

**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

STATEMENT OF CLAIM

6 December 2019

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STATEMENT OF CLAIM

Parties

1. The applicants:
 - (a) are residents of Auckland; and
 - (b) enjoy a long and close association with the recreation reserve on Ōwairaka / Mt Albert (**the Reserve**).

2. The first respondent, Tūpuna Maunga o Tāmaki Makaurau Authority (**the Authority**), is:
 - (a) established by section 106 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014;
 - (b) the administering body of the Reserve for the purposes of the Reserves Act 1977; and
 - (c) the administering body of reserves located at 13 other maunga across Auckland, including Maungakiekie / One Tree Hill, Maungaeri / Mt Wellington, Maungawhau / Mt Eden, and Takarunga / Mt Victoria.

3. Ōwairaka / Mt Albert (including the Reserve on it), along with the other maunga administered by the Authority, are held on trust for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.

4. The second respondent, Auckland Council (**the Council**), is:
 - (a) a unitary authority established under the Local Government (Auckland Council) Act 2009;
 - (b) responsible for the routine management of the Reserve; and
 - (c) in carrying out that responsibility, required to act in accordance with, among other things, any lawful direction of the Authority.

The Ōwairaka / Mount Albert Reserve

5. The Reserve is home to approximately 787 trees, native and non-native.

6. 345 trees, being nearly half of those on the Reserve, are non-native.
7. The non-native trees on the reserve include oak trees, radiata pines, cherry trees, eucalyptus trees and olive trees.
8. Many of the oldest and largest trees on the Reserve are non-native.
9. Most of the trees adjacent to the path around the summit of the mountain are non-native.
10. Most trees encountered by visitors to the Reserve are non-native.
11. The Reserve is home to large numbers of birds, including pīwakawaka (fantail), ruru (morepork), kererū (wood pigeon), kōtare (kingfisher), riroriro (grey warbler), and tūi.
12. There have been sightings on the Reserve of kākā and kārearea (native hawks).
13. Large numbers of birds nest in the non-native trees on the Reserve.
14. It is, as at the date of this application, breeding season.
15. Large numbers of birds use the trees in the Reserve, both native and non-native, as sources for food.
16. Tens of thousands of Auckland residents visit and enjoy the Reserve every year.
17. Hundreds of thousands of Auckland residents have visited and enjoyed the Reserve over the last century.
18. The significant number of trees on the Reserve, including the non-native ones, contribute to the pleasantness, harmony, use, enjoyment and amenity value of the Reserve.

The Authority decides to destroy every non-native tree on the Reserve, all at once

19. At some time, estimated by the applicants to be before or around September 2018, the Authority decided to destroy and remove every non-native tree on the Reserve, all at once (**the Decision**).
20. In or around October 2018, the Authority and the Council applied to the Council for a resource consent in relation to the implementation of the Decision, which the Council processed without public notification, and then granted on 20 February 2019.
21. On a date unknown to the applicants, the Authority directed the Council to implement the Decision.
22. The Authority and the Council intended that the Decision be implemented starting 11 November 2019, and continuing to around mid-December 2019.
23. The implementation of the Decision is, as at the date of this application, being impeded by protestors on the Reserve who are opposed to the Decision.

The effects of the Decision

24. The Decision, if implemented, would result in, among other things:
 - (a) The destruction of all 345 non-native trees on the Reserve, being around half of all trees on the Reserve;
 - (b) The destruction of many of the largest and oldest trees on the Reserve, including oaks, radiata pines, and eucalyptus trees;
 - (c) The destruction of the majority of the trees planted adjacent to the walkway around the perimeter of the mountain, and so the majority of trees encountered by visitors to the Reserve;
 - (d) The destruction of the olive grove grown from seeds sent from Palestine during World War II by a New Zealand soldier and prisoner of war, which is now used as a place of solace;

- (e) The destruction of cherry blossom trees planted in remembrance of a serviceman who died aged 18 in the Great War;
- (f) The disturbance of a large number of birds, native and non-native, and other wildlife;
- (g) If implemented at the time intended, the disturbance of a large number of birds, native and non-native, during the breeding season;
- (h) A breach of section 63(1)(a) of the Wildlife Act 1953, which prohibits the disturbance of protected wildlife;
- (i) If implemented at the time intended, a breach also of section 63(1)(c) of the Wildlife Act 1953, which prohibits the disturbance of any nest of any protected wildlife; and
- (j) The loss of the significant benefits to the ecology and tree life of the Reserve provided by the mature trees to be felled.

The Authority's decision-making process

- 25. The Authority was required by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 to prepare and approve an integrated management plan for the 14 maunga for which it is the administering authority.
- 26. In or around 2016, the Authority published its Integrated Management Plan (**the IMP**).
- 27. The IMP is not specific to the Reserve but applies generally to all the maunga for which the Authority is the administering body.
- 28. The IMP states, among other things, that:
 - (a) The IMP “outlines the Authority’s long-term vision for the Tūpuna Maunga”, being the 14 maunga for which it is the administering body;
 - (b) The IMP “sets the direction for protection, restoration, enhancement and appropriate use of the Tūpuna Maunga”;
 - (c) The Authority intended to, among other things:

- (i) “Investigate opportunities to restore the landform and valued cultural heritage features where these have been modified through inappropriate infrastructure, activities or use in the past”;
 - (ii) “Ensure planting and other landscape features are compatible with the protection of the natural and cultural features of the maunga”;
 - (iii) “Restore suitable areas of the Tūpuna Maunga with indigenous ecosystems. Decisions on location, plant choice, and staging would draw on traditional and scientific knowledge”; and
 - (iv) The IMP would “be implemented in a phased manner”.
29. Nowhere in the IMP is it stated, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.
30. In or around July 2019, after the Decision has been taken, the Authority published the Proposed Integrated Management Plan Strategies (**the Proposed Strategies**).
31. The Proposed Strategies are not specific to the Reserve, but apply generally to all the maunga for which the Authority is the administering body.
32. The Proposed Strategies state, among other things, that:
- (a) The “Design Strategy” would include revegetation and replanting;
 - (b) The “Biodiversity Strategy” would include the restoration of indigenous ecosystems and the reintroduction of native flora;
 - (c) The “Biosecurity Strategy” would include the “removal of exotic pest plant and animal species, aligned with values being protected on each maunga”; and specified that the “removal of exotic trees will occur when there is a health and safety risk, they are identified as a weed species, there is risk to Archaeological

Features, or they impact on the cultural landscape and viewshafts. Any other tree removals will be assessed on a case by case basis.”

33. Nowhere in the Proposed Strategies is it stated, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.
34. On 29 October 2019 or thereabouts, the Authority sent a letter to local residents informing them, for the first time, that the Decision had been made to destroy the 345 non-native trees on the Reserve, starting 11 November 2019.
35. The Authority did not seek the comment of those local residents or anyone else on the merits of the Decision, at that time or at any other time.

FIRST GROUND OF REVIEW – THE AUTHORITY – RESERVES ACT 1977

36. The applicants repeat paragraphs 1 to 35 above.
37. The Authority, as the administering body of the Reserve, is required to act in compliance with sections 17 and 42 of the Reserves Act 1977.

Section 17

38. Under section 17 of the Reserves Act 1977, the Authority is required to administer the Reserve such that “those qualities of the Reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the Reserve shall be conserved”.
39. The Decision, if implemented, would not conserve qualities of the Reserve that contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the Reserve.

Section 42

40. Under section 42 of the Reserves Act 1977, no tree on the Reserve may be cut or destroyed unless the Authority is “satisfied that the cutting or destruction is necessary for the proper management or maintenance of

the Reserve, or for the management or preservation of other trees or bush, or in the interests of the safety of persons on or near the Reserve or of the safety of property adjoining the Reserve, or that the cutting is necessary to harvest trees planted for revenue producing purposes”.

41. Given the matters set out at paragraph 24 above, the Authority cannot reasonably have been satisfied that the Decision was “necessary” for any of those purposes, including the “proper management or maintenance” of the Reserve.
42. Even if the Authority was reasonably satisfied that the destruction of 345 non-native trees is necessary for one of those purposes, the Authority may not proceed with the destruction “except in a manner which will have a minimal impact on the reserve”.
43. The Decision, if implemented, will not have a minimal impact on the Reserve but a radical, immediate and irrevocable one.
44. As a result of the matters at paragraphs 36 to 43 above, the Decision:
 - (a) was made unlawfully in breach of sections 17 and 42 of the Reserves Act 1977; and/or
 - (b) was made unreasonably in terms of section 42; and
 - (c) if implemented, would result in a breach of sections 17 and 42.

SECOND GROUND OF REVIEW – THE AUTHORITY – LACK OF CONSULTATION

45. The applicants repeat paragraphs 1 to 43 above.
46. As a matter of fairness, the Authority was required to consult interested members of the Auckland public, including those in the position of the applicants, prior to taking the Decision.
47. On 22 December 2019, the Authority, through a press release issued by its Chairman, identified the plans on which the Authority believed it had consulted that were relevant to the Decision, namely:

- (a) The Integrated Management Plan, published in 2016; and
 - (b) The Proposed Integrated Management Plan Strategies, published in July 2019.
48. The Proposed Strategies were published after the Authority had already made the Decision.
49. In any event, neither the IMP nor the Proposed Strategies contained information sufficient to enable members of the public to be properly informed of the Decision (or the proposed Decision, whatever the case may be). Neither the IMP nor the Proposed Strategies state or indicate, expressly or otherwise, that the Authority intended to destroy every non-native tree on the Reserve, being 345 trees, all at once.
50. Although the IMP stated that the Authority intended to implement its vision in a “phased” manner, the Decision does not involve a “phased” implementation of the Authority’s vision.
51. The Proposed Strategies state that the Authority would only remove non-native trees where they posed a “health and safety risk”, or “are identified as a weed species, there is risk to Archaeological Features, or they impact on the cultural landscape and viewshafts”, and in other cases on a “case by case” basis.
52. The Decision does not involve any case by case assessment of which non-native trees should be removed, whether by reference to the above criteria or any other criteria.
53. As a result of the matters pleaded above the Authority acted in breach of natural justice by failing to consult interested members of the Auckland public, including the applicants, before making the Decision.

THIRD GROUND OF REVIEW – THE COUNCIL – RESERVES ACT 1977

54. The applicants repeat paragraphs 1 to 53 above.
55. Under section 61 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, the Council:

- (a) is responsible for the “routine management” of the Reserve.
 - (b) must carry out that responsibility “under the direction” of the Authority.
56. The Council need follow only lawful directions of the Authority, and must not follow a direction of the Authority that:
- (a) would result in a breach by the Authority or the Council of section 17 or section 42 the Reserves Act 1977; or
 - (b) was issued by the Authority as a result an unlawful decision-making process.
57. Were the Council to follow the direction of the Authority to implement the Decision:
- (a) section 17 and section 42 would be breached by the Authority and/or the Council; and
 - (b) the Council would be implementing a direction that resulted from an unlawful decision-making process.

RELIEF SOUGHT

58. As against the Authority, and on the basis of the circumstances pleaded in paragraphs 1 to 35 above, and of any one or more of the grounds of review pleaded in paragraphs 36 to 53, above, the applicants seek:
- (a) an order quashing the Decision;
 - (b) a declaration that the Authority acted unlawfully in making the Decision;
 - (c) an order injuncting the Authority from taking any steps to implement the Decision; and
 - (d) costs.
59. As against the Council, and on the basis of the circumstances pleaded in paragraphs 1 to 35 above, and the ground of review pleaded in paragraphs 54 to 57 above, the applicants seek:

- (a) an order injuncting the Council from taking any steps to implement the Decision; and
- (b) costs.

This statement of claim is filed by **ANDREW PEAT** solicitor for the Plaintiffs of the firm **DUNCAN KING LAW**.

The address for service for the Plaintiffs is at the offices of Duncan King Law, 95 Manukau Road, Epsom. Documents for service may be left at that address for service or may be emailed to andrew@dklaw.co.nz, provided that it is also copied to hollyman@shortlandchambers.co.nz and james.little@shortlandchambers.co.nz, and that a hard copy follows to the above address.