

21 September 2020

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Cc:  
Brooke Dales  
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**Dear Fennel**

**Resource consent application at 1109 Dominion Road, Mount Roskill (LUC60347931) –  
Without prejudice response to review summary**

1. Thank you for your email dated 23 July 2020. Your email summarises items raised in a legal review of the section 42A draft planning report and the resource consent application for revegetation restoration and exotic vegetation removal works at Puketāpapa/Mt Roskill.
2. We welcome the opportunity to respond to the items. We also attach legal advice obtained by the Tūpuna Maunga Authority.

**Visual / amenity effects**

3. Points 1 – 7 of your email question aspects of the methodology, analysis and conclusion of the Landscape Visual Assessment (LVA). The basis of this is that LVA contains some speculative assumptions as to how visual change would be perceived by the public and neighbouring property owners.
4. The LVA was prepared by Ms Rebecca Skidmore, a suitably qualified, highly experienced urban designer and registered landscape architect with over 24 years' experience. Ms Skidmore has direct and extensive experience in the preparation of LVA in Auckland and around the country. Ms Skidmore provides expert evidence at council and Environment Hearings and is also an Auckland Council appointed peer reviewer and independent hearings commissioner. Ms Skidmore is therefore very familiar with the obligations of an expert witness.
5. The Council appointed peer reviewer, Mr Peter Kensington is a registered landscape architect and qualified planner of considerable experience. Mr Kensington did not request any further information on this application and we understand he concurs with Ms Skidmore's the assessment and conclusions.

6. We are concerned that it is the legal reviewer who is making assumptions about the LVA and the peer review and this is obviously well outside their expertise. The attached legal advice from Buddle Findlay addresses the inappropriateness of this matter.
7. In response to points raised, from a planning perspective we note :
  - a. There is not always a direct correlation between the level of visual change and the effect of that change. Adverse effects that are noticeable may not have a corresponding oppositional, undesirable or unsympathetic visual effect or outcome. It does not inevitably follow that a high degree of visual change results in a high adverse effect. For instance, removing a derelict building on open space may result in a high visual change, but the visual effect of the change could be highly positive.
  - b. The LVA identifies and assesses the relevant viewing audiences and makes a qualified assessment of how any change may be perceived. The conclusions are not based on viewer's subjective preference for either a vegetated or open visual character. This is qualified and explained in detail at paragraph 4.11 of the LVA.
  - c. The LVA<sup>1</sup> set out that the magnitude of visual change will vary depending on the viewing audience. Whether the view is transient, static, and the perception of the viewer influence the effect of that change. A full assessment of the four viewing groups is provided. Sufficient information is included to enable an assessment on 'near neighbours'.
  - d. This method of assessment and analysis is neither subjective nor inadequate. Ms Skidmore has used a recognised approach adopted by landscape architects. She has brought her extensive expertise to make professional judgements.
  - e. The Council peer reviewer did not find information on affected persons lacking and came to the same conclusion as Ms Skidmore on the magnitude of effects being less than minor.
  - f. You have queried whether the LVA adequately articulates how the revegetation would mitigate the loss of amenity. We reiterate that the revegetation is not required mitigation for a reduction in visual amenity from the tree removal. The conclusion of the LVA is that amenity and visual effects are very low to positive. The impact of the time-lag between tree removals and revegetation is therefore not relevant for the purpose of determining whether the visual amenity effects are minor/less than minor on persons.

### **Noise effects**

8. Council's position is that the construction noise standards do not apply to the tree removal works as they are not related to a construction activity. We disagree<sup>2</sup>, but to expediate matters the applicant sought resource consent for a restricted discretionary activity to infringe the 50dB L<sub>Aeq</sub> noise limit in standard E25.6.18.

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<sup>1</sup> LVA, paragraph 4.13, Appendix 11, AEE

<sup>2</sup> Page 1, Attachment 1 (s 92 response 10 December 2019); points 4-7 (s 92 response 26 February 2020); and page 4, Attachment A, (s 92 response 26 February 2020)

9. Mr Styles position is that his assessment of noise effects does not change and the conclusions of his original assessment remain applicable, irrespective of the noise standard applied to the works.<sup>3</sup> Mr Styles has explained why the construction noise standard is still relevant to the assessment of effects, but we disagree he has effectively applied the construction noise standard as a permitted baseline. We are happy to revisit this matter if necessary to address your concerns.
10. With regards to your comment about a creditable on-site baseline, construction activities are permitted in the zone that could generate noise levels up to 75dBA L<sub>Aeq</sub> (the construction standard as a permitted activity). Examples of these are:
- A Children's playground<sup>4</sup> and toilet building located on the area fronting Roseman Avenue. This would require tree removal generating chainsaw and chipper noise. It may also involve the use of helicopter for tree removal or delivery of playground equipment to avoid ground disturbance, protect the landform and archaeological features.<sup>5</sup>
  - Resealing the carpark or access road<sup>6</sup>, or for installation of boardwalk or stairs<sup>7</sup>, in themselves permitted activities. Some of these activities involve the use of heavy machinery and helicopter.

### **Ecological Effects**

11. We have not been given the opportunity to read the Council's Consultant Ecologist/Environmental Scientist peer review. However, matters of the time lag, staged revegetation, and omission of replanting large trees have been addressed previously. To reiterate, the specialist assessment from Te Ngahere concluded ecological effects as negligible short term through to positive long-term. Immediate mitigation is not required to mitigate the magnitude of the short-term effects as identified by Te Ngahere.
12. The issue about the clarity of Council's peer review to properly inform notification is a matter we leave for Mr Dales.

### **AUP objectives and Policies**

13. We understand your comment about the application inadequately addressing objectives and policies in Chapter E16 relates to notification. While we disagree, for completeness we include the additional assessment against the objectives and policies to inform whether effects on persons are more than minor.
14. Trees over 6m in height are generally protected in open space zones as they may contribute to cultural, amenity, landscape and ecological values.<sup>8</sup> Also, in open space zones, trees need to be managed to ensure their removal doesn't affected the identified values.<sup>9</sup> In this case, the primarily purpose is to remove exotic trees to allow for indigenous planting, and all trees with cultural values are retained. Indigenous planting is encouraged.<sup>10</sup>

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<sup>3</sup> Page 5, Attachment A, s 92 response 26 February 2020

<sup>4</sup> Chapter J1 Public amenities include public toilets, playgrounds and playground equipment

<sup>5</sup> These are not fanciful examples as this work has recently been consented at Maungawhau, Ōwairaka, Maungarei

<sup>6</sup> Chapter J1 Parks maintenance includes resealing and sealing metal parking and access drives and internal park roads,

<sup>7</sup> Chapter J1 Parks infrastructure includes boardwalks

<sup>8</sup> Objective E16.2(1)

<sup>9</sup> Policy E16.3(2)

<sup>10</sup> Policy E16.3(3)

15. In the context of the open space zones, trees are protected irrespective of whether they are exotic. As acknowledged and assessed in the ecological assessment (not relating to open space but generally), the quality of the trees to be removed is relevant, one quarter (37) of trees to be removed are pest species and would not contribute to the ecological values of the open space zone. Amenity and landscape values are enhanced and protected as removal of particularly large exotic trees allows the volcanic landform to be better revealed.
16. There are no more than minor adverse effects relating to the objectives and policy framework of E16 that would result in adverse effects on persons that are more than minor.

**Public notification/ Special circumstances / Limited notification**

17. Notwithstanding that we have not seen the Council's legal advice, the issues raised in your email do not change our view that the application can be determined without notice or service of notice. We are unclear why the Council appears to be taking a different approach to this application when it has granted consent to four similar applications on a non-notified basis. Particularly as this site, unlike the other four, does not have a significant ecological area overlay.
18. The Council did not find that special circumstances existed to warrant notification in the other applications and, indeed, has vigorously defended its decision on the judicial review of the Owairaka resource consent. Attached is a copy of Council's legal submissions.
19. Obviously, consistency of approach is a crucial part of lawful decision-making. We look forward to Council making a timely decision to grant consent on a non-notified basis as agreed by the experts.
20. Should you have any questions regarding the above, do not hesitate to telephone to discuss.

Yours faithfully



**Jodie Mitchell BRPlan (Hons)  
Richmond Planning Limited**



**Tania Richmond BPlan, MNZPI  
Richmond Planning Limited**

Attached: Buddle Findlay advice dated 17 September 2020

17 September 2020

**To**

Paul Majurey  
Chair  
Tūpuna Maunga o Tāmaki Makaurau Authority

**From**

Paul Beverley  
Alanna Garland Duignan

**By Email**

paul.majurey@ahmlaw.nz

Tēnā koe Paul

**Tūpuna Maunga - RMA notification of resource consent applications**

1. Thank you for your instructions in relation to this matter.
2. You have asked for brief advice in relation to whether it is appropriate for a legal reviewer to provide alternative views to those of independent experts within the ambit of their specialist expertise.
3. We address this question below.

**Summary of advice**

4. In summary, in our opinion it is not appropriate for a legal reviewer to provide alternative views to those of independent experts within the ambit of their specialist expertise.

**Auckland Council legal advice**

5. We set out in **Appendix One** what we understand is a legal review of the draft planning report and application material for the Tūpuna Maunga Authority's proposed works at Puketāpapa.
6. We understand this legal review was commissioned by the Auckland Council ("**Council**") project manager before finalising the planning report for the duty commissioner. It appears this review critiques the analysis and findings of independent experts as to the effects of the proposed works.
7. We note also that the Tūpuna Maunga Authority's planning and expert team have prepared separate responses to the technical issues raised in the Council's legal review, and we have reviewed those responses.
8. Under the RMA, the Council must publicly notify an application if it decides that the activity will have or is likely to have adverse effects on the environment that are more than minor.<sup>1</sup> The assessment of the nature and extent of those effects is for independent experts in their specialist fields.

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<sup>1</sup> RMA, sections 95A(7)(a) and 95A(8)(b).

9. We do not consider it appropriate for legal advisers to provide their own analysis and critique the effects analysis and conclusions of independent experts in their specialist fields. It is well-established in RMA processes that only experts are qualified to express opinions on the nature and extent of the effects. Further, it is only experts that are extended the privilege of being able to express opinions on those specialist matters in Court proceedings. It is not appropriate for legal advisers to provide their own assessment (of, for example, landscape matters) and for that legal assessment to form the basis of a notification decision. That decision must be based on an expert assessment of effects, and that is not a matter for legal analysis.
10. One illustration of that principle is found in *The Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council*.<sup>2</sup>
11. In that case, Auckland Council's hearing committee (comprised of elected representatives) had decided to notify an application on the basis that it had more than minor adverse effects despite the conclusions of Council staff. The High Court set aside that decision and ordered that the application be processed on the basis that it was not required to be publicly notified. The Council's consultant planner had agreed with the applicant's consultant planner that the application should be non-notified because it would have no more than a minor adverse effect on the wider environment. The evidence from all the professional advisers, with one possible exception, did not support public notification:

*[62] The Committee did not refer to any evidence which supported that view, and I do not accept the submission that the heritage values of a community are matters which elected members of a local authority were best placed to determine without reference to evidence and the purposes of the legislation. In making the decision, the Committee members were entitled to bring their own perspectives to bear on the information provided, but they were not permitted to decide such matters on a whim.*

*[63] Furthermore, the Committee reached their conclusion despite the many contra-indicators:*

...

*(g) The view of Council staff that the removal of the building would not have an adverse effect on the environment that was more than minor was based on what Mr Magee described as a thorough analysis of numerous expert reports, site meetings with the plaintiff, informal public consultation in the form of petitions of support and Albert/Eden Local Board support for the proposal.*

*[64] I have not decided that a council needs to explain in every case why it has made a decision to depart from the advice of officers. The need for proper written reasons for transparency and accountability purposes are well recognised. Had the Committee failed to*

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<sup>2</sup> *The Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, (2014) 18 ELRNZ 237.

*give any reasons for its notification decision, this would amount to a “proper and distinct ground of judicial review” capable of setting aside the Committee’s decision.*

*[65] The absence of reasons addressing and rebutting the carefully articulated views of the expert advisers in this case, however, leads to an inference that they were disregarded by the Council.*

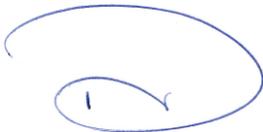
*[66] I am satisfied that the Committee’s decision that s 95A(2)(a) applied could only have been reached on the basis that the Committee failed to take into account the compelling evidence and advice to the contrary. It was not a decision a reasonable committee could have made in the circumstances.*

12. That decision reinforces the role and importance of expert views in the process of assessing the nature and extent of effects for notification purposes.
13. As noted, the Tūpuna Maunga Authority's planning and expert team have prepared separate responses to the technical issues raised in the Council's legal review. We reiterate that for the purposes of the notification decision, and more generally, the Council should not rely on a legal review to override the analysis of independent experts in their specialist fields.

#### **Conclusion**

14. We trust that advice answers your questions and we are very happy to discuss this further.

Ngā mihi nui



**Paul Beverley**  
Partner

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## Appendix One

### Legal Review

#### **Visual / amenity effects**

1. *The Landscape and Visual Assessment (LVA) contains some speculative assumptions as to how visual change would be perceived by the public and neighbouring property owners.*
2. *There is an apparent logical disconnect in accepting that visual effects are undeniably subjective, and that there will be a high or very high degree of visual change, and then concluding that the effect of such change will be very low adverse (less than minor) to positive.*
3. *This conclusion did not appear to be based on any information as to whether affected people have a subjective preference for a vegetated or open visual character on the maunga (and if so, how strong that preference is).*
4. *We could not see how the conclusions that “from limited locations the adverse effects may be perceived as very low adverse” could be reached with any degree of reliability. It is equally possible that such effects will be perceived in a minor or more than minor adverse manner. This is particularly so for property owners / occupiers who are in closer proximity to the maunga who may highly value the existing vegetated outlook and, for instance, the privacy it affords.*
5. *The LVA did not provide viewpoints for near neighbours to Puketāpapa–Pukewīwī / Mt Roskill, such that there was arguably insufficient information to enable an adequate assessment of effects on these viewers.*
6. *We queried whether the LVA had adequately articulated how the proposed revegetation would mitigate the anticipated loss of amenity / visual effects. Given the high level of change at issue, we would expect to see more analysis of this potential effect. The following did not appear to have been adequately addressed in the LVA:*
  - a) *The proposed revegetation will be of lesser stature than the mature trees to be removed;*
  - b) *That the revegetation areas are not co-extensive with the proposed removals; and*
  - c) *The time lag between tree removal and the establishment of native vegetation.*
7. *All this leads to a concern with the reliability of the conclusion reached in the LVA that adverse effects would be, at worst, “less than minor”.*

#### **Noise effects**

8. *The assessment of noise effects was problematic in two respects:*
  - a) *It effectively applied the construction noise standard to the Application when the operational noise limits under the AUP apply; and*

- b) *It applied a permitted baseline for construction noise where no credible onsite permitted activity was identified to warrant the application of such a baseline.*

**Ecological effects**

9. *The peer review of the Te Ngahere ecological assessment by Council's Consultant Ecologist/Environmental Scientist, Andrew Rossaak, found that two effects of the proposal remained a concern, namely:*

- a) *the time lag for revegetation planting; and*  
b) *the overall loss of large trees habitat and associated biodiversity.*

10. *It was unclear from Mr Rossaak's peer review what his conclusion was as to the resultant level of effect (with the application of these conditions) to properly inform a notification assessment.*

**AUP objectives and policies**

11. *The Application has inadequately assessed the proposal in terms of objectives and policies in Chapter E16, which state:*

**E16.2. Objectives**

*(1) **Trees in open space zones that contribute to cultural, amenity, landscape and ecological values are protected.***

*(2) **There is an increase in the quality and extent of tree cover in open space zones, particularly within areas identified for intensified living.***

**E16.3. Policies**

*(1) **Encourage ongoing maintenance of trees to enhance open space zones, while recognising existing constraints and functional requirements of the site.***

*(2) **Manage trees within open space zones to protect their cultural, amenity, landscape and ecological values, while acknowledging that multiple uses occur in open space areas.***

*(3) **Encourage the use of indigenous trees and vegetation for planting within open space zones, where appropriate, to recognise and reflect cultural, amenity, landscape and ecological values.***

*[emphasis added]*

12. *While acknowledging that the trees proposed to be removed are exotic, these provisions are engaged at least in respect of:*

- a) *The ecological values that the larger trees provide in terms of habitat; and*  
b) *The amenity values provided by the trees, including in particular the Phoenix Palms which are noted for such value in the LVA and peer review.*

***Public notification / Special circumstances / Limited notification***

13. *The degree to which these issues are addressed will impact upon whether the application warrants public notification (including because of special circumstances) or limited notification. Please refer to our previous Advice for more detail.*