

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

APPLICANTS' REPLY TO FIRST RESPONDENT'S
AMENDED STATEMENT OF DEFENCE

21 April 2020

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APPLICANTS' REPLY TO FIRST RESPONDENT'S AMENDED STATEMENT OF DEFENCE

1. They admit the positive allegations in paragraphs 2 and 3 but insofar as there is any difference they rely on the terms of the statutes referred to in full.
2. They admit the positive allegations in paragraph 5 and say further that the land referred to falls outside the recreation reserve, is on the lower slopes of the mountain, and is largely private land inaccessible to the public.
3. They admit the positive allegations in paragraph 6.
4. They deny the positive allegations in paragraph 7.
5. They admit that the contractor engaged by the respondents to cut down the non-native trees on the Reserve assessed how each tree should be removed, as opposed to whether it should be removed, but otherwise deny the positive allegations in paragraph 8.
6. They admit the positive allegations in paragraph 11 but say further that:
 - (a) the Ecological Assessment of the effect on birdlife to which paragraph 11 refers was premised on the respondents cutting down the non-native trees outside of bird breeding season;
 - (b) the respondents had, prior to the filing of the judicial review application, intended to cut down the trees in November-December, i.e., during bird breeding season; and
 - (c) with respect to the three tui nests found on the non-native trees on the Reserve referred to in paragraph 11:
 - i. one of the authors of the Ecological Assessment has since given evidence that it is difficult to exclude the possibility that "active nests of species with less conspicuous breeding behaviour than tui were not identified by surveyors"; and

- ii. A report from ecologists employed by the Department of Conservation in November 2019 concluded that it is “highly unlikely that all native bird nests were identified” in the survey relied upon.
7. They admit the positive allegations in paragraph 14.
8. In answer to paragraph 18, they:
 - (a) admit that planting more native trees (as opposed to cutting down all non-native trees) on the Reserve will, in due course and if the planting is successful, enhance the pleasantness, harmony, use, enjoyment and amenity value of the Reserve;
 - (b) deny that removing 345 exotic trees all at once (43.8% of the trees on the Reserve) will enhance those characteristics;
 - (c) are not required to plead to what will “meet the purpose” of legislation; and
 - (d) otherwise deny the positive allegations in paragraph 18.
9. In answer to paragraph 19, they:
 - (a) admit the terms of the Integrated Management Plan (**the IMP**), the Annual Operational Plan 2018/2019, and the Collective Redress Act, and rely on the terms of those plans and that legislation as if pleaded in full;
 - (b) admit that, on 16 October 2017, the Authority and the Council approved the Annual Operational Plan 2018/2019;
 - (c) admit that the Council, through Nicholas Turoa, the Council’s Tupuna Maunga manager, decided to remove all 345 non-native trees on the Reserve and as part of a single operation;
 - (d) admit that the respondents engaged the consultants referred to at paragraph 19(g) to prepare reports to support the application

for a resource consent to cut down the 345 non-native trees on the Reserve;

- (e) have insufficient knowledge of when Mr Turoa made the decision referred to above and with whom he consulted on that decision, and so deny the positive allegations in paragraph 19 in relation to those matters; and
 - (f) otherwise deny the positive allegations in paragraph 19.
10. In relation to the positive allegations in paragraph 20, they rely on the terms of the Council's resource consent decisions as if pleaded in full.
11. They deny the positive allegations in paragraph 24.
12. In answer to paragraph 26, they:
- (a) admit that the Department of Conservation advised Mr Turoa on 28 November 2019 that the proposed works "did not trigger the need for a Wildlife Act authority";
 - (b) otherwise deny the positive allegations in paragraph 26; and
 - (c) say further that Department of Conservation ecologists advised in the report provided to Mr Turoa at the same time that:
 - i. "oversights have been made with regard to the value of vegetation currently present in terms of its provisioning for native species";
 - ii. "the resource consent conditions...do not suitably minimise potential risks to native bird species that are legally protected under the Wildlife Act 1953";
 - iii. "given the number of trees present on Owairaka (n=787) and the search effort it is highly unlikely that all native bird nests were identified"
 - iv. "native and exotic trees are interspersed across Owairaka therefore it is likely that there are exotic trees proposed for

removal are in close proximity to the nests that are present (those detected and otherwise), regardless of if they are nesting in native vegetation”; and

v. “due to the size of the site...there is potential that tree felling methodology...will disturb native nesting birds”.

(d) They rely upon the report from the Department of Conservation ecologists as if pleaded in full.

13. They deny the positive allegations in paragraph 31.

14. They admit that the positive allegations in paragraph 32.

15. In answer to paragraph 48, they:

(a) admit that the Authority was obliged to consult, and did so, on the IMP (and repeat paragraphs 28-31 and 51 of the amended statement of claim regarding the content of the IMP and so what was consulted on);

(b) admit that planting more native shrubs and trees on the Reserve, but not cutting down all non-native trees, has substantial public support;

(c) insofar as the Annual Operational Plan 2018/2019 constituted a decision or plan to cut down all non-native trees on the Reserve (which is denied), deny that the Authority had no obligation to consult on it; and

(d) otherwise deny the positive allegations in paragraph 48.

16. They admit the positive allegations in paragraph 52 and repeat paragraph 52 of the amended statement of claim.

17. In answer to paragraph 54, they:

(a) admit that the Council’s tree-removal contractor individually considered how each non-native tree on the Reserve should be removed, but not whether it should be removed; and

- (b) otherwise deny the positive allegations in paragraph 54.
- 18. They deny the positive allegations in paragraph 57 and rely on the terms of the Collective Redress Act as if pleaded in full.
- 19. In answer to paragraph 62, they:
 - (a) admit that the Council:
 - i. requested further information from the respondents (as the applicants for the resource consent) pursuant to s 92 of the Resource Management Act 1992;
 - ii. commissioned peer reviewers to assess material provided as part of the resource consent application;
 - iii. appointed an independent Commissioner to make the notification and substantive decisions on the matter on its behalf; and
 - (b) otherwise deny the positive allegations in paragraph 62.
- 20. They deny the positive allegations in paragraph 73.