

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**

Applicants

AND **TŪPUNA MAUNGA O TĀMAKI MAKAURAU
AUTHORITY**

First Respondent

AND **AUCKLAND COUNCIL**

Second Respondent

**AFFIDAVIT OF BARRY LLOYD KAYE ON
BEHALF OF THE SECOND RESPONDENT**

Filed 3 April 2020

Affirmed: 2020

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I, **BARRY LLOYD KAYE** of Auckland, Planning Consultant and Independent Hearings Commissioner, solemnly and sincerely affirm:



















QUALIFICATIONS AND EXPERIENCE

1. I have been working as a town planner since 1974 having qualified with a Bachelor of Arts (Geography/Anthropology) and a Master of Town Planning from Auckland University. I am also a member of the New Zealand Planning Institute (NZPI).
2. Initially I worked for the Ministry of Works and Development, however, I have held other roles including being the sole planner for Waiheke County Council and I held management positions in Auckland City Council and in Auckland Council as the manager for Maritime and Rural Areas then the Manager of Environmental and Coastal Planning. I have been an Independent Hearings Commissioner for Auckland Council since 2006. I have been a self-employed planning consultant since 1997 and still carry out work in that capacity for a number of mainly Auckland based clients. My range of work is such that combined with my work as the Duty Commissioner and as a Hearings Commissioner for Auckland Council I am exposed to a wealth of professional reports and opinions on a range of Resource Management Act 1991 (**RMA**) and Local Government Act 2002 (**LGA**) matters which maintains my understanding of statutory matters. I have extensive experience in dealing with resource consents, Plan changes and Plan reviews.
3. In my work as a planning consultant I regularly carry out section 95 (notification) assessments as part of the work I undertake when writing an assessment of environmental effects. I have also reviewed hundreds of section 95 assessments in resource consent applications that I have dealt with as a Duty Commissioner.
4. As such, I have a high level of familiarity with the tests for notification including special circumstances and why and when they may or may not apply.
5. Since my appointment in 2006 as a Commissioner I have been involved with many hearings, both as a panel member and as a Chair.


6. I have also reviewed and made notification and where relevant, substantive decisions on a large number of resource consent applications in my capacity as a Duty Commissioner. Prior to changes to the RMA concerning tree protection rules, I made decisions on a large number of applications to remove and/or alter trees, including scheduled trees. For example, in 2009 I was one of two appointed tree Commissioners; the other being Ken Graham (an ex-Councillor).

7. Below is a list of some of the many applications that concern trees that I made decisions on:

 1 FERRYHILL RD 20 OCT 2012 DECISION	25/10/2012 8:46 AM
 1 FERRYHILL RD 29 OCT 2012 DECISION	29/10/2012 9:45 AM
 1 Peterson Road, Panmure - agd	24/02/2010 7:04 AM
 1 Peterson Road, Panmure -DECISION m...	4/03/2010 7:02 AM
 1 Queensway, Three Kings - agd	20/05/2010 2:06 PM
 1 Queensway, Three Kings - decision 24 ...	24/05/2010 11:07 ...
 1 Ring Terrace, Ponsonby - agd	14/07/2009 8:38 PM
 1 Ring Terrace, Ponsonby - decision 22 ju...	23/07/2009 9:09 AM
 1.57 PT ENGLAND ROAD Arborist Report ...	18/03/2011 10:14 ...
 1.57 PT ENGLAND ROAD Decision 18 mar...	18/03/2011 1:10 PM
 1.57 PT ENGLAND ROAD Draft Decision	18/03/2011 10:14 ...
 1-21A Ruarangi Rd DECISION 21 JUNE 2012	22/06/2012 10:01 ...
 1-21A Ruarangi Rd	18/06/2012 10:37 ...
 1-21A RURANGI Application Material	18/06/2012 10:37 ...
 1-44 Allendale Rd, Mt Albert-Decision 22 ...	22/05/2012 9:06 AM
 1-44 Allendale Rd, Mt AlbertDraft Resolut...	16/05/2012 2:57 PM
 1-44 Allendale RdApplication Material	16/05/2012 2:57 PM
 1-44 Allendale RoadArborist Report,	16/05/2012 2:57 PM
 1-157 Pah Road, Royal Oak - agd	9/02/2010 12:43 PM
 1-157 Pah Road, Royal Oak - decision	15/02/2010 5:29 PM
 1-197 Balmoral Rd, Balmoral - agd	17/04/2010 9:58 AM
 1-197 Balmoral Rd, Balmoral - decision 2...	22/04/2010 12:56 ...
 2 Koangi Street, Remuera - agd	5/03/2010 9:34 AM

	10 McArthur St St Heliers Draft Decision	24/12/2010 8:46 AM
	10 McArthur St St Heliers Plan	24/12/2010 8:46 AM
	10 Wood Street, Freemans Bay - agd	9/09/2010 5:11 PM
	10 Wood Street, Freemans Bay - decision ...	20/09/2010 10:44 ...
	11 Selbourne Street, Grey Lynn - agd	21/10/2009 9:21 PM
	11-15 Tohunga Crescent, Parnell - agd	7/07/2009 2:10 PM
	11-15 Tohunga Crescent, Parnell - decisi...	7/07/2009 3:02 PM
	12 Ascot Avenue, Remuera - agd	27/09/2010 9:16 AM
	12 Ascot Avenue, Remuera - decision	28/09/2010 3:05 PM
	12 Awatea Arborist Report	27/02/2012 8:59 AM
	12 Awatea Road decision 26 Feb 2012	27/02/2012 9:17 AM
	12 Awatea Road Draft decision	27/02/2012 8:59 AM
	12 awatea	27/02/2012 8:59 AM
	12 Kurahaupo Street, Orakei - agd	21/05/2009 1:11 PM
	12 Kurahaupo Street, Orakei - decision	21/05/2009 1:12 PM
	12 Pentland Road, Mt Eden - agd	24/07/2009 7:17 AM
	12 Pentland Road, Mt Eden - decision	29/07/2009 10:18 ...
	13 Evesham Avenue, Glendowie Decision...	19/10/2010 2:42 PM

8. I also was involved with hearings concerning tree related proposals, as per the examples below:

-  1A HERBERT STREET N SHORE JULY 1 2012
-  5 QUENTIN AVE 3 APRIL 2014
-  11 BENBOW STREET 20 OCT 2011
-  15 HAWKE CRES BEACHLANDS 25 SEPT 2...
-  15 MATAI RD DEVONPORT 26 AUG 2013
-  17 DISRAELI STREET MAY 2012
-  37 BARRIER VIEW ROAD LEIGH DEC 2012
-  40 Martin Avenue
-  82 GREAT SOUTH ROAD MAR 2013
-  88 FRANCIS STREET
-  123 grafton road

9. In 2012 I chaired a hearing concerning proposed Plan Change 149 regarding scheduled trees in Rodney District.

10. I am authorised by the Council to make this affidavit.

11. I have read the Code of Conduct for expert witnesses contained in Schedule 4 of the High Court Rules and to the extent that I am exercising my professional opinion (which is not my role when acting as an Independent Commissioner), agree to comply with it.

PURPOSE AND SCOPE OF AFFIDAVIT

12. The purpose of this affidavit is to describe my role as decision-maker on the resource consent application by the Tūpuna Maunga o Tāmaki Makaurau Authority (**Authority**) to undertake the necessary works to remove exotic vegetation and undertake restoration planting on Ōwairaka / Te Ahi-kā-a-Rakataura / Mt Albert (**Ōwairaka**) at 27 Summit Drive, Mt Albert (**Application**).
13. The fourth ground of review in the first amended statement of claim concerns the Council's decision not to notify the Application under sections 95A – 95E of the Resource Management Act 1991 (**Notification Decision**). The Notification Decision is annexed to Mr Yates' affidavit at "AY2".
14. I made the Notification Decision. I also made the decision to grant consent under sections 104 and 104B of the RMA (**Substantive Decision**).
15. I confirm that I held the necessary delegation from the Council under section 34A of the RMA to make both decisions.
16. This affidavit addresses the following matters:
- (a) Processing of the Application;
 - (b) The Notification Decision;
 - (c) The Substantive Decision; and
 - (d) Conclusion.
17. In preparing this affidavit I have reviewed the Council's Application file to confirm specific details.

304.1301

PROCESSING OF THE APPLICATION

18. I first became aware of the Application when the Council's planner Mr Hayden Wadams sent me an email on 12 February 2019 attaching:

(a) A report entitled "Notification and substantive report" prepared by Mr Dale, signed by him on 11 February 2019 and approved for release by Jonathan Begg on 12 February 2019 (**Notification and Substantive Report**), which is attached to Mr Brooke Dales' affidavit as "BD-1";

305.1963

(b) The Duty Commissioner Record Sheet and draft decision report template, which are attached to Mr Dales' affidavit as "BD-4"; and

305.2009

(c) A OneDrive link to the Application documents including correspondence and the Council's expert reviews.

19. This is the Council's standard method of engaging me when I am scheduled as a Duty Commissioner (or on standby) on the Council roster.

20. The record sheet I am required to fill in indicates the reason why this Application was sent to a Duty Commissioner. It is standard practice for an independent commissioner to be appointed where the Council is or is associated with the applicant.

21. My role was to make the Notification Decision and Substantive Decision on behalf of the Council under delegated authority.

THE NOTIFICATION DECISION

22. I made the Notification Decision under sections 95A – 95E of the RMA.

23. In making the Notification Decision I was provided with or had access to the following materials:

- (a) The Application and its supporting documents, including the Assessment of Environmental Effects, supporting expert reports and all correspondence;
 - (b) Information provided subsequent to lodgement (including the response to the request for further information under section 92 of the RMA and the relevant specialist reports prepared on the Council's behalf);
 - (c) The approved Integrated Management Plan (**IMP**) administered by the Tūpuna Maunga o Tāmaki Makaurau Authority
 - (d) Mr Dales' Notification and Substantive Report; and
 - (e) The draft decisions report template prepared on 12 February 2019 by Mr Dales, which was based on the above report.
- 24.** All material relevant to the Application was provided to me either by email or in a Onedrive link, with the exception of the approved IMP as I describe below.
- 25.** I carried out a site visit on 13 February 2019. I am very familiar with the site and surrounds as until recently (December 2019) I lived in Kingsland (where I had lived for 24+ years) and have visited the site frequently (over 10-12 years on average at least 8 times per annum).
- 26.** For my site visit I drove along New North Road to Mt Albert Road, then down Owairaka Avenue and on to Richardson Road then along Allendale Road. I then drove to and parked at the top of Summit Drive and walked through the main treed areas at the top of the Maunga. While driving around for other jobs I also viewed the site from New North Road near the Western Springs Road intersection where a good distant view is available.
- 27.** After considering all the materials listed above and having also reviewed the approved IMP administered by the Authority (which I downloaded as it was not provided to me in the Application bundle of documents), I determined that the Application was to proceed on a non-notified basis.

28. Turning first to my assessment of whether the Application should be publicly notified, I worked through the draft decision report template (as drafted by Mr Dales) and considered each of the section 95A steps as required. I concurred with Mr Dales in terms of Steps 1 and 2.
29. In respect of Step 3, I concurred with Mr Dales in that the evidence in front of me supported reaching a finding that the proposal will have or is likely to have adverse effects on the environment that are no more than minor. That followed from obtaining an understanding of the different effects (as set out in various expert reports from the Authority's experts as well as in the peer reviews by their Council equivalents) that could be identified as being relevant to the proposal and included the following:
- (a) In the context of the landscape and visual values of the Maunga, and following from the expert assessments including the Council's peer review, I found that any adverse landscape and visual effects of the proposal would be short term in nature and were effectively mitigated (albeit over time) by the proposed restoration and replanting such that those effects could be considered to be less than minor (noting the project implements part of the approved IMP required under section 58 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (**Redress Act**));
 - (b) Based on the ecological reporting I found that any adverse ecological effects could be appropriately managed as part of the proposed works programme and accordingly would ensure that any adverse effects were less than minor;
 - (c) Given the nature and particular detail of the proposals, any adverse effects on public access and recreation activities (noting that the estimated duration of total vegetation removal works was 50 working days - including 20 days when helicopter work was also to occur) would be short term in nature and thus could be considered to be less than minor. A communications plan was to be used to keep the public informed;

- (d) As concluded in the specialist assessments, the proposed works had been designed to be sympathetic to the heritage values of the Maunga, and could be managed to ensure that such effects are less than minor;
- (e) The proposed tree removal methodologies described in the proposal were consistent with best arboricultural practice and when implemented would mean any adverse effects would be less than minor; and
- (f) Any adverse effects associated with land disturbance and stability were to be appropriately managed to ensure that any adverse effects were less than minor.

30. In respect of Step 4 of my section 95A assessment I concluded that the proposal was not exceptional or unusual in that the management of vegetation on reserve land owned by the Council and administered by the Authority in accordance with the approved IMP was not such that it could be seen to fall within special circumstances as I understand them. While the proposal involves removal of a large number of exotic trees and replacement plantings and requires consent for a range of reasons in relation to the Auckland Unitary Plan provisions that in itself did not, in my opinion, take the proposal into the realm of special circumstances that would warrant the Application being publicly notified.

31. I turn now to my limited notification assessment under section 95B of the RMA. I considered the expert assessments and the scale and nature of the proposed works including noise management aspects and proposed management plans that formed part of the proposals. In particular I noted that:

- (a) Noise effects were extensively assessed and conditions relating to the use of helicopter and noise levels were proposed by the applicant and the Council's acoustic expert, Mr Runcie supported their inclusion. I was satisfied that the proposed conditions (subject to my amendments) could be effectively implemented and monitored by the Council and would ensure that noise levels are properly managed. Following from that I

was satisfied that adverse noise effects on people arising from the proposal will be short term in nature and could be managed so that any effects were less than minor;

- (b) Any adverse effects on people (in terms of their access to the Maunga being disrupted) would be less than minor;
- (c) Any adverse landscape and visual effects experienced by people with an outlook to, or using the Maunga, were limited and were adequately mitigated by the proposed restoration planting;
- (d) Any construction traffic associated with the removal of the processed trees would be limited in numbers, short term in nature, and occur only in the proposed hours of work (7:30am-6pm Monday to Friday with no work on weekends or public holidays); and
- (e) The Authority had engaged with iwi and the general public with its consultation on its draft IMP and the outcomes of that consultation had been incorporated into the Application.

32. I then concluded that any adverse effects would be less than minor and that there were no adversely affected persons (on whom the adverse effects of the proposed works would be minor or more than minor). In relation to whether there were any special circumstances warranting limited notification I reached the same conclusion as set out above at paragraph 30.

33. The Notification Decision was based on the draft decision report template prepared by Mr Dale, which I amended as appropriate to reflect my understanding of the proposal and the conclusions I reached following my review of all the relevant material. That material was the material that was provided to me including the Council's responses to matters I raised in my draft decision as sent to Mr Wadams on 13 February 2019 (appended as exhibit **BK-1** to this affidavit); and also noting the amendments set out in the draft decision version dated 19 February 2019

with inputs from Mr Dales and his firm (appended as exhibit **BK-2** to this affidavit). This process is explained in greater detail in Mr Dales' affidavit.

- 34.** I confirm that I read the Application, all supporting documents including correspondences, and the reports prepared on behalf of the Council including Mr Dales' Notification and Substantive report. I also confirm I undertook a site visit. I was satisfied that I had sufficient information to consider the matters required by the RMA and to make my decisions under delegated authority on the Application.
- 35.** My view remains that the detailed and expert information that was provided to me was sufficient for me to make a proper and informed decision and addressed all relevant matters adequately.

THE SUBSTANTIVE DECISION

- 36.** I also made the Substantive Decision on 20 February 2019 under sections 104 and 104D of the RMA to grant consent. The Substantive decision is annexed to Mr Yates' affidavit at "AY3".
- 37.** It is common practice for a Duty Commissioner to make the substantive decision under sections 104 and 104D of the RMA having made the prior decision to not notify a proposal. The Substantive Decision confirmed my understanding of the proposal in relation to making the Notification Decision in so far as embedding a number of key aspects of the proposal into relevant consent conditions. Those conditions ensured that the identified effects would be mitigated/managed in the manner that I envisaged when making the Notification Decision.
- 38.** Those conditions dealt with a number of matters that I considered when making the Notification Decision such as:
- (a) Interactions and communications with nearby persons (a Communication Plan being required under Condition 11);
 - (b) Ecological management;
 - (c) Limitations on the hours of work;

- (d) Specific limitations around use of helicopters and prior agreement being obtained from the persons at 25-37 Mount Royal Avenue to the use of a helicopter to remove tree 649; and
- (e) Requiring a restoration plan for the playing fields that are to be used for the processing of removed trees.

39. In addition, Condition 5 required that a number of finalised management plans be provided to the Council for certification prior to any works commencing. Those included a Finalised Communications Plan; a Restoration Plan (Planting Plan); Lizard Survey Results and a Finalised Lizard Management Plan; Tree protection methodologies; a Predator Management Plan (Lizards); and a Works Management Plan, that included a Health and Safety Plan, a Traffic Management Plan and Incorporation of ecological protection measures.

CONCLUSION

40. I am satisfied that I had sufficient information in front of me to make my decisions, and that the decisions I made were appropriate in the context of that information and my understanding of the proposal.

Signature of deponent:



Barry Lloyd Kaye

Affirmed at Auckland on
2020

Before me:

Signature

Name
A Solicitor of the High Court of New Zealand