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In the High Court of New Zealand
Auckland Registry

I Te Kōti Matua O Aotearoa
Tāmaki Makaurau Rohe CIV-2019-404-2682

under the **Judicial Review Procedure Act 2016**

between

Averil Rosemary Norman and **Warwick Bruce Norman**, directors of Auckland

Applicants

and

Tūpuna Maunga o Tāmaki Makaurau Authority, a body established under section 106 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

First Respondent

and

Auckland Council, a unitary authority established under the Local Government (Auckland Council) Act 2009

Second Respondent

FIRST AMENDED STATEMENT OF CLAIM

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29 January 2020

20/3/20. IW
HIGH COURT
31 JAN 2020
AUCKLAND

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FIRST AMENDED STATEMENT OF CLAIM

Parties

1. The applicants:

   (a) are residents of Auckland; and

   (b) enjoy a long and close association with the recreation reserve on Ōwairaka / Mt Albert (**the Reserve**).

2. The first respondent, Tūpuna Maunga o Tāmaki Makaurau Authority (the **Authority**), is:

   (a) established by section 106 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014;

   (b) the administering body of the Reserve for the purposes of the Reserves Act 1977; and

   (c) the administering body of reserves located at 13 other maunga across Auckland, including Maungakiekie / One Tree Hill, Maungaeri / Mt Wellington, Maungawhau / Mt Eden, and Takarunga / Mt Victoria.

3. Ōwairaka / Mt Albert (including the Reserve on it), along with the other maunga administered by the Authority, are held on trust for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.

4. The second respondent, Auckland Council (**the Council**), is:

   (a) a unitary authority established under the Local Government (Auckland Council) Act 2009;

   (b) responsible for the routine management of the Reserve; and

   (c) in carrying out that responsibility, required to act in accordance with, among other things, any lawful direction of the Authority.

The Ōwairaka / Mount Albert Reserve

5. The Reserve is home to approximately 787 trees, native and non-native.

6. 345 trees, being nearly half of those on the Reserve, are non-native.

7. The non-native trees on the reserve include oak trees, radiata pines, cherry trees, eucalyptus trees and olive trees.

8. Many of the oldest and largest trees on the Reserve are non-native.

9. Most of the trees adjacent to the path around the summit of the mountain are non-native.

10. Most trees encountered by visitors to the Reserve are non-native.

11. The Reserve is home to large numbers of birds, including pīwakawaka (fantail), ruru (morepork), kererū (wood pigeon), kōtare (kingfisher), riroriro (grey warbler), and tūī.

12. There have been sightings on the Reserve of kākā and kārearea (native hawks).

13. Large numbers of birds nest in the non-native trees on the Reserve.

14. It is, as at the date of this application, breeding season.

15. Large numbers of birds use the trees in the Reserve, both native and non-native, as sources for food.

16. Tens of thousands of Auckland residents visit and enjoy the Reserve every year.

17. Hundreds of thousands of Auckland residents have visited and enjoyed the Reserve over the last century.

18. The significant number of trees on the Reserve, including the non-native ones, contribute to the pleasantness, harmony, use, enjoyment and amenity value of the Reserve.

The Authority decides to destroy every non-native tree on the Reserve, all at once, and the Council grants a resource consent to do so on a non-notified basis

19. At some time, estimated by the applicants to be before or around September 2018, the Authority decided to destroy and remove every non-native tree on the Reserve, all at once (**the Decision**).

20. In or around October 2018, the Authority and the Council applied to the Council for a resource consent in relation to the implementation of the Decision (application number LUC60328646, referred to here as **the Resource Consent Application**).

21. On 20 February 2019, the Council, through its delegated decision-maker, granted the Resource Consent Application on a non-notified basis.

22. On a date unknown to the applicants, the Authority directed the Council to implement the Decision.

23. The Authority and the Council had intended that the Decision be implemented starting 11 November 2019, and continuing to around mid-December 2019.

24. The implementation of the Decision is, as at the date of this application, being impeded by protestors on the Reserve who are opposed to the Decision.

25. The Authority has, following the issue of proceedings, undertaken to the Court that it will not fell the trees on the Reserve, by any means, until the judicial review is determined.

The effects of the Decision

26. The Decision, if implemented, would result in, among other things:

    (a) The destruction of all 345 non-native trees on the Reserve, being around half of all trees on the Reserve;

    (b) The destruction of many of the largest and oldest trees on the Reserve, including oaks, radiata pines, and eucalyptus trees;

(c) The destruction of the majority of the trees planted adjacent to the walkway around the perimeter of the mountain, and so the majority of trees encountered by visitors to the Reserve;

(d) The destruction of the olive grove grown from seeds sent from Palestine during World War II by a New Zealand soldier and prisoner of war, which is now used as a place of solace;

(e) The destruction of cherry blossom trees planted in remembrance of a serviceman who died aged 18 in the Great War;

(f) The disturbance of a large number of birds, native and non-native, and other wildlife;

(g) If implemented at the time intended, the disturbance of a large number of birds, native and non-native, during the breeding season;

(h) A breach of section 63(1)(a) of the Wildlife Act 1953, which prohibits the disturbance of protected wildlife;

(i) If implemented at the time intended, a breach also of section 63(1)(c) of the Wildlife Act 1953, which prohibits the disturbance of any nest of any protected wildlife; and

(j) The loss of the significant benefits to the ecology and tree life of the Reserve provided by the mature trees to be felled.

The Authority's decision-making process

27. The Authority was required by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 to prepare and approve an integrated management plan for the 14 maunga for which it is the administering authority.

28. In or around 2016, the Authority published its Integrated Management Plan (**the IMP**).

29. The IMP is not specific to the Reserve but applies generally to all the maunga for which the Authority is the administering body.

30. The IMP states, among other things, that:

(a) The IMP "outlines the Authority's long-term vision for the Tūpuna Maunga", being the 14 maunga for which it is the administering body;

(b) The IMP "sets the direction for protection, restoration, enhancement and appropriate use of the Tūpuna Maunga";

(c) The Authority intended to, among other things:

(i) "Investigate opportunities to restore the landform and valued cultural heritage features where these have been modified through inappropriate infrastructure, activities or use in the past";

(ii) "Ensure planting and other landscape features are compatible with the protection of the natural and cultural features of the maunga";

(iii) "Restore suitable areas of the Tūpuna Maunga with indigenous ecosystems. Decisions on location, plant choice, and staging would draw on traditional and scientific knowledge"; and

(iv) The IMP would "be implemented in a phased manner".

31. Nowhere in the IMP is it stated, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.

32. In or around July 2019, after the Decision had been taken and the Resource Consent Application granted, the Authority published the Proposed Integrated Management Plan Strategies (**the Proposed Strategies**).

33. The Proposed Strategies are not specific to the Reserve, but apply generally to all the maunga for which the Authority is the administering body.

34. The Proposed Strategies state, among other things, that:

(a) The "Design Strategy" would include revegetation and replanting;

(b) The "Biodiversity Strategy" would include the restoration of indigenous ecosystems and the reintroduction of native flora;

(c) The "Biosecurity Strategy" would include the "removal of exotic pest plant and animal species, aligned with values being protected on each maunga"; and specified that the "removal of exotic trees will occur when there is a health and safety risk, they are identified as a weed species, there is risk to Archaeological Features, or they impact on the cultural landscape and viewshafts. Any other tree removals will be assessed on a case by case basis."

35. Nowhere in the Proposed Strategies is it stated, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.

36. On 29 October 2019 or thereabouts, the Authority sent a letter to local residents informing them, for the first time, that the Decision had been made to destroy the 345 non-native trees on the Reserve, starting 11 November 2019.

37. The Authority did not seek the comment of those local residents or other users of the Reserve on the merits of the Decision, at that time or at any other time.

FIRST GROUND OF REVIEW – THE AUTHORITY – RESERVES ACT 1977

38. The applicants repeat paragraphs 1 to 37 above.

39. The Authority, as the administering body of the Reserve, is required to act in compliance with sections 17 and 42 of the Reserves Act 1977.

Section 17

40. Under section 17 of the Reserves Act 1977, the Authority is required to administer the Reserve such that "those qualities of the Reserve which

contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the Reserve shall be conserved".

41. The Decision, if implemented, would not conserve qualities of the Reserve that contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the Reserve.

Section 42

42. Under section 42 of the Reserves Act 1977, no tree on the Reserve may be cut or destroyed unless the Authority is "satisfied that the cutting or destruction is necessary for the proper management or maintenance of the Reserve, or for the management or preservation of other trees or bush, or in the interests of the safety of persons on or near the Reserve or of the safety of property adjoining the Reserve, or that the cutting is necessary to harvest trees planted for revenue producing purposes".

43. Given the matters set out at paragraph 26 above, the Authority cannot reasonably have been satisfied that the Decision was "necessary" for any of those purposes, including the "proper management or maintenance" of the Reserve.

44. Even if the Authority was reasonably satisfied that the destruction of 345 non-native trees is necessary for one of those purposes, the Authority may not proceed with the destruction "except in a manner which will have a minimal impact on the reserve".

45. The Decision, if implemented, will not have a minimal impact on the Reserve but a radical, immediate and irrevocable one.

46. As a result of the matters at paragraphs 38 to 45 above, the Decision:

    (a) was made unlawfully in breach of sections 17 and 42 of the Reserves Act 1977; and/or

    (b) was made unreasonably in terms of section 42; and

    (c) if implemented, would result in a breach of sections 17 and 42.

SECOND GROUND OF REVIEW – THE AUTHORITY – LACK OF CONSULTATION

47. The applicants repeat paragraphs 1 to 46 above.

48. As a matter of fairness, the Authority was required to consult interested members of the Auckland public, including those in the position of the applicants, prior to taking the Decision.

49. On 22 December 2019, the Authority, through a press release issued by its Chairman, identified the plans on which the Authority believed it had consulted that were relevant to the Decision, namely:

    (a) The IMP, published in 2016; and

    (b) The Proposed Strategies, published in July 2019.

50. The Proposed Strategies were published after the Authority had already made the Decision.

51. In any event, neither the IMP nor the Proposed Strategies contained information sufficient to enable members of the public to be properly informed of the Decision (or the proposed Decision, whatever the case may be). Neither the IMP nor the Proposed Strategies state or indicate, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.

52. Although the IMP stated that the Authority intended to implement its vision in a "phased" manner, the Decision does not involve a "phased" implementation of the Authority's vision.

53. The Proposed Strategies state that the Authority would only remove non-native trees where they posed a "health and safety risk", or "are identified as a weed species, there is risk to Archaeological Features, or they impact on the cultural landscape and viewshafts", and in other cases on a "case by case" basis.

54. The Decision does not involve any case by case assessment of which non-native trees should be removed, whether by reference to the above criteria or any other criteria.

55. As a result of the matters pleaded above the Authority acted in breach of natural justice by failing to consult interested members of the Auckland public, including the applicants, before making the Decision.

THIRD GROUND OF REVIEW – THE COUNCIL – RESERVES ACT 1977

56. The applicants repeat paragraphs 1 to 55 above.

57. Under section 61 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, the Council:

    (a) is responsible for the "routine management" of the Reserve.

    (b) must carry out that responsibility "under the direction" of the Authority.

58. The Council need follow only lawful directions of the Authority, and must not follow a direction of the Authority that:

    (a) would result in a breach by the Authority or the Council of section 17 or section 42 the Reserves Act 1977; or

    (b) was issued by the Authority as a result an unlawful decision-making process.

59. Were the Council to follow the direction of the Authority to implement the Decision:

    (a) section 17 and section 42 would be breached by the Authority and/or the Council; and

    (b) the Council would be implementing a direction that resulted from an unlawful decision-making process.

FOURTH GROUND OF REVIEW – THE COUNCIL – RMA 1991

60. The applicants repeat paragraphs 1 to 59 above.

Public notification

61. Under section 95A of the Resource Management Act 1991 (the **RMA**), the Council was required to publicly notify the Resource Consent Application if it determined that:

    (a) the activity for which consent was sought would have or would be likely to have adverse effects on the environment that were more than minor; and/or

    (b) special circumstances existed in relation to the Resource Consent Application that warranted it being publicly notified.

62. The Council, through its delegated decision-maker, determined that proposed activity would neither have, nor be likely to have, adverse effects on the environment that were more than minor.

63. The above determination as to adverse effects was unlawful for all or any of the following reasons:

    (a) The Council did not consider adequately, or at all:

        (i) The ecological benefits of the 345 trees to be felled, including to the remaining native trees and trees yet to be planted, and so the loss of those benefits as a result of the felling;

        (ii) The aboricultural effects of the destruction of 345 trees;

        (iii) The heritage value of any or all of the 345 trees to be destroyed, including the olive and cherry blossom groves referred to at paragraph 26(d) and (e) above;

        (iv) The adverse effects on the use, enjoyment and amenity value of the Reserve in the event all 345 non-native trees were felled at once; and

        (v) The extent and variety of birdlife, including native birdlife, which benefit from the non-native trees on the Reserve and

the effect of the proposed felling of all 345 trees at once on that birdlife.

(b) The Council had inadequate information as to the matters in (a) above.

(c) The determination was unreasonable for the reasons pleaded at (a) and (b) above and at paragraph 26 (relating to the effects of the Decision).

(d) No reasonable decision-maker could have concluded that the destruction of the 345 non-native trees on the Reserve, all at once, would neither have nor be likely to have adverse effects on the environment that were minor or more than minor in the circumstances pleaded above.

64. The Council further determined that no special circumstances existed that warranted public notification of the Resource Consent Application. The Council's reasons for that determination were:

(a) "there is nothing exceptional or unusual about the application and the proposal has nothing out of the ordinary run of things to suggest that public notification should occur" and

(b) "The proposal reflects the directions and purposes set out in the approved Integrated Management Plan (IMP) administered by the Tūpuna Maunga o Tāmaki Makaurau Authority."

65. The above determination as to the absence of special circumstances was unlawful for all or any of the following reasons:

(a) The Council did not consider adequately, or at all:

(i) The matters referred to at paragraph 63(a) above;

(ii) The recreation reserve status of the maunga and the resulting statutory restrictions under the Reserves Act 1977, including with respect to the destruction of trees;

(iii) The absence of consultation with the general public, including local residents and users of the Reserve and/or local residents;

(iv) The actual content of the Authority's Integrated Management Plan;

(v) The strong public interest in the Resource Consent Application as a result of the substantial, historic and widespread public use of the Reserve by the people of Auckland; and

(vi) The fact that the Reserve is held on trust for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.

(b) The Council had inadequate information as to the matters in (a) above.

(c) The determination was unreasonable for the reasons pleaded at (a) and (b) above and at paragraphs 16-17 (regarding the numbers of Aucklanders enjoying an association with the Reserve and the consequent significant public interest in activities on the Reserve), paragraph 26 (relating to the effects of the Decision) and 28-31 (relating to the adequacy of consultation).

(d) No reasonable decision-maker could have concluded that there was nothing exceptional, unusual, or out of the ordinary run of things about the Resource Consent Application warranting public notification in the circumstances pleaded above.

66. Had the Council properly informed itself of the matters referred to at paragraphs 63(a) and 65(a) above and taken them into account, it would have been required to conclude that public notification of the Resource Consent Application was required.

Limited notification

67. Under section 95B of the RMA, the Council was required to provide limited notification of the Resource Consent Application to users of the Reserve and/or local residents if it determined that:

(a) the adverse effects of the proposed felling on those persons or any of them would be minor or more than minor; and/or

(b) there were special circumstances that warranted notification to those persons.

68. The Council, through its delegated decision-maker, determined that the proposed activity would not have adverse effects on anyone, including users of the Reserve and/or local residents, that were minor or more than minor.

69. The above determination as to adverse effects was unlawful for all or any of the following reasons:

(a) The Council did not consider adequately, or at all, the matters pleaded above at paragraphs 63(a)(iii) (regarding the heritage value of any or all of the trees to be destroyed), 63(a)(iv) (regarding the adverse effects on the use, enjoyment and amenity value of the Reserve in the event all 345 non-native trees were felled at once), or 65(a)(iii)-(iv) (regarding the lack of consultation).

(b) The Council had inadequate information as to the matters in (a) above.

(c) The determination was unreasonable for the reasons pleaded at (a) and (b) above and at paragraph 26 (relating to the effects of the Decision).

(d) No reasonable decision-maker could have concluded that the destruction of the 345 non-native trees on the Reserve, all at once, would not adversely affect any users of the Reserve and/or local residents in the circumstances pleaded above.

70. The Council further determined that no special circumstances existed that warranted limited notification of the Resource Consent Application, including to users of the Reserve and/or local residents. The Council's reasons for that determination were:

(a) "there is nothing exceptional or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that notification to any other persons should occur"; and

(b) "The proposal reflects the directions and purposes set out in the approved Integrated Management Plan (IMP) administered by the Tūpuna Maunga o Tāmaki Makaurau Authority."

71. The above determination as to the absence of special circumstances was unlawful for all or any of the following reasons:

(a) The Council did not consider adequately, or at all, the matters pleaded at paragraph 65(a)(ii)-(vi) (regarding the recreation reserve status of the maunga, the absence of consultation with users of the Reserve and/or local residents, the strong public interest in the application and the fact the Reserve is held on trust for the common benefit of mana whenua and the other people of Auckland) and paragraph 69(a) above.

(b) The Council had inadequate information as to the matters in (a) above.

(c) The determination was unreasonable for the reasons pleaded at (a) and (b) above and at paragraphs 16-17 (regarding the numbers of Aucklanders enjoying an association with the Reserve and the consequent significant public interest in activities on the Reserve), paragraph 26 (relating to the effects of the Decision) and paragraphs 28-31 (relating to the adequacy of consultation).

(d) No reasonable decision-maker could have concluded that there was nothing exceptional, unusual, or out of the ordinary run of things about the Resource Consent Application warranting notification to users of the Reserve and/or local residents in the circumstances pleaded above.

72. Had the Council properly informed itself of the matters referred to at paragraphs 69(a) and 71(a) above and taken them into account, it would have been required to conclude that notification of the Resource Consent Application to users of the Reserve and/or local residents was required.

RELIEF SOUGHT

73. As against the Authority, and on the basis of the circumstances pleaded in paragraphs 1 to 37 above, and of any one or more of the grounds of review pleaded in paragraphs 38 to 55, above, the applicants seek:

    (a) an order quashing the Decision;

    (b) a declaration that the Authority acted unlawfully in making the Decision;

    (c) an order injuncting the Authority from taking any steps to implement the Decision; and

    (d) costs.

74. As against the Council, and on the basis of the circumstances pleaded in paragraphs 1 to 37 above, and of any one or more of the grounds of review pleaded in paragraphs 56 to 72 above, the applicants seek:

    (a) an order injuncting the Council from taking any steps to implement the Decision;

    (b) a declaration that the Council acted unlawfully in deciding not to publicly notify the Resource Consent Application;

    (c) a declaration that the Council acted unlawfully in deciding not to provide limited notification of the Resource Consent Application to users of the Reserve and/or local residents;

    (d) an order quashing or setting aside the Council's decision to grant the Resource Consent Application; and

    (e) costs.

This amended statement of claim is filed by **ANDREW PEAT** solicitor for the Plaintiffs of the firm **DUNCAN KING LAW**.

The address for service for the applicants is at the offices of Duncan King Law, 95 Manukau Road, Epsom. Documents for service may be left at that address for service or may be emailed to andrew@dklaw.co.nz, provided that it is also copied to hollyman@shortlandchambers.co.nz and james.little@shortlandchambers.co.nz, and that a hard copy follows to the above address.