IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2023-404-001516
[2024] NZHC 1414

BETWEEN	SHIRLEY WARU Applicant
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	5 December 2023
Appearances:	J W H Little & H P Short for the Applicant P T Beverley & C A Easter for the First Respondent No appearance for the Second Respondent
Judgment:	31 May 2024

JUDGMENT OF TAHANA J

This judgment was delivered by me on 31 May 2024 at 1.00pm
Pursuant to Rule 11.5 of the High Court Rules

……

Registrar/Deputy Registrar

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Introduction

[1] At issue in this case is whether the Auckland City Council (the Council) acted lawfully by granting resource consent for the removal and planting of vegetation on Ōtāhuhu / Mount Richmond (Ōtāhuhu) without requiring that the application be notified, or alternatively, without requiring limited notification to users of Ōtāhuhu.

[2] Ōtāhuhu is not the first maunga to be the subject of an application of this nature. In *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* (the *Ōwairaka* decision), the Court of Appeal determined that the Council should have required public notification of a resource consent application to remove vegetation on Ōwairaka / Mount Albert (Ōwairaka).[1] A key issue in this application is whether the Court of Appeal's findings apply to the circumstances of Ōtāhuhu such that this Court is bound to reach the same outcome. Before considering that issue, I first acknowledge the maunga, Ōtāhuhu.

Ōtāhuhu

[3] Ōtāhuhu has stood in Tāmaki Makaurau / Auckland for thousands of years. Its formation has been described as a "fire-fountain" that then created what is now the maunga which encapsulates a cluster of cones or craters that were once vents.

[4] Since the arrival of Māori, different iwi / hapū[2] have established significant connections to the maunga. It was given the name Ōtāhuhu and became a kāinga (home). It carries the etchings of a pā (fortified settlement) and it has witnessed bloodshed so that its surrounds were once tapu.[3] The maunga is of significant spiritual and cultural importance to those iwi / hapū.

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1 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2022] NZCA 30, [2022] 3 NZLR 175 [*Ōwairaka*].

2 Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Pāoa, Ngāti Tamaoho, Ngāti Tamaterā, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whātua Ōrakei, Ngāti Whātua o Kaipara, Te Ākitai Waiohua, Te Kawerau ā Maki, Te Patukirikiri and hapū o Ngāti Whātua.

3 Brent Druskovich *Heritage Impact Assessment of Proposed Tree Removals and Re-vegetation Planting Plan for Ōtahuhu/ Mt Richmond* (January 2019) at 6.

[5] By 1835 Ōtāhuhu was no longer a kāinga for hapū and came under private ownership. It was renamed Mount Haslwell[4] and then Mount Richmond.[5] In 1890, Ōtāhuhu was gazetted as a reserve for quarrying and recreation. The scars of that quarrying are etched into its mounds. Over the years trees have been planted so that Ōtāhuhu is now cloaked with trees both indigenous to Aotearoa New Zealand, and from lands across the seas.

[6] In its more recent history, Ōtāhuhu was the subject of a wider settlement under Te Tiriti o Waitangi / the Treaty of Waitangi between the Crown and a collective of iwi / hapū known as Ngā Mana Whenua o Tāmaki Makaurau.[6] That settlement sought to restore ownership of certain maunga, including Ōtāhuhu, to those iwi / hapū so they may exercise mana whenua and kaitiakitanga over the maunga.[7] The Court of Appeal sets out the settlement history in detail in the *Ōwairaka* decision, so I do not repeat it here. The significance of the settlement and Ōtāhuhu to those iwi / hapū is uncontested.

[7] The first respondent, the Tūpuna Maunga o Tāmaki Makaurau Authority (the TMA), is the administering body of the maunga and developed the proposal to remove non-native vegetation and plant native vegetation on Ōtāhuhu (the proposed activity). The applicant, Ms Waru is a resident of Ōtāhuhu and applies to review the Council's decision not to require notification of the resource consent application.

Issues for determination

[8] Ms Waru applies to review three aspects of the Council's decision not to require notification of the resource consent application under the Resource Management Act 1991 (the RMA):

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4 After Edmund Storr Halswell who was the New Zealand Company Commissioner to manage native reserves.

5 After Mathew Richmond, a Lands Commissioner.

6 Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Pāoa, Ngāti Tamaoho, Ngāti Tamaterā, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whatua Orakei, Ngāti Whātua o Kaipara, Te Ākitai Waiohua, Te Kawerau a Maki, Te Patukirikiri and hapū o Ngāti Whātua.

7 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 3(b) [Redress Act].

(a) first, the decision that the proposed activity will not have, or is not likely to have, adverse effects on the environment that are more than minor;

(b) second, the decision that there were no special circumstances that warrant public notification; and

(c) third, the decision that limited notification was not required.

[9] I outline the grounds for reviewing each of the above decisions after setting out the relevant background.

Background

Parties

[10] Ms Waru is from Te Uri o Tai, a hapū in the Tai Tokerau (the North of Auckland). Ms Waru's evidence is that Ōtāhuhu is named after her tūpuna, Tāhuhu of Te Uri o Tai. Ms Waru has been a resident of the suburb of Ōtāhuhu for over 30 years and is the co-founder and leader of a community group called Respect Mt Richmond / Ōtāhuhu. That group was established to "protect the trees" on Ōtāhuhu.

[11] The TMA was established under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Redress Act).[8] The maunga was vested in the Tūpuna Taonga o Tāmaki Makaurau Trust Ltd and declared a reserve.[9] Ōtāhuhu is held for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.[10]

[12] The membership of the TMA includes six members appointed by iwi rōpū, six members appointed by the Council and one non-voting member.[11]

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8 Redress Act, s 106.
9 Section 41(1).
10 Section 41(2).
11 Section 107.

Context of the proposed activity

[13] The TMA is undertaking a range of projects across the different tūpuna maunga in Tāmaki Makaurau. Ōtāhuhu is part of an ecological restoration programme to restore native vegetation and to remove non-native vegetation.

[14] To understand the context within which the TMA applied for the resource consent, I set out the purposes of the Redress Act, which include to give effect to the settlement by:[12]

> (a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and
>
> (b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu;
>
> …

[15] The evidence of Paul Majurey, the Chair of the TMA and a descendant of Marutūāhu, is that a key principle for the iwi / hapū is to "see the Tūpuna Maunga returned to a state of indigenous vegetation." Mr Majurey's evidence is that the "wellbeing of the Tūpuna Maunga is the fundamental consideration."

[16] Under the Redress Act, the TMA is required to prepare and approve an integrated management plan (IMP) for the tūpuna maunga, including Ōtāhuhu.[13] The TMA prepared and approved an IMP in 2016.[14]

[17] Against that backdrop, an application was filed for resource consent for the proposed activity.[15]

Initial application for resource consent (LUC60344578)

[18] In August 2019, an initial resource consent application (LUC60344578) was lodged for the removal of 443 exotic trees and the planting of 39,600 indigenous plants

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12 Section 3(a) and (b).
13 Section 58.
14 The IMP was subsequently amended after public consultation in 2022.
15 The application lists the Council as the applicant and the TMA as the relevant Department.

(the initial application). The initial application was accompanied by a number of technical reports.

[19] Mr Dales, a senior planner at the Council, processed the application and:

(a) commissioned independent peer reviews of the applicant's technical assessments;

(b) undertook a site visit; and

(c) requested further information, to which the TMA responded.

[20] Mr Dales prepared a report which included his recommendations that the application be processed on a non-notified basis and that it be granted. Mr Dale's report was peer reviewed by Mr Mason, the Council's Principal Project Lead, Resource Consents.

[21] Mr Munro, an independent planning commissioner, was engaged to review and determine the application on behalf of the Council.

[22] On 28 April 2021, the Council informed the TMA that Mr Munro considered that any persons occupying residential zoned land which would experience noise during the tree removal should be notified. The TMA then revised its application to only include those trees that were 100 metres or farther from residentially zoned properties.

Revised application for resource consent (LUC60384274)

[23] In August 2021, an amended application was lodged with the following changes:

(a) removing only 278 exotic trees;

(b) revising the location of the processing areas and the amount of helicopter use; and

(c) not including the planting of 20 native trees on the eastern side of Ōtāhuhu as trees along the Mt Wellington Highway frontage would be retained.

[24] The revised application was accompanied by:

(a) a revised report entitled "Assessment of Effects on the Environment and Statutory Assessment" by Jodie Mitchell and reviewed by Tania Richmond of Richmond Planning Ltd dated 16 August 2021 (the Assessment of Effects on Environment);

(b) a revised report entitled "Ōtāhuhu / Mt Richmond Tree Removal Methodology" by Richard Forward of Treescape Arboriculture Consultants dated May 2021 (the Tree Removal Methodology);

(c) a plan entitled "Ōtāhuhu Planting Plan 2018" by Jessica Le Grice, Anna Mairs and Kelvin Floyd of Te Ngahere dated December 2018 (the Planting Plan);

(d) a revised report entitled "Heritage Impact Assessment of Proposed Tree Removals and Re-vegetation Planting Plan for Ōtāhuhu / Mt Richmond" by Brent Druskovich Consultant Archaeologist dated June 2021 (the Heritage Impact Assessment);

(e) a revised report entitled "Assessment of Noise Effects Ōtāhuhu / Mt Richmond – Vegetation Restoration" by Jon Styles of Styles Group Acoustic & Vibration Consultants dated 21 June 2021 (the Assessment of Noise Effects);

(f) a revised report entitled "Assessment of Ecological Effects – Ōtāhuhu/Mt Richmond Restoration" by Kathryn Longstaff of Tonkin & Taylor Ltd dated June 2021 (the Assessment of Ecological Effects);

(g) a report entitled "Assessment of Environmental Effects of tree removals and habitat restoration activities on Lizards at Ōtāhuhu" by Trent Bell of EcoGecko Consultants dated January 2019; and

(h) a report entitled "Landscape and Visual Assessment for Proposed Tree Removal Ōtāhuhu" by Sally Peake of Peake Design dated 29 April 2019 (the Landscape and Visual Assessment).

[25] Mr Dales processed the revised application, and a peer review report was obtained for a new noise assessment by Mr Runcie. Mr Dales also requested further information from the TMA regarding noise standards, which the TMA provided.

[26] Mr Dales prepared a report which included his analysis and recommendations that the application be processed on a non-notified basis and that it be granted. Mr Dales' report was reviewed by Mr Mason.

Decision to grant resource consent

[27] On 15 September 2021, Mr Munro determined that the revised application (LUC60384274) could proceed on a non-notified basis. He determined that the proposed activity will have or is likely to have adverse effects on the environment that are no more than minor because:

i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be short term in nature and in keeping with the natural landform and landscape, so that overall any adverse effects will be less than minor;

ii. any adverse ecological effects arising from the proposal have been proposed to be appropriately managed as part of the works programme to ensure that any adverse effects will be less than minor;

iii. any adverse effects on public access and recreation will be short term in nature and will be less than minor;

iv. the proposed works have been designed to be sympathetic to the heritage values of Ōtāhuhu, and can be managed to ensure they are less than minor;

v. the tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects associated with this will be less than minor;

vi. any effects associated with land disturbance and stability have [been] proposed to be appropriately managed to ensure they are less than minor; and

vii. noise effects will be localised to adjacent land and users of that land, and in the wider or general environment will be less than minor.

[28] Mr Munro determined that there were no special circumstances warranting public notification because "there is nothing exceptional or unusual about the application." He also determined that the application should proceed without limited notification because there are no adversely affected persons because any adverse effects on any person will be less than minor.

[29] The TMA did not progress the tree removal when the resource consent was issued because by that time, the High Court had issued its decision regarding Ōwairaka and it had been appealed to the Court of Appeal.[16] On 3 March 2022, the Court of Appeal allowed the appeal and set aside the Council's decision not to require notification of the resource consent application for tree felling and removal in relation to Ōwairaka.[17] The Court of Appeal held that the removal of all exotic trees on Ōwairaka, and revegetation with indigenous fauna, was a proposal of such significance that it needed to be provided for in the IMP.[18] That would ensure appropriate, informed, public consultation about the proposal.[19]

[30] After the Court of Appeal decision, the TMA undertook consultation on proposed changes to the IMP.

Consultation on Integrated Management Plan (IMP)

[31] Consultation on the IMP took place from August to November 2022. The revised IMP refers to the removal of "[a] maximum of 443 non-native trees (not all)" and the "[r]etention of selected existing non-native trees." The "[t]ree types to be confirmed for retention include mature, healthy, and significant examples of London Plane, English Oak, She-Oak and Olive trees."

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16 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425.
17 *Ōwairaka,* above n 1.
18 At [212].
19 At [212].

Removal of trees in July 2023

[32] On 25 July 2023, the TMA began felling 60 exotic trees on Ōtahuhu. Mr Nicholas Turoa, Kaiwhakahaere Te Waka Tairangawhenua, manages co-governance and co-management arrangements between the Council and Ngā Mana Whenua o Tāmaki Makaurau. Mr Turoa deposed that given storm damage on Ōtāhuhu and the large machinery required for the removals, he decided to begin "the vegetation restoration tree removals as part of the works to remove unsafe trees that were damaged in the storm."

[33] Ms Waru applied for interim relief to halt the felling, which was declined.[20] This application for review was then filed and the TMA has agreed to halt felling pending the outcome of this proceeding.

Grounds of review

Determination as to adverse effects

[34] Ms Waru claims that Mr Munro's determination that the proposed activity would neither have, nor be likely to have, adverse effects on the environment that were more than minor was unlawful in relation to his consideration of adverse effects on:

(a) amenity values (including temporary effects);

(b) the heritage value of the trees to be removed; and

(c) the natural environment (including birdlife and the trees).

[35] Ms Waru claims that Mr Munro did not give adequate consideration to, and had inadequate information about, the adverse effects in relation to each of the above at [34(a)–(c)].

[36] Further, Ms Waru claims that no reasonable decision maker would have reached the same findings.

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[20] *Waru v Tūpuna Maunga o Tāmaki Makaurau Authority* [2023] NZHC 1996.

Determination of no special circumstances

[37] Ms Waru claims that Mr Munro's determination that no special circumstances existed was unlawful because:

(a) it was based on a factual error as to the content of the IMP;

(b) it was based on a legal error as to the relevance of consultation; and

(c) no reasonable decision maker could find that there were no special circumstances warranting public notification.

Determination as to limited notification

[38] Ms Waru claims that Mr Munro did not give adequate consideration to, and had inadequate information about, the adverse effects for users and the local community in relation to amenity values (including temporary effects), the heritage value of the trees to be felled and the consequent impact on amenity values.

[39] Ms Waru also claims that Mr Munro's determination was based on an error as to the content of the IMP and that no reasonable decision maker would have reached the same decision.

[40] Before considering whether any of Ms Waru's grounds of review are made out, I set out the statutory requirements under the RMA when determining whether a resource consent application must be publicly notified. I then consider the Court of Appeal's findings in the *Ōwairaka* decision.

When must a resource consent application be publicly notified?

Statutory requirements

[41] Section 95A of the RMA governs the public notification of consent applications, and requires that the consent authority consider and decide various questions, including:

(a) whether the activity will have or is likely to have adverse effects on the environment that are more than minor;[21] and

(b) whether special circumstances exist that warrant the application being publicly notified.[22]

[42] If the consent authority's answer to either of those questions is yes, the application must be publicly notified.

[43] When considering whether there are any adverse effects on the environment, the RMA defines both "effect" and "environment." Effect includes "any temporary or permanent effect" and "regardless of the scale, intensity, duration, or frequency of the effect."[23] Environment is defined to include:[24]

(a) ecosystems and their constituent parts, including people and communities;

(b) all natural and physical resources;

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

Adequacy of information before the consent authority

[44] The consent authority "must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects."[25] In *Discount Brands Ltd v*

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21 Resource Management Act 1991, s 95A(8)(b) [RMA].
22 Section 95A(9).
23 Section s 3.
24 Section s 2(1).
25 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [65].

Westfield (New Zealand) Ltd the Court considered that the information in the possession of the consent authority must be adequate for it:[26]

> (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected.

[45] The Court was of the view the adequacy of information was statutorily required. The information is not required to be all-embracing, but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.[27]

[46] The Court must carefully scrutinise the material on which the decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate.[28]

[47] As to the source of the information, the Court observed that:

> [107] The information before the authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision makers concerning the district and the district plan. But in aggregate the information must be adequate both for the decision about notification and, if the application is not to be notified, for the substantive decision which follows to be taken properly – for the decisions to be informed, and therefore of better quality. …

[48] Mr Beverley for the TMA noted that *Discount Brands* was decided prior to the RMA amendments that included:

(a) removal of the express requirement for a consent authority to have adequate information;

(b) removal of the presumption in favour of notification; and

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26 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114].
27 At [114].
28 At [116].

(c) replacement of the requirement to be "satisfied" that adverse effects on the environment "will be minor," with the task of "deciding" whether an activity "will have or is likely to have adverse effects on the environment that are more than minor."

[49] Mr Beverley referred to *Coro Mainstreet (Inc) v Thames Coromandel District Council* where the Court of Appeal noted that the continued applicability of *Discount Brands* was not argued but that the substantial amendments to the RMA, which were directed at providing greater non-notification, may have altered the law.[29] As the point was not argued before the Court of Appeal it did not consider the issue, but noted:[30]

> … If the point had affected the outcome of the present case, we would have wanted to consider whether the 2009 amendments gave effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications, and to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.

[50] Despite referring to the above decision, Mr Beverley did not advance any arguments as to why *Discount Brands* should no longer apply or what a lesser standard would require. This may be because the Court of Appeal in the *Ōwairaka* decision considered that a different approach to *Discount Brands* would "be very difficult to sustain."[31]

[51] It is therefore necessary for this Court to be satisfied that there was adequate information on which to assess adverse effects. Before turning to the circumstances of Ōtāhuhu, I outline the relevant findings in the *Ōwairaka* decision.

Court of Appeal's findings in the *Ōwairaka* decision

[52] I only consider the findings that are relevant to notification of the resource consent application for Ōwairaka, as it is those findings on which Ms Waru relies to justify a similar outcome here.

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29 *Coro Mainstreet (Inc) v Thames Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [41].
30 At [41].
31 *Ōwairaka,* above n 1, at [261].

[53] The Court of Appeal held that the Council had erred and set aside its decision to grant resource consent for the felling and removal of trees. The Court accepted that it was appropriate to consider the overall activities (which included both removal and planting of vegetation) when considering whether there is likely to be adverse effects on the environment. The Council had not erred in this respect. The Court, however, considered that the decision not to require notification was flawed in two respects:[32]

(a) in the Council's consideration of temporary adverse effects; and

(b) in the Council's consideration of the heritage and historical significance of some of the trees.

[54] On the adequacy of information, the Court did not consider the standard set out in *Discount Brands* needed to be revisited despite subsequent amendments to the RMA because "no party sought to argue that a less exacting standard is appropriate."[33] Further, the Court considered that any different approach in the case before it would "be very difficult to sustain."[34] I therefore adopt the *Discount Brands* standard when considering whether the information before the Council was adequate.

[55] The Court then considered the Council's consideration of temporary adverse effects noting that it was clear that there would be a period for which the amenity of Ōwairaka would be adversely affected by the removal of the trees:

> [262] As to temporary adverse effects, it is clear that there would be a period for which the current amenity of Ōwairaka would be adversely affected by the removal of the trees. The maunga clearly operates as a very important public recreation reserve. It seems axiomatic that the process of removing so many trees from it in one process will have an adverse effect for whatever period must elapse before the new planting becomes established.

[56] The Court considered that the Judge should have focused on the statutory test: the consenting authority had to decide whether or not the effects of the activity would be more than minor and that required adequate information.[35]

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32 At [256].
33 At [261].
34 At [261].
35 At [263].

[57] The Court was not satisfied that the information was adequate because the proposal did not give enough detail about what was proposed in key respects. The Court considered that the evidence did not enable the consenting authority to form any proper conclusions as to the "nature and duration of the adverse effects" of tree removal pending the implementation of the planting.[36] The consent conditions did not require any specific timeframes to be met. The Court therefore concluded that the decision was based on inadequate information and the decision to grant resource consent for the felling and removal of exotic trees should be set aside.[37]

[58] Further, the Court was not satisfied that the Council had considered the temporary adverse effects in any meaningful way. Assessment of temporary adverse effects requires consideration of whether those effects are minor without confusing those adverse effects with what may happen in the longer term. This approach is necessary because s 3(b) of the RMA defines "effect" as including any "temporary" effect.[38] The temporary effect could only be assessed if there was adequate information as to its nature and duration.

[59] The Court then referred to this Court's decision in *Trilane Industries Ltd v Queenstown Lakes District Council* where the Court held that the consenting authority could not ignore temporary adverse effects simply by reason of subsequent activities which would address those effects:[39]

> [58] Although the Council repeatedly points to Ms Mellsop's conclusion that effects would be able to be mitigated and would then be low, that is the situation that would be reached over time. A consent authority cannot ignore temporary effects in undertaking its notification assessment. It also cannot average out effects over time to say that a temporary moderate adverse effect which will, in due course, reduce to a low or extremely low effect is therefore a minor or less than minor effect. While the Council says that the assessment must necessarily consider the broad range of effects and how they might change over time, that does not justify ignoring a temporary adverse effect, on the grounds it will be ameliorated in a relatively short timeframe having regard to the life span of the proposed activity. That may, of course, be appropriate in deciding whether to grant the resource consent, but it is not appropriate when making a notification decision, which is intended to allow the public a right

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36 At [268].
37 At [268].
38 At [269].
39 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

> of audience if any adverse effects, whether temporary or permanent, will be more than minor.
>
> …
>
> [60] Here, the Council appears to have taken a global view of the effects on landscape and visual amenity, including over time, to reach the view that effects on landscape and amenity are minor. That is not the correct approach. It would be the equivalent of saying that temporary construction noise effects could be ignored, simply because, once built, the noise effects of the activity would be negligible.

[60] The above passage indicates that any temporary adverse effects must therefore be assessed on their own and not globally as part of any proposed mitigation activity to address those adverse effects in the longer term.

[61] The Court of Appeal in the *Ōwairaka* decision also considered that the Council had inadequate information on which to determine whether there was any heritage value in the trees to be removed. It was inappropriate to assume that the trees had no heritage value because this was not reflected in the Auckland Unitary Plan (AUP).[40] The evidence before the Court indicated that these were matters "which should legitimately have been taken into account in relation to the notification issue but were not before the decision maker."[41]

[62] The Court did not need to go on to consider whether there were special circumstances to justify public notification having found that public notification was already required.[42] The Court set aside the Council's decision to grant resource consent for the felling and removal of the trees.[43]

[63] It is appropriate to first consider whether the Court of Appeal's findings in *Ōwairaka* apply to the circumstances of Ōtāhuhu before considering the other grounds of review. I therefore consider:

(a) Whether Mr Munro gave adequate consideration to, and had adequate information about, the temporary adverse effects on amenity values?

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40 *Ōwairaka,* above n 1, at [277].
41 At [277].
42 At [280].
43 At [285].

(b) Whether Mr Munro gave adequate consideration to, and had adequate information about, the heritage value of some of the trees?

[64] If I determine that there was adequate information and adequate consideration of the above issues, it is then necessary to consider the other grounds of review.

Determination as to adverse effects

Adequacy of information regarding temporary adverse effects on amenity values

[65] Mr Little for Ms Waru submitted that there was inadequate information on which to assess the temporary adverse effects on amenity values and in particular amenity value that is not limited to visual amenity.

[66] Mr Munro's decision discloses the following reasons for determining that the proposed activity will have or is likely to have adverse effects on amenity values that are no more than minor:

> i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be *short term in nature* and in keeping with the natural landform and landscape, so that overall any adverse effects will be less than minor;
>
> ii. …
>
> iii. any adverse effects on public access and recreation will be *short term in nature* and will be less than minor;
>
> iv. …
>
> <u>Other adverse effects</u>
>
> vii. Although public access to the Maunga will be *temporarily disrupted*, this disruption will be *short term in nature* and will not permanently or unreasonably limit people's use or enjoyment of the Maunga. Also, the Applicant has proposed a communications plan to ensure that users of the reserve are aware of any access restrictions.
>
> viii. Following from the Applicant's expert assessments including the Council's peer reviews, it can be concluded that any landscape and visual effects of the tree removals experienced by people with an outlook to, or using the Maunga, will have limited effects and such effects *will be adequately mitigated by the proposed restoration planting.*

(emphasis added)

[67] In the *Ōwairaka* decision the Court considered that it was clear that there would be a period for which the amenity of Ōwairaka would be adversely affected by the removal of the trees. The application for Ōwairaka proposed the removal of 345 trees. The Court considered that:[44]

> The maunga clearly operates as a very important public recreation reserve. It seems axiomatic that the process of removing so many trees from it in one process will have an adverse effect for whatever period must elapse before the new planting becomes established.

[68] Mr Little argued that the position is the same for Ōtāhuhu.

[69] The TMA argued that Ōtāhuhu is different to Ōwairaka and referred to the fact the TMA reduced the number of trees to be removed to 278, olive trees had previously been removed in 2018, 315 trees would remain (noting 61 trees were removed in 2023) and the project will be implemented in stages over several years. Further, the TMA submitted that there is significantly more native planting on Ōtāhuhu and Ōtāhuhu does not have a significant ecology overlay. Mr Beverley asserted that the critical difference is that the Court of Appeal's findings turned on the fact that the resource consent did not require any particular timescales to be met. The TMA says, here, the Planting Plan clearly discloses timescales.

[70] The relevant passage from the *Ōwairaka* decision states:

> [268] We do not consider that the evidence before Mr Kaye enabled him to form any proper conclusions as to the *nature and duration* of the adverse effects which would be the consequence of the intended tree removal, *pending the implementation and establishment* of the replacement planting. There was of course an ability to control both aspects by the imposition of conditions on the grant of consent, but the application itself did not give the detail about what was proposed in these key respects. *Significantly, the resource consent, when granted, did not require any particular time scale to be met*, simply stating as one of the conditions that timeframes for key stages of the works authorised by the consent and finalised tree protection methodologies were required to be submitted prior to commencement of each stage of the tree removals …
>
> (emphasis added)

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[44] At [262].

[71] The above passage indicates that the Court was concerned with the consequences of the tree removal *pending* the implementation and establishment of the replacement planting. The Court was concerned that there was inadequate information as to the *nature* and *duration* of temporary adverse effects. It follows that it would be necessary for the Council to understand timescales in relation to both tree removal and replacement planting as any temporary adverse effect would exist from the time of removal to the time at which the planting was implemented and established.

[72] There was a planting plan in relation to Ōwairaka,[45] so in that respect, the circumstances are similar.

[73] I consider the information available to Mr Munro as to timescales for removal and replacement planting.

[74] Mr Munro's decision required that the removal and planting take place in accordance with the information provided with the application:

> The removal of exotic vegetation and restoration planting activities shall be carried out in accordance with the plans and all information submitted with the application, detailed below, and all referenced by the Council as consent number LUC 603484274:

[75] The resource consent also required that information must be made available at the pre-commencement meeting that included "[t]imeframes for key stages of the works authorised under this consent."

[76] The processes for removal of the trees were contained within the Tree Removal Methodology report dated May 2021 and the Assessment of Noise Effects dated June 2021. The Tree Removal Methodology included an inventory of all trees to be removed and their respective locations on the maunga. The Assessment of Noise Effects noted that "[t]he overall project will be completed in approximately 40 days (allowing for set up and pack down)." A breakdown was then provided by location and type of removal (helicopter versus other removal methods).

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[45] See *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 at [195].

[77] The Assessment of Effects on the Environment also set out the expected duration of the removals and the timing as follows:

> 5.21 Expected duration of the works is 40 days including set up and pack down. Helicopter assisted dismantling will be required for potentially a maximum of 18 days. Helicopter use is restricted between the hours of 9am to 5pm, Monday through Friday.
>
> 5.22 The works will occur:
>
> - in the drier summer months to avoid modification to the ground;
> - between the hours of 7.30am and 6.00pm, Monday to Friday; and
> - no works on Saturday, Sunday or public holidays.
>
> (footnote omitted)

[78] The timing of planting was set out in the Planting Plan. Appendix A to the Planting Plan set out a six-year schedule which included a description of the type of plants to be planted in each year and the locations of the plantings. The Planting Plan records that "[p]lanting should ideally take place during the months of May to August as long as soil conditions are suitable." 7,000 plants would be planted each year in years one to three; 7,500 plants would be planted each year for years four and five; and 3,600 plants would be planted in year six (39,600 in total).

[79] Mr Munro therefore had information:

(a) as to the removal of trees:

(i) the number and location of trees to be removed;

(ii) the approximate time it would take to remove the trees (40 days);

(iii) the timing of the removals (drier summer months on Monday to Friday between 7.30 am to 6 pm);

(iv) that the tree removal could happen all at once unless he imposed conditions requiring staged removal; and

(b) as to the planting:

(i) the number and types of plants to be planted;

(ii) the locations of the planting;

(iii) the timing of the planting (ideally between May to August); and

(iv) the number of plants to be planted each year and the overall total by the end of the six-year plan.

[80] I therefore consider that there was sufficient information on which to assess the *duration* of any temporary adverse effects.

[81] Turning to the *nature* of the temporary adverse effects, this Court cannot ignore the Court of Appeal's view that it seems "axiomatic that the process of removing so many trees … in one process will have an adverse effect for whatever period must elapse before the new planting becomes established."[46] Here, at the time the resource consent was granted, 278 trees were to be removed without any conditions as to timing so that they could all be removed at once. It follows that the circumstances are largely the same as Ōwairaka, although there were 278 and not 345 trees that were to be removed, with 315 trees remaining on Ōtāhuhu.

[82] Here, the reasons for Mr Munro determining that the adverse effects on amenity values were less than minor were:

> i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be *short term in nature* and in keeping with the natural landform and landscape, so that overall, any adverse effects will be less than minor;
>
> ii. …
>
> iii. any adverse effects on public access and recreation will be short term in nature and will be less than minor;
>
> …
>
> (emphasis added)

[46] *Ōwairaka,* above n 1, at [262].

[83] On Mr Munro's reasoning, the adverse effects on visual amenity would be "short term in nature" and "in keeping with the landform and landscape." The question is whether there was adequate information to assess the magnitude of any adverse effects in the short term.

[84] Amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.[47] The issue is whether there was sufficient evidence on which Mr Munro could form conclusions as to the temporary adverse effects on those matters.

[85] Mr Beverley submitted that there was adequate information as to adverse effects on amenity values as contained in Ms Peake's Landscape and Visual Assessment, a peer review of that report by Mr Kensington and the Assessment of Effects on Environment reviewed by Ms Richmond.

[86] Mr Little submitted that there was inadequate information and refers to Ms Waru and Mr Borrell's evidence, which he submits provides information as to amenity values beyond visual amenity. Ms Waru provided evidence:

(a) about the "impressive" beauty of many of the trees;

(b) that the trees provide shelter for users and visitors including in the playground and central walkway and for those having picnics;

(c) that the trees are a habitat and food source for birds, which in turn contributes to amenity;

(d) that the trees block the outlook to the industrial and commercial areas that partly surround the maunga; and

(e) that children climb and play on the trees.

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47 RMA, s 2(1).

[87] Ms Waru also provided evidence of the overall tree canopy cover in the suburb of Ōtāhuhu compared to other suburbs. She referred to the Council's "Urban Forest Canopy Cover" report which provides that canopy cover in Māngere-Ōtāhuhu was eight per cent in 2016/2018 (a net loss of six per cent from 2013), with the minimum threshold being 15 per cent.[48] Ōtāhuhu is therefore not one of the 11 of 16 local boards that meets the minimum canopy cover.

[88] Mr Barrell, an arborist, also provided evidence in support of the application which opines as to the shade and tree cover provided by the trees to be removed:

> There would also be markedly less tree cover and shade in most walkable parts of the reserve in the long term (the intended native planting programme is limited to certain parts of the reserve only, which parts do not include, for the most part, those areas in which exotic trees will be felled … Native planting will take many years to establish and contribute to the reserve's amenity.

[89] I accept that the information before Mr Munro did not include information as to any adverse effects relating to the recreational attributes of the trees to be removed beyond visual amenity whether that be shade, shelter or their use for children's play. Ms Peake and Mr Kensington's respective reports were concerned with the adverse effects on visual amenity.

[90] In this regard, the Landscape and Visual Assessment records the key matters for assessment as: identifying cultural landscape features for protection and enhancement; effects of visual change for user groups/community; and managing visual amenity effects of tree removal. There is no reference to other amenity values such as the recreational attributes of the trees to be removed:

> For those visitors engaged in passive or informal use, the landscape may form an important part of the activity, and as the tracks are located in the area most affected by tree removals, the *visual change* is likely to be more noticeable. In addition, there will be some *initial visual impacts* from retained tree trunks, particularly buttressed roots, although they are expected to be quickly contained and screened by grass and vegetation.
>
> *Visual effects* are expected to vary for different individuals, depending on the purpose of the visit and the nature of the activity and, as for landscape effects, while the project will have *noticeable visual impacts* due to the number and size of trees proposed to be removed, the *final outcome will result in positive*

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[48] Nancy Golubiewski and others *Auckland's Urban Forest Canopy Cover: State and Change (2013-2016/2018)* (Auckland Council, Technical Report 2020/009, July 2020) at 14 and 27.

> *effects on the integrity of the feature* and its landscape through protection and enhancement. This is likely to be appreciated by users sensitive to environmental improvement and is expected to *assist in moderating adverse visual effects*.
>
> Generally, in relation to informal recreation use of the maunga, *the magnitude of visual change* resulting from the vegetation removal will be high due to the location and number of trees proposed to be removed, but effects will vary according to the sensitivity of the receiver (as well as their knowledge/perception about the sensitivity of the environment to change – either positive or negative). Overall, however, the removal of the exotic vegetation will reinstate the natural character of the volcanic feature and mountain, and provides the opportunity to enhance the visitor experience with overall positive effects.
>
> (emphasis added)

[91] The Landscape and Visual Assessment acknowledged that visual amenity is a component of the overall amenity of a place and contributes to people's appreciation of the pleasantness and aesthetic coherence of the environment, but it did not refer to the recreational attributes of the trees beyond their visual amenity. Ms Waru's evidence refers to recreational attributes of the vegetation to be removed which include providing shade, shelter, structures for play and a place to observe birdlife.

[92] Ms Peake provided an affidavit in support of the TMA's opposition. She opined that the amenity values are far broader than the trees alone and that there is a range of other physical and cultural characteristics that are pertinent in the assessment of effects on amenity values. Ms Peake then says those values have been incorporated into the IMP and the AUP and represent shared community values that form the basis for any assessment.

[93] Ms Peake opined that her assessment of effects has fairly evaluated the potential effects on amenity values, and she noted her conclusions for informal recreation users. Ms Peake's evidence suggests that her conclusions as to informal recreation users considers any adverse effect that is not limited to visual amenity. It is therefore helpful to consider Ms Peake's assessment of the adverse effects for those users:

> … For passive or informal users it was identified that the landscape may form an important part of the activity/visit and that *visual change* would likely be more noticeable, including initial *visual impacts from retained tree trunks*. The assessment concluded that:

(a) generally, in relation to informal recreation use of the Maunga, the *magnitude of visual change* (but not necessarily the effect) will be high due to the location and number of trees proposed to be removed; but

(b) the *effect of that visual change* will vary according to the sensitivity of the receiver as well as their knowledge/perception about the sensitivity of the environment to change – whether positive or negative (the section on landscape and natural character effects described how the communications programme is expected to explain the purpose and aims of the restoration); and

(c) overall, the removal of the exotic vegetation will reinstate the natural character of the volcanic feature and mountain, and provides the opportunity to *enhance the visitor experience* with overall positive effects.

(emphasis added)

[94] I do not consider that Ms Peake's assessment includes information as to amenity values that relate to recreational attributes going beyond visual amenity.

[95] The landscape architect appointed by the Council to peer review Ms Peake's report, Mr Peter Kensington, agreed with Ms Peake's conclusions. Mr Kensington referred to his preliminary views as follows:

> As with the application and resource consent at Ōwairaka, this application also proposes the removal of a relatively extensive quantity of mature trees and the *magnitude of visual change* that will occur to this landscape will be significant (it will be a dramatic change). However, from my early review of the application, I can also appreciate that this change will help to 'reveal' the underlying landform of this 'hidden' maunga for the appreciation of the wider community and this will provide for a strong *visual connection* between maunga, particularly those which are visually proximate to Ōtāhuhu, including Māngere, Maungarei and Maungakiekie.
>
> (emphasis added)

[96] The above assessment is also based on visual amenity. Mr Kensington agreed with Ms Peake's assessment of adverse effects:

> 15. In my mind, the above preliminary review comments remain valid, primarily because this application proposes to remove a significant number of exotic trees (similar in number to the Ōwairaka resource consent) with some being relatively large / mature specimens. As such, the relative *magnitude of visual change* is likely to be similar to that at the Ōwairaka site. This change will primarily be experienced by people using the site for active and passive recreation, for people within residential properties that immediately adjoin the

> site and for those people travelling past the site on Great South Road and Mount Wellington Highway.
>
> 16. Having said this, I acknowledge the findings of the applicant's assessment by landscape architect Sally Peake and, following further reflection, I find that I agree with the applicant's reasoning for the proposal and the likely scale of both adverse and positive landscape and *visual effects*.
>
> (emphasis added)

[97] The above passage refers to the adverse effects on visual amenity, the effects on the landscape being positive because the underlying landform of the maunga would be visible.

[98] The Assessment of Effects on Environment also considered amenity values from the perspective of the different viewing audiences (as set out in the Landscape and Visual Assessment) and concluded that any effects on visual amenity would be low to positive:

> Visual amenity effects
>
> 8.10 While the mountain is a distinctive landscape feature, with a relatively low profile (the highest scoria mound being 50m) it is not widely visible within the surrounding business and residential context, noting that no regionally significant viewshafts have been identified in the AUP. Nevertheless from close distances, notably surrounding roads, there are clear views of the maunga and surrounding sports fields. From further afield the maunga is generally screened from view. There are some residential areas immediately adjacent to the reserve with clear views of the project area with overall what is described by Ms Peake as a small visual catchment. The attendant vegetation is also visible to visitors who regularly use the sports facilities and tracks.
>
> 8.11 Three groups of viewing audiences and the corresponding degree of visual changes and therefore effects on each group in relation to the vegetation removal have been identified by Ms Peake. As these relate to effects on persons, they are discussed when assessing section 95B and Section 95E of the RMA. It is noted that Ms Peake has identified the magnitude of change to inform visual effects both positive and adverse and in many instances the visual effects are at worst low adverse initially, with low to positive visual effects at the end of the project.
>
> (footnote omitted)

[99] The Assessment of Effects on Environment also considered the potential adverse effects on different persons including street network users, visitors to the

maunga and residential neighbours. In terms of visitors to the maunga, the report considered the visual change and the impact of temporary closure:

> 8.35 Viewpoints have been identified as having less than minor to nil adverse effects on *visual amenity initially*. As noted by Ms Peake, this conservative rating does not take into account the positive effects of the enhanced cultural and visual integrity on the landscape as a result of the restoration programme. This means that over time, there will be *enhanced vegetative patterns and greater legibility of the maunga*
>
> …
>
> 8.38 It is considered that the purpose of the visitor's trip will influence the effects that the tree removals may have. Two main groups are identified – those engaged in active sports and using the facilities and those engaged in passive or informal use. As the focus of active users is unlikely to be natural landscape, effects at worst will be low. As the landscape is more likely to form part of the activity for passive users, there may be some initial *visual impacts* however, this will vary according to the sensitivity of the receiver. *The final outcome for this group* will result in positive effects on their visitor experience *given the protection and enhancement of the integrity of the feature and its landscape.*
>
> 8.39 Any temporary closure of parts of the park will be communicated in advance. The need to close parts of a park for operational or maintenance works is not an uncommon occurrence. There may be some minor inconvenience to regular park users during the works, in particular those who use the carparking area entrance to access the clubrooms, and users of the Bert Henham sports field. Where health and safety for contractors and public can be assured, public access can be maintained. It is anticipated that any disruption to pedestrians will be low level, minimal and limited to the duration of works.
>
> …
>
> 8.42 There are two small residential enclaves directly adjacent to Bert Henham and McManus Park where closer views are available. All trees within 100m of these properties will be retained. While for some there may be a perceived *adverse visual or amenity impact*, the closest and most visible trees are being retained. This will maintain a vegetated element in the foreground view. As the vegetated slope to the rear of Portage Road properties will be retained, the outlook will be unchanged. Long-term, there will be potentially positive effects through reduced shading and the grass slopes will allow the maunga profile to be better defined and revealed, enabling legibility and appreciation of the volcanic feature.
>
> (footnotes omitted and emphasis added)

[100] The Assessment of Effects on Environment acknowledges the visual impacts of tree removal but also refers to the "final outcome." The final outcome presumably

refers to the final outcome of the restoration planting which will protect and enhance the features of the landscape. While the experts agreed that the visual change was likely to be "noticeable" or "dramatic," both landscape architects acknowledged that whether there was any "adverse" effect was likely to be subjective. It would be positive in so far as it provided more visible viewshafts of parts of the maunga and would be subjective depending on the person's view. In those circumstances they considered that the adverse effect was low.

[101] While the reports disclose consideration of recreational attributes insofar as Ms Peake identified the different types of recreational users (active and passive), there was no information as to the recreational attributes of the trees to be removed (other than their visual amenity) and, whether their removal would have any adverse effects on recreational attributes such as shade, shelter, structures for play and observing birds.

[102] The TMA submitted that the Council specifically considered the adequacy of information and requested further information under s 92 of the RMA. Those further information requests related to noise and landscape effects (including specifically in relation to the temporary adverse effects from tree stumps), and that further information was provided by the TMA.

[103] The TMA also argued that Ms Waru has not provided any expert landscape or planning evidence to challenge or contest the expert views of Ms Peake, Mr Kensington or Ms Richmond or to contest the conclusions of Mr Dales and Mr Munro. The TMA also submitted that the evidence of Mr Barrell invites the Court to assess the merits of the decision, which it is not entitled to do in the context of a judicial review application. Further, the TMA argued that Mr Barrell is not a landscape or amenity expert.

[104] I accept that it is not for the Court to undertake a merits review of the Council's decision or to form its own view as to the merits. The Court of Appeal has provided guidance on how the Court is to approach such an application:[49]

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[49] *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA) at [7].

> It is well established that in judicial review the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant, considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been *some* material capable of supporting the decision …

[105] The expert views of Ms Peake, Mr Kensington and Ms Richmond do not opine on the recreational attributes of the trees beyond their visual amenity. There is no reference in the expert reports to the definition of "amenity values" in the RMA to indicate that the TMA experts turned their minds to the recreational attributes of the trees to be removed. Ms Waru and Mr Barrell, while not landscape or planning experts, provide evidence that is relevant to determining the recreational attributes of the trees. Had the experts considered those attributes and any adverse effects on them from tree removal then I agree that it would be inappropriate to interfere, but that is not the case here.

[106] I accept that there was adequate information to assess the magnitude of any adverse effects on visual amenity. I also accept that there was adequate information on which to assess the circumstances of the maunga after the tree removal — that is, the extent of tree cover remaining. There was also information as to the impact on birdlife as set out in the Assessment of Ecological Effects, which would be relevant to the adverse effects on amenity value. There was *not* however, any information as to the recreational attributes of the trees for shade, shelter or as play structures. Mr Munro did not therefore have adequate information to determine the magnitude of any temporary adverse effects on amenity values beyond visual amenity.

Assessment of temporary adverse effects

[107] In the *Ōwairaka* decision the Court of Appeal held that the Council had not taken into account temporary effects in any meaningful way:[50]

> … while the temporary effects of the tree removal were identified as adverse, it is difficult to see how they were taken into account in any meaningful way. While Mr Kaye's conclusion that the adverse effects would be effectively

[50] At [269].

> mitigated over time could be a legitimate basis for granting consent to the application in accordance with the approach discussed in *Bayley*, we are not convinced that approach can be justified at the notification stage. It would effectively mean that the adverse effects of cutting down such a substantial number of trees on the maunga could be characterised as minor on the basis that those effects will not continue in the longer term. That is difficult to reconcile with the fact that s 3(b) of the RMA specifically refers to "any temporary … effect".

[108] Here, Mr Munro's decision records that:

> Following from the Applicant's expert assessments including the Council's peer reviews, it can be concluded that any landscape and visual effects of the tree removals experienced by people with an outlook to, or using the Maunga, will have limited effects and such effects will be adequately mitigated by the proposed restoration planting.

[109] The above passage indicates that Mr Munro considered that any effects would be "limited" and the restoration planting would mitigate the visual effects. Mr Munro also had the Landscape and Visual Assessment which explained the potential adverse landscape and visual effects.

[110] The Landscape and Visual Assessment did consider the temporary operational effects and temporary landscape and visual effects as follows:

> Temporary effects
>
> In addition to the impacts of visual change, the location and method of tree removal will also create temporary short term effects, particularly for immediate neighbours. The methodology statement by Treescape sets out the different methods proposed to remove the vegetation, including manual removal, MEWP assisted removal, crane assisted removal, and helicopter assisted removal. Structures such as platforms, cranes, and helicopters will introduce visual features that contrast with the natural character of the maunga. However, their temporary use means their introduction will result in only low adverse visual effects for a limited time frame, while for most viewers their small size relative to the overall scale of the mountain will also minimise effects. For some people, the operation will be of interest and will not have any negative effects.
>
> In addition to temporary operational effects, there could be temporary landscape and visual effects from the retention of tree stumps. Such effects will be minimised as far as possible, and the height of retained stumps will be minimise (max. 1m). It is anticipated that stumps will be quickly contained and screened by grass and vegetation.

[111] Ms Peake provided further information in response to a request regarding the Moreton Bay Fig tree stumps noting that the expert arborists had advised that the

stumps would be cut down to a height where they would be rapidly obscured by grass. The temporary adverse effects arising from the tree stumps was therefore considered in a meaningful way.

[112] Ms Peake explains in her evidence that her assessment of temporary adverse effects was brief because the restoration planting is not intended to replace the removed trees. Rather, it is intended to restore the maunga to reflect its status and character as an outstanding natural feature. The restoration planting appears to be more relevant to the landscape feature and not visual amenity, from the sites at which the trees are to be removed, although Ms Peake notes that the planting will "enhance" the visitor experience.

[113] I accept that there was meaningful consideration of temporary adverse effects on visual amenity but there was no meaningful consideration of temporary adverse effects on amenity values beyond visual amenity.

Adequacy of information regarding heritage value of trees

[114] In achieving the purposes of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources must recognise and provide for the protection of historic heritage from inappropriate use and development.[51] Historic heritage means:[52]

> **historic heritage**—
>
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
>
> (i) archaeological:
>
> (ii) architectural:
>
> (iii) cultural:
>
> (iv) historic:
>
> (v) scientific:

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51 RMA, s 6(f).
52 Section 2(1).

(vi) technological; and

(b) includes—

(i) historic sites, structures, places, and areas; and

(ii) archaeological sites; and

(iii) sites of significance to Māori, including wāhi tapu; and

(iv) surroundings associated with the natural and physical resources

[115] Mr Little argued that the Council had inadequate information about the heritage value of the trees to be felled and the *Ōwairaka* decision supports this Court finding that the information was inadequate.

[116] Mr Beverley sought to distinguish *Ōwairaka* by arguing that here, there was no expert evidence that the trees are of heritage value and therefore the Court is entitled to accept the "uncontested views of the heritage experts."

[117] The Court in the *Ōwairaka* decision held that it was inappropriate for the Council to assume that the trees had no heritage value because this was not reflected in the AUP.[53] In the case of Ōtāhuhu, the Assessment on Environmental Effects notes that "none of the vegetation is recorded in the AUP as being of collective or individual significance" so to that extent the Council considered that factor relevant, but that does not, on its own, indicate that this was the basis for reaching the view that the trees to be removed had no heritage value. It is necessary to consider what other information was before the Council.

[118] The evidence in the *Ōwairaka* decision indicated that there was relevant information as to heritage value that should legitimately have been before the Council:

> [277] The approach taken in this case by the proponents of the application and Mr Kaye reflected an assumption, endorsed by the Judge, that if there was any value in the trees to be removed it would have been reflected in the provisions of the Auckland Unitary Plan. But the evidence on which the appellants rely and which we have summarised earlier in this judgment shows that assumption was not able to be made. We do not need to repeat the summary here. For present purposes it is sufficient to mention the summary given by Ms Inomata. These are matters which should legitimately have been

53 At [277].

> taken into account in relation to the notification issue but were not before the decision maker. As a result, in respect of the heritage value of the trees to be removed the material relied on by the Council when making the decision on notification was inadequate in terms of the standard articulated in *Discount Brands.*

[119] It is helpful to set out the evidence the Court was referring to as it indicates the type of evidence the Court considered undermined the assumption as to heritage value:[54]

> Had the society been consulted, Ms Inomata said that information could have been provided on the heritage value of the trees intended to be removed. She gave the following examples:
>
> (a) The olive grove planted with seeds sent home by Jack Turner from Palestine during World War II. Jack's family planted the grove in honour and memory of him, not then knowing whether he lived (he was a prisoner of war).
>
> (b) The so-called "penny trees", being the grove of gum (eucalyptus) trees planted by Mt Albert Borough Council, using seeds purchased for a penny a piece.
>
> (c) The large macrocarpa on the far side of the reserve. It was planted by one of Mt Albert's earliest settlers, William Sadgrove (he appeared on the first electoral roll of 1853 with a Mt Albert address) and is probably the oldest tree on the mountain. Sadgrove Terrace, the road next to the mountain, was named after him.
>
> (d) The cherry trees planted by Ethel Penman in memory of her brother Edgar, who died in the Great War at Gallipoli aged 18.
>
> (e) The woodland grove of mixed native and non-native trees next to the archery field, planted by pupils from Mt Albert Primary School in the 1950s.
>
> [115] Ms Inomata acknowledged that some of the trees to be removed would have little heritage value. Others however were likely to have such value which the society thought should at least be taken into account before the decision was made to remove them.

[120] Here, there is no evidence from any equivalent historic society for Ōtahuhu. There is Ms Waru's evidence that many of the trees to be removed have, or are likely to have, heritage value. Ms Waru's evidence included old Auckland newspaper articles that refer to the efforts of earlier generations to plant trees to "beautify" the

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54 From [114].

reserve and hide the "scars made by man" from quarrying. A 1929 New Zealand Herald article reports:

> A comprehensive scheme of improvements which has served the dual purpose of beautifying a reserve rich in Māori history and providing work for a number of unemployed men, is nearing completion at the Mount Richmond Domain, Ōtāhuhu. The formation of roads and paths and the planting of native and English trees has marked the end of years of effort to save for the people a park that was being destroyed by quarrying operations. … Over 400 trees have been planted, practically every native variety being represented, the exotics including oaks, elms and sycamores… .

[121] Mr Barrell's evidence, refers to Mike Wilcox's book, "Auckland's Remarkable Urban Forest", and its inclusion of a list of individual exotic trees of "outstanding interest" on the reserve. Mr Barrell also gives evidence that "[t]here are many significant individual trees on the reserve that are part of the resource consent," identifies some of them, and says that "[s]ome of them are better specimens than those on the Council's notable trees list."

[122] Neither Ms Waru nor Mr Barrell is a heritage expert, but Mr Barrell is an arborist and has knowledge of trees including the types of trees that are listed as "notable."

[123] Turning to the expert evidence relied on by the TMA. Ms Peake's Landscape and Visual Assessment refers to the same book as Mr Barrell (Auckland's Remarkable Urban Forest) and to the time at which the trees were likely planted:

> Dating back to 1890 when the domain was gazetted, there is a collection of exotic trees across the site, which have been augmented with native trees and smaller vegetation around the buildings and roads. A total of 444 exotic trees have been surveyed and are proposed for removal. There are some 46 different species, with the largest proportion being Olea, which have established across the domain. Other notable trees in higher numbers are Monterey Cypress, Moreton Bay Fig, Monterey Pine, London Plane and Black Poplar.
>
> The author of Auckland's Remarkable Urban Forest states that there is a fine collection of exotic trees on this scoria cone. Of outstanding interest is a very large pagoda tree (Styphnolobium japonicum), a big Chinese fir, a white escallonia (Escallonia bifida), several large European beech, two sweet chestnuts, several magnificent figs and London plane…. There are numerous elms and several enormous eastern cottonwoods…
>
> Not all of these trees are identified in the Treescape survey, however.

(footnote omitted)

[124] The Council requested further information given Ms Peake's reference to the book, "Auckland's Remarkable Urban Forest":

> **5. Discrepancy between the application tree schedule and the Wilcox publication**
>
> The application assessment of landscape and visual effects (at the last paragraph on page 4 and the first sentence on page 5) makes reference to the 2012 publication by Mike Wilcox, Auckland's Remarkable Urban Forest and notes that it mentions the presence of other exotic trees on site in addition to those that have been identified within the application. I request that the applicant clarify this statement and confirm whether the application schedule is correct and can be relied upon, or whether there are additional trees, as identified within the Wilcox publication, to be added.

[125] In her response, Ms Peake stated:

> I have relied on the arboricultural survey to identify the tree species and can only assume that the trees identified in the Wilcox publication have been removed subsequent to 2012.

[126] Ms Peake provided evidence in support of the TMA's opposition to this application that heritage values extend beyond the trees alone and "have been appropriately assessed as a component of landscape and amenity values."

[127] I accept that there is an overlap between the definitions in the RMA of "amenity values" and "historic heritage" but they are not the same. "Historic heritage" includes natural and physical resources that contribute to appreciation of New Zealand's history and cultures, deriving from historic qualities. Amenity values refers to natural or physical qualities and characteristics of an area that contribute to appreciation of its pleasantness, aesthetic coherence, cultural and recreational attributes. The latter does not include appreciation of history, although history may or may not be relevant to pleasantness, aesthetic coherence, cultural and recreational attributes.

[128] The Heritage Impact Assessment also includes information on when the trees would have likely been planted providing photographs at different points in time and noting:

> The 1959 aerial photograph illustrates that many of these quarries have mature vegetation growing in them, thus illustrating that they are not currently in use, the northern slopes near Great South Road slopes appear to be in a state of being rehabilitated and works appear that maybe ongoing on the adjacent lower ground.

[129] The Heritage Impact Assessment notes that the "Heritage Assessment has focused on the archaeological values of this place." That indicates that the heritage value of the trees was not a focus of the report. The report does not opine on the heritage value of the trees which is unsurprising given Mr Druskovich is an archaeologist.

[130] Ms Richmond is a planner and has experience working for councils, central government and in consultancy. Her work has a particular focus on open space and historic heritage places. She has also provided planning advice to the TMA. Ms Richmond provided evidence in support of the TMA's opposition. Ms Richmond's evidence was that the fact trees may have been planted over 100 years ago does not in itself result in heritage value and there was no indication that any of the non-native trees on Ōtāhuhu had any heritage value.

[131] Ms Richmond referred to the Bert Henham Park Management Plan (1977) prepared by the former Tamaki City Council, which is a reference source in the Heritage Impact Assessment, which does not record the trees as having heritage value.

[132] Mr Beverley also referred to Mr Turoa's evidence and submitted that there was an investigation into any notable trees during the individual assessment of each tree for the Tree Removal Methodology and in processing the application. I accept the Council checklist included "Heritage (inc Notable Trees)," and that each tree was identified in the Tree Removal Methodology.

[133] Ms Waru and Mr Barrell's evidence indicates that there is information as to the circumstances in which the trees were planted in 1929 and evidence as to the attributes of the trees to be removed, but much of the historical information regarding the trees was available and expressly referred to in Ms Peake's report. Each tree was also individually identified in the Tree Removal Methodology so their attributes would have been known. Further, the nature of Ms Waru and Mr Barrell's evidence is

different to the evidence regarding Ōwairaka because it does not include the views of a heritage expert (such as evidence from the equivalent Ōtāhuhu historic society) nor does it disclose historical information about particular trees. Rather the evidence refers to the timing of planting, which information was already available and before the Council. The Heritage Impact Assessment included photographs at various stages in the history of the maunga which indicated the trees that had been planted on it at various points in time. Ms Peake's report also referred to that history. Ms Richmond's evidence is that age alone does not establish heritage value.

[134] I am therefore satisfied that there was adequate information on which to determine the heritage value of the trees to be removed, and that such value was adequately considered.

Adverse effects on natural environment

[135] While it is not necessary to consider whether the Council erred in relation to its decision regarding the adverse effects on the natural environment, I do not consider that it did for the reasons outlined below.

[136] In relation to ecological effects, Mr Munro's decision reads as follows:

> the activity will have or is likely to have adverse effects on the environment that are no more than minor because: …
>
> ii. any adverse ecological effects arising from the proposal have been proposed to be appropriately managed as part of the works programme to ensure that any adverse effects will be less than minor…

[137] Mr Little argued that by referring to the works programme, it is unclear whether the adverse effects will be less than minor because of the mitigation steps to be taken when removing the trees, or because of the replanting. Both activities were included in the work programme.

[138] I reject this ground of appeal as the Assessment of Ecological Effects determined the overall ecological effect without regard to mitigation. First, the report considered the magnitude of effects without mitigation and determined the magnitude to be moderate. The report then considered the ecological value of the trees, which

was determined to be low. Together, the report concluded that the *overall ecological effect* was low. After reaching that conclusion, the report then refers to the "residual potential ecological effects" requiring mitigation so that no net loss of biodiversity will result. The planting addresses that residual effect – the loss of biodiversity.

[139] I consider that the Assessment of Ecological Effects assessed overall ecological effects without mitigation as low. The report then identified "residential ecological effects", which would be addressed by planting. This is further supported by the report noting that post mitigation, the effects will be "negligible" indicating that the adverse effects move from "low" to "negligible" because of the planting.

[140] I therefore reject this ground of review.

Overall conclusion

[141] While I accept there was adequate innformation on which to assess the *duration* of any temporary adverse effects, there was inadequate information on which to assess the *nature* of temporary adverse effects. This is because there was an absence of information before Mr Munro as to the temporary adverse effects on amenity values beyond visual amenity. The experts' assessments were limited to the adverse effects on visual amenity only. The definition of amenity values in the RMA is broader than visual amenity alone. Ms Waru and Mr Barrell's evidence indicates that there was relevant information as to amenity values beyond visual amenity, that would have been available had the application for resource consent been notified. Whether there were any adverse effects on amenity values beyond visual amenity (whether temporary or permanent) should have been considered.

[142] It follows that Mr Munro did not consider temporary adverse effects on amenity values beyond visual amenity in any meaningful way.

[143] I otherwise dismiss Ms Waru's grounds for alleging that there was inadequate information to assess the heritage value of the trees or the adverse effects on the natural environment.

[144] For this reason, it follows that the decision of the Council to grant resource consent for the felling and removal of trees must be set aside.

[145] Given my conclusion, it is unnecessary to determine whether limited notification would have been appropriate. It is also unnecessary to determine whether there were special circumstances to justify public notification.

Result

[146] The decision of the Council to grant the resource consent for the felling and removal of trees is set aside.

Costs

[147] If the parties are unable to agree costs, leave is granted to file costs memoranda of no more than five pages with Ms Waru filing a costs memorandum, and the TMA filing any response within 10 working days thereafter.

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Tahana J