and O'Malley suggests that they attempted to do so.

While within the confiscation boundary, the CMS purchase, was considered to be European land, and was not included in the Tauranga confiscation. However, Otamataha's history should not be seen as separate from the raupatu. During the New Zealand wars and the Bush Campaign, much of Otamataha was the site of a military camp. All of the land except for the urupa (which remained in CMS ownership) was purchased by the Crown in 1867. Although the Crown granted some reserves to Maori within the vicinity of Te Papa, the author found no evidence of any of the land within the claim area being set aside for Maori. Instead, most of the land eventually became council reserves. From the late nineteenth century the town began to grow. This growth heralded a new era of development in the twentieth century.

The most significant feature of the twentieth-century phase of development was lack of input from the tangata whenua. Government and local body public works reshaped the contours of Otamataha's waterfront. Much of the earlier public works were centered around the railway, and the later public works around the Railway Wharf. These works were legitimated by a series of actions. They were:

- the Crown's assumption under English common law that it owned the foreshore and the harbour bed;
- the decision to build the East Coast Main Trunk Railway;
- the borough council's decision to gift part of the Cliff Road Reserves in exchange for the Public Works Department reclaiming land along the waterfront;
- the Tauranga Foreshore Vesting Act 1915, which vested the land in the Tauranga Harbour Board;
- the reclamation of the seabed for land around the wharf;
- the transfer of former harbour board land to the district council under the provisions of the Local Government Act 1974;
- and the re-vesting of the foreshore in the Crown in 1991.

The Tauranga Borough Council acquired reclaimed and other land through legislation. In 1991, the Crown acquired a proportion of the foreshore via legislation. The author found no record of any of these actions involving consultation with tangata whenua. The only instance of consultation was under the provisions of the Resource Management Act, when in 1994, local hapu went to the Planning Tribunal to prevent Civenco Construction from building a large hotel at 51 Dive Crescent. However, even then local authorities and developers failed to grasp the full historical and cultural significance of Otamataha. However, Civenco and the claimants have

since come to an agreement about the development of 51 Dive Crescent. Whereas the council is still planning developments which the council are opposed to.

3.1 Main Issues

The main issues that this report raises are summarised below.

- 1) Otamataha is waahi tapu.
- 2) Otamataha was a source of kaimoana, a waka landing place and an urupa.
- 3) Under Pakeha law, Otamataha was alienated not by raupatu, but prior to raupatau when the C M S purchased the land.
- 4) It is doubtful whether Maori and the C M S would have had the same concept of "sale".
- 5) During the Land Claims Commission hearing the Crown ignored Maori evidence that suggested not all those with interests in the sale were paid or consulted, and it ignored further protest in 1866.
- 6) After the Crown's acquisition of Te Papa in 1867, no land in the Wai 580 claim area was reserved for Maori.
- 7) The Crown assumed Common Law title to the foreshore, but there are no clear foundations for this title. There is no evidence that demonstrates that Maori customary title to the foreshore was ever extinguished by statute. There was no voluntary cession of title to the foreshore, and Maori customary title may still exist.
- 8) Development of the waterfront did not acknowledge the significance of Otamataha to the claimant hapu.
- 9) There are no adequate protections to ensure that waahi tapu like Otamataha are protected from development.
- 10) Development had little regard to the tangata whenua relationship to Otamataha, illustrating that the four hapu have lost rangitiratanga over Otamataha.

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44/8 -Property and Reserves -Cliff Road

P1600- Properties Dive Crescent

P 3740-9 Vol. 2 -Redevelopment of Wharf Area

Bay of Plenty Harbour Board Files

Bay of Plenty Harbour Board File, 2/5 -Railway Town -Redevelopment

Bay of Plenty Harbour Board File, 14/52, Ex Army Drill Hall

Bay of Plenty Harbour Board File, 30/3/- Dive Crescent

Bay of Plenty Harbour Board File, 44/8/- Cliff Road -Property and Reserves

National Archives Files:

ABKK W4357 35/369

M 1 3/6/32 pt 1

M 1 4/1532

M 3 6/32/2

OLC 1 689-90, (Repro 95)

W- TG 1 11/35/1

W-TG 1 11/3

W-TG 1 12/2

W-TG 12/15 vol 1

Appendix One- Cliff Road Reserves and Mission Trust Lands

Cliff Road Reserve

Many of the allotments in the Wai 580 claim area are council endowments. The properties have included an historic reserve, a netball court, tennis court, and botanical garden. In 1981, the Cliff Road reserves and the Monmouth Redoubt were classified as recreation reserves.¹

The legal description of the Cliff Road Reserves is allotments 296, 297, and 298 section 1 Town of Tauranga. These allotments are zoned as a recreation reserve. As shown in Chapter One, these allotments were the military camp, in the late nineteenth century. In 1906, a Crown Grant vested the land in the Tauranga Borough Council.² In 1907, the *Bay of Plenty Times* noted that:

[a] former energetic mayor did a great deal by making considerable improvements to the Monmouth Redoubt nearby and had the unsightly buildings thereon removed, a flagstaff erected and other alterations made.³

During the early twentieth century, the Cliff Road endowments were the Borough Council's grazing area. Public pressure led to the council developing these allotments as botanical gardens and recreation grounds, including netball courts, tennis courts and a women's bowling green.

In 1982, allotment 298 became a recreation reserve. The Department of Lands and Survey said:

Part Allotment 298 Town Tauranga, Block X, Tauranga Survey District, which comprises two areas totalling 6247m2...Part Allotment 298 was originally vested in the Tauranga Borough Council as Municipal Endowment but was later vested for public recreation purposes by section 99 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1922. Classification of the reserve for recreational purposes has been undertaken. New Zealand Gazette 1982 page 189 refers. The land is comprised in Certificate of Title 132/108.⁴

1. *New Zealand Gazette*, 1981, p.2586

2. *Bay of Plenty Times*, 27 May 1986

3. *Bay of Plenty Times*, Monday February 25 1907

4. N Wapp for Commissioner of Crown Lands to Director of Parks and Recreation Tauranga City Council, 26 March 1986, P 44/8-, Tauranga District Council

In 1986, the city council proposed to sell the Cliff Road netball and tennis courts. Due to strong public opposition the council retained the property.⁵

Some of the land next to the Cliff Road Reserve is a stopped road. In 1988 Shrimpton and Lipinski, consulting engineers and town planners, remarked that:

Outlined in red is a suggested area for stopping. The stopping would be undertaken in three separate pieces. The strip 0.2 metres wide adjacent to Marsh Street. The main area (to be disposed of later) of 750 square metres, and the area of 30 square metres on which the electrical substation stands. The two small areas are shown as local purpose reserves on the sketch. These would be created as such after the stopping. As the purpose of the 0.2 metre strip is to prevent access onto Marsh Street it is probably more appropriate after stopping, to leave this as an allotment in the name of the City Council.⁶

In practice, this stopped road became part of the council's reserves, and it is included in Robbins Park.

There is also a small piece of triangular land beside 51 Dive Crescent. This site is part of section 298 is a rowing club site and is owned by the district council. It is designated recreation reserve with underlying zoning of waterfront service.⁷

Monmouth Redoubt

Monmouth Redoubt is an historic reserve because, during the New Zealand Wars, the Pakeha women and children of Te Papa relocated to Monmouth Redoubt. In 1878, the redoubt was gazetted for defence purposes.⁸ The legal description of the redoubt is part allotment 247, section 1, Tauranga Town, Block X, Tauranga Survey District. The redoubt is subject to section 99 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1922. Since 1977, the redoubt has been classified under the Reserves Act 1977. In a Gazette Notice of 17 September 1981 the redoubt was reclassified as a recreation reserve. The current certificate of title is 906/8.⁹

5. *Bay of Plenty Times*, 27 May 1986

6. C C Moxham, registered surveyor to Tauranga City Council, 11 March 1988, P1279-1-10, Tauranga City Council, 11 March 1988

7. Harrison Grierson Consultants to Chief Executive Harbour Board, 29 June 1988, Railway Town Redevelopment, Harbour Board File 2/5

8. *New Zealand Gazette*, 1878, p. 630

9. Tauranga City Council to Director, Historic Places Trust, 31 October 1989, P. 96162, Tauranga District Council

The Church Missionary Society Reserves

After the initial Crown Grant in 1852, Brown was issued with a certificate of title, numbered 11/1, in 1875. The property was vested in the New Zealand Mission Trust Board in 1890.¹⁰ In 1907, some of the land was taken for a cemetery and road.¹¹ More land was acquired for a road in 1916.¹² In 1923, the Crown took land for the railway.¹³ In 1976, the land registry issued a new certificate of title, 20B/882, because the duplicate copy to the original had been lost.¹⁴

The CMS reserves are now administered by the New Zealand Mission Trust, part of the Anglican Church. Other than the mission cemetery, and the mission station, the other piece of Mission Trust land at Te Papa is 7552 square metres at 51 Dive Crescent. The legal description of 51 Dive Crescent is: Part Allotment 1 section 1, Town of Tauranga, Block X Tauranga Survey District. It is zoned for waterfront development and held in certificate of title 20b/882.¹⁵

For most of the twentieth century the Church Mission Trust Board has leased the property to businesses. In 1930, the land was leased to the New Zealand Cooperative Dairy Company for 21 years. The lease was renewed in 1951.¹⁶ Smith Harvey leased the property in 1972.¹⁷ In 1990, the lease was transferred to Fletcher Residential Limited and in 1992, to Devon Standen. On 17 March 1993, the Mission Trust leased 51 Dive Crescent to Civenco Construction Limited for 21 years with the right of renewal.¹⁸

10. Certificate of Title 11/1, South Auckland District Land Registry

11. Ibid

12. Ibid

13. Ibid

14. Ibid

15. Memorandum Planner to Joint Hearings Committee, 7 February 1994, P1600-51-2, Tauranga District Council

16. Ibid

17. Ibid

18. Ibid

Appendix Two -Chronology

- 1828** Battle with Hauraki destroys Otamataha Pa, approximately 500 people killed.
- 1838** The Church Missionary Society purchases 30 acres from local Maori.
- 1839** The Church Missionary Society acquires a further 1000 acres -the rest of Te Papa Peninsula.
- 1842** A group of Maori fence of part of Te Papa in protest of Brown's purchase.
- 1844** The Land Claims Commission hears the CMS Te Papa claim.
- 1852** Crown Grant issued in favour of the CMS.
- 1864** Te Papa becomes a military camp. The main military camp is located on Otamataha lands.
- 1866** Te Hiahia, Ngamanu and others ask for the return of land
- 1867** Crown purchase of Te Papa is finalised, four-fifths of Te Papa is acquired by the Crown, and the CMS retains one-fifth.
- 1906** The Tauranga Borough Council acquires land along Cliff Road, formerly the military camp. Land is now council endowments.
- 1907** Land from the Cliff Road endowments is required for railway works. The council and the Public Works Department agree to waive compensation in return for a low level road which is built along the waterfront.
- 1915** Parliament passes the Tauranga Foreshore Vesting and Endowment Act, vesting all of the Otamataha foreshore in the Tauranga Harbour Board.

- 1925** Order in council legitimizes the reclamation of the sea floor for further public works.
Railway wharf is constructed. Dive Crescent is proclaimed a road.
- 1928** The Tauranga section of the East Coast Main Trunk Line is opened.
- 1977** Monmouth Redoubt is declared a reserve.
- 1982** Allotment 298, formerly the site of the Te Papa camp, is declared a recreation reserve.
- 1989** Wharf vested in the Tauranga District Council.
- 1990** Conversion of harbour boards into port companies. Harbour board land alongside Dive Crescent is transferred to the Tauranga District Council.
- 1991** The Foreshore is revested in the Crown under the provisions of the Foreshore and Seabed Endowment Act 1991.
- 1994** The Four hapu begin negotiations with the Tauranga District Council over 51 Dive Crescent.
- 1996** Claim lodged with the Waitangi Tribunal.

Appendix Three -Statement of Claim

OFFICIAL

1.1 Wai 580
1.27 Wai 215.

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CLADMIN
15 12 1996
[Signature]

ex 98

RECEIVED
Waitangi Tribunal
WELLINGTON
15 FEB 1996

Wai 580

Toa Haere Faulkner,
Mt. South P.O.
Mt. Maunganui
ph. 5785999
Dated 6th February 1996.

To
Waitangi Tribunal
Claims Registrar
P.O. Box 5022
Wellington.

Tena Koe REGISTRAR,

We, on behalf of the four Hapu's in Tauranga as listed below, put this claim forward

Ngati Tapu	<i>Lynette Ithaka Stockman</i>
Ngaitamarawaho	<i>Peri Reweti Kohu</i> <i>Peri Reweti Kohu</i>
Ngati Kuku	<i>J. Faulkner</i> <i>TOA FAULKNER</i>
Ngaitukairangi	<i>[Signature]</i> <i>MRTIU ELLIS</i>

to be registered with the WAITANGI TRIBUNAL.

This is a Raupatu claim against the Crown for lands confiscated in Tauranga, and is including the harbour and the foreshores of the harbour that was acquisitioned by the Crown in which it is in breach of the articals of the TREATY OF WAITANGI.

This is also a claim for disspossed lands as taken by legislative discrimination, eg. Public Works Act, Harbour Boards Act, Ministry of transport Act, Proclamations, etc. this is also in breach of the articles of the TREATY OF WAITANGI.

Decisions made by local authorities [District and Regional Councils] have on past performanses, imposed on our Taonga tuku iho, Waahi Tapu and Urupa's etc. without consultation with Tangata Whenua eg. the Resourse Management Act, This RMA legislation ignores the **Question of Land Ownership by Maori**, this again, is in breach of the articles of the TREATY OF WAITANGI.

The area of the Claim in detail, is covered in the **attached schedule**. Location is in the area of **Otamataha**, Street vicinity of Dive Crescent, The Strand, and Cliff Road, **Tauranga, B.O.P.** These streets are adjacent to the old Tauranga wharf and present Railway line.

[A full Wai Number is sought]

Noho Ora Mai

J. Faulkner

P.P.

Toa Haere Faulkner

**ANNEXED SCHEDULE of the OTAMATAHA claim to the WAITANGI
TRIBUNAL**

C.T. No.	24C	/	1186
C.T. No.	17B	/	968
C.T. No.	17B	/	969
C.T. No.	17B	/	970
C.T. No.	17B	/	971
C.T. No.	17B	/	972
C.T. No.	17B	/	973
C.T. No.	17B	/	974
C.T. No.	17B	/	975
C.T. No.	17B	/	976
C.T. No.	41D	/	999
C.T. No.	27D	/	939
C.T. No.	10A	/	1343
C.T. No.	20B	/	882

GAZETTE NOTICE No.

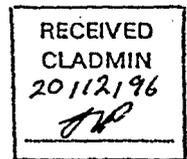
H. 368592
H. 388512

ALLOT	247
"	298
"	297
"	296

51 Dive Crescent Lot. No. 1 of SEC. 1.

Appendix Four -Direction Commissioning Research

Wai 580 - 3.2
Wai 215 - 3.26



WAI 580 ^{m.23}

WAITANGI TRIBUNAL

CONCERNING the Treaty of
Waitangi Act 1975

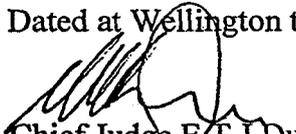
AND CONCERNING the Otamataha
Lands claim

AMENDED DIRECTION COMMISSIONING RESEARCH

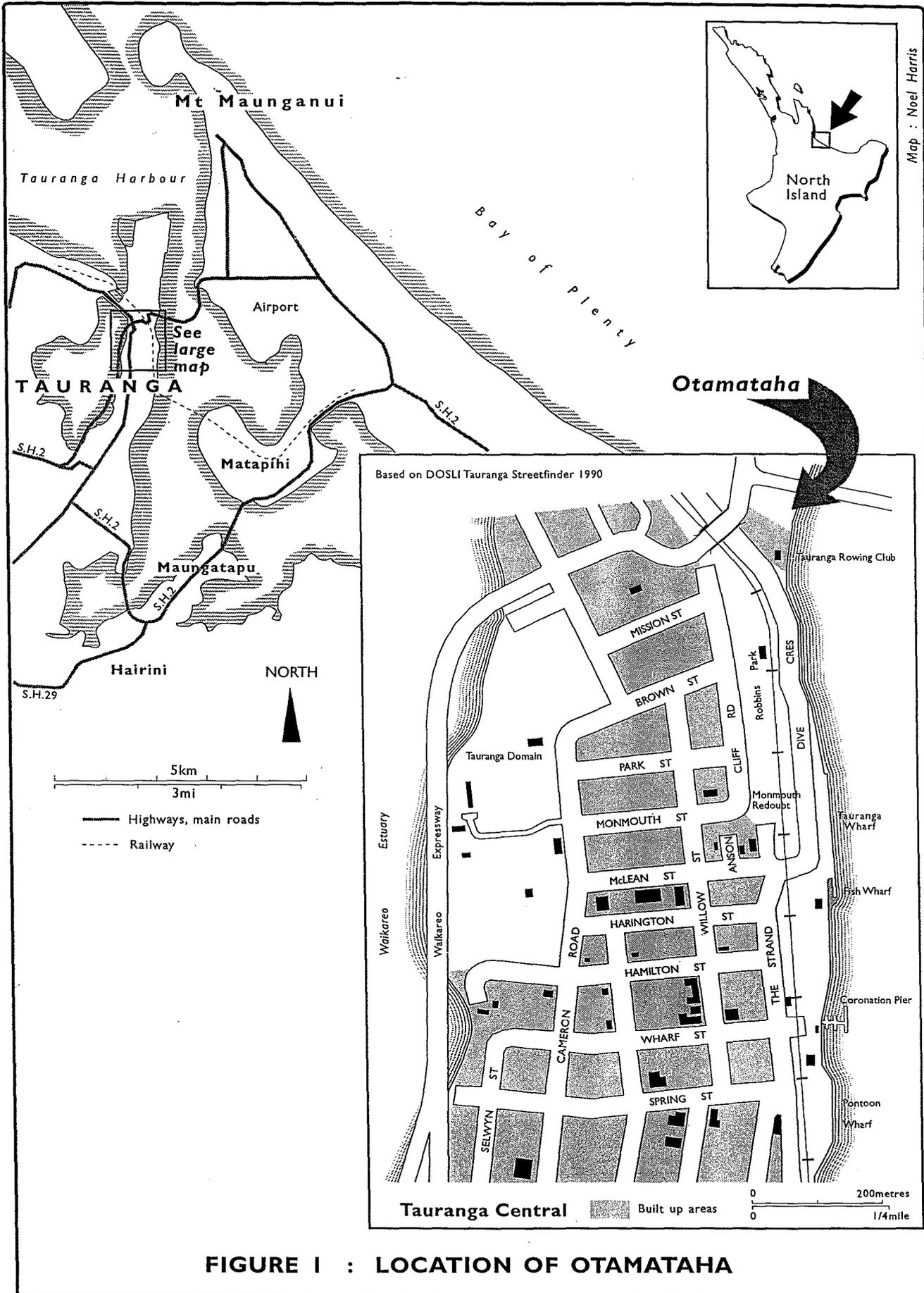
- 1 Pursuant to clause 5A(1) of the second schedule of the Treaty of Waitangi Act 1975, the Tribunal commissions Rachael Willan, of Wellington, a member of staff, to complete a research report for this claim covering the following matters:
 - (a) the Te Papa Old Land claim purchase and its relationship to the Otamataha lands
 - (b) the Government's purchase of part of the CMS block in 1865, and how the land was distributed
 - (c) the way in which the Tauranga District Council acquired the reserve and other land
 - (d) the way in which some of the sections including land reclamations, came to be vested in the harbour
- 2 This commission commenced on 22 October 1996, and ends on 17 January 1997 at which time one copy of the report will be filed in unbound form together with an indexed document bank and a copy of the report on disk.
- 3 The report may be received as evidence and the author may be cross examined on it.
- 4 The Registrar is to send copies of this direction to:

Rachael Willan
Claimants
Counsel for Claimants
Solicitor General, Crown Law Office
Director, Office of Treaty Settlements
Secretary, Crown Forestry Rental Trust
Director, Te Puni Kokiri

Dated at Wellington this 20th day of December 1996.


Chief Judge E. T. J. Durie
Chairperson
WAITANGI TRIBUNAL

Appendix Five - Maps



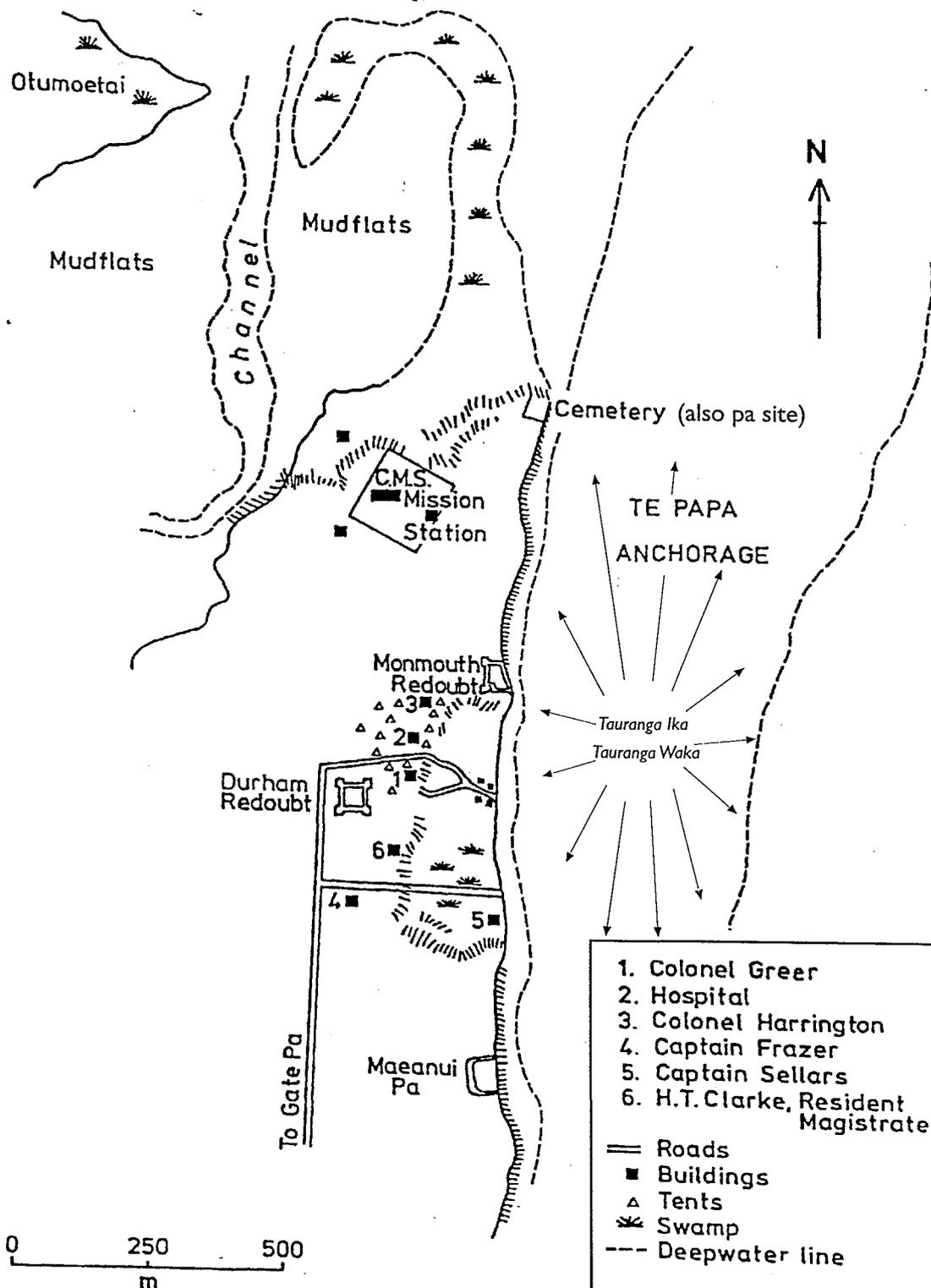
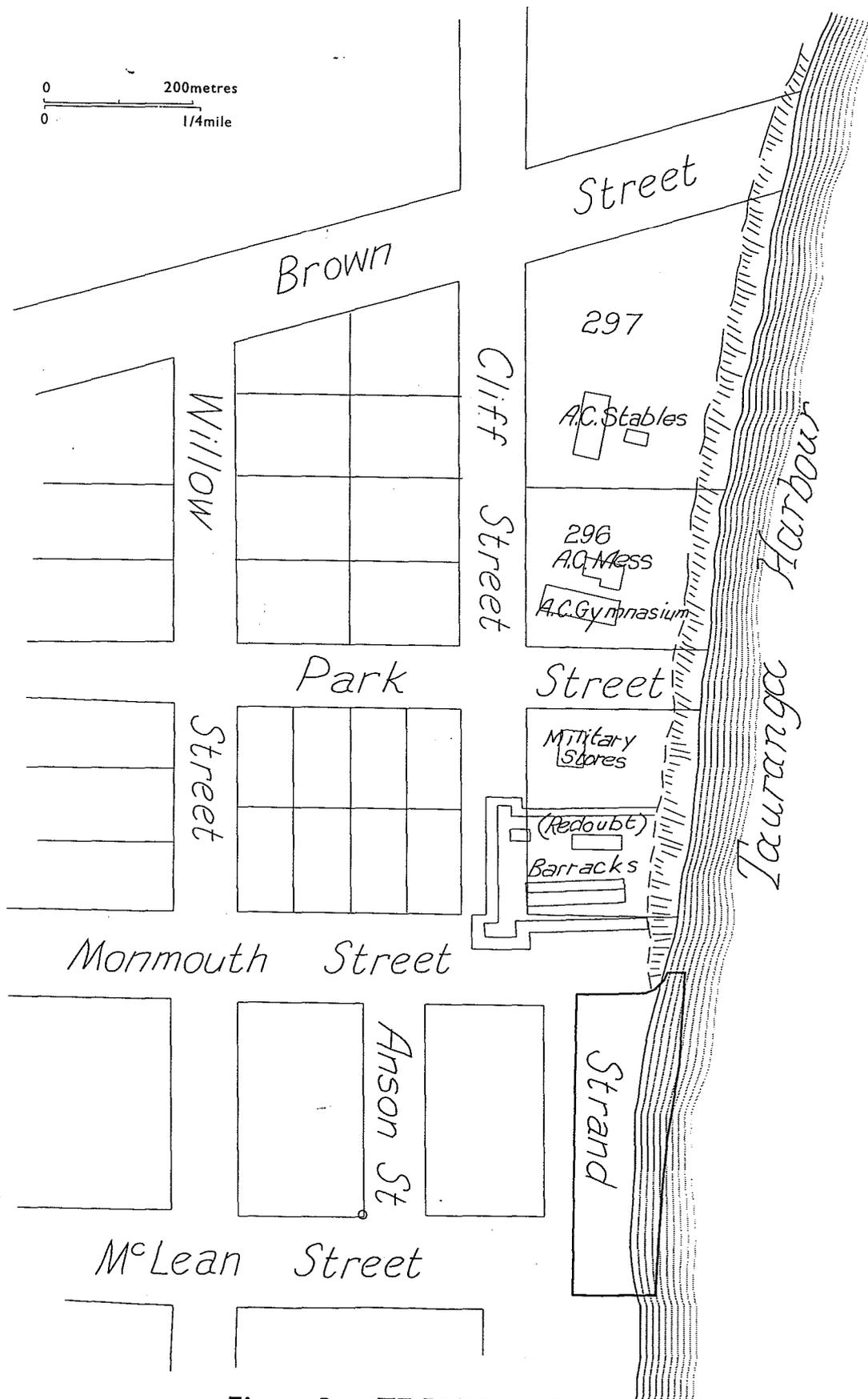


Figure 2 : TE PAPA CAMP - 1864

NORTH



0 200metres
0 1/4mile



Map : Noel Harris

Copied from 'Plan of Port Tauranga Town Section 1, surveyed by ACTurner 1878

Figure 3 : TE PAPA - 1878

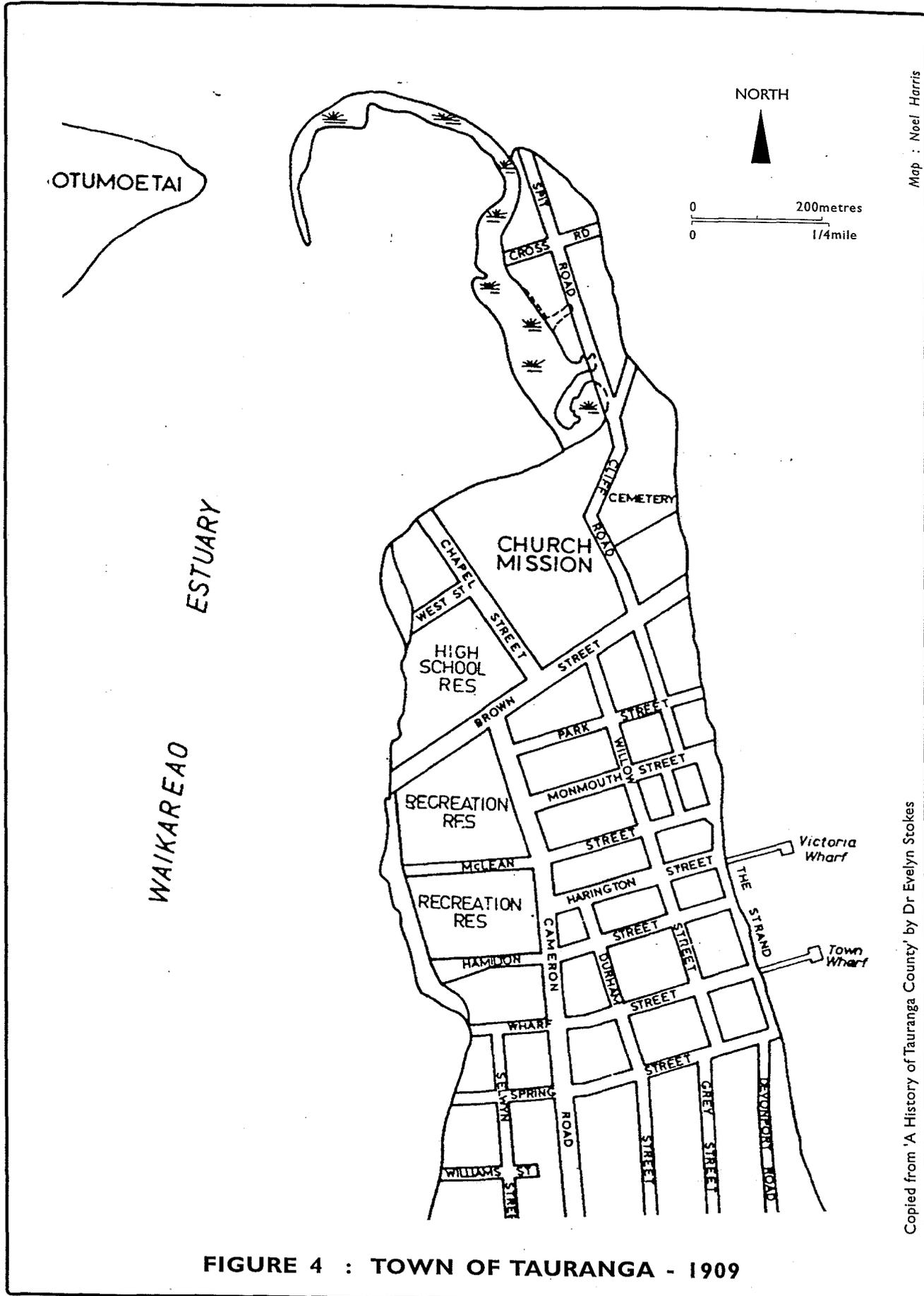
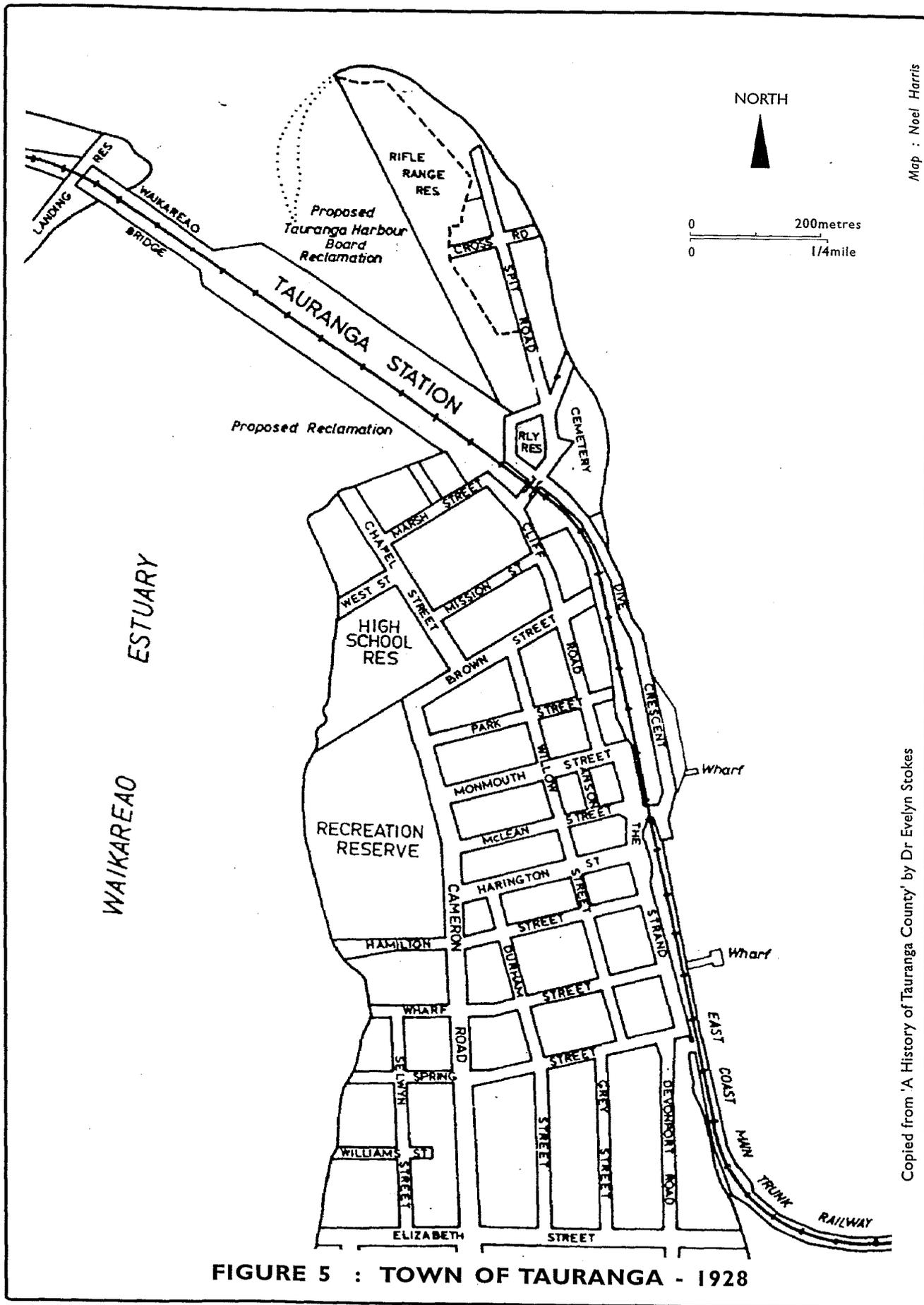
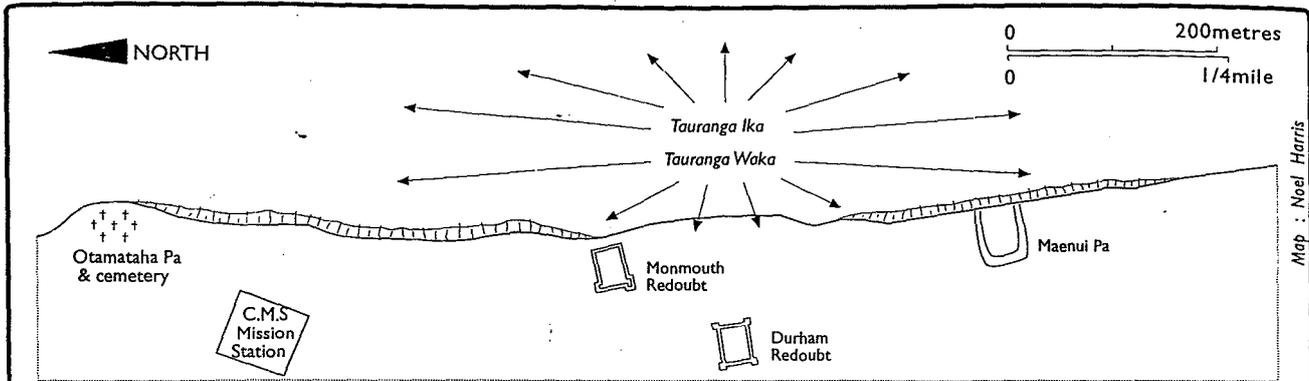


FIGURE 4 : TOWN OF TAURANGA - 1909

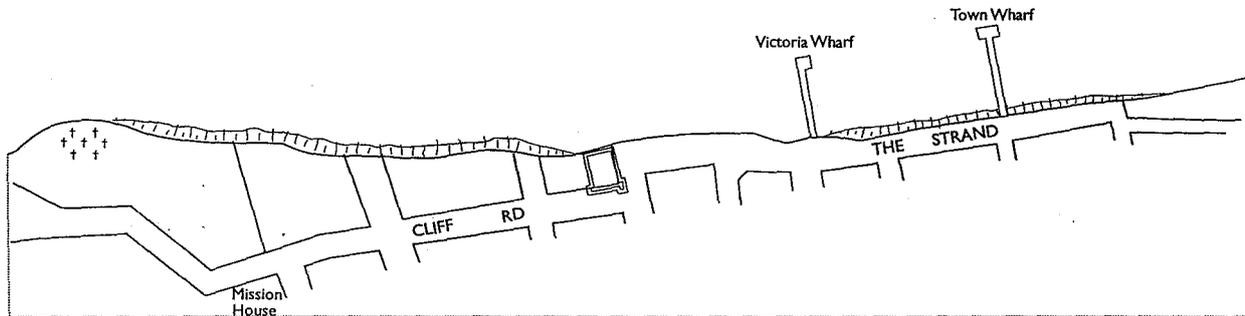
Map : Noel Harris

Copied from 'A History of Tauranga County' by Dr Evelyn Stokes

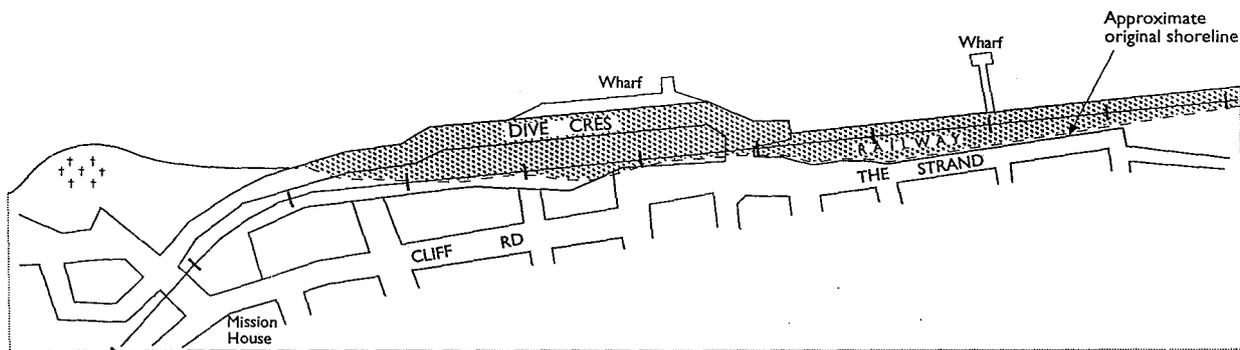




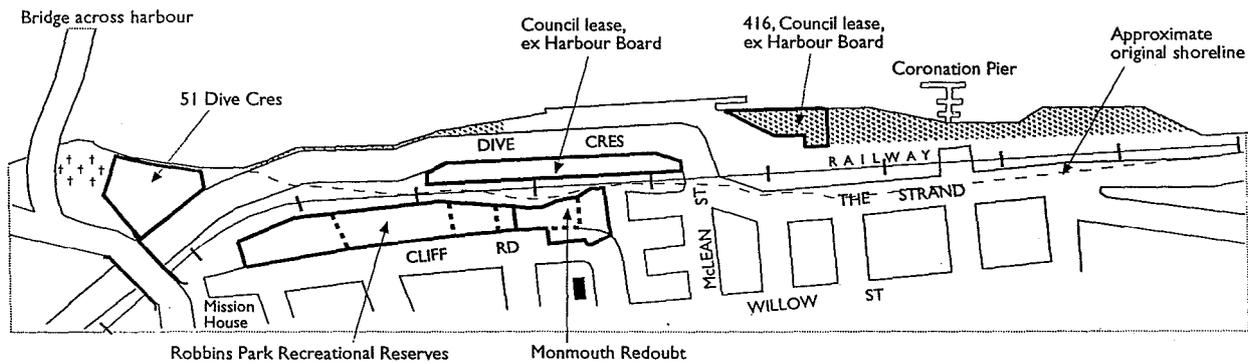
1864



1909



1928



PRESENT - DAY

-  Approximate reclamations
 -  Wai 580 sites
- (Based on DOSLI database)

Figure 6 : TIMELINE - OTAMATAHA

Map : Noel Harris