

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

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FURTHER REPLY AFFIDAVIT OF ANDREW FRANCIS  
BARRELL

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Filed 21 April 2020

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## FURTHER REPLY AFFIDAVIT OF ANDREW FRANCIS BARRELL

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I, Andrew Francis Barrell, arborist of Auckland, swear:

1. In this affidavit, I respond to a number of matters raised by Brook Dales in his affidavit filed 3 April 2020.
2. I repeat the confirmation given in my earlier affidavits regarding the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules. The matters stated in this affidavit are to the best of my knowledge true and correct.

### **Exceptional nature of the resource consent application**

3. Brook Dales has given evidence for the Council. He explains at [8] of his affidavit dated 3 April 2020 that he was the planner appointed by the Council to prepare the report recommending that the resource consent application be granted without public or limited notification.
4. At [68] of his affidavit, Mr Dales says that he concluded at the time he was considering the respondents' application that "there is nothing exceptional or unusual about the Application, and that the proposal has nothing out of the ordinary run of things to suggest that public notification should occur...": at [68]. He goes on to say at [69] that "I considered that the application for the activity cannot be described as out of the ordinary and giving rise to special circumstances".
5. I disagree with these comments. I have been involved with hundreds of resource consent applications relating to trees over the past 15 years, both from my time at the North Shore City Council and as a consultant. Compared to those applications, this application was, in my opinion, clearly exceptional, given the combination of the very high number of trees proposed to be cut down (345 mature trees of many different varieties); the inevitable effect on the environment of cutting down so many mature trees at once, being almost half of those on the reserve; the fact the trees are situated on a popular urban recreation reserve; and the fact the trees are situated in an SEA (Significant Ecological Area) and in a public open space zone.
6. As I said in my affidavit dated 14 February 2020 at [9], this application will have been, in my experience at least, one of the most significant, if not the most significant, from an arboricultural perspective received by the Council in recent years. I am not aware of any other application, in my 15 years' experience, where the mass felling of so many mature trees in an urban environment has been either assessed or consented.
7. Mr Dales gives two reasons for his conclusion that there was nothing out of the ordinary about the application. The first was that it was (at [68](a)):

“generally consistent with the direction of the AUP, as applied through the discretion of the relevant activities of the AUP, with the range of matters relevant to the development provided for in the AUP specifically as either restricted discretionary or discretionary activities”

8. I disagree that the application is consistent with the direction of the Unitary Plan. In my view, it is inconsistent. Chapter E.16 of the AUP addresses trees in open space zones like the reserve on Ōwairaka / Mt Albert (**exhibit A**). It encourages the preservation of trees in open space zones, both native and non-native, as an “important public asset”:

“E16.1. Background

Trees in the open space zones are an important public asset and need to be managed appropriately. As urban areas intensify, open space zones will be relied on to a greater extent to provide amenity in these areas.

Trees in the open space zones contribute towards Auckland being a desirable place to live and are an important part of Auckland’s natural heritage and identity.

Environmentally, trees provide important ecological values in terms of storing carbon and providing habitat and food for wildlife, improving air quality and providing ecosystem services.”

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.”

9. The respondents’ resource consent application sought consent to remove many trees greater than 4 metres in height and 400mm in girth, which is a restricted discretion activity. Accordingly, the Council

was required to consider under Chapter E16.2 the following matters (among others):

(a) the specific values of the trees including any ecological values with respect to water and soil conservation, ecosystem services, stability, ecology, habitat for birds and amelioration of natural hazards;

(b) the loss of amenity values that tree or trees provided;

(c) the risk of actual damage to people and property from the tree or trees including the extent to which adverse effects on the health and safety of people have been addressed as required under health and safety legislation;

(d) any alternative methods that could result in retaining the tree or trees;

(e) the degree to which any proposed mitigation adequately compensates for the values that trees provide..."

10. The only time a distinction is made between native and non-native trees in Chapter E.16 is at E16.3(3), quoted above, which says that the "use of indigenous trees and vegetation *for planting*" is encouraged. That is, where new trees can be planted, the AUP encourages the planting of native trees.

11. The second reason given by Mr Dales for his conclusion that there was nothing exceptional or special about the application was that:

"My assessment had not identified any aspect of the receiving environment or any other factor that would give rise to special circumstances."

12. I addressed the effect on the environment of the respondents' plan at [15], [37]-[41], [51]-[55] of my first affidavit dated 6 December 2019.

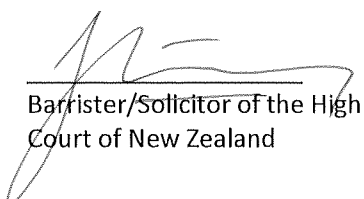
#### **Lack of arboricultural assessment of resource consent application by Council**

13. In my affidavit dated 14 February 2020 at [8], I explained that I would have expected the Council, as the decision-maker on the resource consent application, to have required a detailed assessment of the application from an arboricultural perspective and in particular for it to have sought the input of Council arboricultural specialists on the application.

14. In Mr Dales' affidavit, he says he concluded that it was unnecessary to seek the input of a Council arboriculture specialist on the resource consent application because the proposed *method* of removing the trees had already been confirmed as appropriate in the context of an earlier tree removal application relating to Maungarei / Mt Wellington: at [50]-[52].

15. Mr Dales goes on to confirm at [53] that his consideration of “arboricultural effects” was confined to the management of the effects of the tree removal *process*. He says ecological effects and visual effects were considered separately. The implication is that the ecology and visual effects assessments were an adequate substitute for an arboricultural assessment.
16. I disagree. I addressed in my affidavit dated 14 February 2020 why an arboricultural assessment would have been a standard and valuable part of the process of considering an application of this type (at [8]-[16]). As I have explained in earlier affidavits, that assessment would have included:
- (a) An assessment of the ecological benefits provided by the trees, including to the remaining trees and trees yet to be planted (and so an assessment of the loss of those benefits by the removal of the trees);
  - (b) An assessment of the benefits provided by the trees to people, for example amenity benefits (shade, birdsong, etc.);
  - (c) An assessment of the proposed felling in view of the Council’s Urban Ngahere (Forest) Strategy, which provides for the retention and protection of mature, healthy trees (regardless of origin); and
  - (d) An assessment of whether the applicants had considered, and whether there were, alternative methods of achieving the relevant objectives that did not involve cutting down all non-native mature tree on the mountain.
17. I note these types of assessments were required in any event by chapter E16.2 of the AUP, quoted above. For example, Chapter E16.2(d) required consideration of whether there were “any alternative methods that could result in retaining the tree or trees”. I am not aware of any consideration being given to alternatives to cutting down all non-native trees on the reserve (for example, retaining those trees which do not need to be cut down in order for the native planting plan to proceed).

SWORN at AUCKLAND this 5<sup>th</sup> day  
of June 2020 before me:

  
Barrister/Solicitor of the High  
Court of New Zealand

Jessica Ellen Sarah Storey  
Barrister  
Auckland

  
Andrew Francis Barrell

Sworn before me at Auckland on 5 June 2020

## E16. Trees in open space zones

### E16.1. Background

Trees in the open space zones are an important public asset and need to be managed appropriately. As urban areas intensify, open space zones will be relied on to a greater extent to provide amenity in these areas.

Trees in the open space zones contribute towards Auckland being a desirable place to live and are an important part of Auckland's natural heritage and identity.

Environmentally, trees provide important ecological values in terms of storing carbon and providing habitat and food for wildlife, improving air quality and providing ecosystem services.

### 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

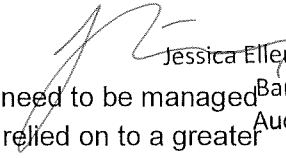
- (1) Encourage ongoing maintenance of trees to enhance open space zones, while recognising existing constraints and functional requirements of the site.
- (2) Manage trees within open space zones to protect their cultural, amenity, landscape and ecological values, while acknowledging that multiple uses 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.

### E16.4. Activity table

Table E16.4.1 Activity table specifies the activity status for land use activities related to trees in open space zones pursuant to section 9(3) of the Resource Management Act 1991

- The rules that apply to network utilities and electricity generation are located in Section [E26 Infrastructure](#).
- All activities must obtain the approval of the Tree Asset Manager for the Council, or the appropriate landowner, in respect of trees in open space zones.

These rules apply if the location of the trunk of the tree is in the open space zones.

  
Jessica Ellen Sarah Storey  
Barrister  
Auckland

**Table E16.4.1 Activity Table**

Activity		Activity status
(A1)	Biosecurity tree works	P
(A2)	Dead wood removal	P
(A3)	Emergency tree works	P
(A4)	Pest plant removal of any tree less than 4m in height and less than 400mm in girth	P
(A5)	Tree trimming or alteration	P
(A6)	Tree trimming or alteration that does not comply with Standard E16.6.1	RD
(A7)	Works within the protected root zone	P
(A8)	Works within the protected root zone that do not comply with Standard E16.6.2	RD
(A9)	Tree removal of any tree less than 4m in height and less than 400mm in girth	P
(A10)	Tree removal of any tree greater than 4m in height or greater than 400mm in girth	RD

### **E16.5. Notification**

- (1) Any application for resource consent for an activity listed in Table E16.4.1 Activity table above will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991.
- (2) When deciding who is an affected person in relation to any activity for the purposes of section 95E of the Resource Management Act 1991 the Council will give specific consideration to those persons listed in Rule C1.13(4).

### **E16.6. Standards**

All permitted and restricted discretionary activities listed in Table E16.4.1 must comply with the following standards.

#### **E16.6.1. Tree trimming or alteration**

- (1) The maximum diameter of any branch removed must be no greater than 100mm at severance.
- (2) No more than 20 per cent of live growth of the tree may be removed in any one calendar year.
- (3) All works must be carried out in accordance with best arboricultural practice.
- (4) All trimming or alteration must retain the natural shape, form and branch habit of the tree.
- (5) Any diseased tree material is to be treated in accordance with the Biosecurity Act 1993.

**E16.6.2. Works within protected root zone**

- (1) For roots less than 60mm in diameter:
- (a) excavation undertaken by hand digging or air spade or hydro vac or machine excavator within the protected root zone without direction and/or supervision of a qualified arborist:
    - (i) the surface area of a single excavation shall not exceed 1m<sup>2</sup>;
    - (ii) works involving root pruning must not be on roots greater than 35mm in diameter at severance;
    - (iii) works must not disturb more than 10 per cent of the protected root zone;
    - (iv) any machine excavator must operate on top of paved surfaces and/or ground protection measures; and
    - (v) any machine excavator must be fitted with a straight blade bucket.
  - (b) excavation undertaken by hand digging, air spade, hydro vac or machine excavator within the protected root zone with direction and/or supervision of a works arborist:
    - (i) works must not disturb more than 20 per cent of the protected root zone;
    - (ii) works involving root pruning must not be on roots greater than 60mm in diameter at severance;
    - (iii) any machine excavator must operate on top of paved surfaces and/or ground protection measures; and
    - (iv) any machine excavator must be fitted with a straight blade bucket.
  - (c) excavation undertaken by trenchless methods must not be undertaken at a depth less than 800mm below ground level.
  - (d) replacement of existing structures, kerbs, and hard surfaces within the protected root zone must be done so that:
    - (i) the removal of the surface is carried out without damage to any tree roots; and
    - (ii) the machine excavator must operate on top of paved surfaces and/or ground protection measures and must be fitted with a straight blade bucket.
  - (e) Standard E16.6.2(1)(a),(b),(c) and (d) does not apply to any tree works undertaken inside existing infrastructure such as pipes and meter boxes.
- (2) For roots greater than 60mm but less than 80mm in diameter:



## E16 Trees in open space zones

- (a) excavation undertaken by hand digging, or air spade, or hydro vac or machine excavator within the protected root zone with direction and/or supervision of a qualified arborist:
  - (i) works must not disturb more than 20 per cent of the protected root zone;
  - (ii) works involving root pruning must not be on roots greater than 80mm in diameter at severance;
  - (iii) any machine excavator must operate on top of paved surfaces and/or ground protection measures;
  - (iv) any machine excavator must be fitted with a straight blade bucket; and
  - (v) the Council's manager for Parks, Sports and Recreation must be notified prior to commencing work.
- (b) Standard E16.6.2(2)(a) does not apply to any tree works undertaken inside existing infrastructure such as pipes and meter boxes.

### **E16.7. Assessment – controlled activities**

There are no controlled activities in this section.

### **E16.8. Assessment – restricted discretionary activities**

#### **E16.8.1. Matters of discretion**

The Council will restrict its discretion to all of the following matters when assessing a restricted discretionary resource consent application:

- (1) all restricted discretionary activities:
  - (a) the effect on the values of the tree or trees;
  - (b) any loss or reduction of amenity values provided by the tree or trees;
  - (c) the risk of damage to people or property;
  - (d) any mitigation proposed;
  - (e) consistency with best arboricultural practice;
  - (f) methods to control plant pathogens;
  - (g) any tree works plan, reserve management plan, or landscape plan relevant to the tree or group of trees;
  - (h) the functional and operational needs of infrastructure; and
  - (i) the benefits derived from infrastructure.

### **E16.8.2. Assessment criteria**

The Council will consider the relevant assessment criteria for restricted discretionary activities from the list below:

- (1) all restricted discretionary activities:
  - (a) the specific values of the trees including any ecological values with respect to water and soil conservation, ecosystem services, stability, ecology, habitat for birds and amelioration of natural hazards;
  - (b) the loss of amenity values that tree or trees provided;
  - (c) the risk of actual damage to people and property from the tree or trees including the extent to which adverse effects on the health and safety of people have been addressed as required under health and safety legislation;
  - (d) any alternative methods that could result in retaining the tree or trees;
  - (e) the degree to which any proposed mitigation adequately compensates for the values that trees provide;
  - (f) the degree to which the proposal is consistent with best practice guidelines for tree management;
  - (g) methods to contain and control plant pathogens and diseases including measures for preventing the spread of soil and the safe disposal of plant material;
  - (h) the provision of a tree works plan to address the effects of the works on the tree or trees and outlining the proposed methods to be used, and where applicable:
    - (i) the provision of a landscape plan; or
    - (ii) consistency with any reserve management plan.
  - (i) the need for the direction and supervision of an on-site monitoring arborist while the works are being carried out;
  - (j) the functional and operational needs of infrastructure; and
  - (k) the benefits derived from infrastructure.

### **E16.9. Special information requirements**

There are no special information requirements for this section.