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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU 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 MAKĀURAU AUTHORITY**

 First Respondent

And **AUCKLAND COUNCIL**

 Second Respondent

FURTHER AFFIDAVIT OF ANTONY BERNARD YATES

Filed 3 April 2020

the day of 2020

20th *May*

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8/6/20 Ⓢ

HIGH COURT
28 MAY 2020
3:09pm
Ⓢ AUCKLAND

AB

I, **ANTONY BERNARD YATES**, Planning Consultant, of Auckland, solemnly and sincerely affirm:

INTRODUCTION

1. I provided an affidavit to the Court on 31 January 2020, in relation to these proceedings. That affidavit summarised my planning work on the resource consent application lodged by the Tūpuna Maunga o Tāmaki Makaurau Authority (**Tūpuna Maunga Authority**) regarding its application and decision to undertake a restoration project to establish 13,000 indigenous plantings and remove 345 exotics trees on Ōwairaka / Te Ahi-kā-a-Rakataura / Mt Albert.
2. As explained in my original affidavit, the resource consent application sought consent to restore the central and historic quarry faces with 13,000 indigenous plantings to recreate a historic WF7 Pūriri broadleaf forest and remove 345 exotic trees at Ōwairaka / Te Ahi-kā-a-Rakataura / Mount Albert.
3. I understand that the applicants have added a ground of review to their claim that challenges the Auckland Council's non-notification decision of the Tūpuna Maunga Authority's resource consent application.
4. In this affidavit I respond to assertions on the adequacy and reasonableness of the resource consent assessment, raised in the reply affidavits of Mary Rose Inomata, Mary Tallon, Andrew Barrell and Philip Blakely, filed by the applicants on 18 February 2020, including the non-notification decision of the Auckland Council.
5. I, again, confirm that I have read and will comply with the 'Code of conduct for expert witnesses' contained in the High Court Rules 2016.

RESPONSE TO THE EVIDENCE OF MARY ROSE INOMATA AND MARY TALLON

6. As a planner, I am guided by the Auckland Unitary Plan (**AUP**) in relation to heritage items and values, as well as any additional expert opinion for a proposal. In this case, there are no scheduled heritage trees or groups of trees deemed worthy of scheduling and protection on the site under the AUP. That statutory plan became operative after a three year period 2013 – 2016 of extensive public notification, public submissions, hearings and appeals.



7. The archaeologist and heritage assessment author for the resource consent application, Mr Brent Druskovich, stated in his affidavit dated 30 January 2020 (at paragraph 54) that he could not find any further information about the cherry trees or olive grove, except for the information filed in the affidavits of the applicants. It is not for experts to prove an unknown negative. Experts must reasonably be able to locate information about heritage in order to assess any effect on it. The onus is on people who consider items to have heritage value, to act and to make their views known through the available statutory processes. When I undertook my planning assessment in September 2018, there was no record of the applicants' perceived heritage value of the trees in statutory documents, and no other historical evidence publicly available. As far as I understand it, that continues to be the case, except for the information that has been shared through this proceeding.
8. Heritage is a subjective matter. The AUP's process for scheduling notable trees enables experts to be guided by reliable protections tested through a separate process. In my view, the relatively recent, and thoroughly tested, nature of the AUP provides additional weight to its scheduling of notable trees. In these unique circumstances borne out of a Treaty settlement, the Tūpuna Maunga Authority had additionally consulted on the Integrated Management Plan (**IMP**). Both the AUP and IMP processes provided an opportunity for heritage values of trees to be raised and recorded. Nor was any information provided on the even more recent public process for the Tūpuna Maunga Strategies.
9. I remain of the view that the AUP was the appropriate method to guide my planning assessment of the heritage values of the 345 trees proposed to be removed in the resource consent application.
10. If Ms Inomata and Ms Tallon had wished to identify and protect the trees, I would have thought that the AUP process would have generated that interest, and failing that, applying to the Auckland Council (to nominate a notable tree for the evaluation process) to have the trees scheduled as notable more recently, is a process described and provided for on its website.
11. Further, in the past decade, there have been numerous statutory processes to raise the heritage value of a tree on the Tūpuna Maunga. I am aware of the following:
 - (a) the former Reserves Management Act process for Ōwairaka / Te Ahi-kā-a-Rakataura / Mt Albert;

- (b) the Isthmus Section Plan Change 305 notified in 2011;
- (c) the Tūpuna Maunga Authority's Integrated Management Plan; and
- (d) the AUP; and
- (e) the Tūpuna Maunga Authority Strategies.

RESPONSE TO THE AFFIDAVIT OF ANDREW FRANCIS BARRELL

- 12. Mr Barrell criticises the arboriculture matters assessed as part of the resource consent application in paragraph 8 to 15 of his reply affidavit.
- 13. I remain of the view that the appropriate arboricultural effects were assessed. That is, the only arboricultural matters of relevance to be assessed by an arborist are the tree removal methodologies which Treescape arboricultural specialists undertook.
- 14. These methodologies are best practice and had been confirmed as appropriate by Council's arborist under resource consent LUC60311082 for exotic tree removal on Maungarei.
- 15. Whilst a matter for Council to confirm, I understand that as these removal methodologies have not changed from application to application, then appropriately Council chose not to reassess these methodologies under each subsequent application.
- 16. In relation to other potential adverse effects of the removals, the Tūpuna Maunga Authority appropriately utilised the assessments of more appropriately qualified experts than an arboricultural specialist, that is: the archaeologist Brent Druskovich, the noise expert Jon Styles, the ecologists from Te Ngahere, and landscape and visual amenity expert Sally Peake. Those experts provided robust assessments of the relevant effects of the proposal (positive and adverse) and concluded as recorded in their assessments which were submitted as part of the resource consent application and which I understand have been summarised in their affidavits (and attached as exhibits for the Court).

RESPONSE TO THE AFFIDAVIT OF PHILIP BLAKELY

- 17. Mr Blakely's affidavit criticises the assessment of landscape and visual amenity of the proposed removal of 345 trees.


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18. The proposal is a restoration project, to remove 345 exotic trees and establish 13,000 indigenous plantings. My planning assessment, appropriately, considered Ms Peake's expert assessment of the effects of the proposal and her conclusions.
19. More specifically, in paragraph 30, Mr Blakely questions the necessity of removing the cherry trees to "restore the visual integrity and legibility of the volcanic cone". He does not go onto consider whether removal of those trees is necessary "to heal the Maunga" as discussed in my AEE (attached as exhibit **AY1** to my original affidavit). To perform its functions lawfully, the Tūpuna Maunga Authority must have regard to the spiritual, ancestral, cultural, customary, and historical significance of the Tūpuna Maunga to Ngā Mana Whenua. In any event, the RMA does not assess on a "necessity" basis, it is an effects-based statute, and the evidence before the Council correctly provided it robust assessments of the relevant effects so it could consider its decision sufficiently furnished with all reasonably relevant information.

THE INDEPENDENT RMA COMMISSIONER'S NON-NOTIFICATION DECISION FOR THE AUCKLAND COUNCIL

20. In my original affidavit, I discussed my view (based on extensive experience) of the robust process the Council applied to its assessment of the resource consent application, and that it ensured that the Tūpuna Maunga Authority's application was well-tested. This included:
 - (a) further information requests under s 92 of the RMA and correspondence with me clarifying information;
 - (b) peer reviews of the majority of expert assessments provided by the Tūpuna Maunga Authority by the Council's own experts in those disciplines; and
 - (c) appointing an independent RMA Commissioner to make the notification and substantive decisions.

CONCLUSIONS

21. I remain of the view that the Council's notification decision of the Tūpuna Maunga Authority's restoration project for Ōwairaka / Te Ahi-kā-a-Rakataura / Mt Albert was entirely appropriate, founded on a comprehensive and robust process undertaken to assess the resource consent application, apolitical, and ultimately supported by the careful, considered and complete assessments



provided by the Tūpuna Maunga Authority and peer reviews commissioned by the Council.



A B YATES

AFFIRMED by **ANTONY BERNARD**
YATES at *Auckland*)
This *28th* day of *May* 2020))
before me:)



S Tuigamala

Deputy Registrar
High Court

A solicitor of the High Court of New Zealand
Auckland



A B YATES