

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

CIV-2019-404-2662

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 DR PHILIP HUNTER MITCHELL

the day of April 2020

BUDDLE FINDLAY
NEW ZEALAND LAWYERS
Barristers and Solicitors
Wellington

Solicitors Acting: **Paul Beverley / Sebastian Bisley**
Email: paul.beverley@buddlefindlay.com / sebastian.bisley@buddlefindlay.com
Tel 64 4 499 4242 Fax 64 4 499 4141 PO Box 2694 DX SP20201 Wellington 6140

I, **PHILIP HUNTER MITCHELL**, Planning Consultant, of Auckland, swear:

1. My full name is **PHILIP HUNTER MITCHELL**.
2. I am employed by Mitchell Daysh Limited, an environmental consulting practice with five offices around New Zealand that I cofounded in 2016. Previously I was a Director of Mitchell Partnerships Limited, an environmental consultancy I established in 1997, and which was merged with Environmental Management Services to form Mitchell Daysh Limited. Prior to that, I was the Managing Director of Kingett Mitchell & Associates Limited, a firm that I cofounded in 1987.
3. I have been engaged by the Tūpuna Maunga o Tāmaki Makaurau Authority ("**Tūpuna Maunga Authority**"), the First Respondent, which is a statutory authority established under the Nga Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. My affidavit provides my analysis and conclusions in respect of the Auckland Council's decision to process the Tūpuna Maunga Authority's resource consent application in respect of its restoration project of indigenous planting and removing exotic vegetation on Ōwairaka/ Te Ahi-ka-a-Rakataura/Mt Albert ("the **project**" or "the "**proposal**") on a non-notified basis.
4. I have had no prior involvement in any aspect of this project, save for the preparation of this affidavit.

Qualifications and Experience

5. I hold the degrees of Bachelor of Engineering (Hons) (1979) and Doctor of Philosophy (1984), both from the University of Canterbury.
6. I am a past president and founding executive committee member of the Resource Management Law Association, a full member of the New Zealand Planning Institute and in 2015 was a recipient of the New Zealand Planning Institute's Distinguished Service Award.
7. I have practised in the field of resource management for the past 34 years during which time I have had a lead resource management role in many significant projects throughout New Zealand.
8. I have acted on several Ministerial advisory panels established to review aspects of the Resource Management Act 1991 ("**RMA**" or "**Act**") and was a

member of the Technical Advisory Group established to review sections 6 and 7 of the RMA.

9. My principal areas of practice are: providing resource management advice to the private and public sectors; acting as an RMA Hearings Commissioner; facilitating public consultation processes; undertaking planning analyses; managing resource consent acquisition projects; and developing resource consent conditions.
10. I have acted as a Hearings Commissioner on some 50 occasions, many in the role of Hearing Chair. In that regard, I am currently chairing the hearing of submissions on the proposed Waikato District Plan.
11. Previously, I was appointed jointly by the Minister for Canterbury Earthquake Recovery and the Christchurch City Council as a Hearings Commissioner for the replacement of the Christchurch City District Plan (the district plan that is intended to facilitate the rebuilding of Christchurch).

Code of Conduct

12. I confirm that I have read and will comply with the 'Code of conduct for expert witnesses' contained in the High Court Rules 2016. I also confirm that I have not omitted to consider any material factors known to me that might alter or detract from the opinions I express.

Scope of Affidavit

13. My affidavit:
 - (a) Briefly summarises the provisions of the RMA that apply when considering the non-notification of resource consent applications.
 - (b) Analyses the process undertaken by the Auckland Council.
 - (c) Presents my conclusions.

Information Reviewed When Preparing this Affidavit

14. In preparing my affidavit I have reviewed the following documents:
 - (a) The affidavit of Antony Bernard Yates dated 30 January 2020;

201.169

- (b) The Assessment of Environmental Effects and Statutory Assessment ("**AEE**") for the proposal, dated October 2018;¹
- (c) The notification decision of the Auckland Council, dated 20 February 2019 ("**notification decision**");²
- (d) The substantive decision of the Auckland Council on the resource consent application, dated 20 February 2019 ("**Council decision**");³
- (e) Section 92 RMA request issued on behalf of Auckland Council, dated 6 November 2018 ("**section 92 request**");⁴
- (f) Section 92 RMA response on behalf of the Tūpuna Maunga Authority, dated 17 December 2018 ("**section 92 response**");⁵
- (g) The various technical peer reviews of the proposal undertaken by Auckland Council;⁶
- (301.0129) (h) Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan (2016) which is produced by Janine Bell and marked **JB1**;
- 101.023 (i) First Amended Statement of Claim on behalf of the Applicants, dated 29 January 2020;
- 201.001
201.011
202.301
202.306 (j) Affidavits of Averil Rosemary Norman and Sir Harold Marshall, both dated 6 December 2019 and the reply affidavits of Mary Rose Inomata and Mary Talon, both dated 13 February 2020; and
- (k) The Auckland Unitary Plan – Operative in Part 2016 ("**Unitary Plan**").

PUBLIC NOTIFICATION PROVISIONS OF THE RMA

15. Section 95A of the RMA sets out the steps that a consent authority must take to determine whether to publicly notify a resource consent application. It states:

95A Public notification of consent applications

- (1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to publicly notify an application for a resource consent.

304.1231
304.1301
304.1307
304.1320
304.1324
304.1407

¹ Affidavit of Antony Bernard Yates – Exhibit AY1.
² Ibid – Exhibit AY2.
³ Ibid – Exhibit AY3.
⁴ Ibid – Exhibit AY4.
⁵ Ibid – Exhibit AY5.
⁶ Ibid – Exhibit AY8.

Step 1: mandatory public notification in certain circumstances

(2) Determine whether the application meets any of the criteria set out in subsection (3) and,—

- (a) if the answer is yes, publicly notify the application; and
- (b) if the answer is no, go to step 2.

(3) The criteria for step 1 are as follows:

- (a) the applicant has requested that the application be publicly notified;
- (b) public notification is required under section 95C;
- (c) the application is made jointly with an application to exchange recreation reserve land under section 15AA of the Reserves Act 1977.

Step 2: if not required by step 1, public notification precluded in certain circumstances

(4) Determine whether the application meets either of the criteria set out in subsection (5) and,—

- (a) if the answer is yes, go to step 4 (step 3 does not apply); and
- (b) if the answer is no, go to step 3.

(5) The criteria for step 2 are as follows:

- (a) the application is for a resource consent for 1 or more activities, and each activity is subject to a rule or national environmental standard that precludes public notification;
- (b) the application is for a resource consent for 1 or more of the following, but no other, activities:
 - (i) a controlled activity;
 - (ii) a restricted discretionary or discretionary activity, but only if the activity is a subdivision of land or a residential activity;
 - (iii) a restricted discretionary, discretionary, or non-complying activity, but only if the activity is a boundary activity;
 - (iv) a prescribed activity (see section 360H(1)(a)(i)).

(6) [Not relevant – relates to residential activities]

Step 3: if not precluded by step 2, public notification required in certain circumstances

(7) Determine whether the application meets either of the criteria set out in subsection (8) and,—

- (a) if the answer is yes, publicly notify the application; and
- (b) if the answer is no, go to step 4.

(8) The criteria for step 3 are as follows:

- (a) the application is for a resource consent for 1 or more activities, and any of those activities is subject to a rule or national environmental standard that requires public notification;
- (b) the consent authority decides, in accordance with section 95D, that the activity will have or is likely to have adverse effects on the environment that are more than minor.

Step 4: public notification in special circumstances

- (9) Determine whether special circumstances exist in relation to the application that warrant the application being publicly notified and,—
- (a) if the answer is yes, publicly notify the application; and
 - (b) if the answer is no, do not publicly notify the application, but determine whether to give limited notification of the application under section 95B

MY ANALYSIS

16. In respect of Steps 1 and 2 and the first limb of Step 3⁷ of section 95A, the notification decision concluded that:
- (a) Public notification was not mandatory (because none of the specified criteria in Step 1 applied);⁸
 - (b) That public notification was not precluded by virtue of the matters listed in Step 2; and
 - (c) There is no rule or National Environmental Standard that applies pursuant to section 95A(8)(b).
17. I agree with that assessment, and note that those matters are factual and require no subjective assessment on behalf of the assessor. Therefore, I do not address Steps 1 and 2 and section 95A(8)(b) further.
18. Regarding the other matters specified in Steps 3 and 4 of section 95A, the notification report states [**my emphasis**]:⁹

Public notification

Under section 95A of the RMA this application shall proceed without public notification because:

...

3. Under step 3, public notification is not required as:
- a.
 - b. **the activity will have or is likely to have adverse effects on the environment that are no more than minor** because:
 - In the context of the landscape and visual values of the Maunga, **any adverse landscape and visual effects of the proposal** are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they **can be**

⁷ RMA - section 95A (8)(a).

⁸ Notification decision – pp 3-4.

⁹ Ibid – 5 -6.

- **considered to be less than minor;**
 - **Any adverse ecological effects** arising from the proposal can be appropriately managed as part of the works programme to ensure that any adverse effects **are less than minor;**
 - **Any adverse effects on public access and recreation** will be short term in nature and **can be considered to be less than minor;**
 - The proposed works have been designed to be **sympathetic to the heritage values of the Maunga, and can be managed to ensure they are less than minor;**
 - **The tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects are therefore considered to be less than minor;**
 - **Any effects associated with land disturbance and stability** can be appropriately managed to ensure they **are less than minor.**
4. Under step 4, **there are no special circumstances that warrant the application being publicly notified** because 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. **The proposal reflects the directions and purposes set out in the approved Integrated Management Plan (IMP) administered by the Tūpuna Maunga o Tamaki Makaurau Authority.**
19. In terms of the notification decision's conclusions that the proposal "will have or is likely to have adverse effects on the environment that are no more than minor", the conclusions listed (and highlighted by me in paragraph 18 above) are those reached by the various independent technical experts, whose reports were appended to the original AEE and which were accepted by the Auckland Council staff as being correct.
20. On the basis of those technical assessments, the conclusions reached in the notification decision regarding adverse effects are, in my opinion, logical and appropriate. I would add further that in light of the conclusions of the various technical specialists, I consider that it would have been inappropriate for the notification decision to have reached a different conclusion.
21. My overall conclusions are that:
- (a) The process followed in the notification decision of working through Steps 1 – 4 of section 95A was correctly applied; and

- (b) Based on the information presented in the AEE, the section 92 response and the Council's peer reviews, the decision not to publicly notify the application was logical and appropriate.
22. Regarding point b) in paragraph 21 above, I have now read the affidavits referred to in my paragraph 14 j). Having done so, and by way of summary, those affidavits raise two sets of concerns on the part of the deponents. Firstly, they reach different conclusions on the scientific assessments undertaken for the Tūpuna Maunga Authority and, secondly, they raise concerns that some of the exotic trees that are proposed to be removed have heritage significance. I address each of these matters below.
23. Regarding the concerns expressed about technical matters, my understanding is that none of the people referred to in my paragraph 14 j) are technical specialists or "experts" in those fields. As such, while their concerns about things like the effects on flora and fauna are clearly heart felt, and genuinely held, the analyses of the various independent technical experts have comprehensively addressed the issues raised. Therefore, there is no reason, in my opinion, why the conclusions of the technical experts should be disregarded, in preference to the views of lay people.
24. Further in respect of point b) in my paragraph 21, the affidavits referred to in paragraph 14 j) above provide information about the history of pākehā interaction with this Maunga. This is "new information" in the sense that it was not available to / included in the AEE lodged with the resource consent application for reasons I discuss below.
25. A selection of the matters raised in the affidavits, includes the following:

Affidavit of Averil Rosemary Norman

History of Trees

16. Some of the trees on Mt Albert have an important historical connection. That tangible history will be immediately lost if the Authority and Auckland Council proceed as planned.
17. There is a grove of olives on the mountain that were planted by Jack Turner. I knew Mr Turner when I was growing up and walked around the mountain with him numerous times.
18. Mr Turner served during World War 2, during which time he was a prisoner of war. During the war years he visited Palestine and from there, sent olive tree seeds back home. These trees have grown from those seeds.

Affidavit of Sir Harold Marshall

23. I hope I have said enough to this point to demonstrate the profound connection, physically and emotionally and

spiritually, that I have with Mount Albert and its trees. Most have grown up with me. I support the Authority but not the method it came to this decision in or manner it plans to carry it out.

Reply affidavit of Mary Rose Inomata

11. The Society's position is that no tree, native or non-native, on Mt Albert should be destroyed if it has historical significance. Some of the non-native trees on the mountain may well have little heritage value; others, however, are likely to have considerable heritage value. That should, in our view, at least be taken into account before a decision is made to cut them down.
12. We have a very poor track record in New Zealand of preserving our history, both Maori and non-Maori, pre- and post- colonisation. The reason has often been that no one thinks to consider whether there is history worth preserving.
13. The very old native and non-native trees on the mountain that were planted in the nineteenth century following colonisation (when the mountain was largely bare of trees, as a pa site) are especially likely to have a special history worth respecting.

Reply affidavit of Mary Tallon

2. My father John Penman Turner (Jack) was born and lived with his family in that house from 1915 until his death in 2005. I was born and lived on the mountain until my marriage. My brothers, their families and their grandchildren still live on the mountain in the home my grandfather built.
3. In 1917, my grandfather Harvey, in concern for the mountain, drove to Wellington to object to the destructive mining of the crater. He persuaded Prime Minister William Massey to put a stop to this. In 1920 he established the produce co-operative, Turners and Growers. Harvey was later appointed by Bernard Freyberg to run the New Zealand Forces Club in Cairo in 1940 and as such was host to the Maori Battalion. After the war, he was Chairman of the Auckland Harbour Board and took the Board to visit Northland to see Tane Mahuta. This was to encourage protection of the Waitakeres and the planting of indigenous trees there. One outcome of the visit was the establishment of Scenic Drive. He was appointed CBE in 1953 and knighted in 1967.
4. In 1939, my father Jack Turner volunteered to go to WWII. This was in response to the death of his mother Ethel Turner's 18-year-old brother (Edgar Penman) at Gallipoli. Ethel planted a cherry walk on the northern slope of the crater in memory of her young brother. That cherry grove is still there on Mt Albert today.
5. Jack eventually went to Egypt with the First Echelon. He sent olives back to his family while on leave in Jerusalem in December 1940, but due to his capture on Crete and transport to Silesia, Poland as a prisoner of war, his family were unable to establish whether he was alive for another seven months. They planted the olive seeds on the northern slope of the mountain in memory of him and lived in hope.

6. Jack did eventually return home, having survived the 1000km forced death march across Europe in the dead of winter which reduced him to 6 stone. The olive trees also remain on the mountain to this day.
 7. I have attached a typed transcript of a letter that Jack sent home to his family during the war. It is labelled Exhibit "A". Near the bottom of page 5, he mentions sending the olives home to New Zealand.
 8. Jack Turner loved the mountain and was an observant guardian of it throughout his lifetime. He lived a life of service to his family and community. He died in 2005. I have attached a printout of his obituary in the New Zealand Herald and have marked it as exhibit "B". It talks about his Mt Albert home as well as his internment in the war.
 9. All of this means that Owairaka has held deep importance for me and my family since the beginning of the 1900s. Over a one-hundred year period, we have maintained the land carefully and respectfully, and planted trees both indigenous and exotic on the mountain. To this day, we regularly walk around the cone to marvel at the view, the sunset and sunrise, the bird life and flora.
 10. I understand the Tūpuna Maunga Authority intends to remove both the cherry grove and the olive trees, as part of its plan to remove all exotic trees on the mountain. I was not aware of this plan until late last year, when it was just about to go ahead. I was certainly *never* consulted or notified about it before the plan was made. If I had been, I would have made the authorities aware of the trees' importance to my family and to the mountain's heritage.
26. These various excerpts serve to illustrate the connection that people in the community have to the Maunga, and, in particular, to what might be referred to as its "memorial trees" and "sense of place".
27. Whilst that information could have been a relevant consideration under Steps 3 and 4 of section 95A of the RMA when the Auckland Council was preparing its notification decision, that could only have been so if it was available. In this regard, I note:
- (a) The Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan (2016) ("**IMP**") makes it clear that the Tūpuna Maunga Authority's intention is to restore native vegetation on the various Auckland Maunga;
 - (b) The IMP is a document that that is relevant to RMA decision makers;
 - (c) There is no mention of any "memorial trees" or any other values attributed to the exotic vegetation on Ōwairaka in the Unitary Plan, an option that was expressly open to concerned residents to pursue via

the public submissions and hearings process – a process that was availed upon by many elsewhere in Auckland;

- (d) The trees proposed to be removed are not “scheduled” for protection in the Unitary Plan. Again, this was an option open to concerned residents to pursue via the submissions and hearings process, but wasn’t; and
 - (e) The cultural and spiritual connection of mana whenua to the Maunga is self-evident, as reflected in the Regional Policy Statement sections of the Unitary Plan and by virtue of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 transferring ownership of the Maunga to mana whenua.
28. When looked at in the round, I consider that the process followed by Auckland Council in preparing the notification report was in accordance with good planning practice and the decision reached was a logical and defensible one. It is the same decision that I would have reached, had I been the Hearing Commissioner making the notification decision.
29. In relation to the statements made in the affidavits on behalf of the Applicants regarding “heritage trees” on Ōwairaka (cited in paragraph 25 above), the Council or the Commissioner could not have been expected to consider this matter when such information was simply not available in any part of the public domain.

CONCLUSION

30. In my opinion, the Auckland Council followed a valid and appropriate process when determining that the subject resource consent application should be processed without public notification.
31. The intention of the Tūpuna Maunga Authority to implement a process of restoring native vegetation on the Maunga of Tāmaki Makaurau has been well signalled in the IMP, a document that is relevant to RMA decision-makers.
32. Furthermore, despite the matters raised in the affidavits referred to above regarding “memorial trees” and the highly valued “sense of place” the vegetation has, there is nothing in the Unitary Plan to suggest to a reader, or decision maker that the Maunga has any of the historic heritage or special values referred to in the affidavits. That is not to say they do not exist, but it

does mean that parties asserting those values have, for whatever reason, not had them recognized in the cornerstone statutory document for Auckland – The Unitary Plan. Similarly, none of the exotic trees are “scheduled” in the Unitary Plan for protection.

- 33. Conversely, the cultural and spiritual connection of mana whenua to the Maunga is self-evident, as reflected in the Regional Policy Statement sections of the Unitary Plan and by virtue of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 transferring ownership of the Maunga to mana whenua.
- 34. Given all the above, I consider that the process followed by Auckland Council in preparing the notification report was in accordance with good planning practice and the decision reached was a logical and defensible one.

DR P H MITCHELL

SWORN by **DR PHILIP**)
HUNTER MITCHELL at)
 this day of 2020)
 before me:)

DR P H MITCHELL

A solicitor of the High Court of New Zealand