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

MEMORANDUM OF COUNSEL FOR SECOND RESPONDENT

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3 February 2020

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Background

1. This memorandum is filed on behalf of the second respondent (the **Council**), in response to the memorandum of counsel for the applicants dated 30 January 2020, which followed purported service of a first amended statement of claim on 29 January 2020.

2. The main change in the amended statement of claim is an entirely new cause of action against the Council (although some minor amendments are proposed to the other causes of action as well). The new cause of action challenges the Council's decision as consent authority not to notify the resource consent application to remove exotic vegetation and undertake restoration planting on Owairaka/Mt Albert.

3. The amended pleading was served, without advance warning, 2 days before the statement of defence to the (original) statement of claim was due for filing. The Council was nevertheless obliged to file that statement of defence, on 31 January 2020, in accordance with a previous Court direction.

Applicants require leave but no leave applied for

4. The applicants need the leave of the Court to file the amended statement of claim because the close of pleadings date has passed (Rule 7.7(1)). Close of pleadings date was 9 December 2019: this is the date the fixture of 20 March 2020 was allocated by Lang J, which was later than 60 working days before the hearing date (4 December 2019) (Rule 7.6(4A)).

5. No such application for leave has been made. No reasons have been given by the applicants as to why the proposed new cause of action could not have been included from the outset. They were clearly aware of the resource consent application and the fact that it was non-notified, because those matters are referred to in the first statement of claim.

6. It is premature for the applicants to be seeking timetable directions when the amended statement of claim is not yet formally before the Court. The applicants must make a formal application for leave to file an amended

statement of claim, supported by reasons, so that issues of prejudice and overall justice can be properly considered, in the normal way.

Council's likely response to leave application

7. The Council's position on the leave application will depend on its content, including the explanation given for the delay in introducing the new cause of action.

8. The other significant consideration will be potential prejudice to the Council. There is very high risk of prejudice based on what the applicants are currently proposing in counsels' memorandum:

(a) *The normal order of evidence exchange is reversed.*

The memorandum states (paragraph 9) that the applicants would file a short affidavit addressing the resource consent on 31 January 2020 but that plan has now been abandoned. Instead, it seems to be proposed that the Council will file its evidence first, and the applicants will "reply" to that, but with no opportunity for the Council to respond. The applicants' truncated process, to accommodate their own delay, would prejudice the Council. The applicants should file their evidence first, in the normal way. If that requires the making of a discovery order, a reasonable time will need to be allocated for that.

(b) *The period for preparing the Council's evidence (less than 3 weeks) is too short.*

Although the new cause of action is factually related to the current pleading, it is a stand-alone claim requiring different evidence. A minimum of 4 weeks would normally be given for the preparation of the decision-maker's evidence in a judicial review proceeding challenging a notification decision under the Resource Management Act 1991. As indicated above, this period should follow the filing of the applicants' evidence.

(c) *The hearing duration is too short*

In counsel's view, a 2 day fixture to deal with all issues (as proposed by the applicants) will be very tight. There is a real risk 2 days would spill over to 3, which would not benefit any party. It is preferable for a more realistic estimate to be made at the outset. Whatever time is estimated – 2 or 3 days – they should be consecutive days to avoid the parties having to prepare for separate hearings.

(d) *The time of a rescheduled fixture may be prejudicial*

The above issues make it very unlikely that the 20 March 2020 date can be retained, without prejudice to the respondents. If the hearing date(s) are moved, then depending on the new dates there is possible prejudice to the respondents in further delay in the tree removal works taking place (assuming the first respondent does not wish, in those circumstance, to re-visit its assurance about not proceeding with the works until the claim is determined).

9. The Council stands ready to respond to the application for leave, which will need to satisfactorily address the issues of prejudice outlined in paragraph 8 above, if it is not to be opposed by the Council.

P M S McNamara/G D Palmer
Counsel for Auckland Council