Tūpuna Maunga Authority

Date: **Monday, 25 July 2022**
Time: **3.00pm**
Venue: **Online via Zoom**

TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY

HUI 77 – 25 July 2022
Open Agenda

Chairperson	Paul Majurey	Ngā Mana Whenua o Tāmaki Makaurau (Marutūāhu Rōpū)
Deputy Chairperson	Cr Alf Filipaina	Auckland Council (Governing Body)
Members	Cr Josephine Bartley	Auckland Council (Governing Body)
	Cr Dr Cathy Casey	Auckland Council (Governing Body)
	Toni Van Tonder	Auckland Council (Devonport-Takapuna Local Board)
	Chris Makoare	Auckland Council (Maungakiekie-Tāmaki Local Board)
	Hauāuru Rawiri	Ngā Mana Whenua o Tāmaki Makaurau (Marutūāhu Rōpū)
	Bernadette Papa	Ngā Mana Whenua o Tāmaki Makaurau (Ngāti Whātua Rōpū)
	Clay Hawke	Ngā Mana Whenua o Tāmaki Makaurau (Ngāti Whātua Rōpū)
	Zaelene Maxwell-Butler	Ngā Mana Whenua o Tāmaki Makaurau (Waiohua-Tāmaki Rōpū)
	Dennis Kirkwood	Ngā Mana Whenua o Tāmaki Makaurau (Waiohua-Tāmaki Rōpū)

(Quorum is 7 members, comprising the chair or deputy chair and 2 members appointed by the rōpū entities and 2 members appointed by Auckland Council)

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Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

109 Functions and powers

(1) The Maunga Authority has the powers and functions conferred on it by or under this Act or any other enactment.

(2) In exercising its powers and carrying out its functions in relation to the maunga, the Maunga Authority must have regard to—

(a) the spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau; and

(b) section 41(2).

(3) In exercising its powers and carrying out its functions in relation to the administered lands, the Maunga Authority must have regard to the spiritual, ancestral, cultural, customary, and historical significance of the administered lands to Ngā Mana Whenua o Tāmaki Makaurau.

[Emphasis added]

41 Maunga must remain as reserves vested in trustee

(1) This section applies to each maunga once the maunga is—

(a) vested in the trustee under subpart 1, 2, or 3 of this Part;

and

(b) Declared a reserve under any of sections 18 to 29, 33, and 39.

(2) The maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.

…

[Emphasis added]


Kaipatiki
Devonport – Takapuna
Waiheke
Takarunga/
Mount Victoria
Maungauika/
North Head
Waitemata
Albert – Eden
Maungawhau/
Mount Eden
Ōhinerau/
Mount Hobson
Orakei
Te Kōpuke/Tītīkōpuke/
Mount St John
Ōwairaka/Te Ahi-kā-a-Rakataura/
Mount Albert
Maungarei/
Mount Wellington
Ōhuiarangi/
Pigeon Mountain
Whau
Te Tātua-a-Riukiuta/
Big King
Maungakiekie/
One Tree Hill
Maungakiekie – Tamaki
Pukewīwī/Puketāpapa/
Mount Roskill
Rarotonga/
Mount Smart
Howick
Puketapapa
Ōtāhuhu/
Mount Richmond
Te Pane-o-Mataoho/Te Ara Pueru/
Māngere Mountain
Mangere – Otahuhu
Otara – Papatoetoe
Matukutūruru/Wiri Mountain
Manurewa
Franklin
Papakura
Key
Tūpuna Maunga
Local board boundaries and geographic areas

Tūpuna Maunga Reserve Status*

The following Tūpuna Maunga, with the relevant reserve status, are classified as reserves subject to the Reserves Act 1977

Maunga	Reserve Status
Matukutūruru	Historic reserve
Maungakiekie / One Tree Hill	Recreation reserve
Maungarei / Mt Wellington	Recreation reserve, Local Purpose reserve
Maungawhau / Mount Eden	Historic reserve, Recreation reserve
Maungauika / North Head	Historic reserve
Ōwairaka / Te Ahi-kā-a-Rakataura / Mount Albert	Recreation reserve
Pukewīwī / Puketāpapa / Mount Roskill	Recreation reserve
Te Kōpuke / Tītīkōpuke / Mount St John	Recreation reserve
Ōhinerau / Mount Hobson	Recreation reserve
Ōhuiarangi / Pigeon Mountain	Historic reserve, Recreation reserve, Local Purpose reserve
Ōtāhuhu / Mount Richmond	Recreation reserve
Takarunga / Mount Victoria	Recreation reserve, Local Purpose reserve
Te Tātua-a-Riukiuta / Big King	Recreation reserve
Te Ara Pueru / Te Pane-o-Mataaho / Mangere Mountain	Historic reserve, Recreation reserve, Local Purpose reserve
Rarotonga / Mount Smart	Recreation reserve

* See sections 18-29, 33 (repealed), 39, 41, 47, 53, 54, and Schedules 1 & 2, 6 of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

Date: **Monday, 23 May 2022**
Time: **1.43pm**
Venue: **Online via Zoom**

TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY
HUI 75 – 23 May 2022
Open Minutes

Chairperson	Mr Paul Majurey	Chairperson
Deputy Chairperson	Cr Alf Filipaina	Deputy Chairperson
Members	Cr Josephine Bartley	Auckland Council (Governing Body)
	Cr Dr Cathy Casey	Auckland Council (Governing Body)
	Toni Van Tonder	Auckland Council (Devonport-Takapuna Local Board)
	Chris Makoare	Auckland Council (Maungakiekie-Tāmaki Local Board)
	Hauāuru Rawiri	Ngā Mana Whenua o Tāmaki Makaurau (Marutūāhu Rōpū)

APOLOGIES

Clay Hawke	Ngā Mana Whenua o Tāmaki Makaurau (Ngāti Whātua Rōpū)
Zaelene Maxwell-Butler	Ngā Mana Whenua o Tāmaki Makaurau (Waiohua-Tāmaki Rōpū)
Bernadette Papa	Ngā Mana Whenua o Tāmaki Makaurau (Ngāti Whātua Rōpū)

Member Dennis Kirkwood opened hui 75.

1 Apologies

MOVED by Member P Majurey, seconded by Cr A Filipaina:

That the Tūpuna Maunga Authority:

a) **accept** the apologies from Member Clay Hawke, Zaelene Maxwell-Butler and Bernadette Papa for absence.

CARRIED

2 Declaration of Interest

MOVED by Member P Majurey, seconded by Cr A Filipaina:

That the Tūpuna Maunga Authority:

a) **note** there were no declarations of interest.

CARRIED

3 Confirmation of Minutes

MOVED by Member P Majurey, seconded by Cr A Filipaina:

That the Tūpuna Maunga Authority:

b) **confirm** the minutes of Hui 73 held on Monday, 11 April 2022, as a true and accurate record.

CARRIED

4 Tūpuna Maunga planting update

Staff were acknowledged for the work done for this term.
MOVED by Member P Majurey, seconded by Member T van Tonder:

That the Tūpuna Maunga Authority:

a) **note** the report

CARRIED

5 Pest Free Howick Lease and Pigeon Mountain Cricket Club Sub-lease

MOVED by Member P Majurey, seconded by Member Rawiri:

That the Tūpuna Maunga Authority:

a) **resolves** to publicly notify pursuant to section 119 of the Reserves Act 1977 an intention to grant a lease to Pest Free Howick for one year plus one year right of renewal for the year round use of the 'pavilion' and part of the changing rooms/toilet block to utilise as a base for staff, education events and the storage and distribution of equipment to support Pest Free Howick's ecological restoration workstreams.

b) **resolves** to publicly notify pursuant to section 119 of the Reserves Act 1977 an intention to grant a sub-lease to Pigeon Mountain Cricket Club for an initial term of 18 months with 1 x one year right of renewal for the year round use of part of the 'pavilion' for storage and the use of the 'pavilion' clubrooms area on Saturdays during the cricket season;

c) **recognises** there may be submissions and a hearing pursuant to s120 of the Reserves Act 1977;

d) **delegates** to the Chair and Deputy Chair the power to execute a lease and sub-lease, including a Maunga Outcomes Plan, with Pest Free Howick and Pigeon Mountain Cricket Club at a rental of $0.10 and otherwise on the standard terms and conditions; and

e) **resolves** to retain the 'pavilion' in Tūpuna Maunga Authority ownership and charge a maintenance fee to recover some of the costs associated with the annual maintenance programme.

CARRIED

6 Sorrento Group Limited Lease

Note: an amendment to clause a) was made with the agreement of the meeting.
MOVED by Member P Majurey, seconded by Member C Makoare:

That the Tūpuna Maunga Authority:

a) **delegates** to the Chair and Deputy Chair the power to execute the lease extension, including a Maunga Outcomes Plan, with the Sorrento Group Limited at the market rental (as previously determined by a registered valuer) and otherwise on the standard terms and conditions; and

b) **resolves** to publicly notify pursuant to section 119 of the Reserves Act 1977 an intention to extend the lease for Sorrento for a two year term.

c) **recognises** there may be submissions and a hearing pursuant to s120 of the Reserves Act 1977;

d) **resolves** that no further extensions be granted to the lease on expiry after two years.

CARRIED

7 Tūpuna Maunga Authority: Quarter 3 Report

MOVED by Member P Majurey, seconded by Member CC Casey:

That the Tūpuna Maunga Authority:

a) **note** the attached 3rd Quarter Report for the 2021/22 financial year.

CARRIED

8 Tūpuna Maunga o Tāmaki Makaurau Authority Draft Operational Plan 2022/23

MOVED by Member P Majurey, seconded by Cr J Bartley:

That the Tūpuna Maunga Authority:

a) **approve** the Tūpuna Maunga Authority Operational Plan 2022/23 (Attachment A) and the summary of the Tūpuna Maunga Authority Operational Plan 2022/23 (Attachment B).

b) **delegate** authority to the Head of Co-governance to incorporate into the Operational Plan maps and photographs and any further minor typographical changes that may be identified.

c) **note** the Auckland Council Governing Body will be invited to jointly approve the Tūpuna Maunga Authority Operational Plan 2022/23 and the summary of the Tūpuna Maunga Authority Operational Plan 2022/23 for inclusion in the Annual Plan 2022/23.

CARRIED

9 Tūpuna Maunga Authority - Annual Financial Report for year ending 30 June 2021

MOVED by Member P Majurey, seconded by Member D Kirkwood:

That the Tūpuna Maunga Authority:

a) **receive** the Annual Financial Report for the year ending 30 June 2021 (Attachment A).

b) **receive** the letter from the chief executive of Auckland Council confirming that the Annual Financial Report is accurate (Attachment B).

c) **note** the members' attendance register for the period 1 July 2020 to 30 June 2021 (Attachment C).

CARRIED

10 Registers

MOVED by Member P Majurey, seconded by Cr A Filipaina:

That the Tūpuna Maunga Authority:

a) **note** the attached Registers, which have been updated since Hui 72 (14 March 2022).

CARRIED

11 Te Hotonga Hapori – Connecting Communities verbal presentation

A public presentation was given by Professor Scott Duncan on Te Hotonga Hapori.

MOVED by Member P Majurey, seconded by Cr J Bartley:

That the Tūpuna Maunga Authority:
a) **thank** the Te Hotonga Hapori team for their presentation.

CARRIED

Member Dennis Kirkwood closed Hui 75.

2.27pm The Chairperson thanked members for their attendance and attention to business and declared the meeting closed.

CONFIRMED AS A TRUE AND CORRECT RECORD AT A MEETING OF THE TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY HELD ON

DATE:.....

CHAIRPERSON:.....

Open Agenda

1 Apologies

No apologies had been received at the close of the agenda.

2 Declaration of Interest

Members are reminded of the need to be vigilant to stand aside from decision making when a conflict arises between their role as a member and any private or other external interest they might have.

3 Confirmation of Minutes

a) **confirm** the minutes of Hui 75 held on Monday, 23 May 2022, as a true and accurate record.

Operational Plan 2022-23 update

Author**:** Dominic Wilson, Head of Co-governance

Purpose	To update on the Tūpuna Maunga Authority's Operational Plan 2022/23
Recommendations	That the Tūpuna Maunga Authority: a) **note** that the Tūpuna Maunga Authority's Operational Plan 2022/23 has been agreed

Background

1. At Hui 75 (23 May 2022), the Authority unanimously adopted the Tūpuna Maunga Authority's Operational Plan 2022-23 and the Summary.

2. On 7 June 2022, Auckland Council agreed the Tūpuna Maunga Authority's Operational Plan 2022-23 and the Summary.

Statutory and other considerations

3. Any decision to determine management within a reserve must take into account the legislative and policy framework.

4. Section 109(2) of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 requires the Authority to have regard to the spiritual, ancestral, cultural, customary, and historical significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau and that the Tūpuna Maunga is held in trust for Ngā Mana Whenua and the other people of Auckland.

5. The Tūpuna Maunga Authority's Integrated Management Plan was unanimously adopted (Mana Whenua and Auckland Council members) by the Authority pursuant to the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 and Reserves Act 1977. The Integrated Management Plan describes a series of "Values" and "Pathways" that guide all activities on the Tūpuna Maunga.

6. The Tūpuna Maunga Authority (Mana Whenua and Auckland Council members) unanimously adopted the Tūpuna Maunga Strategies at Hui 50 on 25 September 2020. The Tūpuna Maunga Strategies are 7 key sections that outline the strategic direction with regards to education, Biodiversity, Tūpuna Maunga design, Recreation, commercial activities and monitoring. Together with the IMP, these strategies inform guide and manage the activities undertaken on the Maunga.

7. The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 sets out a process for the adoption of an "Annual Operational Plan" by the Authority (refer sections 60-63). Management have worked alongside the council's legal and finance teams to ensure compliance with the procedures set out in the legislation.

8. The Authority administers the Tūpuna Maunga under the Reserves Act 1977 and pursuant to Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. The Hauraki Gulf Marine Park Act 2000 is also applicable in relation to Maungauika.

Discussion

9. The Tūpuna Maunga Authority's Operational Plan 2022-23 and the Summary are now agreed in terms of s60(1) of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.

10. The final version can now be viewed on the Authority's website.

Attachments

There are no attachments for this report.

Integrated Management Plan

Authors: Dominic Wilson, Head of Co-governance and Nick Turoa, Tupuna Maunga Authority

Purpose	To decide whether to propose an amendment to the Integrated Management Plan for the Ōwairaka and other Tūpuna Maunga restoration projects.
Recommendations	That the Tūpuna Maunga Authority: a) **confirms** its intention to proceed with the Ōwairaka project, and other projects listed in Attachment B, and that the projects will comply with section 42 of the Reserves Act. The Authority agrees to proceed with an amendment to the Integrated Management Plan to specifically provide for the Ōwairaka and Tūpuna Maunga restoration projects listed in Attachment B to support the health and well-being of the Tūpuna Maunga. b) **agrees** to move directly to publicly notify a draft amendment to the Integrated Management Plan (in terms of s41(6) of the Reserves Act 1977)) as set out in Attachment B. c) **agrees** that it is not necessary to undertake the preliminary notification process under s41(5) of the Reserves Act, as in the circumstances that will not materially assist in the preparation of the amendment. d) **agrees** to hear and consider any public submissions on the draft amendment to the Integrated Management Plan (if any submitter requests to be heard). e) **establishes** a committee and delegates to that committee the function of hearing any public submissions on the draft amendment to the Integrated Management Plan. f) **will** make the final decision on any amendment to the Integrated Management Plan.

Background

1. The Tūpuna Maunga Authority adopted the Integrated Management Plan (IMP) at Hui 19 on 23 June 2016. The IMP describes a series of “Values” and “Pathways” that guide all activities on the Tūpuna Maunga. The primary focus of the IMP is to protect the health and well-being of the Tūpuna Maunga.

2. To further the aims of the IMP, various capital and other projects for restoration have been carried out on the Maunga. A project planned for Ōwairaka/Te Ahi Kā a Rakataura/Mt Albert (the Ōwairaka project) has been unable to proceed due to litigation opposing the project. The Court of Appeal has ruled that, due to it's significance, the Ōwairaka project needed to be included in the Integrated Management Plan (Court of Appeal decision).[1] The Supreme Court has decided not to hear an appeal to the Court of Appeal decision so the Authority needs to consider its next steps as required by the Court of Appeal decision.

[1] *Norman v Tūpuna Maunga o Tāmaki Authority* [2022] NZCA 30

3. The High Court and Court of Appeal decisions contain important statements as to the legislative framework, and the application of that framework to the restoration projects. Those two decisions are included as Attachment A.

Statutory and other considerations

4. Any decision to determine management within a reserve must take into account the legislative and policy framework.

5. The Authority administers the Tūpuna Maunga under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 and the Reserves Act 1977. The Hauraki Gulf Marine Park Act 2000 is also relevant.

6. In making a decision to propose an amendment to the Integrated Management Plan, the Authority is to have regard to the above legislation. Also, there are a number of relevant provisions set out in the court decisions as Attachment A to this report.

7. The Tūpuna Maunga Authority adopted the Tūpuna Maunga Strategies at Hui 50 on 25 September 2020. The Tūpuna Maunga Strategies are seven key sections that outline the strategic direction with regards to education, biodiversity, Tūpuna Maunga design, recreation, commercial activities and monitoring. Together with the IMP, these strategies inform, guide and manage the activities undertaken on the Maunga.

8. The Tūpuna Maunga are within the catchments that support the Hauraki Gulf. The purpose of the Hauraki Gulf Marine Park Act 2000, among other matters, is to "recognise the historic, traditional, cultural, and spiritual relationship of the tangata whenua with the Hauraki Gulf".

Discussion

9. Any amendment to the IMP involves a series of steps as required by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 and the Reserves Act 1977.

10. The key steps to prepare an amendment to the Integrated Management Plan are as follows:

    a. The Tūpuna Maunga Authority must decide whether to proceed with an amendment to IMP
    b. If so, the Authority decides whether or not to move directly to a public notice of an amendment to the IMP (without the preliminary notification process provided for in s41(5) of the Reserves Act)
    c. A draft amendment to the Integrated Management Plan is publicly notified, and submissions invited
    d. There is a two-month submission period on the draft amendment to the Integrated Management Plan
    e. A committee of the Tūpuna Maunga Authority holds hearings (where submitters have requested to be heard in support of their submissions) to consider submissions received
    f. A report from the committee is prepared, reflecting and attaching the submissions received and providing recommendations on those submissions to the Authority
    g. The Authority considers that report and makes a decision on the proposed amendment to the Integrated Management Plan.

Notice of an intention to amend the IMP

11. Section 58 of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 requires the Authority to prepare an IMP in accordance with the requirements of section 41 of the

Reserves Act 1977. In turn, s41(5) and s41(6) of the Reserves Act 1977 provides for a 'two-stage' notification process:

a. preliminary notification which allows persons to send in suggestions on the proposed plan
b. then full notification of the proposed plan amendment, which allows persons to make submissions and be heard on their submission.

12. When the Authority initially decided to create the IMP it carried out the first stage above and publicly notified its intention to prepare the plan and invited submissions in relation to issues (Hui 9, 8 June 2015). Under s41(5A) the Authority is not required to undertake that first stage if it passes a resolution that it has "determined that written suggestions on the proposed plan would not materially assist in its preparation". In the circumstances, Management recommend that the Authority should move to the second step and embark upon notification of a proposed plan amendment.

13. The key reasons why the Authority should decide to move to the second step are that the proposed amendment to the IMP is specific to support the intended restoration projects for the Maunga and the issues have been well publicised. This is not a comprehensive review of the IMP, rather an amendment to meet the requirements of the Court of Appeal decision and the legislation.

14. In essence, the Authority has already sought public input on the wider issues that might be included in the IMP, but in this case the issues are narrowed to the Ōwairaka project and related Maunga projects. Management also consider that the Ōwairaka project has been very well publicised and the subject of wide discussion in the community and the media, and also widely discussed through various public processes such as the court litigation and consultation on the draft operational plans for the Authority. The proposed amendment is specific and targeted and it is not considered that a preliminary notification process would materially assist in the preparation of the amendment (as per s41(5A) of the Reserves Act 1977).

15. For completeness, management note that s41(9) of the Reserves Act 1977 does allow the Tūpuna Maunga Authority to dispense with the second of the above stages (given this is not a 'comprehensive review' of the plan). However, management do not recommend this action here in the circumstances.

Public notice of the amendment to the IMP

16. The Authority must publicly notify an amendment to the IMP in accordance with s41 and s119 of the Reserves Act 1977. There is a 2 month submission period and notification must be completed:

a. once in a newspaper circulating in the area in which the reserve or proposed reserve is situated; and

b. in such other newspapers (if any) as the administering body decides.

17. A committee of the Authority[1] would then hold a hearing, if people ask to be heard, at a date after the close of the 2 month submission period.

18. A report from the committee would then be prepared, reflecting and attaching the submissions received and providing recommendations on those submissions to the Authority

19. The Authority would then consider that report and will make a decision on the proposed amendment to the Integrated Management Plan.

[1] Clause 10(1) of Schedule 4 to Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

Proposed amendment to the IMP

20. Attachment B is a draft amendment to the Integrated Management Plan for consideration by the Authority. The amendment is designed to further the aims of the IMP and progress the restoration of the Maunga.

21. The proposed amendment is a new schedule to the IMP that details proposed restoration projects for:

    a. Ōwairaka/Te Ahi Kā a Rakataura / Mt Albert (the Ōwairaka project)
    b. Pukewīwī/Puketāpapa/Mt Roskill
    c. Ōtāhuhu/Mt Richmond
    d. Te Tātua a Riukiuta/Big King.

22. For Ōwairaka, the Court of Appeal found that the application (and accompanying documents) for the resource consent was the best source of the detail of what is proposed through the Ōwairaka project.[1]

23. The Court referred to the executive summary from the assessment of environmental effects (AEE) as follows:[2]

> 1.1.1 The Auckland Council are seeking consent for exotic vegetation removal and rehabilitation planting on Ōwairaka/Te Ahi-Kā-a-Rakataura/Mt Albert (Ōwairaka) on behalf of the Tūpuna Maunga Authority, [which] is a statutory authority that has ownership and governance of 14 Tūpuna Maunga in the Auckland region.
>
> 1.1.2 This proposal to remove exotic trees and undertake rehabilitation to facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga and to help restore and enhance [the] mauri and wairua of their Tūpuna Maunga, represents another step toward the Tūpuna Maunga Authority [giving] effect to their Integrated Management Plan (IMP) since the return of Ngā Tūpuna Maunga o Tāmaki Makaurau (Auckland's ancestral mountains) to 13 iwi and hapū of Auckland.
>
> 1.1.3 In summary, the proposal will include:
>
> - The removal of approximately 345 exotic trees from the Maunga;
> - The restoration of the central and historic quarry faces with indigenous plantings to create a WF7 Pūriri broadleaf forest ecosystem.
> - Mound planting is proposed for on a small area of the south eastern face.

24. The Court of Appeal also quoted Mr Yate's description in part 6 of the AEE:[3]

> 6.1.1 Consent is required for exotic vegetation removal on Ōwairaka, as the applicant seeks to restore the natural, spiritual and indigenous landscape of the Maunga. The consent will restore the integrity of the Maunga through the removal of exotic species and native restoration plantings.

25. The most numerous species of trees to be removed were flowering cherry (131), eucalyptus (97), banksia (26) and olive (17).[4]

26. The High Court quoted from Mr Yate's affidavit as to the primary premise underpinning the Ōwairaka project:[5]

[1] *Norman v Tūpuna Maunga o Tāmaki Authority* [2022] NZCA 30 at [11] (Court of Appeal decision).
[2] Court of Appeal decision at [12]. See also *Norman v Tūpuna Maunga o Tāmaki Authority* [2020] NZHC 3425 at [25] and [193] (High Court decision).
[3] Court of Appeal decision at [14].
[4] Court of Appeal decision at [15].
[5] High Court decision at [194].

> … to achieve the cultural, spiritual and ecological restoration of Ōwairaka-te Ahi-kā-a-Rakataura, whilst avoiding adverse effects on in-situ archaeology and the high landscape, geological and visual values of the Maunga. Important parts of the project are retaining the tihi in grass to restore and enhance the cultural and spiritual restoration of the Maunga, and the replanting of 13,000 mixed natives (2,700 of which have already been planted) to mitigate and enhance ecological values on the Maunga, in an area where in situ archaeology had been destroyed by historic quarrying.

27. Management have included the above detail within the draft amendment to the IMP in relation to the Ōwairaka project, and also for the related projects at Pukewīwī / Puketāpapa/Mt Roskill, Ōtāhuhu/Mt Richmond and Te Tātua a Riukiuta/Big King.

Decision under section 42 of the Reserves Act 1977

28. The High Court and Court of Appeal accepted that section 42 of the Reserves Act was satisfied in relation to the Owairaka project.

29. The Authority can reconfirm that, in terms of s42(2) of the Reserves Act 1977, the removal of the exotic trees 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".

30. The Authority can also reconfirm that, in terms of s42(3) of the Reserves Act 1977, the manner of removal of the trees will have a minimal impact on the reserve, and there is a plan in place for replanting of the reserve. Those matters are both confirmed in the RMA application documentation and the two Court decisions.

Next steps

31. If determined by the Authority, management will undertake the process set out in this report in relation to the public notification, hearings and decision in relation to the proposed amendments to the Integrated Management Plan.

Attachments

Attachment A: *Decisions in Norman v Tupuna Maunga Authority (CA and HC)*⇩

Attachment B: Draft Amendments to the Integrated Management Plan⇩

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA21/2021
[2022] NZCA 30

BETWEEN	AVERIL ROSEMARY NORMAN AND WARWICK BRUCE NORMAN Appellants
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
AND	AUCKLAND COUNCIL Second Respondent

Hearing:	20 and 21 July 2021
Court:	Cooper, Courtney and Goddard JJ
Counsel:	R J Hollyman QC, J W H Little and J K Grimmer for Appellants P T Beverley and C A Easter for First Respondent P M S McNamara and S J Mitchell for Second Respondent
Judgment:	3 March 2022 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the first respondent to fell and remove the exotic trees on Ōwairaka is set aside.

C The decision of the second respondent to grant resource consent for the felling and removal of the exotic trees is set aside.

D The first and second respondents must pay the appellants costs for a complex appeal on a band A basis, plus usual disbursements. We certify for second counsel.

E The High Court costs order is set aside. Costs in the High Court are to be determined by that Court in light of this judgment.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] This judgment concerns a proposal by the Tūpuna Maunga o Tāmaki Makaurau Authority (the Tūpuna Maunga Authority) to make significant changes to the vegetation on the slopes of Ōwairaka. Ōwairaka is one of the maunga administered by the Tūpuna Maunga Authority in accordance with Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act).

[2] The Collective Redress Act calls the maunga Mt Albert,[1] the name conferred on it by settlers from Britain in the 19th Century. In addition to the Māori name of Ōwairaka, some mana whenua refer to it as Te Ahi-kā-a-Rakataura. For simplicity, we follow the lead of counsel for the Tūpuna Maunga Authority and refer to the maunga as Ōwairaka.

[3] The purpose of the Collective Redress Act is to give effect to provisions of a deed negotiated between the Crown and a collective of iwi and hapū, known as Ngā Mana Whenua o Tāmaki Makaurau, to settle claims based on historical breaches of the Treaty of Waitangi by the Crown.[2] The legislation implements the agreement recorded in the deed by providing, amongst other things, for the vesting in a trustee of 14 maunga in Tāmaki Makaurau, including Ōwairaka. Generally, the maunga (including Ōwairaka) were vested in the trustee by a process involving the revocation of their status as reserves under the Reserves Act 1977 followed by vesting the fee simple in the trustee, declaring the maunga to be reserves with a classification under the Reserves Act and providing that the Tūpuna Maunga Authority was to be the administering body of the reserves. Once vested, the maunga are held by the trustee "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".[3]

[4] In addition to conferring on the Tūpuna Maunga Authority the obligations of an administering body under the Reserves Act, the Collective Redress Act requires the Authority to prepare and approve an Integrated Management Plan (IMP) relating to all of the maunga.[4] Such an IMP was prepared and approved by the Tūpuna Maunga Authority on 23 June 2016. The issues on appeal include the extent to which the Tūpuna Maunga Authority complied with its statutory obligations in relation to the IMP.

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1 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 [Collective Redress Act], s 22.

2 Section 3. Ngā Mana Whenua o Tāmaki Makaurau are listed in s 9 as comprising Ngāi Tai ki Tāmaki; Ngāti Maru; Ngāti Pāoa; Ngāti Tamaoho; Ngāti Tamaterā; Ngāti Te Ata; Ngāti Whanaunga; Ngāti Whātua o Kaipara; Ngāti Whātua Ōrākei; Te Ākitai Waiohua; Te Kawerau ā Maki; Te Patukirikiri and hapū of Ngāti Whātua (other than Ngāti Whātua o Kaipara and Ngāti Whātua Ōrākei) whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri.

3 Section 41(2).

4 Section 58(1).

[5] In the exercise of its functions and powers as the administering body of Ōwairaka, the Tūpuna Maunga Authority decided to carry out what its counsel Mr Beverley described as an "ecological restoration project" involving the retention of all existing indigenous trees and the planting of 13,000 further indigenous trees and plants. Part of the proposal involved the removal of the 345 exotic trees presently growing on the maunga. That proved controversial, and the proposed removal of those trees has given rise to the present litigation.

[6] The appellants sought judicial review of the Tūpuna Maunga Authority's decision to remove the exotic trees. They are among local residents who frequently walk on Ōwairaka and feel a close connection to it and the vegetation currently growing there. There is also affidavit evidence from a number of persons living in the suburb of Mt Albert establishing the various personal and historical connections they have with the maunga. We will return to that evidence later in this judgment.

[7] The application for review also sought relief against the Auckland Council (the Council). Under s 61 of the Collective Redress Act the Council is responsible for "routine management" of the maunga, under the direction of the Tūpuna Maunga Authority and in accordance with an annual operational plan and any standard operating procedures agreed between the Tūpuna Maunga Authority and the Council. The High Court held that in practical terms, Council officers undertake the work of the Tūpuna Maunga Authority since the Authority does not employ its own staff.[5] However, the main claim against the Council is as the consent authority under the Resource Management Act 1991 (the RMA). The Council applied to itself for resource consent to carry out the tree felling and planting work and decided that the application could be determined without being publicly notified or subject to limited notification under the relevant provisions of the RMA.

[8] The High Court rejected the application for review and this appeal has followed. For reasons we address below we have concluded that the decision to fell and remove the exotic trees was made by the Tūpuna Maunga Authority without complying with its statutory obligations in respect of public consultation, essentially

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5 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 [High Court judgment], at n 10.

because the intention to remove all the exotic trees was significant and never made explicit. We also hold that the Council should not have granted resource consent on a non-notified basis. On these bases we have concluded that the appeal should be allowed, and the decisions of the Tūpuna Maunga Authority and the Council set aside.

[9] Before turning to the substantive issues that arise on the appeal, we give a summary of the work the Tūpuna Maunga Authority proposes to carry out, and address some further matters of context.

The proposed revegetation

[10] The Tūpuna Maunga Authority has adopted the stance in this litigation that the decision to remove the 345 exotic trees on Ōwairaka was part of a decision making process which included adoption of the IMP; provision for the project in the Annual Operational Plan; and steps subsequently taken by its Tūpuna Maunga Manager, Mr Nicholas Turoa, to implement the "directions" flowing from the IMP and the Annual Operational Plan. Consistently with that, there is no decision by the Tūpuna Maunga Authority itself to which reference may be made for a description of what the project actually involves.

[11] But in order to implement the project, it was necessary for resource consent to be obtained. The application for resource consent and the documents which accompanied it are the best source of the detail of what is proposed. The application was submitted by Mr Antony Yates, a planning consultant, as agent for the Council in whose name the application was made. Mr Yates swore an affidavit giving the details of the resource consent application documents. These documents included a comprehensive assessment of environmental effects and assessments by various experts engaged for the purposes of the application.

[12] The executive summary given in the assessment of environmental effects contained the following:

> 1.1.1 The Auckland Council are seeking consent for exotic vegetation removal and rehabilitation planting on Ōwairaka/Te Ahi-Kā-a-Rakataura/Mt Albert (Ōwairaka) on behalf of the Tūpuna Maunga Authority, [which] is a statutory authority that has ownership and governance of 14 Tūpuna Maunga in the Auckland region.

1.1.2 This proposal to remove exotic trees and undertake rehabilitation to facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga and to help restore and enhance [the] mauri and wairua of their Tūpuna Maunga, represents another step toward the Tūpuna Maunga Authority [giving] effect to their Integrated Management Plan (IMP) since the return of Ngā Tūpuna Maunga o Tāmaki Makaurau (Auckland's ancestral mountains) to 13 iwi and hapū of Auckland.

1.1.3 In summary, the proposal will include:

- The removal of approximately 345 exotic trees from the Maunga;
- The restoration of the central and historic quarry faces with indigenous plantings to create a WF7 Pūriri broadleaf forest ecosystem.
- Mound planting is proposed for on a small area of the south eastern face.

[13] The assessment of environmental effects referred to the IMP and the Tūpuna Maunga Authority Annual Operational Plan 2018/2019. It attached expert technical reports on the intended tree removal methodology and assessments of heritage impacts, ecological effects, noise effects and herpetology. Among the specialist reports attached was a landscape and visual assessment by Ms Sally Peake, a registered landscape architect, who gave the following description of the existing landscape:

> Ōwairaka is [a] large scoria cone overlying obscured tuft ring remnants with extensive lava flows in three quadrants to the west, north and east. It rises to 140m above sea level and approximately 80m above the underlying ridge of East Coast Bays Formation.
>
> It has been modified since about 1867 when the first scoria pit was opened. Subsequent to this, ballast pits and quarrying occurred on the northern slopes, in the crater, on the eastern side and on the southern side of the maunga.
>
> The existing form reflects the former quarrying and contains two flat areas used for archery and playing fields as well as the platforms of former reservoirs. In addition, a driveway forms a circuitous route around the cone, terminating at a carpark with changing sheds and toilets. A trig station occupies the highest point. … A mix of exotic and native vegetation covers the slopes of the maunga, with the highest concentration on the slope between the main platform areas (site of the former quarry).
>
> Generally, there is a healthy mix of native species across the site (predominantly consisting of Pohutukawa, Totara, and Puriri) accounting for 442 trees in the survey area, and a total of 345 other trees (including 131 Cherry and 97 Eucalyptus). Conspicuous amongst these are three very big Holm Oaks, some large Monterey Cypress and Eucalypts as well as Pohutukawa.

> …
>
> Surrounding the cone is residential development — up to approx 110m contours adjacent to the reservoir area to the southwest (outside the project area). Although it was settled from the 1870s, the suburban residential areas were largely developed from the early 1900s to the 40s and large areas (including all around the maunga) are occupied by single house lots covered by a 'Special Character' overlay.
>
> The mountain is a distinctive landscape feature within the residential context and is widely visible, especially from the west. Multiple regionally significant views have been identified to the mountain and the cone's profile is quite well defined, although housing on its flanks limits the extent of visibility from local roads and public spaces.
>
> (Footnote omitted.)

[14] A detailed description of the proposal was given by Mr Yates in pt 6 of the assessment of environmental effects. He noted:

> 6.1.1 Consent is required for exotic vegetation removal on Ōwairaka, as the applicant seeks to restore the natural, spiritual and indigenous landscape of the Maunga. The consent will restore the integrity of the Maunga through the removal of exotic species and native restoration plantings.

[15] This was followed by a table listing the species of tree to be removed and their numbers. The most numerous were 131 flowering cherry, 97 eucalyptus, 26 banksia and 17 olive. There were also oaks of various varieties, as well as less numerous other species. An aerial map was given showing the tree locations and there was a description of the various areas of work and locations of "restoration planting".

Matters of context

The importance of the maunga

[16] The importance of the maunga generally, including Ōwairaka, to mana whenua was addressed in affidavit evidence by Mr Paul Majurey, who is the Chair of the Tūpuna Maunga Authority. In his affidavit, Mr Majurey said:

> The Tūpuna Maunga are sacred to Mana Whenua as taonga tuku iho (treasures handed down the generations). They are fundamental to our mana and identity.

> The following statement from the Waitangi Tribunal captures the world views of the Mana Whenua with the Tūpuna Maunga:[6]
>
> > ... maunga are iconic landscape features for Māori. They are iconic not because of their scenic attributes, but because they represent an enduring symbolic connection between tangata whenua groups and distinctive land forms. Sometimes, these land forms are the physical embodiment of tūpuna. Thus, associations with maunga are imbued with mana and wairua that occupy the spiritual as well as the terrestrial realm. Maunga express a group's mana and identity. This connection and expression is an integral part of Māori culture. [Footnote omitted]
>
> To the Mana Whenua of Tāmaki, the Tūpuna Maunga are the embodiment of our Tūpuna (ancestors). That is why the return of the Tūpuna Maunga to us through the Tāmaki Collective Treaty settlement is so significant — it represents the reconnection with our land and ancestors. That is also why the Treaty settlement arrangements for the governance and management of the Tūpuna Maunga, through the Tūpuna Maunga Authority, are significant. As discussed below, the ability for Mana Whenua to exercise our kaitiaki responsibilities over the Tūpuna Maunga, alongside Auckland Council in the spirit of the Treaty principle of partnership, is of immense cultural significance.

[17] With particular reference to Ōwairaka, Mr Majurey noted that the 13 iwi/hapū of Ngā Mana Whenua o Tāmaki Makaurau have varying histories and traditions, which is in part reflected by the dual Māori names for the maunga. He further observed that, following generations of Crown Treaty breaches and harm to the Tūpuna Maunga and mana whenua themselves, the return of the maunga was "immensely significant in that we were able to reconnect with our ancestors". It marked "the start of a journey of tangibly and meaningfully reconnecting with the Tūpuna Maunga and directing providing for their care and wellbeing". He observed:

> The Tūpuna Maunga Authority arrangements … allow Mana Whenua, through a unique co-governance arrangement with Auckland Council, to be at the forefront of the process of caring for and restoring the wellbeing of the Tūpuna Maunga.

[18] Mr Majurey was also the author of the introductory section to the IMP, to which we have referred above. In te reo Māori, his introduction included the following:

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[6] Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 95. This is the Waitangi Tribunal report on Treaty settlement processes in Tāmaki Makaurau. Many of the Mana Whenua tribes of Tāmaki participated in the inquiry process, including the Marutūāhu Iwi. The scope of the inquiry included the Tūpuna Maunga of Auckland.

> Kei te iho o tā te Māori titiro, ko tēnei mea te whanaungatanga.
>
> Ko ngā hononga i waenga i te iwi, ko te whānuitanga hoki o ngā taura here i te tangata ki te ao tūroa me to ao wairua kua whiria katoatia mā te whakapapa.
>
> He mea āta tuitui hoki ngā muka o te mauri o te tangata ki ērā o te mauri o te taiao mā ngā hononga ki ngā tūpuna.
>
> Koirā te take e mihi nei te Māori ki ngā Maunga me ngā tohu whenua pēnei i tana mihi ki te tangata, ā, koirā hoki te take e taunga nei ngā kaumātua ki te kōrero hāngai atu ki aua wāhi rā.
>
> He mea nui ngā Tūpuna Maunga o Tāmaki Makaurau ki te tuakiritanga o te Mana Whenua, otirā, kei te iho hoki o te tuakiritanga ā-rohe, ā-motu hoki o Tāmaki Makaurau. Nā ngā ingoa me te horanuku o aua wāhi ka pupū ake ngā maharatanga ki ngā tūpuna me ngā tūāhuatanga ā-iwi e tāpua ana. Mā ēnei taonga tuku iho e pūmau ai tā tātou noho hei tangata ki te whenua.

[19] This was translated into English in the IMP as follows:

> Whanaungatanga (kinship) is at the heart of the Māori world view.
>
> The connections between people, and the broad web of human relationships with the natural and spiritual worlds are all bound together through whakapapa (genealogy).
>
> The mauri (life force) of people is intimately linked to the mauri of the environment through ancestral connections.
>
> This is why Māori refer to mountains and other iconic landscape features in the same way they refer to humans, and why elders feel comfortable speaking directly to them.
>
> The Tūpuna Maunga (ancestral mountains) of Tāmaki Makaurau are fundamental to the identity of Mana Whenua and are at the heart of Auckland's local and international identity. Their names and landscapes invoke the memory of the ancestors and significant tribal events. These taonga tuku iho (treasures handed down the generations) anchor us as people to the land.

[20] It is clear that the return of the maunga to mana whenua in the manner achieved by the Collective Redress Act was an event of very great significance.

The Collective Redress Act

[21] The genesis of the Collective Redress Act is reflected in the Act's preamble, which records:

Preamble

(1) The iwi and hapū constituting the collective known as Ngā Mana Whenua o Tāmaki Makaurau have claims to Tāmaki Makaurau based on historical breaches of the Treaty of Waitangi (Te Tiriti o Waitangi) by the Crown:

(2) Settlement of these claims is progressing through negotiations between the Crown and each individual iwi and hapū:

(3) At the same time, the Crown has been negotiating other redress with Ngā Mana Whenua o Tāmaki Makaurau—

(a) that relates to certain maunga, motu, and lands of Tāmaki Makaurau; and

(b) in respect of which all the iwi and hapū have interests; and

(c) in respect of which all the iwi and hapū will share:

(4) The maunga and motu are taonga in relation to which the iwi and hapū have always—

(a) maintained a unique relationship; and

(b) honoured their intergenerational role as kaitiaki:

(5) The negotiations between the Crown and Ngā Mana Whenua o Tāmaki Makaurau began in July 2009:

(6) On 12 February 2010, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Framework Agreement:

(7) On 5 November 2011, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Record of Agreement:

(8) On 7 June 2012, the Crown and Ngā Mana Whenua o Tāmaki Makaurau initialled a deed encapsulating the agreed redress arising from the Framework Agreement and the Record of Agreement:

(9) On 8 September 2012, representatives of the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed the deed:

(10) To implement the deed, legislation is required:

[22] Part 1 of the Act sets out what are described as "preliminary provisions", including the important statement of the Act's purpose in s 3. That section provides as follows:

> **3 Purpose of Act**
>
> The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tāmaki Makaurau, including by—
>
> (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; and
>
> (c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

[23] Section 7 provides as follows:

> **7 Interpretation of Act generally**
>
> It is the intention of Parliament that this Act is interpreted in a manner that best furthers the agreements expressed in the collective deed.

[24] The expression "collective deed" is one of the important terms defined in s 8(1) of the Collective Redress Act. The importance of the deed is reflected in the provisions of s 16 of the Act which obliges the Chief Executive of the Ministry of Justice to make copies of the deed available for inspection free of charge, and for purchase at a reasonable price, at the head office of the Ministry of Justice in Wellington. The Chief Executive is also required to make a copy of the collective deed available free of charge on an internet site maintained by or on behalf of the Ministry.

[25] The primacy and importance of the settlement implemented by the Collective Redress Act is reflected in other provisions of pt 1 which, amongst other things, provide that:

> (a) no court, tribunal or other judicial body has jurisdiction in respect of any matter that arises from the application of the Te Ture Whenua Māori Act 1993 if the matter relates, amongst other things, to any one or more of the maunga;[7] and

[7] Collective Redress Act, s 12(1).

(b) a number of listed enactments, including ss 8A to 8HJ of the Treaty of Waitangi Act 1975 and ss 27A to 27C of the State-Owned Enterprises Act 1986, do not apply to the maunga.[8]

[26] In summary, it is the Collective Redress Act which, in accordance with its terms, represents the settlement negotiated between the Crown and Ngā Mana Whenua o Tāmaki Makaurau, where necessary to the exclusion of other legislation to which resort might be made for the settlement of Treaty claims.

[27] Part 2 of the Collective Redress Act deals with cultural redress. Sub-part 1 provides for the vesting of the maunga (other than Maungauika and Rarotonga/Mt Smart). Particular sections in sub-pt 2 deal with what is to happen with respect to the individual maunga. Most relevant for present purposes is s 22, which provides as follows:

22 Mount Albert

(1) The reservation of Mount Albert as a recreation reserve subject to the Reserves Act 1977 is revoked.

(2) The fee simple estate in Mount Albert then vests in the trustee.

(3) Mount Albert is then declared a reserve and classified as a recreation reserve subject to section 17 of the Reserves Act 1977.

(4) The Maunga Authority is the administering body of Mount Albert for the purposes of the Reserves Act 1977, and that Act applies as if Mount Albert were a reserve vested in the administering body.

(5) Subsections (1) to (4) do not take effect until the trustee has provided Watercare Services Limited with a registrable easement in gross on the terms and conditions set out in part 6 of the documents schedule.

(6) The easement—

(a) is enforceable in accordance with its terms despite—

(i) the provisions of the Reserves Act 1977, the Property Law Act 2007, or any other enactment; or

(ii) any rule of law; and

(b) is to be treated as having been granted in accordance with the Reserves Act 1977.

[8] Section 13.

[28] The sections dealing with the individual maunga to a certain extent reflect their particular history in terms of the legal arrangements to which they have previously been subject.[9]

[29] All sections however have in common the revocation of the existing reserve status of the maunga, followed by vesting in the trustee and a new declaration as reserve with a stated reserve classification. Particular provision is also made for the ongoing use of parts of the maunga for the purposes of Watercare Services Ltd.[10]

[30] Section 8(1) of the Collective Redress Act defines the term "trustee" as meaning "the Tūpuna Taonga o Tāmaki Makaurau Trust Limited, acting in its capacity as trustee of the Tūpuna Taonga o Tāmaki Makaurau Trust".

[31] Sub-part 4 of pt 2 contains certain general provisions applying to all of the maunga. One of the central provisions in this part is s 41, which defines the position that applies once each maunga is vested in the trustee. The section provides as follows:

> **41 Maunga must remain as reserves vested in trustee**
>
> (1) This section applies to each maunga once the maunga is—
>
> (a) vested in the trustee under subpart 1, 2, or 3 of this Part; and
>
> (b) declared a reserve under any of sections 18 to 29, 33, and 39.
>
> (2) The maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.
>
> (3) The trustee must not—
>
> (a) transfer the fee simple estate in the maunga to any other person; or
>
> (b) mortgage, or give a security interest in, the maunga.
>
> (4) The reserve status of the maunga must not be revoked, but may be reclassified in accordance with the Reserves Act 1977.
>
> (5) Subsection (2) does not of itself create any right on which a cause of action may be founded.

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9 For example, after vesting the fee simple estates in the trustee, Matukutūruru (s 18(3)) and certain parts of Maungawhau/Mt Eden (s 21(4)) and Ōhuiarangi/Pigeon Mountain (s 26(5)) are declared reserves and returned to their previous classification as historic reserves.

10 With the exception of Mt St John (s 24).

(6) Subsection (2) does not affect the application of section 16(8) of the Reserves Act 1977.

(7) Despite subsection (3), the trustee may transfer the fee simple estate in the maunga if—

(a) the transfer is to give effect to an exchange of any part of the maunga in accordance with section 15 of the Reserves Act 1977; and

(b) the instrument to transfer the land in the maunga is accompanied by a certificate given by the trustee, or its solicitor, verifying that paragraph (a) applies.

(8) The prohibition in subsection (4) does not apply to any part of the maunga transferred in accordance with subsection (7).

[32] We discuss this provision further below, in the context of addressing the relationship between the Collective Redress Act and the Reserves Act, but we draw attention at this stage to subs (2) which provides that the maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland and the statement in subs (6), that subs (2) does not affect the application of s 16(8) of the Reserves Act. Section 16(8) of the Reserves Act provides for each reserve classified under s 16 of that Act to be held and administered "for the purpose or purposes for which it is classified and for no other purpose".

[33] Section 42 of the Collective Redress Act vests each maunga in the trustee subject to or together with any interests listed for the maunga in sch 1. This means, in the case of Ōwairaka, that the vesting is subject to the easement in gross in favour of Watercare Services Ltd referred to in s 22(5).

[34] Section 43 is a machinery provision relating to the vesting. Subsection (2) provides for the Registrar-General to register the trustee as the proprietor of the fee simple estate of the land and record anything on the register and do anything else necessary to give effect to pt 2 and the collective deed. The Registrar-General is also required to create a computer freehold register where the land is not already contained in such a register.[11]

[11] Section 43(3) to (5).

[35] Section 44(1) obliges the Registrar-General to record on any computer freehold register for each maunga that the iwi and hapū identified in the collective deed have spiritual, ancestral, cultural, customary and historical interests in the particular maunga. Sub-pt 6 of pt 2 of the Collective Redress Act contains provisions relating to the care, management and maintenance of the maunga. Section 58 obliges the Tūpuna Maunga Authority to prepare and approve an IMP. It provides as follows:

> **58 Integrated management plan**
>
> (1) The Maunga Authority must prepare and approve an integrated management plan—
>
> (a) that applies to the following land:
>
> (i) the maunga; and
>
> …
>
> (iii) the administered lands;[12] and
>
> (iv) any land for which any other enactment requires the Maunga Authority to be the administering body; and
>
> (b) that complies with the requirements of section 59.
>
> (2) Despite subsection (1),—
>
> …
>
> (b) the Maunga Authority must make the entire plan available for inspection by the Minister of Conservation whenever the Minister requires.
>
> (3) Section 41 of the Reserves Act 1977 applies to a plan prepared under this section—
>
> (a) with any necessary modifications; but
>
> (b) subject to this section.
>
> (4) To avoid doubt, the Minister of Conservation may still require the Maunga Authority to—
>
> (a) review the plan under section 41(4) of the Reserves Act 1977; or
>
> (b) consult another administering body under section 41(14) of that Act.

12 Section 8(1) defines the "administered lands" by reference to the "Maungakiekie / One Tree Hill northern land" and Māngere Mountain.

[36] The continuing status of the maunga as reserves after the vesting in the Tūpuna Maunga Authority is reflected in the application of s 41 of the Reserves Act to the IMP by subs (3). This is underlined by the provisions of subs (4).

[37] Section 59 contemplates that the IMP will contain provisions enabling Ngā Mana Whenua to carry out activities for cultural and spiritual purposes on the maunga and recognising members' traditional and/or ancestral ties to the lands. This is consistent with later provisions in sub-pt 7, including a Crown acknowledgement of the importance of cultural activities on and traditional uses of the maunga,[13] examples of which are given in s 66. That section defines an "authorised cultural activity" as meaning:

> (a) the erection of pou or flags:
>
> (b) an instructional or educational hīkoi:
>
> (c) a wānanga, hui, or pōwhiri:
>
> (d) an event that celebrates the maunga and volcanic activity as distinguishing and land-shaping features of Tāmaki Makaurau:
>
> (e) an event that marks or celebrates the history of Aotearoa, Waitangi Day, or Matariki:
>
> (f) an event that celebrates the ancestral association, or exercises the mana, of Ngā Mana Whenua o Tāmaki Makaurau with or over the maunga:
>
> (g) an event that celebrates Ngā Mana Whenua o Tāmaki Makaurau in its collective capacity:
>
> (h) an event that celebrates an iwi or a hapū of Ngā Mana Whenua o Tāmaki Makaurau:
>
> (i) any other activity in relation to which provisions are included in the integrated management plan in accordance with section 59(4) to (7).

[38] Section 60 requires the Tūpuna Maunga Authority and the Council to agree to an annual operational plan providing a framework in which the Council will carry out its functions for the financial year.[14] The annual operational plan is required to include information relating to matters set out in subs (4), indicative information for those matters for the following two financial years and relevant financial information

13 Section 65.
14 Section 60(1).

derived from the Council's long-term plan for all activities and functions relating to the maunga.[15] The matters that must be provided for are:[16]

(a) funding:

(b) restoration work:

(c) capital projects:

(d) strategic, policy, and planning projects:

(e) maintenance and operational projects:

(f) levels of service to be provided by the Council:

(g) contracts for management or maintenance activities on the maunga and the administered lands:

(h) facilitation of authorised cultural activities:

(i) educational programmes:

(j) Ngā Mana Whenua o Tāmaki Makaurau programmes, including iwi or hapū programmes:

(k) opportunities for members of Ngā Mana Whenua o Tāmaki Makaurau to carry out or participate in any of the activities described in paragraphs (b) to (i).

[39] Section 61(1) provides that the Council is responsible for the routine management of the maunga. Subsection (2) then provides:

(2) The Council must carry out this responsibility—

(a) under the direction of the Maunga Authority; and

(b) in accordance with—

(i) the current annual operational plan; and

(ii) any standard operating procedures agreed between the Maunga Authority and the Council; and

(iii) any delegations made to the Council under section 113.

[40] Subsection (4) enacts:

15 Section 60(3).
16 Section 60(4).

(4) For the purposes of carrying out its responsibilities under this section, the Reserves Act 1977 applies—

(a) as if the Council were the administering body of the maunga and the administered lands; and

(b) with any necessary modification; but

(c) subject to subsection (2).

[41] Subsection (5) provides that s 61 is subject to s 62. Under the latter section, the Council is responsible for the costs which it incurs in carrying out its functions under the Act, and those which are incurred by the Tūpuna Maunga Authority in carrying out its functions "under this Act or the Reserves Act".[17]

[42] Section 63 contains provisions relating to financial management, financial reporting and operational accountability. The Council is required to report quarterly to the Tūpuna Maunga Authority on the costs, funding and revenue of the maunga for that quarter,[18] and to provide the Tūpuna Maunga Authority with an annual financial report and an annual operational report.[19]

[43] Section 64 obliges the Council and Ngā Mana Whenua o Tāmaki Makaurau to meet annually to discuss matters relating to the maunga including the performance of the Tūpuna Maunga Authority during the year and its proposed activities in the following year.[20]

[44] We have already referred in general terms to the provisions of sub-pt 7 of pt 2 of the Collective Redress Act dealing with cultural activities in relation to the maunga.[21] It is not necessary for present purposes to say anything more on that subject.

[45] Part 3 of the Collective Redress Act deals with the Tūpuna Maunga Authority. The Authority is established under s 106. Section 107 describes its membership, and provides as follows:

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17 Section 62(1)(b).
18 Section 63(3)(a).
19 Section 63(3)(b) and 63(4).
20 Section 64(1).
21 Above at [37].

> **107 Membership**
>
> (1) The Maunga Authority comprises—
>
> (a) 2 members appointed by the Marutūāhu rōpū entity; and
>
> (b) 2 members appointed by the Ngāti Whātua rōpū entity; and
>
> (c) 2 members appointed by the Waiohua Tāmaki rōpū entity; and
>
> (d) 6 members appointed by the Auckland Council; and
>
> (e) 1 non-voting member appointed by the Minister for Arts, Culture and Heritage—
>
> (i) for the first 3 years of the Maunga Authority's existence; and
>
> (ii) for any longer period agreed between the Minister, the trustee, and the Auckland Council.
>
> …

[46] Those members appointed by the rōpū entities must appoint the Chairperson of the Tūpuna Maunga Authority from among its members.[22] The members appointed by the Council must appoint the Deputy Chairperson of the Tūpuna Maunga Authority from among its members.[23]

[47] Section 109(1) provides that the Tūpuna Maunga Authority has the powers and functions conferred on it under the Collective Redress Act or any other enactment. Subsection (2) is in the following terms:

> (2) In exercising its powers and carrying out its functions in relation to the maunga, the Maunga Authority must have regard to—
>
> (a) the spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau; and
>
> (b) section 41(2).

[48] The reference to s 41(2) underlines the fact that the maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland. The effect of s 109(2)(b) is that the Tūpuna Maunga

22 Section 108(1).
23 Section 108(2).

Authority must have regard to the fact that the trustee holds the land for the common benefit of both. In effect, the Tūpuna Maunga Authority has the same responsibilities as the trustee in this respect.

[49] Under s 111(1) the Tūpuna Maunga Authority may exercise or perform, in relation to the maunga, any power or function that the Minister of Conservation has delegated to all local authorities under s 10 of the Reserves Act that is relevant to the maunga. The delegation is said to apply to the Tūpuna Maunga Authority with all necessary modifications.[24]

[50] Section 112 then puts the Tūpuna Maunga Authority in the position of a local authority under the Reserves Act. Thus the Authority may exercise or perform, in relation to the maunga, any power or function that a local authority is authorised to exercise or perform under the Reserves Act which is relevant to the maunga.[25] The Reserves Act applies "with all necessary modifications".[26] Under s 113(1), the Tūpuna Maunga Authority may delegate to the Council a power or function to which ss 111 or 112 applies and any one or more of its general functions, duties and powers as the administering body of the maunga under the Reserves Act for the purposes of enabling the Council to exercise its routine management responsibility under s 61. The Council also is given power to delegate any of the functions delegated to it by the Tūpuna Maunga Authority to another person, subject to any conditions, limitations or prohibitions imposed on the Council by the Tūpuna Maunga Authority when making the original delegation.[27] These delegations do not relieve either the Tūpuna Maunga Authority or the Council "of the liability or legal responsibility to perform or to ensure the performance of any function or duty".[28]

[51] The Council is obliged by s 114(1) to provide the Tūpuna Maunga Authority with the administrative support necessary for the Authority to carry out its functions and exercise its powers under the Collective Redress Act.

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24 Section 111(2).
25 Section 112(1).
26 Section 112(2).
27 Section 113(2).
28 Section 113(4).

The Reserves Act

[52] It will be apparent from the preceding summary that there are important intersections between the provisions of the Collective Redress Act and the Reserves Act.

[53] It is significant for the purposes of the appeal that the mechanism adopted to implement the collective deed involves revocation of the existing status of the reserves, vesting of the fee simple estate, and a further declaration of reserves and classification as reserves subject to the relevant provision in the Reserves Act.

[54] In the case of Ōwairaka, the result is that the land comprising the maunga is vested in the trustee, classified as a recreation reserve subject to s 17 of the Reserves Act and administered by the Tūpuna Maunga Authority. As we have seen, the Collective Redress Act provides the reserve status of the maunga must not be revoked, although reclassification is possible "in accordance with the Reserves Act".[29] And the legislation specifically preserves the effect of s 16(8) of the Reserves Act, to which we have referred.[30]

[55] Section 17 of the Reserves Act provides as follows:

> **17 Recreation reserves**
>
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.
>
> (2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), every recreation reserve shall be so administered under the appropriate provisions of this Act that—
>
> (a) the public shall have freedom of entry and access to the reserve, subject to the specific powers conferred on the administering body by sections 53 and 54, to any bylaws under this Act applying to the reserve, and to such conditions and restrictions as the administering body considers to be

[29] Collective Redress Act, s 41(4).
[30] Above at [32].

necessary for the protection and general well-being of the reserve and for the protection and control of the public using it:

(b) where scenic, historic, archaeological, biological, geological, or other scientific features or indigenous flora or fauna or wildlife are present on the reserve, those features or that flora or fauna or wildlife shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:

provided that nothing in this subsection shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:

(c) 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:

(d) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

[56] The functions of administering bodies are set out in s 40(1), which provides:

40 Functions of administering body

(1) The administering body shall be charged with the duty of administering, managing, and controlling the reserve under its control and management in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified.

[57] In preparing and approving an IMP under s 58 of the Collective Redress Act, the Tūpuna Maunga Authority must apply s 41 of the Reserves Act. That is because, as we have noted, s 58(3) provides that s 41 of the Reserves Act applies to a plan prepared under s 58. Section 58(3) speaks of s 41 applying "with any necessary modifications" and "subject to this section". In order to understand that section, it is necessary first to see what s 41 of the Reserves Act provides. We now set it out:

41 Management plans

(1) The administering body shall, within 5 years after the date of its appointment or within 5 years after the commencement of this Act, whichever is the later, prepare and submit to the Minister for his or her approval a management plan for the reserve under its control, management, or administration.

(2) The Minister may extend the time within which an administering body is required to submit its management plan to him or her for approval, where he or she is satisfied with the progress the administering body has made with the preparation of its management plan.

(3) The management plan shall provide for and ensure the use, enjoyment, maintenance, protection, and preservation, as the case may require, and, to the extent that the administering body's resources permit, the development, as appropriate, of the reserve for the purposes for which it is classified, and shall incorporate and ensure compliance with the principles set out in section 17, section 18, section 19, section 20, section 21, section 22, or section 23, as the case may be, for a reserve of that classification.

(4) The administering body of any reserve shall keep its management plan under continuous review, so that, subject to subsection (3), the plan is adapted to changing circumstances or in accordance with increased knowledge; and the Minister may from time to time require the administering body to review its management plan, whether or not the plan requires the approval of the Minister under this section.

(5) Before preparing a management plan for any 1 or more reserves under its control, the administering body shall—

(a) give public notice of its intention to do so; and

(b) in that notice, invite persons and organisations interested to send to the administering body at its office written suggestions on the proposed plan within a time specified in the notice; and

(c) in preparing that management plan, give full consideration to any such comments received.

(5A) Nothing in subsection (5) shall apply in any case where the administering body has, by resolution, determined that written suggestions on the proposed plan would not materially assist in its preparation.

(6) Every management plan shall be prepared by the administering body in draft form in the first place, and the administering body shall—

(a) give public notice complying with section 119 stating that the draft plan is available for inspection at a place and at times specified in the notice, and calling upon persons or organisations interested to lodge with the administering body written objections to or suggestions on the draft plan before a

specified date, being not less than 2 months after the date of publication of the notice; and

(aa) on giving notice in accordance with paragraph (a), send a copy of the draft plan to the Commissioner; and

(b) give notice in writing, as far as practicable, to all persons and organisations who or which made suggestions to the administering body under subsection (5) stating that the draft plan has been prepared and is available for inspection at the place and during the times specified in the notice, and requiring any such person or organisation who or which desires to object to or comment on the draft plan to lodge with the administering body a written objection or written comments before a specified date, being not less than 2 months after the date of giving of the notice; and

(c) make the draft management plan available for inspection, free of charge, to all interested persons during ordinary office hours at the office of the administering body; and

(d) before approving the management plan, or, as the case may require, recommending the management plan to the Minister for his or her approval, give every person or organisation who or which, in lodging any objection or making any comments under paragraph (a) or paragraph (b), asked to be heard in support of his or her or its objection or comments, a reasonable opportunity of appearing before the administering body or a committee thereof or a person nominated by the administering body in support of his or her or its objection or comments; and

(e) where the management plan requires the approval of the Minister, attach to the plan submitted to him or her for approval a summary of the objections and comments received and a statement as to the extent to which they have been allowed or accepted or disallowed or not accepted.

(7) Where under subsection (4) the Minister requires an administering body to review its management plan, he or she may direct that the administering body follow the procedure specified in subsections (5) and (6), and the administering body shall follow that procedure accordingly as if the review were the preparation of a management plan.

(8) Where in terms of its responsibilities under this Act the administering body of any reserve resolves to undertake a comprehensive review of its management plan, the administering body shall follow the procedure specified in subsections (5) and (6) as if the review were the preparation of a management plan.

(9) Where under subsection (4) the administering body considers any change not involving a comprehensive review to its management plan is required, it may, if it thinks fit, follow the procedure specified in subsections (5) and (6).

(10) The administering body or committee or person before which or whom any person appears at any hearing in support of any objection or comments shall determine its or his or her own procedure at the hearing.

(11) The administering body shall in the exercise of its functions comply with the management plan for the reserve and any amendment thereof, being, in the case of a plan or an amendment that requires the approval of the Minister, a plan or an amendment so approved.

(12) No approval by the Minister for the purposes of this section shall operate as an approval or a consent for any other purpose of this Act.

(13) Where a recreation reserve is vested in a local authority or a local authority is appointed to control and manage a recreation reserve, the local authority shall not be required to submit its management plan to the Minister for approval, unless the terms of vesting or of appointment to control and manage the reserve so require:

provided that the local authority shall make its management plan available for inspection by or on behalf of the Minister whenever so required.

(14) The Minister may, by notice to them, require the administering bodies of reserves in any locality to consult with each other in the preparation of their management plans so that the management plans are integrated for the benefit of the locality.

(15) Where under this Act the approval or consent of the Minister is required to any action by an administering body, the Minister may, at his or her discretion, refuse to grant his or her approval or consent unless and until the administering body has submitted its management plan for approval (whether or not the plan otherwise requires the approval of the Minister under this section) and the plan has been approved by him or her.

(16) This section shall not apply in respect of any government purpose reserve or local purpose reserve unless the reserve is vested in an administering body or an administering body is appointed to control and manage the reserve, and the Minister in the notice of vesting or notice to control and manage directs that this section is to apply in respect of the reserve.

[58] When s 58(3) of the Collective Redress Act refers to s 41 of the Reserves Act applying to the IMP "with any necessary modifications", we consider the "necessary modifications" must be such modifications as are necessary having regard to other provisions of the Collective Redress Act, and the fact it is the Tūpuna Maunga Authority that approves the IMP, not the Minister. As we have noted above, the Tūpuna Maunga Authority is the administering body of each of the maunga for the

purpose of the Reserves Act: in the case of Ōwairaka, s 22(4) of the Collective Redress Act provides:[31]

> (4) The Maunga Authority is the administering body of Mount Albert for the purposes of the Reserves Act 1977, and that Act applies as if Mount Albert were a reserve vested in the administering body.

[59] The language applying the Reserves Act with the "necessary modifications" effectively adopts and adapts the Reserves Act provisions concerning management plans to the IMP. The approach has the advantage of drafting simplicity and avoiding the need to provide tailored provisions in the Collective Redress Act itself. But as we demonstrate, that approach masks a degree of complexity when it comes to working out the way in which s 41 of the Reserves Act in fact applies. The fact that s 41 applies "subject to" s 58 of the Collective Redress Act itself adds a further layer of complication.

[60] We consider the way in which s 41 of the Reserves Act applies to the IMP, having regard to s 58(3) of the Collective Redress Act, may be summarised as follows:

(a) Section 41(1) applies to the preparation of the IMP, but without the requirement to submit the IMP to the Minister of Conservation for approval.

(b) Section 41(2) does not apply, because there is no requirement for ministerial approval.

(c) Section 41(3) applies, with a requirement that the IMP incorporate and ensure compliance with the principles set out in the relevant provision of the Reserves Act correlating to the classification of a reserve. In the case of Ōwairaka, this follows from its classification as a recreation reserve under s 17 of the Reserves Act,[32] and the application of that Act

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31 In the case of the other maunga, the individual sections of the Collective Redress Act that pertain to them make similar provisions. These sections are s 18(4) (Matukutūruru), s 19(4) (Maungakiekie / One Tree Hill), s 20(6) (Maungarei / Mount Wellington), s 21(6) (Maungawhau / Mount Eden), s 23(4) (Mount Roskill), s 24(4) (Mount St John), s 25(4) Ōhinerau / Mount Hobson), s 26(8) (Ōhuiarangi / Pigeon Mountain), s 27(4) (Ōtāhuhu / Mount Richmond), s 28(8) (Takarunga / Mount Victoria) and s 29(4) (Te Tātua-a-Riukiuta).

32 Collective Redress Act, s 22(3).

as if Ōwairaka were a reserve vested in the Tūpuna Maunga Authority as the administering body.[33] However, the requirement that the IMP "provide for and ensure the use, enjoyment, maintenance, protection, and preservation"[34] of Ōwairaka as a reserve incorporating and ensuring compliance with the principles set out in s 17 must be subject to s 58 of the Collective Redress Act, including the requirement that the IMP must comply with s 59.[35] In other words, and in general terms, the Tūpuna Maunga Authority must consider including provisions in the IMP enabling members of Ngā Mana Whenua o Tāmaki Makaurau to carry out the activities set out in s 59(5)(a) to (i), subject to any terms and conditions included in the IMP under s 59(6).[36]

(d) The obligation in s 41(4) to keep a management plan under continuous review applies to the IMP and the ability of the Minister to require review is specifically preserved by s 58(4) of the Collective Redress Act.

(e) Section 41(5) applies, requiring the Tūpuna Maunga Authority to give public notice of an intention to prepare the IMP, invite persons and organisations interested to send written suggestions on the proposed plan and to give full consideration to any comments received.

(f) Section 41(5A) would authorise the Tūpuna Maunga Authority to determine, by resolution, that written suggestions on a proposed IMP would not materially assist in its preparation. We are not aware of any purported exercise of that power in the present case.

(g) Section 41(6) applies, so as to require the Tūpuna Maunga Authority to prepare the IMP in draft form and proceed with the public notice procedure prescribed by the paragraphs within the subsection.

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33 Section 22(4).
34 Reserves Act, s 41(3).
35 Collective Redress Act, s 58(1)(b).
36 We have referred here to Ōwairaka, but the same observations will apply to each of the maunga.

The provisions concerning forwarding the plan to the Minister for approval do not apply.

(h) Section 41(7) applies in the event that the Minister requires the Tūpuna Maunga Authority to review the IMP.

(i) Section 41(8) applies, with the effect that where the Tūpuna Maunga Authority resolves to undertake a comprehensive review of the IMP, it must follow the procedures specified in subss (5) and (6) as if the review were the preparation of an IMP.

(j) Section 41(9) applies, enabling the Tūpuna Maunga Authority to follow, if it thinks fit, the procedures specified in subss (5) and (6) where the Authority considers any change to the IMP not requiring a comprehensive review is necessary.

(k) Section 41(10) applies, enabling the Tūpuna Maunga Authority to determine the procedure to be followed at the hearing of objections.

(l) Section 41(11) applies, obliging the Tūpuna Maunga Authority to comply with the IMP in the exercise of its functions. The reference to a plan or amendment requiring the approval of the Minister does not apply.

(m) Section 41(12), which pertains to ministerial approvals, does not apply.

(n) Section 41(13) does not apply because the Reserves Act applies as if the reserves were vested in the administering body. The maunga are not reserves vested in a local authority, nor is the Tūpuna Maunga Authority a local authority which has been appointed to control and manage a recreation reserve. But this does not mean that the IMP must be referred to the Minister for approval, because s 41(13) of the Reserves Act is subject to s 58(1) of the Collective Redress Act which provides that the Tūpuna Maunga Authority must prepare "and

approve" the IMP. Section 41(13) of the Reserves Act appears in the circumstances to be an example of necessary modifications being made to s 41, with the result that it does not apply, and is also an illustration of the way in which s 58(3)(b) of the Collective Redress Act works.

(o) Section 41(14) will not apply because of the nature of the IMP. It is necessarily integrated and there would be no purpose or indeed scope for a ministerial direction under this subsection.

(p) Section 41(15) clearly does not apply.

(q) Section 41(16) again does not apply.

[61] We mention also s 42 of the Reserves Act, which contains provisions dealing with the "cutting or destruction" of the trees or bush on reserves. Clearly this section must be complied with by the Tūpuna Maunga Authority because it is the administering body of reserves. Subsection (2) provides that the trees or bush on any recreation reserve shall not be cut or destroyed:

> … unless the administering body of the reserve 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.

[62] Section 42(3) provides that where such cutting or destruction is to take place, the administering body shall not carry it out:

> … except in a manner which will have a minimal impact on the reserve and until, as circumstances warrant, provision is made for replacement, planting, or restoration; and the administering body shall not proceed to authorise the cutting or destruction, except subject to conditions as to the method of cutting or destruction and extraction which will have minimal impact on the reserve and, as circumstances warrant, replacement, planting, or restoration; and any other conditions which the administering body considers to be appropriate in the circumstances.

[63] For completeness we also note s 53 of the Reserves Act, which sets out the powers of administering bodies in relation to recreation reserves. The powers listed are discretionary powers able to be used in the exercise of the administering body's

functions under s 40 and "to the extent necessary to give effect to the principles set out in section 17".[37] Section 53(1)(o) confers a broad power to "do such other things as may be considered desirable or necessary for the proper and beneficial management, administration, and control of the reserve".

The Integrated Management Plan

[64] The IMP was developed in a process that began in early 2015. On 22 June 2015, the Tūpuna Maunga Authority gave public notice of its intention to prepare an IMP for the Tūpuna Maunga o Tāmaki Makaurau. It invited interested persons or groups to send written suggestions on the proposed IMP to inform the preparation of it. In addition to public notification in *The New Zealand Herald* and suburban papers, notice was given on the Council's website advising the public of the opportunity to make submissions. Letters inviting comment were sent directly to the Tūpuna Taonga Trust, the 13 iwi/hapū of Ngā Mana Whenua o Tāmaki Makaurau and the Council's local boards. Other potentially interested parties were also contacted, including lessees; Heritage New Zealand; the Geological Society of New Zealand; the Volcanic Cones Protection Society; the New Zealand Archaeological Society; a group called Friends of Maungawhau; Auckland Transport; Watercare Services Ltd; Auckland Tourism, Events and Economic Development; Screen New Zealand; tour operators; and sports field users. In response to the public notice, 44 individuals and 16 organisations provided written submissions.

[65] A draft IMP was then put together in the period September to November 2015. The draft was considered by the Tūpuna Maunga Authority at a hui on 7 December 2015. The Authority approved the release of an informal draft for further public response. A similar process of public notification was carried out, with the draft IMP publicly notified on 12 December 2015 and submissions called for by 22 January 2016. Five individuals and 15 groups submitted feedback.

[66] On 22 February 2016, the Tūpuna Maunga Authority approved a proposed IMP informed by the submissions that had been received on the draft and resolved to commence the statutory public notification process. The proposed IMP was publicly

[37] Reserves Act, s 53(1).

notified on 27 February 2016, with submissions to be provided by 29 April 2016. One hundred and twelve submissions were received (92 from individuals and 20 from groups), five of which addressed the issue of vegetation management.

[67] Submitters were advised of the opportunity to make oral submissions, and on 7 June 2016 a Tūpuna Maunga Authority hearing panel convened at the Auckland Town Hall for that purpose.

[68] Having considered the submissions, the hearing panel made a series of recommendations on the proposed IMP.

[69] At a hui on 23 June 2016, the Tūpuna Maunga Authority approved the recommendations of the hearing panel and then approved the IMP.[38]

[70] The IMP, as required by the Collective Redress Act,[39] applies to all of the maunga. Paragraph 1.11 in the introduction records that the IMP:[40]

> a. outlines the Tūpuna Maunga Authority's long-term vision for the Tūpuna Maunga.
>
> b. sets the direction for the protection, restoration, enhancement and appropriate use of the Tūpuna Maunga.
>
> c. replaces the former separate legacy reserve management plans for the Tūpuna Maunga.
>
> d. has been developed in accordance with Section 41 of the Reserves Act to provide for and ensure the use, enjoyment, maintenance, protection, preservation, and development as appropriate for the reserve purposes for which each of the Tūpuna Maunga is classified.

[71] As stated in paragraph 1.16, the IMP sets out Values and Pathways to achieve "the integrated outcomes" for all of the maunga. It is said that:

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38 The approved IMP was forwarded to the Minister of Conservation for approval in respect of its provisions concerning Maungauika (which at the time was administered by the Department of Conservation), as contemplated by s 58(2)(a) of the Collective Redress Act as it then stood. The Minister's approval of the IMP in respect of Maungauika was given by letter dated 11 October 2016.

39 Collective Redress Act, s 58(1)(a)(i).

40 Tūpuna Maunga o Tāmaki Makaurau Authority *Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan* (approved 23 June 2016) [Integrated Management Plan].

a. The Values provide the tika (correct) framework for the care and protection of the Tūpuna Maunga.

b. The Pathways elaborate and give tangible expression to the Values. They are guiding principles and objectives that set the direction for the Tūpuna Maunga Authority to protect and care for the Tūpuna Maunga and provide a crucial framework for decision-making.

c. The Values and Pathways will be delivered through the methods set out in section 10.

[72] The values are listed in paragraph 1.17 as follows:

Wairuatanga / Spiritual

Mana Aotūroa / Cultural and Heritage

Takotoranga Whenua / Landscape

Mauri Pūnaha Hauropi / Ecology and Biodiversity

Mana Hononga Tangata / Living Connection

Whai Rawa Whakauka / Economic and Commercial

Mana Whai a Rēhia / Recreational

[73] Paragraph 1.18 states that the IMP will be implemented in a phased manner, which will include "the preparation of overarching guidelines and strategies for all Tūpuna Maunga".

[74] Paragraph 1.19 then states that there will be individual Tūpuna Maunga Plans detailing the "care and management of each Tūpuna Maunga" and reflecting the Values and Pathways, overarching guidelines and strategies for each of the maunga.

[75] Paragraphs 1.20 to 1.21 then provide:

1.20 The Tūpuna Maunga Authority will confirm the public engagement processes for development of the strategies, guidelines and Tūpuna Maunga Plans and they will form part of the IMP as adopted by the Tūpuna Maunga Authority.

1.21 This IMP and the subsequent companion strategies, guidelines and Tūpuna Maunga Plans will be implemented through the annual Tūpuna Maunga Operational Plan.

[76] After sections dealing with the origins of Tāmaki Makaurau,[41] and human occupation over the last one thousand years,[42] the plan then sets out specific provisions for each of the maunga. It represents by aerial photographs the current state of each, describes current activities and lists the iwi/hapū who have interests in the particular maunga.

[77] Following paragraphs deal with the concept of co-governance and the IMP's integrated management framework, including references to ss 58 and 59 of the Collective Redress Act. It is said that the IMP is "being developed" in accordance with the relevant provisions of the Collective Redress Act and the Reserves Act,[43] and it is acknowledged that existing reserve management or conservation plans made under the Reserves Act will continue to apply until the IMP takes effect.[44] Paragraph 7.9 provides:

> 7.9 The IMP is an enabling plan that sets the strategic direction and establishes the future decision making framework for the Tūpuna Maunga as taonga and connected landscapes. The direction sets the scene to enable the preparation of overarching strategies and guidelines for the protection, restoration, enhancement, open access and appropriate activities on each Tūpuna Maunga.

[78] Paragraph 7.10 refers to the 14 individual Tūpuna Maunga Plans which will be provided so as to reflect the Values, Pathways, overarching strategies and guidelines in the specific context of each maunga.

[79] Paragraph 7.11 states:

> 7.11 The Tūpuna Maunga Authority will confirm the public engagement process for preparation of the strategies, guidelines and Tūpuna Maunga Plans and they will form part of the IMP once adopted by the Authority.

[80] Part 8 contains the IMP's provisions for Values and Pathways. Each "Value" is followed by several "Pathways" which provide the tangible expression for each

41 At [2.1]–[2.5].
42 At [3.1]–[3.6].
43 At [7.4].
44 At [7.5].

Value.[45] It is not necessary to address these in detail, but some provisions may appropriately be mentioned.

[81] The first Value expressed is "Wairuatanga/Spiritual Value", which reflects the sacred nature of the maunga to mana whenua.[46] One of the related Pathways aims to restore and recognise the relationship between the maunga and its people. One of the means of doing this is to reconnect mana whenua to their "stories, traditions and history on the maunga" so that "the importance of the maunga as sites of cultural and spiritual significance to mana whenua is recognised and the relationship between the tangata and the whenua is restored". Another provision references establishing "an authentic Māori presence" and removing "impediments to mana whenua exercising their kaitiakitanga". A third provision refers to recognising the "sense of identity and affinity that all people of Tāmaki Makaurau and Aotearoa draw from these special landscapes, both now and into the future". Another provision refers to envisaging the "Tūpuna Maunga as places for people of all cultures to come together and share common aspirations for the protection and restoration of these important landscapes".

[82] Another Value dealt with in the IMP is what is referred to as "Mana Aotūroa/Cultural and Heritage Value".[47] The Pathways set out for that Value include enabling mana whenua's role as kaitiaki over the maunga, restoring customary practices and associated knowledge and encouraging "culturally safe access". Another Pathway is to recognise European and other histories and interaction with the maunga. The provisions in respect of that Pathway include reflecting "European and other histories alongside mana whenua history on the Tūpuna Maunga" and honouring "the multiple narratives, cultural meaning and connections felt and expressed among all people of Tāmaki Makaurau over the Tūpuna Maunga".

[83] The next Value dealt with in the IMP is "Takotoranga Whenua/Landscape Value".[48] One of the Pathways for this Value is active restoration and enhancement of the natural features of the maunga. Here, the IMP refers to increasing:

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45 At [8.2].
46 At [8.5].
47 At [8.6].
48 At [8.7].

> … the biodiversity, structural diversity and native habitat values of the Tūpuna Maunga and their hinterland by enhancing plant health, soil health, native food resources and habitat connectivity through the development and implementation of an Ecological Restoration Strategy.

The plan seeks to "[e]nsure planting and other landscape features are compatible with the protection of the natural and cultural features of the maunga."

[84] Another Pathway is to preserve the visual and physical authenticity and integrity of the maunga as landmarks of Tāmaki. It is sought to maintain significant views to the maunga from across Tāmaki Makaurau and to identify and protect significant views on and between the maunga and from the maunga to the motu.

[85] The next Value referred to in the IMP is "Mauri Pūnaha Hauropi/Ecology and Biodiversity Value".[49] A Pathway set out for this Value seeks to "[r]ekindle mana whenua connections, such as planting of traditionally used plants, with the ecological and biodiversity values of the Tūpuna Maunga", in addition to enabling mana whenua to fulfil their role as kaitiaki. Of particular relevance, another Pathway speaks of protecting and restoring the biodiversity of the Tūpuna Maunga, including restoring suitable areas of the maunga with indigenous ecosystems. Decisions on location, plant choice and staging would draw on traditional and scientific knowledge. There is also reference to the reintroduction or attraction of indigenous species to the maunga, phasing out stock grazing, removing invasive plant and animal pests and a phased reduction in the use of herbicides and pesticides.

[86] Part 9 of the IMP is about delivering the Values and Pathways. It refers to guidelines and strategies to be prepared to give effect to the Values and Pathways. The guidelines and strategies once prepared "will form part of the IMP".[50]

[87] A Design Guideline and Recreation Strategy is to be prepared and implemented for all of the maunga which must, among other things, address:[51]

> Ensuring any new buildings and structures, services, areas of planting and facilities are appropriately located, designed (culturally based) and

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49 At [8.8].
50 At [1.20] and [9.11].
51 At [9.13.5] and [9.15.11].

> constructed to complement the landform, nature of the surroundings, and reduce visual distractions;

[88] An integrated Biodiversity Strategy is also to be prepared and implemented. Relevantly it must "as a minimum" address:[52]

> 1. Protection and enhancement of indigenous species including threatened plant and animal species already present on the Tūpuna Maunga;
>
> 2. Replanting and restoring the indigenous biodiversity of the Tūpuna Maunga, connections between the Tūpuna Maunga and the wider volcanic landscape;
>
> 3. Replanting and restoring traditional indigenous mana whenua flora and fauna;
>
> …
>
> 6. A planting regime with plant choice based on use of appropriate and representative species;
>
> …
>
> 9. Explore native grassland establishment where appropriate.

[89] Other strategies to be prepared for the maunga include an integrated Pest Management and Biosecurity Strategy;[53] integrated Education, Communication and Signage Strategy;[54] and an integrated Commercial Strategy.[55]

[90] Consultation on the draft integrated management strategies ran from 6 July to 16 August 2019, approximately five months after the consent for the Ōwairaka proposal was granted by the Council on 2 February 2019.

[91] Paragraph 9.24 of the IMP then states that the individual Tūpuna Maunga Plans to which we have referred will be prepared following the preparation of the guidelines and strategies,[56] and will "give effect to" those guidelines and strategies in addition to the Values and Pathways.[57] Concurrently with the preparation of the Tūpuna Maunga Plans, a review of the current reserves classification for each maunga is contemplated,

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52 At [9.19].
53 At [9.16]–[9.17].
54 At [9.20]–[9.21].
55 At [9.22]–[9.23].
56 At [9.24].
57 At [9.24].

assessing the appropriateness of that classification and any replacement classifications.[58] Paragraph 9.26 in this section of the IMP sets out an extensive list of matters that the Tūpuna Maunga Plans must address "as a minimum". Included in the list are "[r]especting the sacredness of the tihi" and, importantly for this case:

> 22. Native planting and ecological restoration and enhancement;
>
> 23. Proactively manage plant pests and inappropriate exotic vegetation;

[92] It is appropriate to emphasise that the individual Tūpuna Maunga Plans, including such a plan for Ōwairaka, do not yet exist.

The significance of indigenous planting

[93] Although the focus of the argument in the High Court was on the removal of 345 exotic trees, Gwyn J considered that the removal of those trees was properly to be viewed in the context which included replacement planting of some 13,000 indigenous trees and plants.[59]

[94] It will be apparent from our discussion of the IMP that the planting of indigenous flora was consistent with, and in fact would implement, many of the policies reflected in the IMP. Both the proposed planting and the supportive policy framework contained in the IMP reflect a central aspect of the relationship between mana whenua and the maunga. In his affidavit filed in the High Court, Mr Majurey discussed the importance of indigenous planting in the following terms:

> For Mana Whenua, the return to indigenous vegetation is an important part of the journey of reconnection with the Tūpuna Maunga. All of our histories, all of our matauranga (knowledge) and all of our connections with the spiritual and temporal worlds of the Tūpuna Maunga revolve around native flora and fauna. They are imprinted on the very names of the Maunga — Maungawhau and Maungakiekie (in reference to the native whau tree and kiekie plant) and Matukutūruru (in reference to the native owl) are a few examples. Returning the Tūpuna Maunga to a state of indigenous vegetation reflects the Māori worldview that the vegetation that originally cloaked these significant Maunga should be restored. That is fundamental to our identity.

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58 At [9.25].
59 High Court judgment, above n 5, at [28].

[95] There was also evidence from Mr David Taipari, Chair of the Independent Māori Statutory Board established by the Local Government (Auckland Council) Amendment Act 2010 in the context of the creation of the new Auckland Council. Mr Taipari said in his affidavit:

> The Authority's proposals for ecological restoration at Ōwairaka/Te Ahi-kā-a-Rakataura and other Tūpuna Maunga are of fundamental importance to Mana Whenua. The proposals to re-introduce indigenous vegetation and remove exotic vegetation [are] significant to our cultural well[be]ing and the re-connection between Mana Whenua and the Tūpuna Maunga. The cultural landscapes and the protection of the views to and from the Tūpuna Maunga are also of fundamental importance to Mana Whenua.

[96] There was also evidence from Mr Turoa,[60] who said that his role was to manage the overall operational programme of work including the ecological restoration programme on behalf of the Council. In his affidavit, Mr Turoa wrote:

> The Ōwairaka/Te Ahi-kā-a-Rakataura ecological restoration project will facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga. This project represents a significant step toward the realisation of the IMP. This includes opening up viewshafts and defensive site lines from Maunga to Maunga while also opening up the terracing and other important archaeological features of the Maunga. The protection and restoration of these archaeological values is a very important element of this project.

[97] As noted by the Judge, removal and restoration planting programmes have taken place on other maunga, namely Maungarei/Mt Wellington, Māngere Mountain and Ōhuiarangi/Pigeon Mountain.[61] The Judge referred to plans of the Tūpuna Maunga Authority to plant approximately 74,000 native trees across the maunga by 2021, 8,260 of which had already been planted according to the evidence before the High Court.[62]

The decision to remove the trees

[98] There is no written record of the decision to remove the 345 exotic trees from Ōwairaka, nor to do so over a short period of time. The Judge found that the decision was made at some time in the period of 9 August to 11 October 2018, and was made

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60 As we have noted at [10], Mr Turoa is the Tūpuna Maunga Manager at the Tūpuna Maunga Authority.
61 High Court judgment, above n 5, at [33].
62 At [33].

by Mr Turoa on behalf of the Tūpuna Maunga Authority.[63] The finding that the decision to remove the exotic trees was made during that period was based on the evidence of Mr Turoa, who did not provide any more precise date.

[99] Mr Turoa described a process whereby the IMP is implemented through the Annual Operational Plan required by s 60 of the Collective Redress Act. He described that once the strategic direction is set by the IMP, strategies are subsequently developed and then implemented through the Annual Operational Plan agreed between the Tūpuna Maunga Authority and the Council. Mr Turoa stated that the Ōwairaka project was based on the "strategic direction" set through the IMP and Annual Operational Plan, which was then "convert[ed] … into a project for implementation". He explained that after conducting site visits to Ōwairaka, an individual assessment of all trees in the area of the maunga administered by the Tūpuna Maunga Authority and the commissioning of expert assessments, he "decided that the 345 exotic trees on the area of Ōwairaka/Te Ahi-kā-a-Rakataura administered by the Authority should be removed in the one process". Mr Turoa stated that the decision was:

> … considered to be an appropriate and responsible operational response to the particular circumstances on Ōwairaka/Te Ahi-kā-a-Rakataura and the direction provided through the IMP, annual operational plan and the Tūpuna Maunga Strategies.

[100] Mr Majurey also provided evidence about the process referring to what he described as the "Ōwairaka/Te Ahi-kā-a-Rakataura project" which he said had been dealt with as a "capital project" in the Annual Operational Plan. He said that a summary of the draft Annual Operational Plan for 2018/2019 had been included as part of the Council's annual plan and subject to public consultation in that process. He noted that the draft Annual Operational Plan had included the indigenous revegetation projects for the maunga, noted in the "Work Programme Overview" under the heading "Healing". He highlighted the following statement under that heading:

> Restoration of indigenous native eco-systems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds

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63 At [20].

[101] Mr Majurey also noted a table, in which the following statement appeared:

> **Biodiversity programme:** restore the indigenous biodiversity of the Tūpuna Maunga through the ongoing management of existing threatened plants, replanting of suitable areas with indigenous ecosystems and the reintroduction or attraction of indigenous species such as microorganisms, invertebrates, lizards and birds.

[102] Mr Majurey then referred to other parts of the draft Annual Operational Plan identifying activities to be undertaken for each maunga, including Ōwairaka. He drew attention to the project for Ōwairaka titled the "Protection and restoration of integrity of the Tūpuna Maunga" which was described as a "Network-wide programme to remove vegetation and revegetate — actions and staging to be confirmed". It was recorded that the project "is part of a network-programme … which will be assigned to individual maunga through project plans that are still to be finalised/developed". In a later section of the draft Operational Plan dealing with such "Network-wide Programmes" it is recorded:

> There are a number of programmes that require further project planning to determine how they will be applied to each maunga. Once this has occurred, the individual maunga sections will be updated at the next available opportunity.

[103] The Annual Operational Plan 2018/2019 was adopted by the Tūpuna Maunga Authority on 28 May 2018 and by the Tira Kāwana/Governing Body of the Council on 28 June 2018.

[104] At a hui on 3 December 2018, a quarterly update was provided to the Tūpuna Maunga Authority in relation to work programmes on the maunga. This made reference to a "[d]eveloped planting plan and tree removal methodology and impact assessments" for Ōwairaka to inform the resource consent application then in contemplation. Subsequently on 4 March 2019, at another hui, the next quarterly update was provided to the Tūpuna Maunga Authority in which it was said that there had been "significant progress" in the planning for the Ōwairaka project amongst others. Another quarterly update followed on 6 May 2019.

[105] The Ōwairaka project was then progressed by the Council as an operational matter in accordance with the Annual Operational Plan.

[106] It was Mr Majurey's evidence that the project was fully discussed by the Tūpuna Maunga Authority at various workshops and meetings, including as part of the quarterly updates to which he referred. He stated that as a result of the updates and formal and informal discussions the Tūpuna Maunga Authority developed a clear understanding of the operational approach being taken to the ecological restoration project by the Council. According to Mr Majurey, the Tūpuna Maunga Authority both understood and agreed with what he referred to as "the Council's approach to the timing and scope of the restoration work".

[107] Mr Majurey's evidence can be contrasted with that of Mr Christopher Parkinson, who was a member of the Tūpuna Maunga Authority from its inception to the end of 2019. Mr Parkinson at the relevant time was a board member of the Ngāti Whātua Ōrākei Reserves Board. He was appointed by the Council as a representative on the Tūpuna Maunga Authority for two three-year terms. In his affidavit, he noted that while the Tūpuna Maunga Authority had agreed the Annual Operational Plan, the documents comprising that plan did not contain any detail of the proposed removal of the trees. He said that he had attended all of the hui and prior workshops held by the Tūpuna Maunga Authority, aside from "a few absences" both during the formation of the IMP and after that. He said that to the best of his knowledge, there had been no discussion of the removal of all of the exotic trees on Ōwairaka at any of the hui or workshops in which he took part.

[108] Mr Beverley referred to the matters mentioned by Mr Majurey, emphasising that a summary of the Annual Operational Plan had been included in the Council's draft and final annual plan, which was subject to public consultation. That summary had expressly referred to "[r]estoration of indigenous native ecosystems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds".

[109] We have considered the various references to the Ōwairaka project to which Mr Beverley refers, and agree that the project included both the planting of indigenous species and the removal of exotic species. But we have not been able to find in the material any clear statement that all exotic trees on the maunga would be removed, and in a short timeframe. Such a conclusion could be reached only by treating the

references to "removing inappropriate exotic trees and weeds" as connoting a decision to remove all 345 exotic trees. We do not consider that intention was made plain in any of the documents of the Tūpuna Maunga Authority to which Mr Majurey referred.

Opposition to the removal of the trees

[110] In the High Court, the appellants relied on various affidavits in support of the application for review. One such affidavit was sworn by the first-named appellant Ms Averil Norman, who recorded her concerns about the plan to fell so many mature trees in one event, what she described as the "sudden and drastic impact" on the maunga and its use and enjoyment as a reserve and the decision making processes adopted by the Tūpuna Maunga Authority and the Council. She described having been a visitor to the maunga since her childhood and said it had been a "constant source of refuge and place of tranquillity throughout [her] life". She described the "wonderful mature trees growing throughout", and continued:

> The mature trees turn the mountain into a refuge from the City. As you drive up Summit Drive, and then walk around the drive to the summit, you feel engulfed by those trees and an immediate demarcation from, and disassociation with, the City.
>
> That to me is a large part of the beauty of the mountain — a beauty that would be irreparably lost if the Authority and Auckland Council fell all these trees at once.

[111] Ms Norman also gave evidence about the history of some of the trees in the following passage:

> Some of the trees on Mt Albert have an important historical connection. That tangible history will be immediately lost if the Authority and Auckland Council proceed as planned.
>
> There is a grove of olives on the mountain that were planted by Jack Turner. I knew Mr Turner when I was growing up and walked around the mountain with him numerous times.
>
> Mr Turner served during World War 2, during which time he was a prisoner of war. During the war years he visited Palestine and from there, sent olive tree seeds back home. These trees have grown from those seeds.
>
> While Mr Turner has passed, his legacy that remains in that olive grove — providing a place of solace for others — will be felled by the Authority and Auckland Council.

> Mr Turner's mother, Lady Ethel Turner, planted the cherry blossom trees that are on the mountain in memory of her brother Edgar who died in World War 1, aged 18. They too are planned to be felled by the Authority and Auckland Council. The spirituality and historical significance of the planting that I have mentioned here is incalculable.

[112] Other parts of her affidavit referred to the amenity afforded by bird song, shade and sun protection and visual amenity. She feared it would take generations for trees to grow back to the height and maturity of the trees that currently exist. In that time features of the mountain that she values would be lost.

[113] In another part of her affidavit she expressed her view that neither the Tūpuna Maunga Authority nor the Council had conducted "meaningful consultation" before making the decision to fell the trees. She said she was aware that the Tūpuna Maunga Authority might have been granted a resource consent, but said that as far as she was aware the Authority had "not disclosed publicly what that resource consent is for — and when it first made the decision to apply for it". She referred to what was then the draft Annual Operational Plan for 2019/2020, noting that there was "only passing reference" in the capital expenditure programme for what was described as a "network-wide programme to remove vegetation and … reinstate and/or revegetate — actions and staging to be confirmed". She complained that there was little or no detail about what was proposed, and no statement of the intention to fell so many mature trees in one process. She said that she had not been aware of what was proposed until contacted by a friend in November 2019, and that there had been no advertisements by the Tūpuna Maunga Authority in newspapers or other media advising what the plans involved or inviting submissions. Despite many visits to the maunga she had not seen any signs indicating what was intended.

[114] An affidavit was also provided by Ms Mary Inomata, the President of the Mount Albert Historical Society Inc, a society of persons currently and formerly residing in Mt Albert with an interest in the history of the area. The society had a membership of 127 when Ms Inomata swore her affidavit on 13 February 2020. Ms Inomata noted that the society had been consulted in respect of other resource consent applications raising potential heritage issues in the area. She expressed surprise and disappointment that no opportunity to comment was given in the case of the present project. 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.

[116] Another affidavit was provided by Sir Harold Marshall, a long-term resident and founder born, in his words, "in the shadow of Mount Albert", and having lived in the area all his life. He is a Professor Emeritus at the University of Auckland School of Architecture and his affidavit described his use of the maunga over his life. He said he has walked up, down and around the maunga hundreds of times over his lifetime and has a "profound emotional and spiritual connection" with it. Although he praised the Tūpuna Maunga Authority's vision of the renewal of an ecological network of native forest centred on the 14 maunga in Auckland, he continued:

> I have seen the felling of trees that has already been carried out on Māngere Mountain and Pigeon Mountain. The devastation I saw on Māngere Mountain and Pigeon Mountain from that felling leaves me speechless. It does such violence to the physical, emotional and spiritual realities of these places that a better way must be found.

> I only became aware of the Authority's plans for extensive felling on Mount Albert last month. I was not aware of any prior consultation or community engagement having been carried out before the decision for felling was made.
>
> I would have expected detailed consultation to have occurred. The mountain means so much to so many people.
>
> It is the lack of consultation and extensive felling in one event that really concerns me. I worry about the dramatic impact on the mountain and its use and enjoyment and the ecology it sustains. I would have thought that the Authority could have consulted prior to its decision and undertaken phasing of the work to a forest regeneration timeline of years — rather than a short number of weeks. A chainsaw is the most unforgiving of places to start.
>
> I hope I have said enough to this point to demonstrate the profound connection, physically and emotionally and spiritually, that I have with Mt Albert and its trees. Most have grown up with me. I support the Authority but not the method it came to this decision in or manner it plans to carry it out.

[117] Another affidavit was sworn by Ms Mary Tallon. Ms Tallon's great grandfather came to the Mt Albert area and his son, Ms Tallon's grandfather, Mr Harvey Turner built a home on the slopes of the maunga close to the entrance of what is now the reserve. In turn, her father was born and lived in that house until he died in 2005. Ms Tallon herself was born and lived on the maunga until she married and other family members still live in the family home. Ms Tallon described some strong connections with trees on the mountain, including "a cherry walk on the northern slope of the crater" which was planted to memorialise a relative who died at Gallipoli which is still there. She described her father having sent back olive seeds obtained while on service in the Middle East during World War II, planted in his absence overseas as a soldier and eventual prisoner of war and remaining on the maunga to this day.

[118] Another affidavit was sworn by Ms Anna Radford. Ms Radford is also a resident of Mt Albert, occupying a house on the slopes of the maunga. She also spoke of the existing environment, and why she values it during her regular walks on it. She is particularly attracted by the cherry grove and the blossoms in spring time, as well as the mature pohutukawa trees that are scattered over the maunga (which would be retained). She said that she found out about the planned removal of the trees on 29 October 2019 when she received a notification in her letterbox that the removal of the trees would take place from Monday 11 November 2019 till mid-December 2019. She spoke to a journalist at the New Zealand Herald, organised a meeting and

subsequently formed a group calling itself "Honour the Maunga". The group set up a Facebook page and organised an occupation of the maunga in opposition to the proposed removal of the trees.

[119] Ms Radford too confirmed her support for the Tūpuna Maunga Authority's long-term ecological vision for the maunga but she is concerned about the removal of the trees leaving the mountain "barren and uninviting". She is concerned that a large proportion of the trees to be removed are on the perimeter road along which people on the maunga walk. The lush nature of the landscape, and the "shady glades" that she finds particularly attractive will disappear and she worries that it will "take decades for it all to regrow".

[120] The affidavits on which the appellants rely describe a real and deeply-felt connection to the maunga.

The application for review

[121] The application for judicial review proceeded on four grounds in the High Court. The first alleged that the decision to remove the 345 exotic trees on Ōwairaka breached the Tūpuna Maunga Authority's obligations under ss 17 and 42 of the Reserves Act. The second claimed that the Tūpuna Maunga Authority was obliged to consult regarding the decision to remove the exotic trees and failed to do so. The third alleged against the Council that it could not lawfully implement a direction from the Tūpuna Maunga Authority to fell the trees, because the Authority's decision was unlawful in terms of either the first or second ground of review.

[122] The final ground of review was based upon a breach of the RMA provisions as to notification by the Council. It was claimed that the Council erred by deciding not to require notification of the resource consent application either to the public generally, or on a limited basis to users of the reserve.

[123] The Judge rejected all grounds of review. We deal with her reasons for doing so in addressing the arguments now presented on appeal.

The grounds of appeal

First ground of appeal — breach of the Reserves Act

[124] The basis of the first ground of appeal is that the decision to remove the exotic trees put the Tūpuna Maunga Authority in breach of its obligations under ss 17 and 42 of the Reserves Act. Counsel for the appellants Mr Hollyman QC submits that the Tūpuna Maunga Authority as the administering body of Ōwairaka is obliged to comply with both sections.

[125] Obligations that flow from s 17(1) identify that the provisions of the Act relating to recreation reserves are to have effect for "the protection of the natural environment and beauty of the countryside". Then under s 17(2)(c), the recreation reserve must be "so administered … 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". Mr Hollyman submits that the Tūpuna Maunga Authority's decision to remove all non-native trees falls outside the powers and permitted purposes of the recreation reserve.

[126] He argues that the statutory purposes set out in s 17 do not include the eradication of attractive, healthy, exotic trees. He draws a contrast to ss 19 (scenic reserves), 20 (nature reserves) and 21 (scientific reserves). In each of those cases, the Reserves Act specifically contemplates preservation of "indigenous flora and fauna" and extermination so far as possible of "exotic flora and fauna".[64] Mr Hollyman submits that s 17(2)(c) places a substantive obligation on administering bodies to exercise the relevant powers under the Act (in ss 40, 42 and 53) so as to preserve the qualities listed. He argues that the references to "protection" (s 17(1)) and "shall be conserved" (s 17(2)(c)) confirm that it is the existing qualities of a recreation reserve that contribute to its pleasantness, harmony, cohesion and better use and enjoyment which must be preserved. He contends it is self-evident that removal of almost half of the mature, attractive trees on Ōwairaka would be the antithesis of conserving the qualities sought to be protected. He emphasises the urban location of the reserve, and its role as a park where people walk, picnic and engage in recreation.

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64 Reserves Act, ss 19(2)(a), 20(2)(b) and 21(2)(a).

He emphasises the affidavit evidence provided in support of the application for review as to the contribution made by the non-native trees to the pleasantness of the natural environment and the better use and enjoyment of the reserve, as well as the evidence about the heritage value of some of the trees to be removed.

[127] The Judge held that the appellants' analysis of the relevant statutory provisions fundamentally misconstrued the overall statutory framework.[65] She accepted the submission of the respondents that the Reserves Act had to be read in the context of the Collective Redress Act which itself gave effect to the settlement of, and provided redress for, historical Treaty breaches. It did so by establishing a clear regime for the Tūpuna Maunga Authority to govern the maunga, including the exercise of mana whenua and kaitiakitanga.

[128] She noted that under s 47(3) of the Collective Redress Act, the Reserves Act applies to the maunga subject to the provisions of the Collective Redress Act and that s 5(2) of the Reserves Act states that in its application to any reserve, the Reserves Act is to be read subject to "any Act … making any special provision with respect to that reserve".[66] Further, s 109(2) of the Collective Redress Act directs the Tūpuna Maunga Authority, in exercising its powers and carrying out its functions, to have regard to the "spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau", and the fact that the trustee holds the maunga for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.[67]

[129] The Judge considered that that statutory framework was fundamental to understanding the statutory mandate of the Tūpuna Maunga Authority and the manner and purpose of the exercise of its powers and compliance with its obligations under the Reserves Act.[68] She recorded her agreement with Mr McNamara, who submitted for the Council, that s 17 of the Reserves Act contains "high level" principles which cannot be read as absolute requirements of law.[69] The language of the principles was

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65 High Court judgment, above n 5, at [68].
66 At [69(e)].
67 At [69(f)].
68 At [70].
69 At [71].

"aspirational and incompatible with objective measurement".[70] On this basis, she did not accept that those principles imposed absolute standards, breach of which would be a legally reviewable error of law. The Judge also noted that while s 17(2)(b) of the Reserves Act specifically identifies indigenous flora present on the reserve to be managed and protected, no similar provision is made for exotic plants. She also accepted the argument put to her by Mr Beverley for the Tūpuna Maunga Authority that management and protection in accordance with s 17(2)(b) would include enhancement as proposed by the Ōwairaka project.[71] She applied by analogy the definition of "protection" in s 2 of the Conservation Act 1987, as embracing both maintenance and "restoration to some former state" and "augmentation, enhancement, or expansion".[72]

[130] The Judge accepted the submission advanced by Mr McNamara that the qualities that contribute to the "pleasantness, harmony and cohesion of the natural environment and to the better use and enjoyment" of a reserve under s 17(2)(c) of the Reserves Act are subjective concepts that must first be identified by the authorised decision maker, followed by an assessment of the trees' "contribution" to those qualities.[73] The assessment required was therefore "inherently subjective".[74]

[131] The essence of the Judge's reasoning was encapsulated in the following passage of the judgment:

> [75] The applicants' view of the effect of felling the trees, while a valid and sincerely held view, cannot be treated as a legal conclusion that the felling would be in breach of s 17. The Collective Redress Act acknowledges that the Maunga are taonga and that iwi and hapū have a unique relationship with the Maunga. The Maunga Authority, as the administering body, had to reach its own view as to which of the s 17(2)(c) qualities contribute to the "pleasantness, harmony and cohesion of the natural environment" and should be conserved. In doing so the Authority must have regard to the "spiritual, ancestral, cultural, customary, and historical significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau" as well as the fact that the Maunga is held on trust for the common benefit of Ngā Mana Whenua and the other people of Auckland (a further subjective assessment). I am satisfied that is what the Maunga Authority did. Applying those requirements, and in light of the purposes in s 3 of the Collective Redress Act, it was plainly open to the

70 At [71].
71 At [72].
72 At [72]–[73].
73 At [74].
74 At [74].

> Maunga Authority to reach a different view from the applicants as to what qualities of the reserve should be conserved or protected (including, as Mr Beverley submitted, being restored to its former, native state).
>
> (Footnote omitted.)

[132] Mr Hollyman attacks the Judge's reasoning. He argues that she should have applied the ordinary meaning of "protect" and "conserve" as reflected in the definitions of those words in the Oxford English Dictionary instead of lifting an expanded definition of "protection" from the Conservation Act. Mr Hollyman criticises the Judge's description of the matters listed in s 17 of the Reserves Act as "aspirational" and not absolute requirements of law, breach of which could result in a legally reviewable error. He is also critical of the Judge's reliance on s 109 of the Collective Redress Act to effectively modify the way in which s 17 of the Reserves Act was to be applied. He submits that section and the other provisions of the Collective Redress Act simply add matters to which the Tūpuna Maunga Authority must have regard, without expanding the range or application of s 17.

[133] As to the claim of breach of s 42(2) of the Reserves Act, the Judge accepted the submissions made by the respondents that the Reserves Act did not require a particular documented decision to be made under s 42(2) confirming that the felling of trees was necessary.[75] She identified the powers being exercised as being those under ss 40, which we have set out above, and 53(1)(o). The latter section provides that an administering body of a recreation reserve may from time to time, in the exercise of its functions under s 40 and to the extent necessary to give effect to the principles in s 17, "do such other things as may be considered desirable or necessary for the proper and beneficial management, administration, and control of the reserve".

[134] The Judge also thought that since no trees had been felled, the prohibition in s 42(2) had not been engaged and it was sufficient if, as he did in his affidavit, Mr Majurey could demonstrate that the Tūpuna Maunga Authority was properly aware of its obligations under s 42(2) and considered the proposed tree removals to be necessary for the proper management and maintenance of the reserve.[76] The Judge considered that in context, the word "necessary" used in s 42(2) should be construed

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75 At [79].
76 At [80] and [90].

as meaning "expedient or desirable",[77] and that s 109(2) of the Collective Redress Act should inform what amounts to "proper management" of the reserve under s 42 of the Reserves Act.[78] Importantly, she considered that:[79]

> The proper management of Ōwairaka and the other Maunga subject to the Collective Redress Act involves a broader range of matters than is the case for recreation reserves subject only to the Reserves Act.

[135] Essentially, the Judge accepted the evidence given by Mr Majurey and Mr Turoa that the Ōwairaka project would recognise and protect the spiritual, ancestral, cultural, customary and historical significance of Ōwairaka and that removal of the trees was necessary to "open up volcanic sightlines, remove destruction of archaeological sites and restore cultural landscapes".[80] The Judge emphasised that the issue for determination was whether there was a reasonable and legitimate basis upon which the Tūpuna Maunga Authority could legitimately make its decision on the information available to it.[81]

[136] She concluded that there was sufficient basis for the Tūpuna Maunga Authority to reach a conclusion that the felling of the trees was necessary for the proper management of the reserve.[82] A decision to return the maunga to a state of native vegetation was not inconsistent with the maunga being held on trust "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".[83] Taking a long-term view of the needs of the reserve, including when making decisions about planting which would have long-term effects, could be consistent with the proper management and maintenance of the reserve.[84] The Judge considered it inherent in s 109 of the Collective Redress Act that the Tūpuna Maunga Authority should take a long-term view.

[137] In arguing that s 42(2) had been breached, Mr Hollyman emphasises the obligation of the administering body to be satisfied that cutting or destroying trees on

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77 At [81].
78 At [82].
79 At [82].
80 At [83]–[84].
81 At [88].
82 At [93].
83 At [93].
84 At [94].

any recreation reserve is "necessary" for one of the limited purposes specified in that section, namely the proper management or maintenance of the reserve, the management or preservation of other trees or bush, the safety of persons or property or the harvesting of trees planted for revenue producing purposes. He submits this strict language is consistent with the substantial weight placed on conservation and preservation in the Reserves Act, particularly in relation to recreation reserves. He relies on this Court's judgment in *Environmental Defence Society Inc v Mangonui County Council* and the decision of the Full Court of the High Court in *Brown v Māori Appellate Court*.[85]

[138] From *Environmental Defence Society Inc*, Mr Hollyman draws attention to observations of Cooke P about the use of the word "unnecessary" in s 3(1) of the Town and Country Planning Act 1977, declaring, as one of the matters of national importance to be recognised and provided for, the protection of the coastal environment and the margins of lakes and rivers from "unnecessary … development".[86] Cooke P considered that "[i]n that context, as in many others, necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other."[87]

[139] In *Brown*, the High Court had to construe a provision in Te Ture Whenua Māori Act 1993 controlling the partition of land, including a requirement that the Māori Land Court or Māori Appellate Court be satisfied that the partition is "necessary to facilitate the effective operation, development, and utilisation of the land".[88] The High Court observed:[89]

> [51] "Necessary" is properly to be construed as "reasonably necessary" (*Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25 at p 54 per North J). We do not accept the contrary suggestion by Judge Spencer in the Māori Appellate Court, where at p 3 of his judgment he expresses the view that, in context, an order is not necessary unless "there is no other way". The Court is not required to conclude in an absolute sense that there is no other way. But the test is not a light one. Necessity is a strong concept. What may be considered reasonably necessary

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85 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA); and *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC).
86 Town and Country Planning Act 1977, s 3(1)(c).
87 *Environmental Defence Society Inc v Mangonui County Council*, above n 85, at 260.
88 Te Ture Whenua Māori Act 1993, s 288(4)(a).
89 *Brown v Māori Appellate Court*, above n 85.

> is closer to that which is essential than that which is simply desirable or expedient (*Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at p 260 per Cooke P).

[140] Mr Hollyman points out that s 40(1) of the Reserves Act imposes a duty on the administering body to manage a reserve under its control in accordance with the appropriate provisions of the Act so as to ensure it is managed for the purpose for which it is classified. On this basis, he argues that the purposes and constraints in s 17 are relevant in interpreting the phrase "the proper management or maintenance of the reserve, or for the management or preservation of other trees or bush" in s 42(2). In this case however, Mr Hollyman argues the Tūpuna Maunga Authority had not considered whether the destruction of any of the non-native trees, let alone all of them, was necessary for the purposes of s 42(2). He notes that although Mr Turoa had said that he was aware of the relevant Reserves Act provisions, he did not claim to have considered whether the cutting down of the trees was necessary for the proper management or maintenance of the reserve, or for the management or preservation of other trees or bush in terms of s 42(2). Nor had Mr Turoa referred to any of the purposes of recreation reserves under s 17 or had any regard to the fact that Ōwairaka is a recreation reserve when making the decision to fell the trees. Mr Hollyman also points to Mr Parkinson's evidence that no consideration was given to Ōwairaka's status as a recreation reserve in the drafting of the IMP, and his claim that the removal of the trees on Ōwairaka had not been discussed at relevant hui.

[141] In all the circumstances, Mr Hollyman submits that the Tūpuna Maunga Authority did not turn its mind to the statutory prohibition in s 42(2), let alone do what would have been necessary to be "satisfied" as to the necessity of removing the trees.

[142] Mr Hollyman also submits that the decision under s 42(2) was unreasonable and made for an improper purpose. He criticises the evidence given by Mr Turoa and Mr Majurey that some of the trees to be removed are pest plants, pose a risk to health and safety, pose a risk to archaeological features or have an adverse effect on viewshafts. Mr Hollyman criticises these explanations as having the air of retrospective justification and, in any event, for being incapable of justifying the removal of only exotic trees. He also notes that the resource consent application did

not proffer these matters as justification for the tree removal. Rather, Mr Hollyman submits the actual purpose of felling the trees was to return Ōwairaka to a state of indigenous vegetation. This was, according to Mr Majurey's evidence, to give effect to the Māori worldview that the vegetation that originally grew on the maunga should be restored. Mr Hollyman submits that such a purpose is not found in s 17 of the Reserves Act and its effects on the existing state of Ōwairaka make the purpose inconsistent with that section.

[143] Finally, Mr Hollyman argues there is no evidence that the Tūpuna Maunga Authority took into account the fact that the reserve is also held for the common benefit of the other people of Auckland, a mandatory relevant consideration under s 109(2) of the Collective Redress Act.

Discussion

Section 17

[144] Section 17 of the Reserves Act sets out obligations which must be complied with by the administering bodies of recreation reserves. Since the Tūpuna Maunga Authority is the administering body of Ōwairaka which is classified as a recreation reserve, it must comply with those obligations. We consider that it would be wrong to characterise s 17 as not setting out matters of legal requirement. The language used by Parliament is not compatible with such a conclusion.

[145] Section 17(1) provides that the appropriate provisions of the Reserves Act "shall have effect" in relation to recreation reserves for the stated purpose which follows in the subsection. Similarly, in subs (2) the instruction that "every recreation reserve shall be so administered under the appropriate provisions of this Act" to secure the outcomes set out in the following paragraphs is a clear direction by Parliament that those outcomes must be achieved. Within the paragraphs, the language used is similarly couched in terms of obligation: in (a) it is said that "the public shall have freedom of entry and access to the reserve", in (b) the identified features which are present "shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve" and in (c) it is directed that the 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". Finally, in (d) the reserve's value as a soil, water and forest conservation area "shall be maintained".

[146] It must be accepted of course that the purposes set out in s 17(1) and (2) are expressed in broad language, which will necessarily leave to the administering body a large area of discretion as to the policies it adopts and the steps it takes to meet its obligations under the section. But that does not mean that the administering body can please itself as to the steps it takes; the statutory objectives must be achieved even if there is broad discretion as to how that is done.

[147] In the present case, the issue at the forefront of the appellants' argument concerns s 17(2)(c), which requires the qualities of the reserve set out in that subsection to be conserved. The appellants place great emphasis on the contribution made to those qualities by the existing mature trees growing on Ōwairaka. In summary terms, it is said that removal of all the exotic trees cannot take place in accordance with the obligation to conserve set out in s 17(2)(c).

[148] There appear to be two ideas inherent in that proposition. The first is that the existing vegetation on the reserve must be maintained in a state similar to that which currently exists. As Mr Hollyman put it, the statute does not allow the felling of healthy exotic trees. The second seems to be that if there is to be a change, it should not be so comprehensive and immediate as what the Tūpuna Maunga Authority intends, because the qualities of the reserve cannot be conserved unless a much more gradual approach is adopted in which the existing trees are allowed to remain until they need to be replaced by reason of age or disease.

[149] These are arguments that can be advanced based purely on the language used in s 17 of the Reserves Act. They involve adopting for the word "conserved" several of the meanings given to that verb in the Oxford English Dictionary: to preserve or keep, to preserve intact or maintain an existing state and to preserve unimpaired.[90] We doubt that adopting the definition of "protection" in the Conservation Act is a

[90] Oxford University Press *Oxford English Dictionary* (online ed), definition of "conserve".

legitimate way of disposing of the argument based on plain meaning of the ordinary words used in the Reserves Act, but that was only part of the Judge's reasoning.

[150] It will however be clear from our earlier discussion of the relevant provisions of the Collective Redress Act that the Tūpuna Maunga Authority's obligations under the Reserves Act cannot be construed by reference to that Act alone and as if the Collective Redress Act had not been enacted. That would self-evidently be contrary to the legislative purpose behind the enactment of the Collective Redress Act and the particular linkages it has with the Reserves Act. And it would be contrary to the plain statement in s 47(3) of the Collective Redress Act that "the Reserves Act 1977 applies to the maunga subject to the provisions of this Act".

[151] As to purpose, we have earlier set out s 3 of the Collective Redress Act. The purposes set out in paras (a) and (b) are particularly relevant in the present context.

[152] The provisions of the Reserves Act applicable to the maunga include, as Mr Hollyman emphasises, s 16(8) which is specifically adopted in s 41(6) of the Collective Redress Act. As we have explained,[91] s 16(8) of the Reserves Act is a statement about the purpose for which a reserve is held, and is therefore linked to s 17(1) of that Act in the case of recreation reserves. This means, for example, that Ōwairaka is to be held for the purposes of providing areas for recreation, sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside with emphasis on the retention of open spaces and outdoor recreational activity. Those purposes of themselves do not require the retention of the existing vegetation on the maunga.

[153] That conclusion is supported by the nature of the IMP which the Tūpuna Maunga Authority is obliged to prepare under s 58 of the Collective Redress Act. The section has a number of important implications. First, the obligation is to approve an integrated plan that applies to all of the maunga. The idea is that there should be an integrated plan of broad reach and a common approach applicable to the management of the maunga generally. It seems self-evident that the IMP must be one of the principal means by which mana whenua and kaitiakitanga can be exercised in

[91] Above at [32].

respect of the maunga in accordance with the statutory purpose set out in s 3(b) of the Collective Redress Act.

[154] As noted earlier, s 41 of the Reserves Act concerning management plans applies, with any necessary modifications and subject to s 58 of the Collective Redress Act. We have already given a detailed analysis of what that means for the subsections in s 41.[92] For present purposes, one of the most important provisions that must be modified is subs (3). That is one of the key provisions of the Reserves Act, because it provides the mechanism by which the statutory obligations in s 17 (and the sections relating to other kinds of reserve) are reflected in the management plans required to be adopted under the Reserves Act. Looking at the interplay between s 58(3) of the Collective Redress Act and s 41(3) of the Reserves Act, it is plain that the Tūpuna Maunga Authority, in preparing and approving the IMP, must comply with s 59(1), (4) and (5) of the Collective Redress Act. The consequence of that, as we have earlier said, is that the IMP must contain provisions enabling Ngā Mana Whenua o Tāmaki Makaurau to carry out the activities set out in s 59(5)(a) to (i) of that Act.[93]

[155] But more than that, the Tūpuna Maunga Authority must consider including (and therefore must be empowered to include) provisions that recognise the members' traditional or ancestral ties to the maunga.[94] This must inevitably allow the Authority to include in the IMP provisions that contemplate the extensive planting of indigenous vegetation on the maunga for all of the reasons that have in fact been comprehensively addressed in the IMP, as discussed above. And if that is true for the content of the IMP, it must be the case that s 17(2)(c) of the Reserves Act should be read and applied in a manner that authorises that approach, thereby reflecting the legislative intent as to the interrelationship between the two statutes. Putting that another way, it would be wrong to construe s 17(2)(c) so as to require a disconnect between the legitimate and evidently intended subject matter of the IMP prepared and approved under s 58 of the Collective Redress Act, and the Reserves Act.

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92 Above at [60].
93 Collective Redress Act, s 59(4)(a).
94 Section 59(4)(b).

[156] It is also important to bring s 109 of the Collective Redress Act into the equation. Under s 109(2)(a), which we have set out above,[95] the Tūpuna Maunga Authority must have regard to the spiritual, ancestral, cultural, customary and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau. We earlier referred to evidence given by Mr Majurey about the importance of indigenous vegetation to the connection of mana whenua with the Tūpuna Maunga. The substantial planting of indigenous vegetation must therefore be seen as in accordance with s 109(2)(a). The statutory direction in that section of course applies not only to the preparation and approval of the IMP, but also to the exercise of any other powers of the Tūpuna Maunga Authority in relation to the maunga. That would include the powers it exercises under s 17 of the Reserves Act and other relevant provisions of that Act and, in this case, the decision to remove the exotic trees on Ōwairaka.

[157] In saying this, we do not overlook s 109(2)(b) of the Collective Redress Act, which requires the Tūpuna Maunga Authority to have regard to s 41(2) of that Act. That of course is to acknowledge the fact that the maunga are held for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland. There may be an implication in some of the arguments addressed in support of the appeal that the broader interests of the people of Auckland require maintenance of the existing range of planting and/or species on the maunga. However, we are not persuaded it can have been Parliament's intention that s 41(2) of the Collective Redress Act should be applied so as to require the maintenance of exotic trees on the maunga. We can see nothing in that Act justifying such an approach, which would certainly derive no support from the statement of legislative purpose in s 3. And we consider it can properly be said that there is a common benefit in achieving the purpose of the Act, as well as a particular benefit to mana whenua. Everyone benefits from the implementation of legislative measures designed to provide redress for historical breaches of the Treaty.

[158] It must also be remembered that the constitution of the Tūpuna Maunga Authority is such as to effectively create a partnership of interests which together

[95] Above at [47].

oversees the way in which the maunga are managed. Membership of the Tūpuna Maunga Authority includes six members appointed by the Council as well as the six mana whenua representatives.[96] It can be assumed that in this way the common benefit embraced by s 41(2) of the Collective Redress Act will be achieved in the absence of evidence to the contrary.

[159] In our view, the interrelationship between the two Acts is such that it cannot tenably be claimed that s 17(2)(c) of the Reserves Act requires preservation of the existing nature of the vegetation on the maunga. The fact that change is so clearly contemplated means that the approach to the "qualities of the reserve" referred to in s 17(2)(c) cannot be tethered to the existing state and nature of the vegetation on the maunga and must be able to embrace revegetation which itself contributes to a pleasant, harmonious and cohesive natural environment. In this way the qualities of the reserve can be conserved and equally contribute to the better use and enjoyment of the reserve.

[160] These conclusions also have implications for what we identified as the second proposition inherent in the appellants' argument that carrying out the revegetation programme by removing all the exotic trees at the outset and not in a gradual process would be contrary to s 17(2)(c), at least in the short or medium term. At first glance, that argument has some merit because it is inevitable that for a period while the revegetation programme takes effect, there will be a loss of amenity on the reserve.

[161] However, once it is accepted that the overall objectives sought to be achieved by the Tūpuna Maunga Authority are in accordance with the statutory regime under which it operates, we are not persuaded that the timing of the steps the Authority takes can render the project unlawful. The reality is that the Tūpuna Maunga Authority's objectives as recorded in the IMP will not be able to be achieved without revegetation at some stage. We are unable to conclude that the timing of the implementation of the objectives should render unlawful under the Reserves Act something that would be lawful if achieved over a more extended time period.

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[96] Collective Redress Act, s 107(1).

[162] We note at this point that of course the administering body must, in exercising its powers, act reasonably and in accordance with the law. If its actions cannot be so characterised it will have acted unlawfully. This can be illustrated in a straightforward way by reference to the obligation under s 17(2)(a) to administer recreation reserves so that the public has freedom of entry and access to the reserve, subject to various qualifications. If, for example, the public were denied access for no objectively justified reason, whether to a reserve generally or to parts of it, the administering body would have acted irrationally and therefore unlawfully.

[163] But for the reasons we have explained, we are not satisfied that the decision to remove the exotic trees on Ōwairaka was unlawful by reason of non-compliance with s 17 of the Reserves Act.

Section 42(2)

[164] Much of the reasoning set out above in relation to the argument under s 17 of the Reserves Act applies to the arguments made by Mr Hollyman concerning s 42(2) of the Reserves Act. In assessing whether the tree removal is "necessary for the proper management or maintenance of the reserve", as required by s 42(2), the starting point must evidently be that the Tūpuna Maunga Authority considers implementation of the Ōwairaka project necessary for what it considers to be the proper management of the reserve. That means simply that existing exotic vegetation should be removed and replaced with indigenous flora. That is plainly the Tūpuna Maunga Authority's vision for the maunga. We accept the criticism that at the time the decision to remove the trees was made, the fact that all exotic trees were to be removed had not been made plain. But that is not the point for present purposes. The simple fact is that in order to achieve the Authority's objectives for vegetation on the maunga, the exotic trees are to be removed. The Ōwairaka project apparently represents the Tūpuna Maunga Authority's view of what "proper management" of the reserve entails.

[165] We add that although there was evidence from Mr Parkinson that removal of the exotic trees had not been discussed by the Authority itself, the trees remain in place and notionally the Tūpuna Maunga Authority could at any time decide they should not be removed. The decision to remove, evidently made by Mr Turoa (because he

considered it was the implicit outcome of policies already adopted by the Tūpuna Maunga Authority) is not the kind of decision that, once made, cannot be revisited. Given that the Tūpuna Maunga Authority has defended the decision in the High Court and again on this appeal it would be artificial to conclude the absence of a formal resolution means it does not wish the trees to be removed.

[166] The reasons for the revegetation of the maunga are those articulated by Mr Majurey and Mr Turoa, to which we have already referred. We do not need to go over the same ground again. We think it is sufficient to say at this point that the project, including removal of the exotic trees, is a legitimate response to the objectives sought to be achieved by the Collective Redress Act. Cases decided in other statutory settings such as those relied on by Mr Hollyman do not lead to a different conclusion. In particular, we think it can be said that in this context, the removal of the exotic trees could be considered reasonably necessary when the Tūpuna Maunga Authority's objectives are borne in mind.

[167] Nor do we consider it can seriously be argued that the Tūpuna Maunga Authority has acted for an improper purpose. Resting that claim on the fact that the Authority's objective was to give effect to the Māori worldview that the vegetation that originally grew on the maunga should be restored is untenable having regard to the legislative purpose already discussed.

[168] The argument that the decision to remove the exotic trees was made without having regard to the mandatory consideration of common benefit under s 42(2) of the Collective Redress Act also cannot be sustained for reasons already addressed.

[169] For these reasons we reject the first ground of appeal against the High Court judgment.

[170] We add that we have not found it necessary to deal with another argument raised by Mr Beverley based on s 4 of the Conservation Act. That section requires the Conservation Act to be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Mr Beverley contends that the provision "adds further weight and support to the Tūpuna Maunga Authority's approach to the Ōwairaka

project", noting that for mana whenua the project is a tangible expression of the Treaty principles in action. The Tūpuna Maunga Authority sought to support the High Court judgment on this alternative ground, which the Judge considered would not add anything to the position she had reached by interpreting the Reserves Act in the context of the Collective Redress Act.[97]

[171] As Mr Hollyman points out, the primary focus of s 4 of the Conservation Act is the interpretation and administration of that Act. While the Reserves Act appears in the list of enactments administered by the Department of Conservation,[98] it is not clear how that could have the consequence of applying s 4 to decisions of an independent statutory body such as those at issue in this case. Nor is it clear what would be added by the application of s 4 given the express and detailed statutory provisions in the Collective Redress Act which have been enacted to give effect to the settlement of important Treaty claims. In agreement with the Judge, we do not consider it necessary to resolve these issues here. While we acknowledge the Supreme Court's statements in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* as to the powerful effect of s 4 of the Conservation Act in the context of decisions made by the Department of Conservation,[99] we consider it preferable to leave questions concerning the potential application of s 4 to decision makers not acting under that Act to cases where it is necessary to resolve them.

The second ground of appeal — duty to consult

[172] The second ground of appeal is based on a pleading that the Tūpuna Maunga Authority was required to consult interested members of the Auckland public, including those in the position of the appellants, prior to making the decision to fell the exotic trees.

[173] The Judge noted that a duty to consult can arise explicitly or implicitly from a statute, through a legitimate expectation of consultation arising from a promise or past

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97 High Court judgment, above n 5, at [102]–[103].
98 Conservation Act 1987, s 6 and sch 1.
99 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]–[53].

practice or as a common law incident of fairness.[100] The Judge further accepted that where a duty to consult exists, those entitled to be consulted must be sufficiently informed about the proposal to know what it is, and they must be consulted at a point where their input could still have some effect.[101] She found that there had been no "direct" consultation on the decision to remove the exotic trees.[102] She also accepted that there was a duty to consult on the IMP in accordance with s 41(5) of the Reserves Act. However, she held that the Tūpuna Maunga Authority had complied with its obligation under that section. She also noted that the draft Annual Operational Plan for 2018/2019 had also been the subject of consultation, and it had included references to the restoration of native ecosystems, reintroducing native plants and "removing inappropriate exotic trees and weeds".[103]

[174] The Judge rejected an argument that a statutory obligation to consult before felling the trees in question arose by implication from ss 41(2) and 109 of the Collective Redress Act. She accepted Mr McNamara's submission that those provisions were neutral on the issue of consultation.[104] In summary she held there was no express statutory duty to consult beyond that in relation to the draft IMP and the draft Annual Operational Plan, which had been met.[105]

[175] The Judge also rejected an argument that there was a legitimate expectation of consultation deriving from either a promise, past practice or a combination of the two. She considered the Tūpuna Maunga Authority, as a new administering body, did not have any relevant past practice to refer to, and the approach previously taken by the Council could not be relied upon for that purpose.[106] In any event, she thought it was sufficient that the Tūpuna Maunga Authority had consulted on the IMP and she accepted as relevant evidence given by Mr Mace Ward, the General Manager of Parks, Sports and Recreation within the Customer and Community Services Division of the Council, about the broad discretion claimed and exercised by administering bodies

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100 High Court judgment, above n 5, at [106], citing *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370 per Tipping J.
101 At [106], citing *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.
102 At [149].
103 At [147].
104 At [151].
105 At [152].
106 At [157].

under the Reserves Act concerning particular management decisions.[107] In that setting, the Judge accepted the submission made to her by Mr Beverley that "reading in" a further consultation requirement in the statutory scheme would create significant administrative uncertainties.[108]

[176] The Judge did not accept that there was a legitimate expectation based on representations made by the Tūpuna Maunga Authority through the IMP process. It was argued that the IMP had created an expectation that the Authority would consult further before taking any specific action as significant as removing all exotic trees from Ōwairaka and replanting native plants. The Judge noted that:[109]

> … the IMP stated that individual plans "must" address the management of vegetation to protect cultural features, native planting, ecological restoration and enhancement, and the management of pest plants and inappropriate exotic vegetation (amongst other issues). They would do so in order to "give effect to the Values, Pathways, guidelines and strategies".

[177] The Judge said:

> [167] I agree that readers of the IMP might reasonably have inferred from the material pointed to by the applicants that an individual Ōwairaka Tūpuna Maunga Plan would canvass the matters referred to in the IMP in more detail.
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> [168] However, I do not think that inference goes so far as to ground a legitimate expectation requiring remedy through judicial review.

[178] She explained this reasoning on the basis that there was no statutory obligation on the Tūpuna Maunga Authority to produce individual maunga plans, no specific time frame within which it was to do so and in fact no statutory obligation to consult on such plans. In addition, the IMP did not go so far as to say that "those matters" (presumably, the removal of the exotic trees), if subsequently included in an individual Tūpuna Maunga Plan, would be the subject of consultation.[110] She considered the IMP did not contain a commitment to consult sufficiently clear to justify reliance on it.[111] She noted also that there had been no suggestion of "detrimental reliance" on the part of the appellants, or any witnesses who had sworn affidavits in support of the

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107 At [158]–[161].
108 At [161].
109 At [164].
110 At [169].
111 At [174]–[176].

claim.[112] This was fatal to a claim alleging breach of a legitimate expectation of consultation.

[179] In any event, the Judge noted that although the draft Operational Plan 2018/2019 did not refer specifically to the felling of the trees, it was clear that the removal of exotic plants and weeds, replanting native trees and restoring indigenous ecosystems was a priority for the Tūpuna Maunga Authority. She considered that if the Authority had made a commitment to consult, that had been fulfilled through subsequent consultation on the draft Operational Plan.[113]

[180] Finally, the Judge rejected an argument that the importance of the reserve and the significance of the decision to fell the trees created an obligation on the Tūpuna Maunga Authority to consult. We note that in this part of her reasoning, the Judge acknowledged evidence that had been called by the appellants about the significance of the decision to fell the trees for them and other users of the reserve. She referred, for example, to evidence given by Mr Andrew Barrell, an arborist with 35 years of experience and the director of a company providing consultancy and tree management services, who said, in the context of the resource consent application, that in his view it would have been "one of the most significant, if not the most significant, from an arboricultural perspective received by the Council in recent years". However, the Judge contrasted this by reference to the report prepared on the resource consent application for the Council by Mr Brooke Dales and statements by Mr Barry Kaye (the independent Commissioner who decided the consent should be granted) who rejected the idea that the resource consent application gave rise to "special circumstances" for the purposes of public notification. In the result, the Judge concluded this was not a "truly exceptional" case where a common law duty to consult could run concurrently with the various statutory obligations.[114]

[181] In this Court, Mr Hollyman repeats the arguments that the public importance of the reserve and the significance of the decision gave rise to a duty to consult and he argues that the Tūpuna Maunga Authority's public representations during the IMP

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112 At [177]–[178].
113 At [180].
114 At [187].

process and in the IMP itself, as well as the past practice of consultation regarding reserve management plans, gave rise to a duty to consult.

[182] As to the importance of the reserve, Mr Hollyman emphasises high public use of Ōwairaka and the value placed on it by the local community. He submits these considerations provide strong indicators that decisions affecting the reserve ought to be the subject of consultation. And he submits the decision itself is deeply significant for the reserve because of the immediate, radical and permanent change that it would engender, noting the Tūpuna Maunga Authority's own evidence that the decision is highly significant and would transform the reserve.

[183] As to the processes adopted by the Tūpuna Maunga Authority, Mr Hollyman describes the IMP as a high level document, expressed in broad principles, and containing no specifics as to how individual maunga would be managed or the principles in the IMP applied. Moreover, the IMP states that individual management plans for each maunga would be prepared following a further public engagement process. He emphasises the statement in the foreword of the IMP that:

> Future individual maunga plans will provide an opportunity for us to work closely with the Local Boards and diverse communities to produce plans that capture and enhance the unique qualities of each maunga.

[184] He also notes the statement in the IMP that individual maunga plans "must" address matters including "[p]roactively" managing "plant pests and inappropriate exotic vegetation", "[n]ative planting and ecological restoration and enhancement" and the management of "vegetation to protect cultural features and visitor safety".[115] He argues this is clear recognition that individual maunga have a unique quality to which the existing trees contribute. He submits that the approach adopted by the Tūpuna Maunga Authority had apparently been to defer for the individual plans matters relating to each particular reserve: these individual plans were yet to be produced or consulted upon but were intended to later form part of the IMP.

[185] Mr Hollyman points out that the statement in the IMP that matters to be addressed in individual plans would include management of "plant pests and

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115 Integrated Management Plan, above n 40, at [9.26].

inappropriate exotic vegetation" had been explained during the IMP consultation process. At that stage, the Friends of Maungawhau had pointed out that the use of the terms "appropriate" and "inappropriate" was too general. They asked that "exotic species be considered and not all treated as pests" and stated that "many exotic trees are of heritage significance". This drew a response from the authors of a report in the Tūpuna Maunga Authority hui workshop agenda for 22 February 2016 that:

> It is acknowledged that not all exotic species are necessarily pests and many have heritage significance. This assessment will occur as part of the development of the individual Tūpuna Maunga Plans. An amendment to the list of individual Tūpuna Maunga Plan actions and specifically the bullet point dealing with the management of exotic vegetation and plant pests is recommended.

[186] The authors also explained that "[t]he suggestion to use more directive language in certain situations will be more appropriate, and will be considered, in the detailed provisions developed for the individual Tūpuna Maunga Plans."

[187] Mr Hollyman claims that in the absence of individual maunga plans, including for Ōwairaka, the Tūpuna Maunga Authority has never engaged with the community as to the meaning of "inappropriate" exotic species and the heritage significance of trees on the reserve.

[188] Mr Hollyman submits that, when taken together, the Tūpuna Maunga Authority's public statements regarding the individual maunga plans and exotic trees, as well as past practice in relation to maunga reserve plans, clearly indicated that more community consultation was going to occur before further steps such as the decision to fell the trees were taken. The consultation never occurred. Mr Hollyman submits the Judge was wrong to conclude that any duty to consult would have been met by the steps taken in relation to the Annual Operational Plan 2018/2019. That plan had used generalised language, referring to "inappropriate exotic trees" and gave no more certainty as to what was proposed than the IMP. He draws attention to the fact that, in relation to Ōwairaka, the Operational Plan had made a vague reference to a "[n]etwork-wide programme to remove vegetation and re-vegetate — actions and staging to be confirmed". That would have given no reasonable reader any indication that a decision to remove the trees would be made.

[189] For the Tūpuna Maunga Authority, Mr Beverley submits the Judge had correctly found there was no failure to consult, and further consultation was not required beyond what had been carried out. He submits that the Collective Redress Act and the Reserves Act are both clear and specific as to when consultation is required and when it is not. Under the Collective Redress Act, the Tūpuna Maunga Authority was required to consult the public on the IMP and extensive consultation was undertaken. That Act also requires consultation on the Annual Operational Plan, which occurred as part of the Council's annual plan process. Mr Beverley submits that no further consultation is required for the implementation of "operational projects".

[190] Similarly, in terms of the Reserves Act Mr Beverley submits the Judge had identified the specific instances in the Act when consultation is required. For example, the consultation requirement applies in respect of classifying and changing the classification of reserves, vesting of reserves, adopting and amending a management plan and granting certain rights in respect of the use of reserves. There is however no express obligation to consult, as the Judge correctly held, before exercising any of the general powers relating to recreation reserves such as those provided for in s 53 of the Act.

[191] Mr Beverley submits that in this clear legislative setting, it is neither necessary nor appropriate to read in common law or other consultation obligations for "operational projects" such as the Ōwairaka project. That is particularly so where recent Treaty settlement legislation has deliberately addressed the consultation requirements under the two Acts. Mr Beverley argues the Judge rightly pointed to the practical difficulties that might arise if a further non-statutory consultation requirement were grafted on to the Reserves Act provisions in respect of a wide range of operational decisions made for many parks and reserves in the Auckland region and more generally. Mr Beverley submits the significance of a reserve and a decision made in respect of it could not justify reading in a non-statutory consultation obligation.

[192] Mr Beverley submits the Judge was right to conclude that the appellants could not claim a legitimate expectation of consultation on the basis of a promise contained

in the IMP. He notes the IMP was designed to replace 12 existing reserve management plans, and submits that it would not be feasible to identify within it every project across all of the Tūpuna Maunga. If such projects were required to be included in the IMP, it would be necessary to wait for a review of that plan to include a project that may have been omitted.

[193] Another consideration was that, based on the evidence of Mr Ward, reserve management plans were not generally specific about particular management decisions which may be proposed. It was Mr Ward's evidence that he would not expect a reserve management plan to identify that particular trees were proposed to be removed even if they were relatively large in number. Mr Beverley suggests that the evidence called for the appellants from Mr Christopher Howden, an expert in the management of public parks, about what should be included in a reserve management plan did not reflect the "bespoke approach" contemplated by the Collective Redress Act, the inherent flexibility in the Reserves Act and what Mr Beverley called "contemporary reserve management practice". Although the IMP refers to the provision of individual management plans for the Tūpuna Maunga, Mr Beverley submits the plan contains no unambiguous promise that could give rise to a legitimate expectation of further consultation. Nor was there any evidence that the appellants had in fact seen or relied on the statements in the IMP.

[194] He also submits the Judge had correctly dealt with the arguments claiming a legitimate expectation based on past practice. To the extent that past practice for the Tūpuna Maunga Authority exists, Mr Beverley submits that practice tells against any further duty to consult.

[195] For the Council, Mr McNamara also submits that the Judge had correctly dealt with this ground of review. In a succinct submission he argues that there is no express statutory obligation to consult on the decision to remove the trees, the statutory context leaves no room for imposition of a common law obligation to consult and the consultation required by the Collective Redress Act had taken place in the context of the IMP (under s 58(3)) and the Annual Operational Plan (under s 60(2)). He further argues the draft Operational Plan for 2018/2019 made it clear that removing exotic trees and replanting native ones was a priority for the Tūpuna Maunga Authority, and

that there could be no legitimate expectation of consultation on the decision to remove the exotic trees based on the Authority's past practice (because none existed) nor a clear and unambiguous representation that there would be such consultation.

Discussion

[196] We consider the key issue to be resolved is whether the decision to fell the trees was one which should be characterised as sufficiently important to have been the subject of consultation by inclusion in the IMP, having regard to the statutory setting in which the decision was made.

[197] By referring to the statutory setting we mean more than the individual sections of the Reserves Act on which the Tūpuna Maunga Authority and the Council would rely to perform the work. The Judge considered ss 40 and 53(1)(o) contained the necessary powers,[116] and there has been no suggestion she was incorrect. It is necessary, rather, to look at the broader context represented by the Collective Redress Act and the Reserves Act. For present purposes we think the main considerations are the following.

[198] As noted, the Collective Redress Act requires the Tūpuna Maunga Authority to prepare an IMP applicable to all of the maunga.[117] An integrated plan and the special provisions of the Collective Redress Act providing for such a plan may fairly be said to be a unique approach to the preparation of reserve management plans, reflecting the most appropriate way in which the statutory purpose of restoring ownership to Ngā Mana Whenua o Tāmaki Makaurau and providing mechanisms by which they can exercise mana whenua and kaitiakitanga over the maunga as set out in s 3(a) and (b) of the Act might be achieved.

[199] The requirement to consult arises from the processes required in preparing and approving the IMP and undergoing the Annual Operational Plan process by a further round of consultation in accordance with the Council's own obligations under the

116 High Court judgment, above n 5, at [79].
117 Collective Redress Act, s 58(1).

Local Government Act 2002 in relation to its annual plan.[118] We consider the Judge was correct to find no warrant in this legislative setting for a requirement for consultation outside these two statutory processes.

[200] We also accept that the Judge correctly found that this is not an appropriate case for relief to be granted on the basis of a breach of legitimate expectation. As was observed in *Comptroller of Customs v Terminals (NZ) Ltd*:[119]

> [123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue. A promise of the kind alleged may be express or implied.
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> [124] Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.

[201] As we have recorded, the Judge accepted that the IMP itself stated that individual maunga plans would address the management of vegetation including "inappropriate exotic vegetation".[120] She considered readers of the IMP might reasonably have inferred from the material in the IMP that an individual Ōwairaka Tūpuna Maunga Plan would canvass the matters referred to in the IMP, including management of inappropriate exotic vegetation in more detail.[121] But she found that fell short of a commitment to undertake further consultation in relation to those plans,[122] and in the circumstances there was no clear promise that the Tūpuna Maunga Authority would consult before the decision to remove the exotic trees was made.[123]

[202] We agree.

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118 Local Government Act 2002, ss 82 and 95. See also s 60(5)(c) of the Collective Redress Act which provides that the Tūpuna Maunga Authority and the Council must "jointly consider" submissions relating to the part of the Council's draft annual plan relating to the summary of the draft Annual Operational Plan.

119 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 (footnotes omitted).

120 High Court judgment, above n 5, at [164].

121 At [167].

122 At [168].

123 At [174] and [176].

[203] We consider the Judge was also correct to find that there was no evidence of the kind of reliance that would be necessary to found a claim of breach of a legitimate expectation.[124] However, that is not the end of the matter.

[204] We have, earlier in this judgment, given the detail of what the IMP says about the development of individual Tūpuna Maunga Plans.[125] The IMP does state (at paragraph 7.10) that individual Tūpuna Maunga Plans would be provided so as to reflect the Values, Pathways, overarching strategies and guidelines in the specific context of each of the maunga. It also envisages (at paragraph 7.11) that the Tūpuna Maunga Authority will engage with the public in the preparation of the strategies, guidelines and the individual Tūpuna Maunga Plans, which would form part of the IMP once adopted by the Authority. Similarly, the IMP envisages that an integrated Biodiversity Strategy for all the maunga will be prepared and implemented.[126] That strategy must include, amongst other things, replanting and restoring the indigenous biodiversity of the maunga, "[r]eplanting and restoring traditional indigenous mana whenua flora and fauna", "[a] planting regime with plant choice based on use of appropriate and representative species" and exploring "native grassland establishment where appropriate".[127] As we have also noted, paragraph 9.26 of the IMP states that Tūpuna Maunga Plans must address "as a minimum" native planting and ecological restoration and enhancement.[128]

[205] Even if, as the Judge found and we accept, these provisions do not amount to a firm commitment to consult on the content of the individual Tūpuna Maunga Plans, it does seem that the Tūpuna Maunga Authority contemplated that such plans would be prepared, and in due course form part of the IMP. The only way that would occur would be in the process of continuous review pursuant to the requirements of s 41(4) of the Reserves Act.

[206] An alternative might have been to rely upon the notification process for the Annual Operational Plan as contemplated by s 60 of the Collective Redress Act. But

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124 At [177]–[178].
125 Above at [74], [78]–[79] and [91].
126 Integrated Management Plan, above n 40, at [9.18].
127 At [9.19].
128 At [9.26(22)].

on the face of it, that would not be in accordance with what the IMP says about the incorporation of details in respect of the individual Tūpuna Maunga Plans into the IMP. In any event, as we have explained, the development and provisions of the Annual Operational Plan 2018/2019 did not make the Tūpuna Maunga Authority's intentions plain. Relevantly, there was reference in that plan to removing "inappropriate exotic trees and weeds" and the "replanting of suitable areas with indigenous ecosystems and the reintroduction or attraction of indigenous species". There was also mention of a "network-wide programme to remove vegetation and revegetate — actions and staging to be confirmed". And, as set out above, there was reference to how the network-wide programme would be carried out on individual maunga through project plans that were still to be finalised and developed.

[207] However, none of the material in the Annual Operational Plan contained any statement that all or even a substantial number of the exotic trees on the maunga would be removed. The contrary conclusion would require reading the references to the removal of inappropriate exotic trees and weeds as connoting the removal of all exotic trees. In our view, that intention was not made plain in either the Annual Operational Plan or the IMP. And as we have earlier mentioned, we have been referred to no decision of the Tūpuna Maunga Authority itself which formally made that decision.

[208] The absence of consultation meant that the bases for opposition to the tree removal described in the affidavits relied on by the appellants and summarised above were not brought to the Tūpuna Maunga Authority's attention. It is hard to escape the conclusion that had the intended comprehensive tree removal been made plain in the draft IMP, the issues now raised would have been addressed in submissions provided in the statutory consultation process.

[209] It is in this context that we return to the question posed at the outset of this discussion as to whether the decision to fell the exotic trees was one which should be characterised as sufficiently important to have been the subject of consultation by inclusion in the IMP. It seems to us that the decision, at least insofar as Ōwairaka is concerned, was of considerable significance. It was a decision to remove approximately half the mature trees on the maunga. And the statutory setting clearly envisages that there will be consultation on important aspects of the IMP affecting the

future use, management and maintenance of the reserves constituting the maunga.[129] As we have seen, s 41(3) of the Reserves Act expressly requires the management plan to incorporate and ensure compliance with the principles set out in s 17.

[210] Mr Beverley's argument that the decision was "operational" in nature seems predicated on an assumption that an operational decision is one that does not need to be the subject of public consultation under the Reserves Act, and can simply be undertaken as part of routine management. Carried to its logical conclusion that would mean that a decision to remove trees could never be the subject of a requirement to consult, a proposition which we do not accept.

[211] We accept Mr Beverley's submission that it would not have been feasible to set out detailed plans for each of the maunga, including the intended tree removal on Ōwairaka, in the IMP when it was first prepared and approved. However, that does not mean that the public could not have been advised what the intention was in the draft IMP. All that was required was a straightforward statement explaining it was the intention to remove all of the exotic trees; it is difficult to see how this could have given rise to any practical difficulty. Instead, words were used referring, for example, to the management of "inappropriate" exotic vegetation. This implied that some exotic trees, perhaps a significant number, would remain. Further, "revegetation" by planting indigenous flora is not the equivalent of, and does not necessarily embrace, the removal of exotic trees. An alternative would have been to wait until the individual management plans were prepared for each of the maunga, and in that way inform the public of what was proposed before implementing the proposal.

[212] In summary, the proposed 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. That would ensure appropriate, informed, public consultation about the proposal. The proposal to remove the trees was not made plain in the initial IMP, and no individual management plan for Ōwairaka setting out the proposal had yet been prepared. As a result, the public consultation that took place did not properly inform the public about what was intended. As we have explained,

[129] Collective Redress Act, s 58(3); and Reserves Act, s 41.

the proposal to remove the trees was never made plain in any document on which the public could make submissions. That is a necessary requirement for fulfilment of a statutory obligation to consult. Where the decision maker is considering a particular proposal, the obligation is to inform, listen and consider; it involves telling those consulted what is proposed, and giving them a fair opportunity to express their views.[130] It also involves providing sufficient information to enable those consulted to be adequately informed so as to be able to make intelligent and useful responses.[131]

[213] We have concluded that the failure to state that the Tūpuna Maunga Authority intended to remove all of the exotic trees on Ōwairaka meant that the Authority did not comply with its consultation obligations under s 41 of the Reserves Act as applied by s 58(3) of the Collective Redress Act in respect of the IMP. We therefore conclude that this ground of appeal should succeed. In the circumstances, we consider it inevitable that the decision to fell and remove the trees must be set aside.

The third ground of appeal — notification

[214] The appellants argued in the High Court that the Council had unlawfully granted resource consent without requiring the application to be publicly notified or, alternatively, without requiring limited notification to the users of the reserve.

[215] The application was for a land use consent, and the general description given on the application form referred to "Exotic Tree removal Ōwairaka (Mount Albert)". The application stated that the Council was itself the applicant. We have set out above an extract from the executive summary given in the accompanying assessment of environmental effects describing what was proposed.[132]

[216] Mr Dales processed the application for the Council, and in doing so commissioned independent peer reviews on the technical assessments appended to the assessment of environmental effects. He prepared a report which dealt with both the question of whether the application should be publicly notified and whether or not

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130 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].
131 *Wellington International Airport Ltd v Air New Zealand*, above n 101, at 676, cited with approval in *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [280].
132 Above at [12].

consent should be granted. He recommended that the application should be granted without either public or limited notification.

[217] His conclusion that public notification was not required was based upon his views that:

- In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor;
- Any adverse ecological effects arising from the proposal can be appropriately managed as part of the works programme to ensure that any adverse effects are less than minor;
- Any adverse effects on public access and recreation will be short term in nature and can be considered to be less than minor;
- The proposed works have been designed to be sympathetic to the heritage values of the Maunga, and can be managed to ensure they are less than minor;
- The tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects are therefore considered to be less than minor;
- Any effects associated with land disturbance and stability can be appropriately managed to ensure they are less than minor; and
- There are no special circumstances.

[218] Similarly, Mr Dales considered the limited notification was not required because no persons would be adversely affected. He gave the following reasons:

- … adverse noise effects on people arising from the proposal are short term in nature and can be managed so that they are less than minor.
- Although public access to the Maunga will be temporarily disrupted, this disruption will be short term in nature, and necessary for health and safety reasons, and the applicant has proposed a communications plan to ensure that users of the reserve are aware of any restrictions. Overall, it is considered that any adverse effects on people accessing the Maunga will be less than minor;
- As outlined with respect to the tests of public notification, any landscape and visual effects of the tree removals experienced by people with an outlook to or using the Maunga are likely to be short term in nature and it is considered that these effects are mitigated by the proposed restoration planting, and in the context of the volcanic

cone landform that will be exposed, any adverse effects are less than minor;

- Given the scale and nature of the works, any construction traffic associated with the removal of the processed trees, and that associated with the necessary machinery, will be limited in volume, short term in nature, and occur only in the hours of work (7:30am–6pm Monday to Friday with no work on weekends or public holidays), and as such can be considered to be less than minor; and

- The applicant has engaged with local Iwi groups and the general public as part of the consultation process for the Tūpuna Maunga Integrated Management Plan (IMP). Having reviewed the IMP, this document makes clear the expectations with respect to exotic vegetation and cultural significance of the restoration of the Maunga, and the outcomes of this engagement have been incorporated in the application.

[219] Mr Dales also concluded that there were no special circumstances warranting any person being given limited notification of the application.

[220] Mr Barry Kaye, an experienced planning consultant, was appointed by the Council to make the notification decision under delegated authority. Mr Kaye has acted as an independent hearings commissioner for the Council since 2006. He determined that the application could proceed without public notification because the activity would have, or was likely to have, adverse effects on the environment that were no more than minor. He also concluded there were no special circumstances warranting public notification because there was "nothing exceptional or unusual about the application" and the proposal had "nothing out of the ordinary run of things to suggest that public notification should occur". In addition, Mr Kaye decided that limited notification was not required because there were "no adversely affected persons". He was also of the view that there were no special circumstances that warranted limited notification.

[221] Mr Kaye said in an affidavit that he considered all of the material comprised in the application and accompanying reports as well as Mr Dales' report and the expert peer reviews he had commissioned. He downloaded the IMP from the internet. He then worked through a "draft decision report template" provided by Mr Dales and considered the various steps required under s 95A of the RMA. As to his agreement with Mr Dales' view that the application would have, or was likely to have, adverse effects on the environment that were no more than minor, Mr Kaye explained:

That followed from obtaining an understanding of the different effects (as set out in various expert reports from the Authority's experts as well as in the peer reviews by their Council equivalents) that could be identified as being relevant to the proposal and included the following:

(a) In the context of the landscape and visual values of the Maunga, and following from the expert assessments including the Council's peer review, I found that any adverse landscape and visual effects of the proposal would be short term in nature and were effectively mitigated (albeit over time) by the proposed restoration and replanting such that those effects could be considered to be less than minor (noting the project implements part of the approved IMP required under section 58 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Redress Act));

(b) Based on the ecological reporting I found that any adverse ecological effects could be appropriately managed as part of the proposed works programme and accordingly would ensure that any adverse effects were less than minor;

(c) Given the nature and particular detail of the proposals, any adverse effects on public access and recreation activities (noting that the estimated duration of total vegetation removal works was 50 working days — including 20 days when helicopter work was also to occur) would be short term in nature and thus could be considered to be less than minor. A communications plan was to be used to keep the public informed;

(d) As concluded in the specialist assessments, the proposed works had been designed to be sympathetic to the heritage values of the Maunga, and could be managed to ensure that such effects are less than minor;

(e) The proposed tree removal methodologies described in the proposal were consistent with best arboricultural practice and when implemented would mean any adverse effects would be less than minor; and

(f) Any adverse effects associated with land disturbance and stability were to be appropriately managed to ensure that any adverse effects were less than minor.

[222] Mr Kaye then proceeded to grant consent to the application.

[223] The application for review challenged the decision that public notification was not required on the basis that:

(a) inadequate information was provided;

(b) the decision involved an unlawful balancing of positive and negative effects;

(c) the Commissioner had applied an incorrect definition of "effect" by dismissing effects perceived as "short term"; and

(d) the decision was unreasonable.

[224] The Judge concluded that the Council had sufficient relevant information before it in order to make the notification decision on an informed basis.[133] She was influenced by the fact that the assessment of environmental effects submitted with the application had been accompanied by specialist technical reports and the Council had itself sought independent peer reviews of each of those reports.[134] The recommendation made by Mr Dales had been peer reviewed by the Council's principal specialist planner. All of this information was in turn available to Mr Kaye who also had a copy of the IMP which he had specifically sought. As with Mr Dales, Mr Kaye undertook a site visit and had expressed himself satisfied that he had sufficient information to consider the matters required by the RMA.[135]

[225] The Judge took "confidence in the breadth and depth of the expertise and information" which was available to the Council for the purposes of the notification decision.[136] She considered the appellants had not pointed to any further relevant information without which the Council could not understand the nature and scope of the proposed activity, assess the magnitude of any adverse effect on the environment and identify persons who might be more directly affected. She addressed issues of the heritage value of the trees to be removed in the following brief paragraph:

> [266] On the specific question of the heritage value of the 345 exotic trees, I am satisfied that there was no such information in the AUP Schedule of Historic Heritage or the AUP Notable Trees schedule, the sources of information which the Council would look to in the normal course. Nor was any information drawn to their attention. The appellants have not pointed to a serious failure on the part of the Council to be sufficiently and relevantly informed as to any heritage issues.

133 High Court judgment, above n 5, at [260].
134 At [262].
135 At [264].
136 At [265].

[226] The Judge rejected the argument that the Council had unlawfully balanced positive and negative effects.[137] She considered the removal of exotic trees was to be seen in the context of the proposed planting of native trees and shrubs. Both were part of the "cultural, spiritual and ecological restoration of Ōwairaka".[138] It was wrong to analyse the position by focussing solely on the removal of the exotic trees, since both were part of the same project. The Judge noted this Court's judgment in *Auckland Regional Council v Rodney District Council,* in which it was said "[t]he activity is what the applicant wishes to do as expressed in its application."[139] Here the application made it plain that the proposal involved not only the removal of exotic vegetation but also undertaking restoration planting on Ōwairaka.[140] Both elements were comprised in the application and Mr Kaye was entitled to take into account prospective mitigating conditions inherent in the application when considering the potential adverse effects. The Judge also expressed the view that removal of the trees should not be regarded as an adverse effect of the activity. This reasoning was expressed as follows:

> [290] But this is not a case where the cutting down of the exotic trees is a necessary, but unfortunate and "bad" effect of the activity for which consent is sought. It is an integral and essential part of the activity. While some of the replanting will have a mitigatory effect, the removal of the exotic trees in itself achieves a desired and positive effect. As I have already noted, the project as a whole is intended to facilitate the restoration of the "natural, spiritual and native landscape". It will open up viewshafts and defensive sight lines from Maunga to Maunga across Tāmaki Makaurau, open up terracing and other important archaeological features of the Maunga.

[227] In all the circumstances, the Judge considered that it was clearly open to Mr Kaye to conclude that the adverse effects were no more than minor.[141]

[228] The Judge dealt next with the appellants' contention that Mr Kaye had discounted or ignored adverse visual effects because they would be temporary in nature. This argument was based on the broad definition of "effect" in s 3 of the RMA: under s 3(b), "effect" includes "any temporary or permanent effect". The Judge held

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137 At [278].
138 At [281].
139 At [284], citing *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 453 at [55].
140 At [285].
141 At [297].

that the Council had not applied an incorrect definition of "effect".[142] She accepted that a temporary effect might be a relevant adverse effect,[143] but found that Mr Kaye had considered the duration of any adverse landscape and visual effect based on the extensive material before him and weighed that factor in his overall assessment of the effects. The weight given to temporary effects was a matter for him.[144]

[229] Finally, the Judge determined that the decision not to notify could not be described as unreasonable.[145]

[230] In addressing this ground of appeal, Mr Little submits, as the appellants had done in the High Court, that the non-notification decision was based on inadequate information, applied the incorrect test by taking into account positive prospective effects of the proposed planting project and was unreasonable.

[231] As to the adequacy of information, Mr Little submits that Mr Kaye had inadequate information as to the heritage value of the trees to be felled. Mr Kaye had no information on that issue, other than the fact that none of the trees was listed under the Auckland Unitary Plan. Mr Little refers to Ms Inomata's evidence, which we noted earlier, that the Mount Albert Historical Society had not been approached by either the Tūpuna Maunga Authority or the Council in respect of any historical or heritage value of the trees. Mr Little argues that it was not reasonable for Mr Kaye to treat the absence of listed trees under the Unitary Plan as decisive on the question of heritage value. That was especially so given the large number of mature trees which were to be felled in a popular and historic urban recreation reserve. He submits further that the consideration given to the amenity effects on visitors to the reserve of the removal of the trees was inadequate, describing Ms Peake's assessment as cursory. In addition, Mr Little contends that Mr Kaye had inadequate information as to the arboricultural effects of felling the trees. He claims that the only relevant report before Mr Kaye addressed how the trees should best be removed, not whether they should be removed or the effects of removal. The consent application had, unusually, not been referred to

142 At [303].
143 At [304].
144 At [306].
145 At [320].

the Council's in-house arboriculture team, contrary to Mr Barrell's evidence that was standard practice.

[232] As to the improper consideration of positive effects, Mr Little relies on this Court's judgment in *Bayley v Manukau City Council*,[146] in which it had been said that:[147]

> … whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional soundproofing.

[233] Here, Mr Little submits that Mr Kaye had concluded that the "adverse effects" on the environment were no more than minor because, amongst other things:

> In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor;

[234] Mr Little submits that this amounted to using the positive effects of the proposed planting to offset or justify the possibility of adverse landscape and visual effects consequent upon removal of the trees. This would not be to exclude or eliminate adverse effects, as contemplated by *Bayley*; the adverse effects would happen nevertheless. He develops this argument by reference to the decision of the High Court in *Trilane Industries Ltd v Queenstown Lakes District Council*, concerning the need to take into account short-term adverse effects for the purposes of the notification decision, where there would be a delay in any mitigation taking effect.[148]

[235] Mr Little advances a further submission that any long-term positive effects of planting trees and shrubs in certain parts of the reserve were not in any event effects of the "activity" for which consent was sought (removing the exotic trees). In this respect, Mr Kaye had wrongly conflated the "activity" with the "proposal" described by the Tūpuna Maunga Authority.

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146 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
147 At 580.
148 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

[236] The same grounds are also relied on to submit that the decision not to notify was unreasonable. Mr Little emphasises in this context the magnitude of the proposed tree removal (comprising almost half of the mature trees in the reserve), and the fact that all of the trees could be removed at once. Further the trees are situated in a popular urban public space classified as a recreation reserve, on land identified as a "Significant Ecological Area" and zoned "open space" in the Auckland Unitary plan.

[237] Although pointing out that the adequacy of information is not itself a separate ground of judicial review, Mr McNamara accepts that a notification decision must be made on the basis of adequate and reliable information, and that a Council must decide the level of effects based on a "sufficiently and relevantly informed understanding of those effects".[149] However, he submits that given the extensive information that was before Mr Kaye when he made the decision not to notify, the Judge had rightly concluded the decision was based on sufficient information.

[238] On the particular issue of the heritage value of the trees, Mr McNamara submits it was reasonable for Mr Kaye to have regard to the fact that none of the trees to be removed was listed as having heritage value under the Auckland Unitary Plan. As the Judge found, the Unitary Plan provisions were the relevant source of information that the Council would normally take into account in deciding whether an application for resource consent should be publicly notified. In addition, Mr McNamara submits there was no other information "in the public domain" to indicate that the exotic trees to be removed had heritage value. In this context, he refers to evidence given by Mr Dales that on a site visit he had not observed any signage, plaques or other indication of when any particular trees or groups of trees on Ōwairaka were planted, who planted them or the circumstances in which they were planted. Further, Mr Yates had given evidence that when he undertook his planning assessment in September 2018, he found no record of the perceived heritage value of the trees in statutory documents or other historical evidence publicly available.

[239] Mr McNamara also challenges Mr Little's claim that the consideration given to the amenity effects of the tree removal on visitors was "cursory" and lacking in

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[149] Citing *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNZ 76 at [65].

specificity. Ms Peake, in her landscape and visual assessment, had identified and considered visual effects on three viewing audiences: visitors, users of the open space network on the maunga and residents/users of the surrounding street network. The assessment was sufficiently detailed. Mr McNamara also refers to information before Mr Kaye as to a number of different aspects of amenity that warranted consideration given the RMA's definition of "amenity values". These included effects on public access and recreational amenity, ecological effects, noise effects, heritage effects and effects on cultural and spiritual values.

[240] Mr McNamara also submits that the appellants were wrong to claim that there was inadequate information as to the "arboricultural effects" of the tree removal and that no arboricultural assessment had been provided to Mr Kaye. In this context, Mr McNamara relies on evidence given by Mr Dales that arboricultural effects were considered in terms of the effects of the tree removal work on the native trees being retained. Mr Kaye had given explicit consideration to those effects. Mr Dales considered that it was not necessary to seek further input from an in-house Council specialist because the proposed tree removal methodologies were consistent with those already confirmed as appropriate by the Council's specialist in relation to other resource consent applications by the Tūpuna Maunga Authority in respect of tree removal proposed for Māngere Mountain and Maungarei (Mt Wellington). Mr McNamara also refers to a report prepared by Ms Sarah Budd, an ecologist appointed to review the application for the Council, who had identified temporary loss of vegetation cover and habitat for indigenous fauna as one of three primary adverse ecological effects to be considered.[150]

[241] Mr McNamara submits that Mr Kaye had not sought to balance "good and bad" effects. Rather, he had taken into account conditions of consent that were inherent in the application as mitigating its effects. This was permissible. Not to proceed in that way would involve ignoring the practical reality of what the adverse effects on the environment would be. Mr McNamara submits that the application constituted a single proposal involving both vegetation removal and restoration planting, with both aspects requiring multiple resource consents. Mr Kaye's decision

[150] The others were disturbance and potential harm to indigenous lizards, and disturbance to indigenous birds.

had properly recorded the proposal as comprising both of those aspects, and he had properly reached a conclusion as to the overall level of effects of the application. Mr McNamara argues that this did not involve improper "balancing" of positive and negative effects, but rather a proper appreciation of what the Tūpuna Maunga Authority's proposal actually involved.

[242] Mr McNamara further submits that the Judge had correctly rejected the appellant's approach of considering vegetation removal per se as having adverse effects: in fact, the removal of the exotic trees achieved a desired and positive effect, by facilitating the restoration of the indigenous landscape of the maunga. He says the appellants' argument ignores the potential for the visual effects of the tree removal to be viewed in a positive light.

[243] Mr McNamara submits that Mr Kaye had not ignored adverse landscape and visual effects of the application on the basis that they were "short term". Rather, he had permissibly taken into account the duration of any adverse landscape and visual effects as well as the mitigation proposed, as part of his assessment of the overall level of adverse landscape and visual effects. The weight given to temporary adverse landscape or visual effects was a matter for Mr Kaye as the decision maker.

[244] Further, Mr McNamara submits that the unreasonableness challenge to the notification decision cannot be sustained. The Judge had rightly held it was not enough that another decision maker might have reached a different conclusion. Mr McNamara submits that Mr Kaye's decision was not unreasonable or irrational in the sense required.

[245] Finally, Mr McNamara submits there were no special circumstances justifying public notification.

Discussion

[246] In determining whether to publicly notify the application for resource consent, the council was obliged to consider whether it met the criteria set out in s 95A(8) of

the RMA. In this case that meant deciding whether the activity would have or be likely to have "adverse effects on the environment that are more than minor".[151]

[247] It is clear from the statutory language that the focus of this consideration is the application as a whole. In this respect we consider the Judge was correct to hold this embraced everything that the application involved,[152] including those aspects of it that required resource consent, and any that did not. We have already described the terms of the application. Under the terms of the Auckland Unitary Plan consents were required for the tree removal, modification of existing features of the maunga, conservation planting and earthworks. There was also an anticipated non-compliance with the construction noise limits in the Unitary Plan.

[248] According to the detailed description of the proposal given by Mr Yates in the assessment of environmental effects, both discretionary activity and restricted discretionary activity consents were required in respect of the removal of the trees. The consents were required under different parts of the Unitary Plan including those relating to vegetation management and heritage. One of the discretionary activity consents required, pursuant to rule D17.4.2 (A23), was for what was described as "conservation planting" within a "Category A Extent of Place". Thus both the planting and the tree removal required resource consent and formed part of the overall application, the effects of which fell to be considered as part of the notification assessment. It is unnecessary here to undertake a more fine-grained analysis of the extent to which the Council restricted the exercise of its discretion, and we note that the application proceeded and was dealt with on the basis that, overall, discretionary activity consent was required.

[249] This Court in *Bayley* accepted an argument that in assessing the effects of the activity for which consent is sought the consent authority should not take into account

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151 Resource Management Act 1991, s 95A(8)(b). Nothing in this case turns on the more particular directions set out in s 95D.

152 High Court judgment, above n 5, at [281].

activities able to be undertaken without resource consent.[153] But here both the planting and tree removal required resource consent and positive effects referable to the new planting proposed were legitimately able to be considered. The Judge's reference to this Court's statement in *Auckland Regional Council v Rodney District Council* that the activity is what the applicant wishes to do as expressed in its application was apt.[154]

[250] Mr Little seeks to emphasise that in *Bayley,* addressing the then applicable provisions of the RMA relevant to notification, this Court held that it was not appropriate to balance positive and adverse effects.[155]

[251] The Court's comments in that case, to which we have referred, were made in relation to s 94(2)(a) of the RMA, which authorised non-notification in the case of applications for consent for discretionary and non-complying activities in circumstances where the consent authority was satisfied that the adverse effect on the environment of the activity for which consent was sought would be "minor". There have been a number of changes to the relevant statutory provisions since *Bayley* was decided. The key provision for present purposes, s 95A(8)(b), now states when public notification is required (as opposed to when it is not required), and the application must be publicly notified if it will have or be likely to have adverse effects on the environment that are *more than* minor. But these changes do not affect the reasoning on this point in *Bayley*. It remains the case that the focus must be on the adverse effects on the environment of the activity for which consent is sought.

[252] However, it would be wrong to proceed on the basis that in making the necessary assessment it is appropriate to consider only those aspects of the application that may be thought adverse in environmental terms, and leave out of account those which may be said to be positive in a relevant way. That is inherent in the Court's

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153 *Bayley v Manukau City Council,* above n 146, at 577. This gave rise to the series of cases addressing what became known as the "permitted baseline": see *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA); *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA); and *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA). This is not a case involving consideration of the permitted baseline but the reasoning in those cases can be seen as emphasising that the aspects of a proposal that require resource consent must be taken into account.

154 High Court judgment, above n 5, at [284], citing *Auckland Regional Council v Rodney District Council*, above n 139, at [55].

155 *Bayley v Manukau City Council,* above n 146, at 580.

reference in *Bayley* to countervailing factors. The example given was to noise generated but excluded by soundproofing.[156] In the present case, the key countervailing consideration to the tree removal is the replacement planting inherent in the application, and for which resource consent was sought. There is a direct and sufficient linkage between the two that would make it artificial to leave the planting out of account in assessing whether the adverse effects on the environment would be more than minor. We do not think it matters that the proposed planting would not be in precisely the same location on the maunga as the trees to be removed and would consist of different kinds of plants.

[253] Putting this conclusion more simply, the statutory task under s 95A(8) of the RMA is to assess the adverse effects on the environment of implementing the consent. That cannot be done by ignoring some aspects of the proposal which will be highly relevant to the nature and quality of the adverse effects thought to arise. As Mr McNamara puts it, the contrary approach would ignore the reality of what the actual adverse effects of the activity would be.

[254] We also accept the force of the Judge's reasoning concerning the indirect benefit of removal of the exotic vegetation, to the extent that may be seen as facilitating restoration of the indigenous landscape of the maunga.[157] In the context of the Tūpuna Maunga Authority's intended approach across all of the maunga, there is merit in the proposition that a comprehensive programme of the planting of indigenous flora would be positive in environmental terms.

[255] For these reasons we do not consider that the Judge erred in her conclusion that Mr Kaye had not unlawfully balanced positive and negative effects in making the notification decision.

[256] We have however concluded that in two respects the decision not to notify was flawed. The first is in relation to the manner in which the Council dealt with the issue of the temporary effects of the very extensive tree removal proposed. The second concerns the heritage and historical significance of some of the trees.

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156 At 580.
157 High Court judgment, above n 5, at [290].

[257] In this part of the case, Mr Little relies on the decision of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd,* which discussed the statutory provisions as they stood before the RMA was amended to assume its current form.[158] Blanchard J summarised the information required before a decision could be made on whether an application for resource consent should be publicly notified in the following passage:

> [114] So, in summary to this point, the information in the possession of the consent authority must be adequate for it: *(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.* The statutory requirement is that the information before the consent authority be adequate. It 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.
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> …
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> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.
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> (Emphasis added.)

[258] Blanchard J had earlier said that the information before the consent authority:[159]

> … 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.

[259] Amendments to the RMA in 2009 changed the statutory provisions, and in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* this Court observed that the amendments to the statute since *Discount Brands* were substantial and had been

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158 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
159 At [107].

directed at "providing greater facility for non-notification".[160] The Court held out the possibility that the law articulated in *Discount Brands* might need further evaluation in the revised statutory setting.[161] But it was unnecessary to carry out such further evaluation in that case and the Court did not do so.

[260] The issue was again discussed in *Auckland Council v Wendco*, where the Supreme Court referred to what had been said in both *Discount Brands* and *Coro Mainstreet* and noted the possibility that subsequent changes to the RMA meant that a less exacting approach to non-notification should be taken, but held it was not necessary to decide the issue for the purposes of the judgment.[162]

[261] In this case also there is no need to revisit the standard set out in *Discount Brands*, as no party has sought to argue that a less exacting standard is appropriate. We also note that in *NZ Southern Rivers Society Inc v Gore District Council* (in absence of submissions to the contrary) this Court did not disturb the High Court's decision in that case that *Discount Brands* remained good law as to the requirement that a consent authority must be in possession of sufficient information at the notification stage to decide the issue of whether the adverse effects of a proposal will be more than minor.[163] We consider any different approach in this case would be very difficult to sustain.

Temporary adverse effects

[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.

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160 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [34].
161 At [41].
162 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [46]–[47].
163 *NZ Southern Rivers Society Inc v Gore District Council* [2021] NZCA 296, (2021) 22 ELRNZ 880 at [28].

[263] As has been seen, the Judge's approach was to note that Mr Kaye had proceeded on the basis that there would be an adverse landscape and visual effect, and taken that into account in his overall assessment of the effects. She considered that the weight to be afforded that consideration was properly a matter for him, and not the Court.[164] We think it better to focus on the statutory test: Mr Kaye had to decide whether or not the effects of the activity would be more than minor. And in order to make that decision, he had to have adequate information.

[264] Mr Kaye's reasoning is encapsulated in the extract of his affidavit which we have set out at [221] above. In summary, he was persuaded that any adverse landscape and visual effects of the proposal would be short-term and were:

> … effectively mitigated (albeit over time) by the proposed restoration and replanting such that those effects could be considered to be less than minor (noting the project implements part of the approved IMP approved under s 58 of the [Collective Redress Act]).

[265] It is not clear to us why the claim that the project would implement the IMP was relevant to the factual question of the adverse effects of the proposal, unless that was a shorthand reference to perceived benefits of the proposed planting. If the latter, it would not obviously be related to the short-term effects of the tree removal, for however long those effects might last.

[266] Mr Kaye's decision gave no further detail about the reasoning behind this part of his decision, but it may safely be inferred that it was influenced by the report provided by Mr Dales and the other reports provided by the experts in support of the application and those retained to peer review those reports. So far as Mr Dales is concerned, he made it plain in his affidavit that, based on the specialist advice he had received, he was satisfied that the tree removal works proposed could be undertaken in a manner that was consistent with best arboricultural management. In respect of landscape and visual effects however, it appears that he relied on the report provided by Ms Peake. His affidavit did not deal specifically with the question of short-term effects of the tree removal.

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[164] High Court judgment, above n 5, at [306].

[267] The focus of Ms Peake's report was on the result that would be achieved by implementation of the replanting. She briefly reported about temporary effects noting that "the method of tree removal is also likely to create temporary short term effects", and after referring to the proposed methodologies prepared by the firm Treescape, she expressed the view that that there would be "only low adverse visual effects for a limited time frame".[165]

[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. The fact that Mr Kaye evidently felt able to form the view that any short-term effects would be minor and effectively mitigated over time should not protect that conclusion from review if it was based on inadequate information.

[269] More than that, 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 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".

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[165] The Treescape report, which was produced in evidence in the High Court, dealt mainly with the process of tree removal and how that would be carried out, rather than the visual effects of doing so or how long the replacement planting might take to offset any adverse effects.

[270] In this context, we see merit in the approach taken in *Trilane Industries Ltd v Queenstown Lakes District Council*, the authority on which Mr Little relies.[166] In that case resource consent was sought to remove an existing residential building and replace it with a more substantial building and an accessory building on land fronting Lake Wānaka. Although it would be much larger, the new building was designed to be more sympathetic it to its setting, and approximately 68 per cent of the proposed built form would be below ground level and thus integrated with the land. Extensive earthworks were required. Resource consent was granted on a non-notified basis following a peer review of the proposal by a registered landscape architect engaged by the Council, Ms Helen Mellsop. She concluded that the completed development would have more substantial visual effects than those of the building it would replace. Although the earthworks would adversely affect the natural character and integrity of the landscape to a moderate extent, she considered the effects would be "adequately mitigated by the retention of the schist outcrops and by remediation of finished cut and fill slopes through re-grassing and revegetation with grey shrubland species". Given the mitigation proposed, she considered that five to seven years after construction these effects would be "low".

[271] Trilane Industries Ltd made an application for review of the decision to deal with the application on a non-notified basis and to grant resource consent. Dunningham J granted the application, declaring both decisions invalid and setting them aside.[167] Her reasoning included the following:

> [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 of audience if any adverse effects, whether temporary or permanent, will be more than minor.

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166 *Trilane Industries Ltd v Queenstown Lakes District Council*, above n 148.
167 At [74].

…

> [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.

[272] We do not understand Mr McNamara to argue that this reasoning is incorrect. Rather, he submits that *Trilane Industries* is distinguishable on the facts. Mr McNamara's proposition is that Mr Kaye had *not* ignored any adverse landscape and visual effects of the application because they were "short term"; he had simply taken into account the duration of adverse landscape and visual effects and the mitigation proposed as part of the application in assessing the overall level of adverse landscape and visual effects.

[273] For the reasons we have given, we are not able to accept that approach.

Heritage and historical significance

[274] On this issue, Mr Little submits that Mr Kaye had inadequate information as to the heritage value of the trees to be felled and indeed had no information on that issue other than the fact that none of the trees were listed under the Auckland Unitary Plan.

[275] The Judge, as we have seen, dealt with the issue of the possible heritage value of the trees to be removed in a brief passage, noting that there was no information on that subject in the Unitary Plan's schedule of historic heritage or the notable trees schedule, to which the Council would normally look when considering such an issue.[168] She added that such information had not been drawn to the Council's attention. In the circumstances, the Judge considered that the appellants had not pointed to any serious failure on the part of the Council to be sufficiently informed as to relevant heritage issues.[169]

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[168] High Court judgment, above n 5, at [266].
[169] At [266].

[276] We assume the Judge's reference to relevant information not being drawn to the Council's attention must relate to the fact that those advising the Tūpuna Maunga Authority and the Council itself had not drawn such matters to the attention of Mr Kaye. It can hardly have been directed at the appellants or other members of the public because there was no occasion for them to do so given that the application was dealt with on a non-notified basis. In fact, one of the justifications for public notification is the relevant information that might be elicited as a consequence of that process. As Elias J wrote in *Murray v Whakatane District Council*, referring to s 94 of the RMA as it then stood:[170]

> The requirements of notice and the wide rights of public participation conferred as a result are based upon a statutory judgment that decisions about resource management are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated.

[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 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*.

[278] We accept that the matters raised in relation to some of the trees to be removed may not seem significant judged from the overall perspective of the Tūpuna Maunga Authority's intentions for Ōwairaka and the other maunga now subject to its control. But that does not mean the removal cannot have adverse effects on the environment which could be considered more than minor, and which might, for example, be able to be mitigated by suitable conditions concerning the timing of the removal.

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170 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 309–310.

Such possibilities could not be explored in the absence of the issues being drawn to the attention of the decision maker; the inevitable consequence of non-notification.

[279] For these reasons we have concluded that the application should have been publicly notified under s 95A of the RMA. In the circumstances the resource consent granted by the Council must be set aside.

[280] That conclusion makes it unnecessary to decide the question of whether, short of public notification, limited notification would have been appropriate. It is also unnecessary for us to express any view on the issue of whether there were special circumstances justifying notification pursuant to s 95B(10).

Costs

[281] In the High Court, the Judge awarded costs to the Tūpuna Maunga Authority and the Council on a 2B basis, subject to a discount of 15 per cent to reflect the public interest nature of the claim.[171] The appellants challenge this on appeal.

[282] Given the outcome in this Court, the costs order made by the High Court must be set aside. Any issue as to costs in that Court should be determined by that Court in light of this judgment.

Result

[283] The appeal is allowed.

[284] The decision of the first respondent to fell and remove the exotic trees on Ōwairaka is set aside.

[285] The decision of the second respondent to grant resource consent for the felling and removal of the exotic trees is set aside.

[286] The first and second respondents must pay the appellants costs for a complex appeal on a band A basis, plus usual disbursements. We certify for second counsel.

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[171] *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2021] NZHC 944 at [27]–[28].

[287] The High Court costs order is set aside. Any issue as to costs in the High Court is to be determined by that Court in light of this judgment.

Solicitors:
Duncan King Law, Auckland for Appellants
Buddle Findlay, Wellington for First Respondent
Simpson Grierson, Auckland for Second Respondent

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2019-404-2682
[2020] NZHC 3425

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	AVERIL ROSEMARY NORMAN and WARWICK BRUCE NORMAN Applicants
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	8 and 9 June 2020
Counsel:	R J Hollyman QC, J W H Little and J K Grimmer for Applicants P T Beverley and R A Balasingam for First Respondent P M S McNamara and S J Mitchell for Second Respondent
Judgment:	22 December 2020

JUDGMENT OF GWYN J

This judgment was delivered by me on 22 December 2020 at 2.30pm
Pursuant to Rule 11.5 of the High Court Rules

.....

Registrar/Deputy Registrar

Solicitors/Counsel:
R J Hollyman QC, Auckland
J W H Little, Auckland
Duncan King Law, Auckland
Buddle Findlay, Auckland
Simpson Grierson, Auckland

NORMAN v TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY [2020] NZHC 3425 [22 December 2020]

Contents

Introduction

[1] Ōwairaka, or Mt Albert (Ōwairaka), is one of fourteen Tūpuna Maunga, or ancestral mountains, of Tāmaki Makaurau, or Auckland (Tāmaki Makaurau), which were transferred from Crown ownership to the 13 iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau (Nga Mana Whenua) under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Collective Redress Act).

[2] Under the Collective Redress Act, the fee simple estate in the 14 Tūpuna Maunga, including Ōwairaka, is vested in Ngā Mana Whenua's collective legal entity, the Tūpuna Taonga o Tāmaki Makaurau Trust (Tūpuna Taonga Trust) [1] for the common benefit of the iwi and hapū of Ngā Mana Whenua and the other people of Auckland.[2]

[3] The Tūpuna Maunga o Tāmaki Makaurau Authority (Maunga Authority) is the governance and administering body of Ōwairaka, as it is for most of the transferred Tūpuna Maunga,[3] for the purposes of the Reserves Act 1977 (Reserves Act).[4] This statutory co-governance authority has equal representation from Ngā Mana Whenua and Auckland Council,[5] with one (non-voting) Crown representative.[6]

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1 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 8.
2 Section 41(2).
3 Rarotonga/Mt Smart excepted: ss 17 and 39.
4 Reserves Act 1977, ss 22(4) and 106.
5 Also referred to in this judgment as "the Council".
6 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 107.

[4] The Tūpuna Maunga are classified as reserves under the Reserves Act and that classification was maintained by the Collective Redress Act.[7] Ōwairaka is a recreation reserve,[8] located in the suburb of Mt Albert, Tāmaki Makaurau. It comprises approximately 9.5 hectares.

[5] In the period between 9 August 2018 and 11 October 2018, the Maunga Authority made a decision to remove 345 exotic trees from Ōwairaka and to replant 13,000 native plants.

[6] It is that decision, or part of it, that Mr and Ms Norman seek to review in this Court.[9] The applicants are Averil Norman and Warwick Norman. Ms Norman's evidence is that she is a frequent visitor to Ōwairaka. In her evidence she describes the beauty of the Maunga and the close connection she feels to it. There is other evidence before the Court that indicates that Ōwairaka is enjoyed and well-used by local residents and visitors from further afield. Various personal and historical connections are described in the evidence.

[7] The applicants also challenge the actions of Auckland Council, to the extent the Council is to implement the challenged decision[10] and, separately, the Council's decision that it was not necessary to publicly notify or give limited notification of the Maunga Authority/Council's application to carry out the tree felling and planting work under ss 95A to 95E of the Resource Management Act 1991 (RMA).

Context

[8] The preamble to the Collective Redress Act sets out the historical context to this proceeding regarding Ōwairaka:

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7 Pursuant to s 22 the reservation of Ōwairaka as a recreation reserve was revoked for the purposes of vesting the fee simple estate in the trustees of the Tūpuna Taonga Trust. Ōwairaka was then declared a reserve and classified as a recreation reserve under s 17 of the Reserves Act.

8 Reserves Act 1977, ss 16 and 17.

9 What is comprised in "the decision" that the applicants seek to challenge is discussed below at [20]–[34].

10 Under s 61 of the Collective Redress Act the Council is responsible for "routine management" of the Maunga, under the direction of the Maunga Authority and in accordance with the Annual Operational Plan and any standard operating procedures agreed between the Authority and the Council. In practice, as the evidence shows, Council officers under the Maunga Authority's operational work, since the Authority does not have its own staff. Mr Turoa who is the Tūpuna Maunga manager for the Maunga Authority, is also a Council employee.

Preamble

(a) The iwi and hapū constituting the collective known as Ngā Mana Whenua o Tāmaki Makaurau have claims to Tāmaki Makaurau based on historical breaches of the Treaty of Waitangi (Te Tiriti o Waitangi) by the Crown;

(b) Settlement of these claims is progressing through negotiations between the Crown and each individual iwi and hapū;

(c) At the same time, the Crown has been negotiating other redress with Ngā Mana Whenua o Tāmaki Makaurau—

(i) that relates to certain maunga, motu, and lands of Tāmaki Makaurau; and

(ii) in respect of which all the iwi and hapū have interests; and

(iii) in respect of which all the iwi and hapū will share;

(d) The maunga and motu are taonga in relation to which the iwi and hapū have always—

(i) maintained a unique relationship; and

(ii) honoured their intergenerational role as kaitiaki;

(e) The negotiations between the Crown and Ngā Mana Whenua o Tāmaki Makaurau began in July 2009;

(f) On 12 February 2010, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Framework Agreement;

(g) On 5 November 2011, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Record of Agreement;

(h) On 7 June 2012, the Crown and Ngā Mana Whenua o Tāmaki Makaurau initialled a deed encapsulating the agreed redress arising from the Framework Agreement and the Record of Agreement;

(i) On 8 September 2012, representatives of the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed the deed;

(j) To implement the deed, legislation is required.

[9] The Collective Redress Act gives effect to the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed (Collective Redress Deed). Section 3 of the Collective Redress Act provides:

> **3 Purpose of Act**
>
> The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tāmaki Makaurau, including by—
>
> (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; and
>
> (c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

[10] Paul Majurey is the Chair of the Maunga Authority and has been since its establishment in 2014. Mr Majurey was also the Chair of the Tāmaki Collective, the Treaty settlement negotiations entity for the 13 iwi and hapū of Tāmaki Makaurau that negotiated the Collective Redress Deed. His evidence is given on behalf of the Authority.

[11] Mr Majurey notes that the Tūpuna Maunga are among the most significant spiritual, cultural, historical and geological landscapes in the Auckland region. He describes the Tūpuna Maunga as fundamental and sacred to Mana Whenua, being taonga tuku iho, or treasures handed down the generations. Since human occupation of Tāmaki Makaurau commenced some 1,000 years ago, Maori settled and established pā, kainga and extensive cultivations in and around the Tūpuna Maunga. The Maunga have been central to the lives of tribes of Tāmaki Makaurau as places of habitation, rituals of daily life and worship, the cultivation of food, and sometimes warfare. He notes that the tangible inscriptions of the Tūpuna Maunga remain today in, for example, the modified terraced fortified pā, cultivated areas and stone features.

[12] As the Waitangi Tribunal recorded:[11]

> … maunga are iconic landscape features for Maori. They are iconic not because of their scenic attributes, but because they represent an enduring symbolic connection between tangata whenua groups and distinctive land forms. Sometimes, these land forms are the physical embodiment of tūpuna.

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11 *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 95 (footnotes omitted). This is the Waitangi Tribunal report on Treaty settlement processes in Tāmaki Makaurau. The scope of the inquiry included the Tūpuna Maunga of Tāmaki Makaurau.

> Thus, associations with maunga are imbued with mana and wairua that occupy the spiritual as well as the terrestrial realm. Maunga express a group's mana and identity. This connection and expression is an integral part of Maori culture.

The claims

Overview

[13] The applicants seek an order quashing the decision to fell the exotic trees, a declaration that the Maunga Authority acted unlawfully in making that decision and an order injuncting the Maunga Authority from taking any steps to implement the decision.

[14] The applicants' application for judicial review was filed, together with an application for urgent interim relief, on 6 December 2019. The interim injunction application sought orders preventing the proposed felling of the 345 exotic trees until the judicial review application is determined. The applicants and the first respondent have agreed that the status quo be preserved (that is, the proposed tree felling not take place) until the substantive judicial review proceeding has been determined. That agreement is recorded in a Minute of Lang J dated 13 December 2019.

[15] The grounds of review are:

(a) first ground of review: the decision does not comply with ss 42 and 17 of the Reserves Act;

(b) second ground of review: there was an obligation on the Maunga Authority to consult regarding the decision to fell the 345 exotic trees and it failed to do so;

(c) third ground of review: the Council cannot lawfully follow a direction from the Maunga Authority to fell the trees given that the decision to fell was unlawful in terms of either the first or second ground of review;

(d) fourth ground of review: the Council erred in terms of the RMA in deciding not to require notification of the resource consent application to fell the exotic trees to either the public or to users of the reserve.

Role of the Court on review

[16] The proper approach on judicial review is not in dispute. However, in light of the content of some of the affidavit evidence before me, which might be seen as inviting me to reach a different view to that of the Maunga Authority and the Council on the substance of their respective decisions, it may be useful to set out that approach.

[17] Judicial review is not an appeal from the decisions in question, but a review of the manner in which the decisions were made.[12] It is not for the Court to interfere with the way the Maunga Authority and/or the Council exercised the powers given to them by statute, simply on the basis that the Court thinks the decision should have been different – for example, not removing the trees or doing so in a staged manner over an extended period.

[18] The Court of Appeal in *Pring v Wanganui District Council* said:[13]

> It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the [authority under review]. 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 information 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 be *some* material capable of supporting the decision.

[19] Because an application for judicial review does not involve a review of the decision's merits, the Court must focus only on the information that was before the Maunga Authority and the Council at the time they made their decisions, not the further information that has been made available through the evidence of the applicants and their experts and the evidence in reply.[14]

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12 *Chief Constable for North Wales v Evans* [1982] 1 WLR 1155 at 1174 (HL).
13 *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA) at [7].
14 *Evans v Clutha District Council* [2018] NZHC 3355 at [38]–[39].

What was the decision under review?

[20] It is important to clarify at the outset what is the decision that the applicants want to review. In the period of 9 August 2018 to 11 October 2018, the Maunga Authority made a decision to remove 345 exotic trees from Ōwairaka and to replant 13,000 native plants. That decision was made by Nicholas Turoa (who is the Tūpuna Maunga Manager for the Maunga Authority and an employee of Auckland Council) on behalf of the Maunga Authority.

[21] The applicants solely seek to review the decision by the Authority to simultaneously cut down the 345 exotic trees. They do not challenge the proposal to plant native plants in their place.

[22] Mr Hollyman QC, for the applicants, says that their case is not about whether planting more native trees on the reserve is lawful or otherwise a good thing; the applicants are not opposed to the planting of many more native trees. His submission is that, by conflating the proposed felling of the 345 exotic trees with the intended planting of 13,000 native plants, the respondents are seeking to have the Court infer that the former is necessary to achieve the latter, when that is not the case.

[23] This also bears on the applicants' fourth ground of review, against the Council. The applicants say the respondents in their (successful) application for consent erroneously grouped together two separate proposals – removal of exotic trees from the reserve and planting of native trees and shrubs in certain parts of the reserve – as a single proposal. They say these should have been two separate applications, and the bundling of the two affected the way the Commissioner considered and decided notification issues.

[24] Mr Turoa, and the respondents, frame the decision as a single operational implementation decision as part of a broader sequence of decision-making that included the Tūpuna Maunga Integrated Management Plan (IMP)[15] and the 2018/18 Annual Operational Plan. This is the Ōwairaka ecological restoration project.

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15 Mr Turoa's evidence is that the IMP was developed in accordance with the Collective Redress Act and s 41 of the Reserves Act and was unanimously adopted by the Maunga Authority at its Hui 19 on 23 June 2016.

[25] That framing is reflected in the resource consent application which sought consent to restore the central and historical quarry faces of the Maunga with over 12,2000 native plantings to recreate a WF7 Pūriri broad leaf forest. It is also consistent with the evidence of Antony Yates, the consultant planner for the Maunga Authority during the resource consent application process. He notes that the purpose of the resource consent application was to facilitate the restoration of the cultural, spiritual and native landscape of Ōwairaka, whilst avoiding adverse effects on in-situ archaeology and the high landscape, geological and visual values of the Maunga.[16]

[26] In Mr Turoa's evidence he summarises the procedural context of the decision following the approval of the Maunga Authority's 2018/2019 Annual Operational Plan:

(a) Pre-planning internal meetings – approval of the project operations plan through to August 2018;

(b) initial site visit to Ōwairaka/Te Ahi-kā-a-Rakataura – 9 August 2018;

(c) ongoing planning meetings and discussions – 9 August 2018 to approximately 10 October 2018;

(d) archaeological, ecological, landscape and other assessments undertaken - 9 August 2018 through to late September 2018;

(e) review of draft expert reports and ongoing discussions – late September 2018 through to 10 October 2018;

(f) decision made that 345 exotic trees would be removed – 9 August 2018 through to 11 October 2018;

(g) application for resource consent prepared – October 2018 and lodged on 19 October 2018;

(h) application for resource consent granted 20 February 2019; and

(i) post-resource consent actions and meetings in preparation for project commencement – 20 February 2019 through to November 2019.

[16] In the context of the fourth ground of review, the Council notes that the "Proposal" as described in the Notification Decision, was "to remove exotic vegetation and undertake restoration planting on Ōwairaka." While a number of separate land use consents were required because different rules under the Auckland Unitary Plan were engaged, there was a single proposal involving both vegetation removal and restoration planting. The Council observes that the draft conditions annexed to the AEE included requirements that the planting be undertaken in accordance with a finalised planting plan (a draft of which was submitted with the Application) and maintained thereafter. These conditions were an inherent part of the proposal for which resource consent was sought. I discuss later in this judgment the significance of what activities consent was sought for and granted.

Analysis

[27] "Decision" is not defined in the Judicial Review Procedure Act 2016 but, as in Taylor, *Judicial Review A New Zealand Perspective*, it is to be interpreted in a common sense way.[17]

[28] I accept the submission of Mr McNamara for the Council that it would be artificial to attempt to separate out the Maunga Authority's decision to fell all the exotic trees from its decision to carry out replanting on the Maunga. Such an approach would isolate Mr Turoa's operational decision from its wider context and the Authority's high level decisions. While the applicants are correct that the felling of trees is not strictly necessary for the replanting, which will not occur in exactly the same places as the felled trees, the reasons for the felling of the exotic trees are inextricably bound up with the replanting: that is, to facilitate the restoration of the "natural, spiritual and native landscape."

[29] As the Maunga Authority's evidence details, that has a number of aspects. Mr Majurey says:[18]

> For Mana Whenua, the return to indigenous vegetation is an important part of the journey of reconnection with the Tūpuna Maunga. All of our histories, all of our matauranga (knowledge) and all of our connections with the spiritual and temporal worlds of the Tūpuna Maunga revolve around native flora and fauna. They are imprinted on the very names of the Maunga – Maungawhau and Maungakiekie (in reference to the native whau tree and kiekie plant) and Matukūtururu (in reference to the native owl) are a few examples. Returning the Tūpuna Maunga to a state of indigenous vegetation reflects the Maori world view that the vegetation that originally cloaked these significant Maunga should be restored. That is fundamental to our identity.

[30] Mr Taipari, a Mana Whenua representative on the Independent Maori Statutory Board, says:[19]

> The Authority's proposals for ecological restoration at Owairaka/Te Ahi-kā-a-Rakataura and other Tūpuna Maunga are of fundamental importance to Mana Whenua. The proposals to re-introduce indigenous vegetation and remove exotic vegetation is significant to our cultural well[be]ing and the re-connection between Mana Whenua and the Tūpuna Maunga. The cultural

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17 Graham Taylor, *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [5.14].
18 Affidavit of Paul Francis Majurey, 5 February 2020 at [42].
19 Affidavit of David Errol Taipari, 19 February 2020 at [25].

> landscapes and the protection of the views to and from the Tūpuna Maunga are also of fundamental importance to Mana Whenua.

[31] Mr Turoa notes:[20]

> The Owiaraka/Te Ahi-kā-a-Rakataura ecological restoration project will facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga. This project represents a significant step toward the realisation of the Integrated Management Plan. This includes opening up viewshafts and defensive site lines from Maunga to Maunga while also opening up the terracing and other important archaeological features of the Maunga. The protection and restoration of these archaeological values is a very important element of this project.

[32] The Maunga Authority also observes that the Ōwairaka project is part of a broader ecological restoration programme being undertaken by the Maunga Authority across the Tūpuna Maunga. For example:

(a) 180 exotic trees have been removed from Maungarei/Mt Wellington;

(b) 150 exotic trees have been removed at Māngere Mountain; and

(c) 165 exotic trees have been removed at Ōhuiarangi/Pigeon Mountain.

[33] In conjunction with those removals there has been restoration planting programmes undertaken on each of those Tūpuna Maunga. The Maunga Authority plans to have approximately 74,000 native trees planted across the Tūpuna Maunga by 2021, 8,260 of which have already been planted.

[34] I have concluded that, as a matter of fact, and for the purpose of the first three grounds of review, there was one decision, which encompassed removal of the exotic trees, retention of the existing native trees and a programme of new planting of native trees and plants. I will consider separately the decisions involved in the RMA ground of review.

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[20] Affidavit of Nicholas Henry Turoa, 31 January 2020 at [43].

First ground of review: Reserves Act 1977

[35] The applicants' first ground of review focuses on alleged breaches of ss 17 and 42 of the Reserves Act.

[36] Ōwairaka is a recreation reserve to which s 17 of the Reserves Act applies. The applicants say that the Maunga Authority, as the administering body of the Ōwairaka Reserve, is required to act in compliance with ss 17 and 42 of the Reserves Act, and the decision is inconsistent with those provisions.

[37] To begin I set out for convenience s 109 of the Collective Redress Act, which is relevant to this cause of action:

> **109 Functions and powers**
>
> (1) The Maunga Authority has the powers and functions conferred on it by or under this Act or any other enactment.
>
> (2) In exercising its powers and carrying out its functions in relation to the maunga, the Maunga Authority must have regard to—
>
> (a) the spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau; and
>
> (b) section 41(2) [which states: "The maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland."].
>
> (3) In exercising its powers and carrying out its functions in relation to the administered lands, the Maunga Authority must have regard to the spiritual, ancestral, cultural, customary, and historical significance of the administered lands to Ngā Mana Whenua o Tāmaki Makaurau.

[38] The starting point in terms of the Reserves Act is s 16(8), which says that a reserve shall be held and administered for the purpose(s) for which it is classified and for no other purpose. Section 40 provides that administering bodies shall administer, manage and control reserves in accordance with the appropriate provisions of the Reserves Act, "so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified:". Section 53(1) sets out powers the administering body of a recreation reserve may utilise "in the exercise of its functions under section 40 and to the extent necessary to give effect to the principles set out in section 17."

[39] Section 17 itself provides:

> **17 Recreation reserves**
>
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.
>
> (2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), every recreation reserve shall be so administered under the appropriate provisions of this Act that—
>
> (a) the public shall have freedom of entry and access to the reserve, subject to the specific powers conferred on the administering body by sections 53 and 54, to any bylaws under this Act applying to the reserve, and to such conditions and restrictions as the administering body considers to be necessary for the protection and general well-being of the reserve and for the protection and control of the public using it:
>
> (b) where scenic, historic, archaeological, biological, geological, or other scientific features or native flora or fauna or wildlife are present on the reserve, those features or that flora or fauna or wildlife shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:
>
> provided that nothing in this subsection shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:
>
> (c) 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:
>
> (d) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

[40] The essence of Mr Hollyman's case regarding s 17 is that it acts as a constraint on the Maunga Authority's decision-making power regarding Ōwairaka, and that the significant damage that the Ōwairaka restoration project would do to existing features

of the reserve is not consistent with either the general purposes in s 17(1) or the more specific purposes in s 17(2).[21] In particular, felling a substantial number of trees is contrary to the protection and pleasantness, harmony and cohesion of the existing natural environment.

[41] Section 42 of the Reserves Act limits the circumstances in which cutting or destruction of trees or bush on any recreation reserve may be undertaken. It provides:

> **42 Preservation of trees and bush**
>
> (1) The trees and bush on any historic reserve or scenic reserve or nature reserve or scientific reserve shall not be cut or destroyed, except in accordance with a permit granted under section 48A or with the express consent in writing of the Minister and subject to such terms and conditions as the Minister may determine, including (as appropriate) the method of cutting, extraction, and restoration.
>
> (2) The trees or bush on any recreation reserve, or government purpose reserve, or local purpose reserve shall not be cut or destroyed, except in accordance with a permit granted under section 48A or unless the administering body of the reserve 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.
>
> (3) Where in the case of any recreation reserve or government purpose reserve or local purpose reserve the administering body is satisfied that the cutting or destruction of trees or bush is necessary for any of the reasons mentioned in subsection (2), the administering body shall not proceed with the cutting or destruction and extraction except in a manner which will have a minimal impact on the reserve and until, as circumstances warrant, provision is made for replacement, planting, or restoration; and the administering body shall not proceed to authorise the cutting or destruction, except subject to conditions as to the method of cutting or destruction and extraction which will have minimal impact on the reserve and, as circumstances warrant, replacement, planting, or restoration; and any other conditions which the administering body considers to be appropriate in the circumstances.

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[21] Supporting this point, counsel pointed to various smaller-scale actions that could be taken which would be feasible within s 17 while having regard to s 109 of the Collective Redress Act – such as accounting for areas of significance to Ngā Mana Whenua when determining a new walking track, considering activities that are culturally significant to Ngā Mana Whenua when determining what recreational activities should be provided for at the archery club grounds, closing the road on the Maunga, protecting areas of cultural or spiritual significance, and closing the reserve or parts of it for Matariki celebrations and other celebrations.

The applicants' submissions

[42] The applicants say that the Maunga Authority cannot reasonably have been satisfied that the decision to fell the trees was "necessary" for any of the purposes set out in s 42(2), including the "proper management or maintenance" of the reserve.

[43] Further, the applicants say that, even if the Maunga Authority was reasonably satisfied that felling the trees is necessary for one of those purposes, the Maunga Authority may not proceed with the cutting of the trees "except in a manner which will have a minimal impact on the reserve".[22] They say that the tree felling if implemented as planned will have a more than minimal impact on the reserve.

[44] I will set out, in turn, each of the applicants' four principal arguments as to why the decision to fell the trees was inconsistent with the Reserves Act:

(a) The Maunga Authority failed to consider whether the cutting down of any of the trees was necessary for the purposes specified in s 42(2) or at all.

(b) To the extent there was a decision under s 42(2), it was unreasonable and not for a permitted purpose.

(c) The felling of 345 exotic trees will not conserve the qualities of the reserve identified in s 17(2)(c).

(d) The felling of almost half of the trees on the reserve at the same time will not have a "minimal impact" in terms of s 42(3).

(a) That the decision is not necessary in terms of s 42(2)

[45] The applicants' submission is that the "necessary" test in s 42(2) is consistent with the substantial weight placed on conservation and preservation in the Reserves Act, both generally, and also in relation to recreation reserves specifically, pointing to s 17. They say the statute requires that each tree be specifically and individually

[22] Section 42(3).

considered. Mr Hollyman emphasised the word "necessary" as a "strong word falling in between expedient or desirable on the one hand and essential on the other".[23]

[46] The applicants also say that a threshold of necessity is consistent with the fact that trees (whether native or not) are integral to the qualities that s 17(2)(c) requires be conserved: those "which contribute to pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve." Further, s 42(2) requires felling of trees be necessary for the proper management or maintenance of a reserve. Counsel says "proper management or maintenance" must be read in light of the s 17 purposes of a recreation reserve – further heightening the focus on protection and conservation of existing natural features.

[47] The applicants say that the Maunga Authority did not ever consider whether the felling of the 345 trees was necessary for the purposes of s 42(2) and therefore could not have been "satisfied" on that matter. They point to the absence of a written record setting out the decision or the reason for it, noting that it is, instead contained in Mr Turoa's affidavit.

[48] The applicants are critical of that affidavit for two reasons. First, while Mr Turoa says that he is aware of the relevant Reserves Act provisions, he does not assert that he considered the test under s 42(2) at the time of making the decision. And second, nor does he refer to any of the purposes of recreational reserves under s 17.

(b) That the decision was not reasonable

[49] The applicants say that if there was a decision under s 42(2), it was unreasonable and not for a permitted purpose. They cite the reasons given for the decision, which are:[24]

(a) Some of the trees are classified as pest plants.

(b) Some of the trees pose risks to health and safety.

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[23] *Environmental Defence Society v Maungonui County* [1989] 3 NZLR 257 (CA) at 260 per Cooke P.
[24] In the evidence of Mr Majurey and Mr Turoa.

(c) Some of the trees pose risks to archaeological features.

(d) Some of the trees affect viewshafts.

(e) The project will "facilitate" the restoration of the "natural, spiritual and indigenous landscape."

[50] However, the applicants say that the decision by the Maunga Authority was to cut down *all* exotic trees. This was because of their status as exotic trees and not because all exotic trees qualify under one of the first four identified reasons. Accordingly, the first four reasons are not rationally connected to the decision.

[51] Further, counsel submits that if the first four reasons were really taken into account, it was unreasonable of the decision-maker to have done so.

[52] Only the fifth consideration, restoration of the "natural, spiritual and native landscape," might be directed to all of the exotic trees. The contemporaneous RMA consent application cites the fifth consideration as the reason for removing the trees.

[53] The applicants contend that "proper management and maintenance" of recreation reserves under s 42(2) cannot extend to the destruction of exotic trees on the mere basis that they are non-native trees. Section 42 does not distinguish native trees from exotic trees; it protects all trees equally. This is in contrast to the distinction between native and exotic trees that is drawn in other parts of the Reserves Act.

[54] The applicants say that s 109 of the Collective Redress Act does not assist the Maunga Authority. While s 109(2) and (3) require the Maunga Authority to have regard to the "spiritual, ancestral, cultural, customary, and historical significance" of the maunga and administered lands when exercising its powers and carrying out its functions in relation to them, these do not expand the Maunga Authority's powers beyond what is provided in the Reserves Act. Indeed, the applicants say, it is plain that the Maunga Authority and Mr Turoa did not take into account the mandatory requirement to have regard to the fact that "the maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the

other people of Auckland."[25] The applicants say this provides further reason to quash the decision to fell the exotic trees.

[55] The applicants seek to distinguish *Evans v Clutha District Council*, which appears to be the only other case on s 42(2), on the basis of its facts.[26]

[56] *Evans* involved a decision by a local Council to remove two trees from a playground in Balclutha. The trees were situated in a small recreation reserve adjacent to a home. The homeowners complained to the Council, over a number of years, that the trees encroached on their property. After a number of arborists' reports and a site inspection by the Mayor and several Councillors, the Council decided to remove both trees following a public meeting. The decision was challenged by Ms Evans, a member of the public, on three grounds, including that the Council failed to comply with s 42(2) of the Reserves Act.

[57] On s 42(2) both the High Court and the Court of Appeal accepted that the Council was satisfied that the destruction of the two trees was necessary for the proper management and maintenance of the reserve, on the basis that the trees adversely affected a neighbouring property, could be a danger in an extreme weather event and were of a size incompatible with the nature of the reserve. The Court of Appeal, upholding the decision, said these were "proper management and maintenance reasons."[27]

[58] Counsel submits that the facts in *Evans* are simply too different from those in the present case for any analogy to hold. Further, the Council's reasons for removing the trees were relevant to the decision made and reflected "proper management" of the reserve – which counsel contends is not so in this case.

[59] The applicants also refer to *Attorney-General v Ireland*, in which the Court of Appeal considered the legality of a decision relating to a reserve that was made for a

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25 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, ss 109(2)(b) and 41(2).
26 *Evans v Clutha District Council* [2018] NZHC 3355; upheld in *Evans v Clutha District Council* [2020] NZCA 5 (*Evans Appeal*).
27 At [40].

"purpose" not explicitly recognised in the Reserves Act.[28] The Court of Appeal held that the Department of Conservation's pursuit of the additional, unauthorised purpose was lawful, because their additional purpose did not prejudice or thwart the policy or objectives of the Reserves Act.[29]

[60] While that decision was later affirmed by the Supreme Court in *Unison Networks Limited v Commerce Commission*,[30] the Supreme Court has since significantly qualified the application of the *Ireland* principle in *Hawkes Bay Regional Investment Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*.[31] In that case the Court distinguished *Unison* on the basis that the expert body exercising statutory power in that case, "was relatively unconstrained in identifying the broad policy considerations that it relied on."[32] Here there is a specific set of applicable policy considerations (relating to recreation reserves) set out in statute. On that basis, Mr Hollyman says the principle in *Ireland* and *Unison* has little role to play.

(c) That the decision will not conserve the qualities of the reserve identified in s 17(2)(c)

[61] The applicants say that the felling of 345 trees will not conserve the qualities of the reserve identified in s 17(2)(c) of the Reserves Act. The emphasis on "conservation" confirms that it is the existing qualities of a recreation reserve that contribute to its pleasantness, harmony and cohesion, which have value and must be preserved in their existing state. The destruction of the 345 exotic trees, all at once, will fail to conserve those qualities and so will be inconsistent with s 17(2)(c). The applicants point to the evidence they have filed as to the significant contribution made by the exotic trees to the use and enjoyment of the reserve and therefore what the loss of those trees could mean. Sir Harold Marshall, Mary Tallon, Ms Norman and Anna Redford have all given evidence in this regard. The applicants say that compelling evidence has not been contested.

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28 *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA).
29 At [42]–[45].
30 *Unison Networks Limited v Commerce Commission* [2007] NZSC 71, [2008] 1 NZLR 42 at [53].
31 *Hawkes Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZHC 106, [2017] 1 NZLR 1041.
32 At [110].

[62] The applicants refer also to uncontested evidence from Mary Inomata, the President of Mt Albert Historical Society, that the decision to fell will result in the destruction of trees of considerable heritage value.[33] The affidavit evidence of Philip Blakely, a landscape architect, covers the effect of felling all of the exotic trees at once, on the reserve's environment and on visitors' use and enjoyment. Mr Blakely says that "it is clear and obvious that cutting down the 345 mature trees on the reserve will have an immediate, significant and negative effect on its amenity as experienced by visitors in the many parts of it, and its use and enjoyment."[34]

[63] The applicants' submissions anticipate the Maunga Authority's response, which notes that the replanting of native trees and plants, following the removal of the exotic trees, will conserve and enhance the pleasantness, harmony, use, enjoyment and amenity value of the reserve. Above, I have set out why I consider the felling and replanting are part of the same decision. Nonetheless, for s 17(2)(c) purposes, the applicants emphasise that the large majority of the new native trees and shrubs will not be planted in the spaces currently occupied by the exotic trees. In particular, some trees intended to be felled will not be directly replaced by native plants.

[64] The applicants' experts also question the nature of the planting plan and the likely success of it, in view of what the applicants say is the Maunga Authority's poor track record to date of planting on the reserve and at Mangere Mountain and that the method of some of the planting proposed ("mound" planting) is not proven and has no guarantee of success. Even if a positive outcome is achieved, it will only be in many years' time. This contrasts with the immediate impact of cutting down almost of the trees on the reserve.

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33 Affidavit of Mary Rose Inomata, 13 February 2020 at [9]. By way of example, Ms Inomata gives examples including an olive grove planted with seeds sent home by Jack Turner, a prisoner of war, from Palestine during World War II, eucalyptus trees known as the "penny trees" due to their seeds having been purchased at a penny apiece, a large macrocarpa planted by one of Mt Albert's earliest (Pākehā) settlers and likely the oldest tree on the Maunga, cherry trees planted by Ethel Penman in memory of her brother Edgar who died at Gallipoli and a woodland grove planted by pupils from Mt Albert Primary School in the 1950s.

34 Affidavit of Philip Ronald Blakely, 17 February 2020 at [34].

(d) That the decision will have more than minimal impact

[65] As to s 42(3) of the Reserves Act, the applicants rely on Mr Blakely's evidence as to the "immediate, significant and negative impact" on the amenity of the reserve from cutting down all of the exotic trees at once. He notes that the plan will result in large clusters of decaying tree stumps in many parts of the reserve; together with the immediate loss of nesting and perching habitat involved in removing all the trees at once. The applicants also rely on Andrew Barrell's evidence as to the "significant and negative impact on the reserve's eco-system, including many of the remaining native trees, of felling of all the trees at once.

Analysis

[66] Rather than reiterate the respondents' comprehensive submissions in response I have simply set out the points which I accept in my reasons.

[67] The applicants' case was put forward on the basis that Ōwairaka is a recreation reserve "governed by the Reserves Act (as confirmed by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014…)." The submission for the applicants was that they "take no issue" with the underlying Treaty of Waitangi settlement that led to the vesting of the reserve in the Tūpuna Taonga Trust and to the creation of the Maunga Authority as the administering body of the reserve and other Maunga. They say that was a good thing. However, the effect of the applicants' interpretative approach to the Reserves Act is to give only lip service to the Collective Redress Act and what sits behind it. Applying that approach consistently would have the effect of thwarting the underlying settlement process and what it was designed to achieve.

[68] In my view the applicants' analysis of the relevant statutory provisions fundamentally misconstrues the overall statutory framework. I accept the submission from the respondents that the Reserves Act must be read in the context of the Collective Redress Act, which itself gives effect to the settlement of and provision of redress for historical Treaty breaches in respect of Ngā Mana Whenua, including by establishing a clear regime for the Maunga Authority to govern the Tūpuna Maunga, including the exercise of mana whenua and kaitiakitanga by Ngā Mana Whenua.

[69] Any analysis must start with the Collective Redress Act. Significantly, the Collective Redress Act:

(a) gives effect to the Collective Redress Deed;[35]

(b) recognises that the Maunga are taonga with which the iwi and hapū of Ngā Mana Whenua have always maintained a unique relationship and maintained their intergenerational role as kaitiaki;[36]

(c) restores ownership of certain Maunga and provides mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the Maunga;[37]

(d) is to be interpreted in a manner that best furthers the agreements expressed in the Collective Redress Deed;[38]

(e) notes that the Reserves Act applies to the Maunga, subject to the provisions of the Collective Redress Act,[39] and see also s 5(2) of the Reserves Act:

> "Except as otherwise specially provided herein, this Act in its application to any reserve shall be read subject to –
>
> (a) any Act (whether passed before or after the commencement of this Act) …. making any special provision with respect to that reserve, whether by direct reference thereto or by reason of the reserve being vested in any particular local authority, board, or trustees, or in any local authority of a particular class, or by reason of the reserve being one of any particular class, or authorising the setting apart of any reserve for any purpose …

(f) includes a direction that the Maunga Authority, in exercising its powers and carrying out its functions in relation to the Maunga, must have regard to "the spiritual, ancestral, cultural, customary, and historical

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35 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, preamble and s 3.
36 Preamble.
37 Section 3.
38 Section 7.
39 Section 47(3).

significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau" and the fact that the trustee holds the Maunga for the common benefit of Ngā Mana Whenua and the other people of Auckland;[40] and

(g) establishes the Maunga Authority, which is a co-governance body of Ngā Mana Whenua and Auckland Council.[41]

[70] That statutory framework is fundamental to understanding the statutory mandate of the Maunga Authority and the manner and purpose of the exercise of the Authority's powers and compliance with its obligations under the Reserves Act. The practical effect is that ss 17 and 42 of the Reserves Act must be applied by the Maunga Authority in a way that recognises that the Maunga are taonga, allows iwi and hapū to exercise mana whenua and kaitiakitanga over the Maunga and has regard to the spiritual, ancestral, cultural, customary, and historical significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau, as well as the fact that the Maunga is held on trust for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland. That is the necessary starting point for the analysis of ss 17 and 42 of the Reserves Act.

(a) Whether felling trees will not conserve the qualities of the reserve identified in s 17(2)(c) of the Reserves Act 1977

[71] I agree with Mr McNamara that s 17 sets out principles which are high level and cannot be read as absolute requirements of law. Their language is aspirational and incompatible with objective measurement. I do not accept that they impose absolute standards, breach of which is a legally reviewable error of law. Further, as the respondents argue, s 17 sets out a range of principles together, including s 17(2)(b),

40 Section 109(2).
41 Section 107.

which specifically identifies indigenous flora as requiring protection, whereas exotic plants are not.[42]

[72] The concept of management and protection in s 17(2)(b) must, Mr Beverley for the Maunga Authority says, also include the concept of an enhancement as proposed under the Ōwairaka Restoration Project. Although "managed" and "protected" are not defined in the Reserves Act, "protection" is defined in s 2 of the Conservation Act 1987:

> **protection**, in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—
>
> (a) its restoration to some former state; and
>
> (b) its augmentation, enhancement, or expansion

[73] The reference in s 17 Reserves Act to the "management" and "protection" of the indigenous flora on Ōwairaka must therefore include the restoration to a former state, and that flora's augmentation, enhancement or expansion. Mr Majurey's evidence is that one of the key drivers of the project is to restore the native vegetation cover that once existed on the Maunga. That restoration principle is reflected in the IMP. I accept that submission.

[74] I further accept Mr McNamara's submission for the Council that s 17(2)(c) requires an inherently subjective assessment. First, the authorised decision-maker must identify the "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". Then they must assess the trees' "contribution" to the named qualities (themselves subjective concepts), and what constitutes "better use and enjoyment" of the reserve. The evidence given on behalf of the applicants by a number of individuals

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42 *Evans v Clutha District Council* [2018] NZHC 3355 at [86]. I also note the submission for the Maunga Authority that s 53(1)(m) of the Reserves Act envisions the erection of huts for the use of persons engaged in the lawfully authorised destruction or eradication of introduced flora and fauna – further indicating that their destruction can be compatible with the Act. Section 3 of the Reserves Act further says the Act is to be administered for the purpose of providing, for the management for the benefit and enjoyment of the public, areas possessing (amongst other things) "indigenous flora or fauna". Ensuring the survival of "all indigenous species of flora" is also a statutory purpose: s 3(1)(b).

as to their experience and enjoyment of the reserve,[43] and the landscape architect,[44] illustrates this point; all express "subjective views about inherently subjective matters".

[75] The applicants' view of the effect of felling the trees, while a valid and sincerely held view, cannot be treated as a legal conclusion that the felling would be in breach of s 17. The Collective Redress Act acknowledges that the Maunga are taonga and that iwi and hapū have a unique relationship with the Maunga. The Maunga Authority, as the administering body, had to reach its own view as to which of the s 17(2)(c) qualities contribute to the "pleasantness, harmony and cohesion of the natural environment" and should be conserved. In doing so the Authority must have regard to the "spiritual, ancestral, cultural, customary, and historical significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau" as well as the fact that the Maunga is held on trust for the common benefit of Ngā Mana Whenua and the other people of Auckland (a further subjective assessment).[45] I am satisfied that is what the Maunga Authority did. Applying those requirements, and in light of the purposes in s 3 of the Collective Redress Act, it was plainly open to the Maunga Authority to reach a different view from the applicants as to what qualities of the reserve should be conserved or protected (including, as Mr Beverley submitted, being restored to its former, native state).

[76] I turn now to s 42.

(b) Whether the Maunga Authority failed to consider whether the cutting down of trees was necessary for the purposes specified in s 42(2)

[77] Section 42(2) requires the Maunga Authority as the administering body of the reserve to be "satisfied" that the cutting or destruction is "necessary for the proper management or maintenance of the reserve".

[78] The applicants' submissions frame s 42(2) as requiring a conscious decision to be made. They criticise both the Maunga Authority's failure to consciously address

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43 Sir Harold Marshall, Mary Tallon, Averil Norman, Anna Radford and Mary Inomata.
44 Philip Blakely.
45 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 109(2)(a).

s 42(2) in its decision-making process, and the lack of a contemporaneous record as to any consideration of s 42(2).

[79] I accept the respondents' submission that the Reserves Act does not require a particular documented decision be made under s 42(2) confirming felling the trees is necessary. The statutory powers under which the decision was made were ss 40 and 53(1)(o). I agree too that s 42(2) does not impose an objective standard of necessity. It is a constraint on the exercise of a power, in the form of certain prerequisites that must be satisfied as a matter of fact before trees or bushes are destroyed.

[80] Further, given no trees have been felled as yet and the s 42(2) prohibition is not engaged, Mr Majurey is able to demonstrate that the s 42(2) prerequisite is satisfied by setting out the present position of the Maunga Authority in his affidavit:

> The Authority is also aware that Ōwairaka/Te Ahi-kā-a-rakataura is a recreation reserve under section 17 of the Reserves Act. In terms of section 42(2) of that Act, I confirm, for the reasons set out in this affidavit, that the Authority considers that the proposed tree removals at Ōwairaka/ Te Ahi-kā-a-rakataura are necessary for the proper management and maintenance of the reserve, for the management and preservation of other trees and bush and in the interests of the safety of persons. In terms of section 42(3), I confirm, for the reasons set out in this affidavit, that the Authority is also satisfied that the tree removals will be undertaken in a manner that will have a minimal impact on the Maunga and that an appropriate revegetation programme is in place.

(c) Whether the decision to fell trees was unreasonable and not for a permitted purpose by reference to s 42(2)

[81] What is required is that the Maunga Authority, as the administering body, is satisfied as to the necessity of the destruction for the proper management or maintenance of the reserve. In my view "necessary" as used in s 42(2) is at the "expedient or desirable" end of the spectrum of possible meanings.[46]

[82] Section 109(2) of the Collective Redress Act informs what amounts to "proper management" of the reserve under s 42 of the Reserves Act. The proper management of Ōwairaka and the other Maunga subject to the Collective Redress Act involves a broader range of matters than is the case for recreation reserves subject only to the Reserves Act.

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[46] See *Evans Appeal*, above n 26, at [40].

[83] The Maunga Authority necessarily brings to its role not just the conventional "reserves management" expertise on which the applicants focus, but also its understanding of and expertise in the spiritual, ancestral, cultural, customary and historical significance of the Maunga, including Ōwairaka, for mana whenua.

[84] The evidence of both Mr Turoa and Mr Majurey addresses the spiritual, ancestral, cultural, customary and historical significance of the Maunga and the contribution of the proposed ecological restoration programme to the recognition and protection of those values.[47] That evidence provides support for the Maunga Authority's position that removal of the trees is necessary in order to open up volcanic sightlines, remove destruction of archaeological sites and restore cultural landscapes.[48] This evidence also addresses the spiritual, ancestral, cultural, customary and historical significance of these objectives to Mana Whenua. Other considerations are also addressed, such as pest status, health and safety and practical considerations around undertaking the removal project in one swoop and in a manner that causes minimal disturbance to the Maunga.

[85] Mr Turoa's summary was underpinned by the expert advice he received from, amongst others, tree removal methodology experts, ecology experts, an expert in landscape architecture, an expert archaeologist and an expert resource management planner.

[86] The Maunga Authority further submits that a project to remove exotic vegetation and restore native vegetation on a recreation reserve is consistent with the reserve's status as a recreation under the Reserves Act and the purposes of that Act. The Maunga Authority and the Council are entitled to take a long-term view of what is appropriate for Ōwairaka.[49] Indeed, the Maunga Authority says, that approach is at the heart of the Māori world view, underscored by the Treaty settlement context.

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47 This is consistent with s 109(2)(a) of the Collective Redress Act.
48 See Affidavit of Nicholas Henry Turoa, 31 January 2020 at [47].
49 *Evans Appeal*, above n 26, at [41].

[87] The applicants dispute the basis on which the Maunga Authority's decision to remove the 345 exotic trees, and to do so in one operation, was made. The applicants' expert witnesses canvas:

(a) arguments that the high-level nature of the IMP does not fulfil the requirements of a management plan under the Reserves Act;[50]

(b) arguments that removal of almost half the mature trees on the reserve is a significant policy decision that should be part of a management plan; it is not an operational matter;[51]

(c) the negative arboricultural effects of the tree felling;[52] and

(d) the negative amenity effects of the tree felling on users of the reserve, lack of consideration of the heritage value of the trees to be removed; the significant negative visual impact of removing all 345 trees at the same time, the likely loss in birdlife and the short to medium term loss in character and seclusion.[53]

[88] I reiterate my comments at the beginning of this judgment regarding the role of the Court on review. I am focussed on whether there was a reasonable and legitimate basis on which the Maunga Authority could legitimately make its decision on the information available to it. It is not my role to second-guess the Maunga Authority's justifiable conclusions on a range of evidence before it.[54]

[89] Mr Hollyman suggested that s 42 required the Maunga Authority to consider each tree individually in making a decision as to whether felling was necessary. There is nothing on the face of s 42(2) to suggest that is a requirement and no specific authority was cited for the proposition. I do not accept that is a requirement but, in any event, the evidence of Mr Turoa and Bradley Beach (an arboricultural project manager whose company provided a report on tree removal methodology to the

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50 Reply Affidavit of Christopher (Kit) Hoyles Howden, 18 February 2020.
51 Reply Affidavit of Christopher (Kit) Hoyles Howden, 18 February 2020.
52 Unsworn Affidavit of Andrew Francis Barrell, filed 21 April 2020.
53 Affidavit of Philip Ronald Blakely, 17 February 2020.
54 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [191].

Maunga Authority) is that the latter made an individual assessment and report of all 787 trees on the Maunga, covering their height, age, condition, likelihood and consequences of failure, impacts on viewshafts and pest status.[55]

[90] The Maunga Authority had to be satisfied that cutting down the trees was necessary for the proper management or maintenance of the reserve, as a recreation reserve, having regard to the principles in s 17 of the Reserves Act. I have already found that s 17 sets out principles and that the factors listed in s 17(2)(c) are not susceptible to any one, objective and "correct" answer. Both on the terms of s 17 itself, and having regard to the requirements to interpret it in light of ss 3, 7 and 109(2) of the Collective Redress Act, the Maunga Authority was entitled under s 42 to make its assessment as to what was necessary regarding those factors.

[91] I bear in mind the Court of Appeal's decision in *Evans*:[56]

> While the Council did not use the word "necessary" we are satisfied that they decided in effect that destruction of the trees was necessary for the proper management and maintenance of the reserve for essentially the same reasons noted at [22] above. Their primary reason was recorded in the minutes – that the trees were inappropriate for the location and should be replaced with plantings that will not grow too large and are in keeping with the structure of other plantings in the reserve. These are "proper management and maintenance" considerations.

[92] I consider the decision is applicable, insofar as it confirms that "proper management and maintenance considerations" is not bounded so narrowly as the applicants would have me find.

[93] I conclude that there was a sufficient basis for the Maunga Authority to reach the conclusion that the felling of the trees was necessary for the proper management of the reserve. The decision to return the Maunga to a state of native vegetation, in order to reflect the traditional relationship between Mana Whenua and the Maunga, to protect historical and archaeological features of the Maunga and to open up viewshafts and defensive site lines from Maunga to Maunga, was consistent with having regard to the spiritual, ancestral, cultural, customary, and historical significance of the

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55 Affidavit of Bradley William Beach, 31 January 2020.
56 *Evans Appeal* [2020] NZCA 5 at [40].

Maunga to Ngā Mana Whenua and the expert advice that Mr Turoa received and considered. I also do not consider it was inconsistent with the Maunga being held by the Maunga Authority on trust "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".

[94] Further, I consider that taking "a long-term view" of the needs of the Reserve, including when making decisions about long-term planting decisions, can be consistent with proper management and maintenance of a reserve.[57] In this case, it is inherent in s 109 of the Collective Redress Act that the Maunga Authority should take a long term view.

(d) Whether the felling of almost half of the trees on the reserve at the same time will not have a "minimal impact" in terms of s 42(3)

[95] Section 42(3) of the Reserves Act relevantly requires that the removal of trees shall not proceed "except in a manner which will have a minimal impact on the reserve and until, as circumstances warrant, provision is made for replacement, planting, or restoration", as well as that the method of removal be one "which will have minimal impact on the reserve".

[96] I agree with Mr McNamara that s 42(3) is not directed at minimal impact on the trees being removed themselves and does not require that the final result, after removal of the trees, will be minimal impact on the reserve. "In a manner" means what it says – it focuses on the impacts of the manner or method of removal.

[97] In any event, the expert evidence received by Mr Turoa from Mr Beach (as to tree removal methodology) and Brent Druskovich (as to preservation of the archaeology and cultural landscape) is that the trees will be removed in an arboriculturally sound and proper way with minimal impact on the reserve.

[98] If, as the applicants contend, s 42(3) requires that there be no more than minimal impact on the reserve as a whole, the evidence is that provision has been made

[57] *Evans Appeal*, above n 26, at [41].

for replacement, planting or restoration (and indeed, consent was sought and granted for a large-scale restoration programme).

[99] For these reasons, I am satisfied that the decision does not fall afoul of s 42(3).

Other matters relevant to the first ground of review

[100] Mr Beverley for the Maunga Authority urged me to apply s 4 of the Conservation Act 1987, and thus the principles of the Treaty, to the interpretation of the Reserves Act. He cites the Supreme Court's decision in *Ngāi Tai ki Tāmaki v Minister of Conservation* in which the Court confirmed the powerful effect of the Treaty principles and s 4 in the context of Reserves Act decisions. [58]

[101] Section 4 applies to the Conservation Act and to Acts listed in Schedule 1, including the Reserves Act. It provides:

> **4 Act to give effect to Treaty of Waitangi**
>
> This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

[102] I have not found it necessary to consider the specific application of s 4 in this context, given that, as I have found, the Reserves Act cannot be interpreted in isolation from the Collective Redress Act. As Mr Majurey notes in his evidence, the Collective Redress Act, and the Collective Redress Deed it gives effect to, reflect the Treaty principles of redress, active protection of Mana Whenua interests and, in the co-governance structure of the Maunga Authority, partnership. The Collective Redress Act also reflects a Māori world view, including recognition of the intergenerational responsibility of Mana Whenua as kaitiaki. Inherent in that is a long-term view of what is required in the management of the Maunga.[59]

[103] My initial view therefore is that the effect of s 4 of the Conservation Act, as Mr Beverley argues for it, is in substance the position arrived at by an analysis of the Reserves Act, read in the context of the Collective Redress Act. While it is possible

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58 *Ngāi Tai ki Tāmaki v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.
59 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 109.

that s 4 of the Conservation Act could have greater relevance to a future case, I do not consider I need to resolve its application in this instance.

Second ground of review: failure to consult

The applicants' submissions

[104] The applicants say there was an obligation on the Maunga Authority to consult regarding the decision to fell the 345 exotic trees and that the Maunga Authority failed to do so.

[105] The duty is framed in the statement of claim as a requirement to consult with interested members of the Auckland public, including those in the position of the applicants, and prior to taking the Decision.

[106] A duty to consult can arise explicitly or implicitly from a statute, through a legitimate expectation of consultation arising from a promise or past practice, or as a common law incident of fairness.[60] Where such a duty arises, the parties who are entitled to be consulted must be sufficiently apprised of the proposal in order to know what it is – and they must be consulted at a point when their input could still have some effect.[61]

[107] In particular, the duty here is said to have arisen from:

(a) the statutory context;

(b) the Maunga Authority's public representations through the IMP (including that there would be individual management plans for each reserve);

(c) the past practice of consultation by administering bodies of reserves;

(d) the public importance of the reserve; and

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60 *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370, per Tipping J.
61 *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) at 676.

(e) the significance of the decision.

[108] I summarise their submissions on each head.

The statutory context

[109] First, regarding the statutory context, the applicants say that both the Collective Redress Act and the Reserves Act support an obligation to consult. They refer particularly to the Collective Redress Act's statement that the reserve is held on trust "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland", to which the Maunga Authority must have regard when exercising its powers and carrying out its functions.[62] The applicants emphasise the reference to the "other people of Auckland" alongside named iwi and hapū, the fact that the land is held on trust (which the applicants say imports "a significant depth of political meaning") and that it is held on trust for their *common benefit*.

[110] Regarding the IMP, the applicants point to the requirement in the Collective Redress Act that the Maunga Authority prepare an IMP applicable to the reserve.[63] That plan is subject to s 41 of the Reserves Act,[64] which contains consultation requirements, most relevantly:

> (5) Before preparing a management plan for any 1 or more reserves under its control, the administering body shall—
>
> (a) give public notice of its intention to do so; and
>
> (b) in that notice, invite persons and organisations interested to send to the administering body at its office written suggestions on the proposed plan within a time specified in the notice; and
>
> (c) in preparing that management plan, give full consideration to any such comments received.
>
> (5A) Nothing in subsection (5) shall apply in any case where the administering body has, by resolution, determined that written suggestions on the proposed plan would not materially assist in its preparation.

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62 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, ss 41(2) and 109(2)(b).
63 Section 58(1) states that the Maunga Authority must prepare and approve an IMP applicable to the reserve.
64 Section 58(3) explicitly states that s 41 of the Reserves Act applies to an IMP, with any necessary modifications, but subject to that section.

(6) Every management plan shall be prepared by the administering body in draft form in the first place, and the administering body shall—

(a) give public notice complying with section 119 stating that the draft plan is available for inspection at a place and at times specified in the notice, and calling upon persons or organisations interested to lodge with the administering body written objections to or suggestions on the draft plan before a specified date, being not less than 2 months after the date of publication of the notice; and

(aa) on giving notice in accordance with paragraph (a), send a copy of the draft plan to the Commissioner; and

(b) give notice in writing, as far as practicable, to all persons and organisations who or which made suggestions to the administering body under subsection (5) stating that the draft plan has been prepared and is available for inspection at the place and during the times specified in the notice, and requiring any such person or organisation who or which desires to object to or comment on the draft plan to lodge with the administering body a written objection or written comments before a specified date, being not less than 2 months after the date of giving of the notice; and

(c) make the draft management plan available for inspection, free of charge, to all interested persons during ordinary office hours at the office of the administering body; and

(d) before approving the management plan, or, as the case may require, recommending the management plan to the Minister for his or her approval, give every person or organisation who or which, in lodging any objection or making any comments under paragraph (a) or paragraph (b), asked to be heard in support of his or her or its objection or comments, a reasonable opportunity of appearing before the administering body or a committee thereof or a person nominated by the administering body in support of his or her or its objection or comments; and

(e) where the management plan requires the approval of the Minister, attach to the plan submitted to him or her for approval a summary of the objections and comments received and a statement as to the extent to which they have been allowed or accepted or disallowed or not accepted.

[111] The IMP produced by the Maunga Authority left the individual management plans for each reserve for another day. Each of those plans, the applicants say, will have to comply with the Reserves Act's "exhaustive" requirements as to public consultation, per the process set out above, and regarding the content of the plans:[65]

[65] Reserves Act 1977, s 41(3).

> (3) The management plan shall provide for and ensure the use, enjoyment, maintenance, protection, and preservation, as the case may require, and, to the extent that the administering body's resources permit, the development, as appropriate, of the reserve for the purposes for which it is classified, and shall incorporate and ensure compliance with the principles set out in section 17 …

[112] Counsel for the applicants submit these provisions reflect a Parliamentary intent that the Maunga Authority consult with the public on how it proposes to manage the reserve.

Representations by the Maunga Authority and in the IMP

[113] Second, the applicants rely on the purported representation by the Maunga Authority that it would consult on how it would manage appropriate exotic vegetation of each reserve. They point to various provisions within the IMP, including:

(a) In the foreword:

> Future individual maunga plans will provide an opportunity for us to work closely with the Local Boards and diverse communities to produce plans that capture and enhance the unique qualities of each maunga.

(b) Under the heading "Introduction":

> 1.19 In addition, there will be individual Tūpuna Maunga Plans reflecting the Values and Pathways, overarching guidelines and strategies for each of the Tūpuna Maunga. These plans will detail the care and management of each Tūpuna Maunga. …

(c) Under the heading "Individual Tūpuna Maunga Plans":

> 9.24 Following the preparation of the above guidelines and strategies, individual Tūpuna Maunga Plans will be prepared. These Plans will give effect to the Values, Pathways, guidelines and strategies.
>
> …
>
> 9.26 The Tūpuna Maunga Plans must, as a minimum, address:
>
> …
>
> 10. Manage vegetation to protect cultural features and visitor safety;
>
> …

22. Native planting and ecological restoration and enhancement;

23. Proactively manage plant pests and inappropriate exotic vegetation;

[114] They also refer to comments in the Authority's response to a submission made on behalf of the Friends of Maungawhau (FOM) expressing concern with the draft IMP (specifically its use of general language like "appropriate" and "inappropriate" in referring to trees, noting that some exotic trees have heritage significance and seeking confirmation that some examples of exotic trees would be kept):

> It is acknowledged that not all exotic species are necessarily pests and many have heritage significance. This assessment will occur as part of the development of the Tūpuna Maunga plans. An amendment to the list of individual Tūpuna Maunga plan actions and specifically the bullet point dealing with the management of exotic vegetation and plant pests is recommended.
>
> …
>
> The suggestion to use more directive language in certain situations will be more appropriate, and will be considered, in the detail provisions developed for the individual Tūpuna Maunga Plans.

[115] The applicants further point to evidence of Christopher Parkinson, a member of the Maunga Authority until late 2019, who says based on his experiences at the Authority that the Authority always intended individual management plans for each reserve to be developed, and that he believes there would have been consultation on matters including the management of exotic vegetation.[66]

Past practice of consultation

[116] Third, the applicants rely on the alleged past practice of consultation by administering bodies. They cite the evidence of Kit Howden, who sets out his extensive experience in the management of public spaces such as reserves, and his experience of drafting management plans.[67] Mr Howden also discusses what, in his view, management plans are expected to look like, in terms of level of detail. Counsel says Mr Howden's experience is applicable in assessing decision-making by the Maunga Authority.

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66 Reply Affidavit of Christopher Connell Parkinson, 13 February 2020 at [14]–[23].
67 Reply Affidavit of Christopher (Kit) Hoyles Howden, 18 February 2020.

Public importance of the reserve

[117] Fourth, the applicants point to the public importance of the reserve. The applicants refer to the tens of thousands of Aucklanders who visit and enjoy the Ōwairaka reserve every year and the specific experience of those local people who have given evidence about the value of their connection with Ōwairaka and the value they place on it.

Significance of the decision

[118] Fifth, the applicants note that the felling of the trees is an extremely significant decision in the context of Ōwairaka, which will result in "immediate radical and permanent change.

The respondents' submissions

[119] The Maunga Authority and the Council refute any obligation to consult. Their submissions are in two categories – first disputing any statutory obligation to consult regarding the decision under review (or any parallel common law duty), and second outlining the extent of the consultation which occurred.

The statutory context

[120] Both the Maunga Authority and the Council contend that the statutory framework points away from the duty asserted by the applicants. Both the Reserves Act and the Collective Redress Act specifically provide for consultation before certain decisions affecting a reserve are made. These include:

(a) preparing the IMP and Annual Operational Plan for the Tūpuna Maunga;[68]

(b) preparing motu plans;[69]

(c) declaring a reserve to be a national reserve;[70]

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68 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, ss 58(3) and 60(5).
69 Sections 89–101.
70 Reserves Act 1997 s 13.

(d) classifying and changing the classification of reserves;[71]

(e) vesting reserves;[72]

(f) adopting and amending a management plan;[73]

(g) revoking a conservation management plan;[74]

(h) setting aside a wilderness area;[75]

(i) granting a right of way or easement over a reserve (in some circumstances);[76]

(j) granting a licence for a communications station;[77]

(k) granting certain permits, leases and licences over a reserve;[78] and

(l) commencing or contracting for the afforestation of a reserve.[79]

[121] By contrast, there is no express obligation to consult before exercising any of the general powers relating to recreation reserves in s 53 or before making a decision to which s 42 applies.

[122] Both the Maunga Authority and the Council submit that these examples reflect a conscious Parliamentary distinction in the Reserves Act between situations when public consultation is required and when it is not. Against that background, the Maunga Authority submits that it neither necessary nor appropriate to read in common law or other consultation obligations in relation to the Ōwairaka project.

71 Sections 24 and 16(4).
72 Section 24.
73 Section 41.
74 Section 40A(4).
75 Section 47.
76 Section 48.
77 Section 48A.
78 Sections 54, 56, 57, 58A, 59, 73 and 74.
79 Section 75

[123] Counsel further points to the difficulty of establishing a common law duty against that statutory context, by analogy to *Wellington City Council v Minotaur Custodians Ltd*:[80]

> Because the clear intention of Part 6 is to give Councils a wide discretion in this field, it will always be difficult to establish a concurrent common law duty to consult except in truly exceptional cases such as *Pascoe*.

[124] *Minotaur* was decided under the Local Government Act 2002, with Minotaur contending that a duty to consult arose at common law, notwithstanding the absence of a specific statutory duty to consult under that Act. The Court of Appeal cautioned against finding a similar duty to the one found to exist in *Pascoe* on the basis that:[81]

> In our view, that case is best understood as one founded in legitimate expectation arising from [its] unique facts. We do not consider it is authority for the proposition that directly affected landowners will always be entitled to be consulted in council decision-making. Such proposition contradicts the plain terms of ss 78, 79 and 82 (3) of the LGA.

[125] The Maunga Authority notes the IMP is the management plan required by s 58 of the Collective Redress Act, which provides:

> **58 Integrated management plan**
>
> (1) The Maunga Authority must prepare and approve an integrated management plan—
>
> (a) that applies to the following land:
>
> (i) the maunga; and
>
> (ii) [Repealed]
>
> (iii) the administered lands; and
>
> (iv) any land for which any other enactment requires the Maunga Authority to be the administering body; and
>
> (b) that complies with the requirements of section 59
>
> (2) Despite subsection (1),—
>
> (a) [Repealed]

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80 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [48]; cited in *Evans Appeal*, above n 26, at [34]–[35].

81 At [46]; referring to *Pascoe Properties Limited v Nelson City Council* [2012] NZRMA 232 (HC).

(b) the Maunga Authority must make the entire plan available for inspection by the Minister of Conservation whenever the Minister requires.

(3) Section 41 of the Reserves Act 1977 applies to a plan prepared under this section—

(a) with any necessary modifications; but

(b) subject to this section.

(4) To avoid doubt, the Minister of Conservation may still require the Maunga Authority to—

(a) review the plan under section 41(4) of the Reserves Act 1977; or

(b) consult another administering body under section 41(14) of that Act.

[126] There is a statutory requirement for public consultation for both the IMP and the Annual Operational Plan and counsel points to evidence showing extensive consultation in relation to both. While those plans did not refer specifically to the removal of the 345 exotic trees, the documents informed the operational decision to remove the trees.

[127] The Council submits that the requirements of a reserve management plan are deliberately set at a very high level under s 41(3) of the Reserves Act,[82] leaving the administering body to determine, in its discretion and subject to the consultation process, what the plan says including the level of detail.

[128] The Reserves Act itself contemplates the possibility of different approaches to management plans. The example the Council gives is whether or not consultation is required for a proposed lease of a recreation reserve.[83] This depends on whether the lease is "in conformity with and contemplated by the approved management plan for the reserve".[84] Inherent in that is that management plans may or may not contain the level of detail to "contemplate" such a lease. Mr Ward's evidence for the Council is that different administering bodies take different approaches to the question of how to approach a management plan, depending on the particular body and the particular

82 Set out above at [110].
83 Reserves Act 1977, s 54.
84 Section 54(2A)(a).

reserve. He notes that a management plan would not normally identify the particular trees proposed for removal, even a relatively large number of trees.

[129] The Council says that the applicants do not directly challenge the IMP as failing to comply with s 58 of the Collective Redress Act or s 41 of the Reserves Act. Clearly, it must be open to the Maunga Authority to adopt an IMP that articulates the strategic vision based on "values" and "pathways," rather than a prescriptive approach. Nor is there any claim that the decision to fell the trees is contrary to the IMP: the decision is in accordance with the values and pathways in the IMP, which refer (amongst other things) to restoring native biodiversity, restoring traditional native flora and proactively managing inappropriate exotic vegetation.

[130] Further, the Council submits that the fact that the Maunga Authority proposes adopting additional management plans for each Maunga does not affect or preclude management decisions in the meantime. Those prospective individual plans are *not* the management plan required by s 58 of the Collective Redress Act, which must be an integrated plan. The individual plans are voluntary and cannot affect the operation of the statutory documents or the management decisions under the IMP in the meantime.

[131] The Council says the fact that the Reserves Act requires consultation on a management plan but does not require that management plan to contain proposed management decisions such as tree removal supports the conclusion that consultation is not required in that situation. The applicants' reliance on the statutory provisions relating to management plans does not support the contextual argument for common law consultation. The Council contends those provisions have the reverse effect.

The extent of consultation

[132] The Maunga Authority's submissions and evidence canvass, in detail, the extent of the consultation undertaken in the adoption of both the IMP and the 2018/2019 Annual Operational Plan.

Integrated Management Plan

[133] On 23 June 2016 the Maunga Authority approved the IMP. The process that led to the approval and adoption of the IMP is covered primarily in the affidavit evidence of Janine Bell and Mr Turoa.

[134] Ms Bell is a planner, partner and director at Boffa Miskell Ltd (BML). In August 2015 BML was engaged to assist the Maunga Authority to develop an IMP in accordance with the requirements of s 58 of the Collective Redress Act (set out above, at [125]).

[135] Ms Bell was also involved in developing the Tūpuna Maunga Strategies. She describes the IMP and Strategies development process in detail.[85] In summary, the key points of that process were:

(a) The IMP had to cover all 14 of the Tūpuna Maunga;[86]

(b) Section 59 of the Collective Redress Act sets out mandatory considerations to be covered in an IMP in relation to members of Ngā Mana Whenua carrying out authorised cultural activities;

(c) The notification and consultation provisions of s 41 of the Reserves Act applied to the process. In practice that included various steps:[87]

(i) *Public notice of the intention to prepare the IMP*.[88] The Notice of Intention was given on 22 June 2015, with a closing date for feedback on 31 July 2015. In addition to advertisements in newspapers, posting on the Auckland Council website, letters inviting feedback were sent directly to, among others, all local boards and a number of stakeholder groups. In response, 60 persons and organisations (including local boards) provided written suggestions. Four of the written suggestions explicitly

85 Affidavit of Janine Anne Bell, 30 January 2020.
86 Section 58(1) of the Collective Redress Act.
87 See Affidavit of Janine Anne Bell, 30 January 2020 at [19].
88 At [24]–[28].

addressed exotic vegetation management. A further ten gave more general comments on vegetation management.

(ii) *Preparation of a draft IMP*.[89] This occurred from September to November 2015. This process involved discussions by the Maunga Authority at various hui, hikoi and workshops, engaging with the Tūpuna Taonga Trust and with Mana Whenua, stock-taking of current activities being undertaken on the Maunga, incorporation of the new policy directions adopted by the Maunga Authority, consideration of the submissions received to the Notice of Intent and contributions from local board members. At its Hui 15 (7 December 2015) the Maunga Authority approved the release of an informal (non-statutory) draft of the IMP for public feedback over the December 2015-January 2016 period.

(iii) *Public notice of the draft IMP*.[90] The informal draft IMP was publicly notified on 12 December 2015 and was available for submission until 22 January 2016. The opportunity to make submissions was publicly advertised. The informal draft was also sent to a number of individuals and organisations, including those who had provided suggestions on the Notice of Intent.

(iv) *Feedback on the draft IMP*.[91] Feedback was received from five individuals and 15 groups. Feedback from three individuals and from the FOM related to the proposed management of vegetation.

(v) *Proposed incorporation of feedback*.[92] In response to the informal feedback process, the Maunga Authority proposed a series of amendments to the draft IMP. Ms Bell notes that those

89 At [29]–[35].
90 At [32]–[35].
91 At [36]–[41].
92 At [41] –[42].

parts of the FOM submission relating to ecological values, biodiversity and weed control were carefully considered.

(vi) *Public notice of the proposed IMP and further submissions.*[93] The draft and proposed amendments were made available for public inspection and the lodgement of written objections and suggestions, public hearings to enable those who wished to be heard in support of their objection or comments to appear before the Maunga Authority.

Annual Operational Plan

[136] Mr Turoa's evidence is that the operational management of the Tūpuna Maunga is not dependent on the Tūpuna Maunga strategies or the individual plans that were signalled as being developed for each Tūpuna Maunga.[94] He notes that the Maunga Authority, the IMP and the Annual Operational Plan drive the operational management of the Tūpuna Maunga. He says that the strategies and individual plans are not a pre-condition to undertaking operational work, which has been underway since the establishment of the Maunga Authority in 2014.

[137] Mr Turoa's evidence is that the IMP is implemented through the Annual Operational Plan which is provided for in s 60 of the Collective Redress Act.[95] Once this strategic direction is set through the IMP (and moving forward under the strategies and eventually the Maunga plans), then the Annual Operational Plan is agreed between the Maunga Authority and the Council. It is then the role of the Council to implement that Annual Operational Plan.[96]

[138] The 2018/2019 Annual Operational Plan was unanimously adopted by the Maunga Authority at its Hui 36 on 28 May 2018.[97] The 2019/2020 Annual Operational

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93 At [43]–[48].
94 Affidavit of Nicholas Henry Turoa, 31 January 2020 at [12].
95 At [14].
96 Pursuant to Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, ss 60 and 61.
97 Affidavit of Nicholas Henry Turoa, 31 January 2020 at [16].

Plan was unanimously adopted by the Maunga Authority at its Hui 47 on 2 June 2019.[98] Both plans were also unanimously adopted by Auckland Council.[99]

[139] Mr Turoa's evidence is that both plans went through a public consultation and submissions process as part of Auckland Council's annual plan process. The 2018/2019 Annual Operational Plan included work to protect the wairuatanga, or spiritual values, and the takatoranga, or landscape values, of the Maunga.[100] This work included a network-wide programme to remove vegetation and revegetate the native vegetation, including specifically for Ōwairaka.

[140] The Draft Annual Operational Plan for 2018/19 was presented, inter alia, at the Maunga Authority's Hui 30 on 16 October 2017[101] and to the Auckland Council Finance and Performance Committee at an open meeting on 31 May 2018 at which Mr Turoa confirmed that the Maunga Authority intended to remove all inappropriate exotic trees including those blocking viewshafts, hindering the cultural landscape, posing a risk to archaeological features or health and safety and pest species.[102] The Maunga Authority's Tūpuna Strategies were also available at each public event the Maunga Authority participated in.

[141] The 2018/2019 Draft Annual Operational Plan, which formed the basis of the consultation, included:

(a) As part of the Work Programme Overview:

> Restoration of indigenous native ecosystems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds".

(b) In the Tūpuna Maunga Work Programme 2018–28 (at Table 1), projects to be carried out over the course of a decade (under various headings):

- vegetation management – remove weed species, manage health and safety risks and inappropriate exotics;

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98 At [17].
99 At [17].
100 At [19].
101 Affidavit of Paul Francis Majurey, 5 February 2020 at [92].
102 Affidavit of Nicholas Henry Turoa, 31 January 2020 at [124].

> …
>
> - vegetation removal - weed species, health and safety risks, and inappropriate exotics;
>
> …
>
> - **Biodiversity programme**: restore the native biodiversity othe Tūpuna Maunga through the ongoing management of existing threatened plants. Replanting of suitable areas with indigenous ecosystems …";
>
> (c) As part of the Capital Expenditure Programme for Ōwairaka:
>
> Network-wide programme to remove vegetation and revegetate – actions and staging to be confirmed

[142] The same items appear in the Draft Operational Plan for 2019/20 which Mr Turoa says was held out for consultation between 17 February and 17 March 2019.[103]

[143] Counsel for the respondents do not, in their written submissions, substantively address the indications in the IMP that further details would be determined through the individual Maunga plans, including regarding the proactive management of inappropriate exotic vegetation, native planting and ecological restoration and enhancement. The applicants contend those indications promise by implication that a further consultative process will occur before the making of any decision as significant as removing 345 trees.

[144] The respondents accept that the decision to remove the 345 trees was not consulted on. Implied in their submissions is that no promise to consult on such points was made – and the applicants' reading of the IMP, including the indication that individual Maunga plans would be developed does not accurately reflect the process by which the Maunga Authority makes decisions such as the one to remove the 345 trees. Mr Turoa says that the Maunga Authority is not dependent on strategies or individual plans in making operational management decisions.[104] As such, no legitimate expectation of consultation capable of grounding review could arise.

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[103] At [126].
[104] At [12].

Analysis

[145] Given the Maunga Authority did not consult on the specific decision to remove 345 trees that the applicants seek to challenge, the question I am to determine under this head is whether it was obliged to do so.

[146] The Maunga Authority prepared an IMP as it was required to under s 58 of the Collective Redress Act. To the extent the legislation is prescriptive of the content of the IMP, the Maunga Authority met those requirements, including those set out in s 59. The applicants say that the IMP was of a different nature than what other reserves' administering bodies might have produced, but they do not challenge the IMP as failing to comply with s 58 of the Collective Redress Act or s 41 of the Reserves Act.

[147] The Maunga Authority consulted on the IMP as it was required to do under s 41(5). It also consulted on the 2018/2019 Annual Operational Plan. The Draft Annual Operational Plan included references to, for example, the "restoration of native ecosystems", "reintroducing native plants", and "removing inappropriate exotic trees and weeds".[105]

[148] The summary of the Draft Annual Operational Plan included:

(a) in a summary of values to guide Maunga Authority decision-making (in the category of Takotoronga/Landscape):

> preserve the visual and physical integrity of the maunga as landmarks of Tāmaki
>
> active restoration and enhancement of the natural features of the Maunga

(b) amongst the "priority programs and projects" for the first three years identified in the Work Programme Overview, under the heading "Healing":

> Restoration of indigenous native eco-systems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds

[105] See [141] above.

[149] The crux of the applicants' case is that the Maunga Authority signalled it would prepare individual Maunga plans, which would cover in more detail matters referred to in the IMP, but did not do so. That meant there was no opportunity for consultation beyond the IMP with its more general statements, and the Annual Operational Plan. There was no direct consultation on the decision to remove the 345 exotic trees. This is particularly problematic if the applicants were reassured that their concerns to do with exotic trees would be addressed through further consultation.

Whether there was a statutory obligation to consult prior to the decision

[150] The applicants say that a statutory obligation to consult on the decision to fell the trees in question arises by implication from the terms of the Collective Redress Act, particularly those of ss 41(2) and 109.

[151] I agree with Mr McNamara's submission for the Council that those provisions underlie the Maunga Authority's guardianship role but are neutral in terms of consultation. As Mr McNamara notes, all reserves are held in the form of a trust for the benefit of New Zealanders.[106] The provisions do not specify or imply a duty to consult.

[152] I agree with the respondents that there is a deliberate scheme in the Reserves Act in terms of specifying when consultation is required. There is no express statutory duty to consult, beyond that in relation to the draft IMP and the Draft Operational Plan, which obligations were met. As in *Nicholls,* I find that "if anything the statutory framework points against a duty of consultation in that such duties are expressly dealt with when required … and there is therefore little room for any implication".[107]

Whether there was a legitimate expectation of consultation based on past practice

[153] Legitimate expectation in administrative law reflects the principle that governments and public authorities should act fairly and reasonably. The Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shi* considered that:[108]

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106 See Reserves Act 1977, s 3(1).
107 *Nicholls v Health & Disability Commissioner* [1997] NZAR 351 (HC) at 370.
108 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 351.

> … when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as it does not interfere with its statutory duty.

[154] Beyond a statutory bar, a public authority can also depart from a legitimate expectation it has fostered if there is a "satisfactory reason" for it to do so.[109] The Court of Appeal in *Comptroller of Customs v Terminals (NZ) Ltd* set out the broad principles applicable to claims of legitimate expectation:[110]

> [123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue. A promise of the kind alleged may be express or implied.
>
> [124] Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.
>
> [125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.
>
> [126] The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.
>
> [127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[155] Legitimate expectations can be purely procedural in nature – such as that a body will consult before making a particular type of decision or taking a particular course of action.[111] Regarding whether a legitimate expectation has been established, Harrison J for the Court of Appeal in *Green v Racing Integrity Unit Ltd* emphasised the high standard:[112]

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109 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.
110 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 (footnotes omitted); confirmed in *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZRMA 1.
111 *New Zealand Association for Migration and Investment Inc v Attorney-General* [2006] NZAR 45 (HC) at [145].
112 *Green v Racing Integrity Unit Ltd*, above n 110, at [14].

> … success at the first step — establishing the existence and content of the expectation pleaded — might not come in the form of an explicit promise. A promise can be implied from past practice or policy. But where the expectation is in the form of a practice or policy, as alleged here, its existence and content must equally be established to the level of a commitment or undertaking. The existence and content of such a practice or policy must be both unambiguous, and settled in the sense that it is regular and well established.

[156] The Court in *Green* also stressed the importance of establishing reasonable reliance on the expectation.[113] Factual reliance must be reasonable to differentiate a legitimate expectation from a mere expectation or hope of a particular process or outcome.[114]

[157] I turn to whether the applicants can claim a legitimate expectation deriving either from a promise of consultation or past practice or some combination of the two. The applicants' submissions rely heavily on past practice by the Council as an administering body of consulting on draft management plans as set out in Mr Howden's evidence. However, the Maunga Authority is a new administering body and for this purpose has no relevant past practice to look to. The establishment of the Maunga Authority, as a new body, to give effect to administration of the Maunga in a manner which provides mechanisms by which iwi and hapū may exercise mana whenua and kaitiakitanga over the Maunga[115] also tells against past practice being relevant.

[158] In any event, the Maunga Authority did consult on the IMP. The heart of the issue is that the IMP is a different kind of plan than Mr Howden would have prepared.

[159] Mace Ward is the General Manager Parks Sports & Recreation, Customer Services Division of Auckland Council and gave evidence for the Council.[116] His role includes responsibility for 4,000 local parks and sports fields and facilities, 27 regional parks, 42 pools and leisure centres, cemeteries and the Council's delivery of sport and recreation. He has responsibility for the operational side of the Council's role in relation to co-governed land, including the Tūpuna Maunga. Mr Ward notes that in

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113 At [15].
114 At [15].
115 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 3.
116 Affidavit of Mace Falconer Ward, 31 January 2020.

his extensive experience, administering bodies of reserves regards themselves as having a broad discretion about how reserves are managed, subject to compliance with the Reserves Act (and, in the case of the Maunga, compliance with the Collective Redress Act).[117] Different administering bodies take different approaches. He observes that, except in certain areas, such as the leasing powers, the Reserves Act leaves a lot of leeway for the administering body to make its own decisions about management and control, within the "envelope" of the reserves classification and the reserve management plan.[118]

[160] Mr Ward also notes that, in his experience, reserve management plans can differ significantly one from the other, in terms of the information presented.[119] Generally, reserve management plans are not specific about particular management decisions which may be proposed. The management plan is a policy document, setting out the framework for later decisions, rather than an enumeration of the decisions themselves.

[161] I accept Mr Ward's evidence, and Mr Beverley's submission that reading in a further consultation requirement in the statutory scheme would create significant administrative uncertainty for managers of reserves such as Mr Ward.

[162] The net impression I am given by the evidence is that there is no single universally-practised approach to consultation between different bodies and individuals charged with managing reserves. The Maunga Authority does not have a history of consultation to point to as grounding a legitimate expectation of consultation, and no legitimate expectation arises from the overwhelming general practice of reserve administrators. While the applicants may have expected greater consultation from the prior administrators of Ōwairaka, it seems clear that the advent of a new administrative body embodying a different set of values would mean changes in how the reserves it took responsibility for were to be managed. The applicants' claim fails at the first arm of the test.

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117 At [26].
118 At [26].
119 At [29].

[163] I turn to whether there is a legitimate expectation of consultation deriving from a promise.

Whether there was a legitimate expectation of consultation based on representations made by the Maunga Authority throughout the IMP process

[164] The promise in question is said to arise from a representation by the Maunga Authority throughout the IMP process and in the IMP itself that it will develop and consult with the public and local communities on individual management plans for each of the Maunga before deciding to carry out any major management or development project. Specifically, the IMP stated that individual plans "must" address the management of vegetation to protect cultural features, native planting, ecological restoration and enhancement, and the management of pest plants and inappropriate exotic vegetation (amongst other issues). They would do so in order to "give effect to the Values, Pathways, guidelines and strategies".

[165] The applicants argue that the clear impression given by the IMP was that, although a broad direction was set by the IMP, the Maunga Authority would consult further before taking any specific action as significant as removing all exotic trees from Ōwairaka and replanting native plants. The IMP promised further plans, which would be consulted on.

[166] Justice Wild in *Air New Zealand Ltd v Wellington International Airport Ltd* set out (in obiter comments) his view on legitimate expectations as to consultation:[120]

- A legitimate expectation(s) can arise when a public body makes an explicit representation to a person that it will not act unless it consults that person. That person then has a legitimate expectation of being consulted before action is taken. Any failure to consult is a reviewable error of law.
- A legitimate expectation can also arise when a public body promises not to act in a certain way, but then sets about acting in just that way, significantly adversely affecting a person. An example is where a local body promises that construction of a new road near a person's property will not affect that property. The public body then needs to reposition the road, affecting the person's property. The public body has breached the person's legitimate expectation.

[120] *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [59].

[167] I agree that readers of the IMP might reasonably have inferred from the material pointed to by the applicants that an individual Ōwairaka Tūpuna Maunga plan would canvass the matters referred to in the IMP in more detail.

[168] However, I do not think that inference goes so far as to ground a legitimate expectation requiring remedy through judicial review.

[169] As I have already discussed, there was no statutory obligation on the Maunga Authority to produce individual Maunga plans, no specific timeframe within which it was to do so and no statutory obligation to consult on them. The IMP does not go so far as to say that those matters, if subsequently included in an individual Maunga plan, would be consulted on. A close analysis of the IMP does not ultimately reveal anything conclusive, either way.

[170] On the one hand, the IMP says "Following the preparation of the above guidelines and strategies, individual Tūpuna Maunga Plans will be prepared. These Plans will give effect to the Values, Pathways, guidelines and strategies".[121] And further:[122]

> The first phase will be the preparation and implementation of the guidelines and strategies. The second phase will be the preparation and implementation of the individual Tūpuna Maunga Plans.

[171] Part 9 of the IMP ("Delivering the Values and Pathways") provides:

"The Values and Pathways will be delivered as follows:

9.1 The Values and Pathways will be delivered as follows:

- Plans and policies prepared by the Tūpuna Maunga Authority;
- Decisions of the Tūpuna Maunga Authority;
- Provision for Cultural Activities;
- Annual Tūpuna Maunga Operational Plan;
- Preparation of Tūpuna Maunga guidelines and strategies;

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121 Tūpuna Maunga o Tāmaki Makaurau Authority *Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan* (23 June 2016) at [9.24].

122 At [9.32].

- Preparation of individual Tūpuna Maunga Plans;
- Advocacy to Auckland Council, central government, private sector, regarding policies, plans and bylaws (for example Auckland Unitary Plan);
- Advocacy supporting a World Heritage nomination; and
- Other legislation.

[172] The order in which those items are listed might suggest that plans and decisions are intended to come ahead of individual Maunga plans.

[173] I note too that the list of issues to be covered by the individual Maunga plans is a mixture of very general, high level activities and more concrete steps.[123]

[174] Looked at as a whole, I do not think the references in the IMP to the development of individual Maunga plans can be interpreted as an express commitment to consult. There was no clear promise, implied or otherwise, of consultation regarding the management of exotic trees.

[175] In any event, the specific matters referred to were in fact included in the Draft Annual Operational Plan,

[176] As I have noted, the duty to consult is framed by the applicants as a general duty to consult with interested members of the Auckland public, including those in the position of the applicants. They do not allege a specific commitment or one that was certain in its terms. As the Court of Appeal said in *Comptroller of Customs v Terminals (NZ) Ltd* a legitimate expectation must be more than a "mere hope";[124] it must, in the circumstances (including the nature of the decision-making power and the affected interest) be sufficiently clear to amount to a level of commitment or undertaking such that reliance on it was reasonable. That was not the case here.

[177] As Wild J emphasised in *Air New Zealand v Wellington International Airport Ltd*, detrimental reliance, or at least reliance simpliciter, is necessary to establish

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123 At [9.26].
124 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [124].

breach of legitimate expectation.[125] Neither Ms Norman, nor any other of the lay witnesses who filed affidavit evidence in support of the applicants' claim, refer to having seen let alone relied on, the statement in the IMP.

[178] Rather, Ms Norman for example, refers to a general expectation "for such an important decision to be made without robust consultation is unacceptable".[126] Ms Norman does refer to the Maunga Authority's draft Annual Operational Plan for 2019/20 but, again, does not give evidence that she saw the draft plan at the time it was being consulted on, or relied on it as a promise of further consultation..

[179] On balance, I do not think that the references in the IMP, noted at [170]-[173] above, gave rise to an implied commitment to consult before taking the decision to fell the exotic trees. As Robertson J put it in *Te Heu Heu v Attorney-General* "What the [applicants] wanted never developed beyond a hope or expectation on their part." [127]

[180] If I am wrong in that, I think the subsequent consultation process in relation to the Draft Annual Operational Plan (developed in October 2017, consulted on in March 2018 and approved and adopted in May/June 2018) which, although it did not refer specifically to the felling of the trees, was clear that removing exotic and weeds, replanting native trees and restoration of indigenous eco-systems was a priority for the Maunga Authority, met any such obligations.

[181] As such, this argument must also fail.

The importance of the reserve and the significance of the decision

[182] I address the last two arguments on this cause of action together.

[183] The applicants rely on the importance of the reserve, and the significance of the decision to fell the trees, as pointing to an obligation on the Maunga Authority to consult.

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125 *Air New Zealand v Wellington International Airport Ltd* [2009] NZAR 138 (HC), at [[63]-[67].
126 Affidavit of Averil Rosemary Norman, 6 December 2019, at [34].
127 *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) at 127.

[184] I accept that the applicants and others, including those who have given evidence in support of the application, see the decision to fell the trees as of considerable significance to them and other users of the reserve. Some of the applicants' expert witnesses comment on what they see as the scale and significance of the decision. For example, Mr Barrell says (in the context of the Resource Consent Application) that "the application here will have been one of the most significant, if not the most significant, from an arboricultural perspective received by the Council in recent years."[128]

[185] On the other hand, in the context of preparing his report recommending that the resource consent application be granted without public or limited notification under the RMA, Brooke Dales did not consider the activity for which consent was sought as being out of the ordinary and giving rise to special circumstances.[129]

[186] Barry Kaye, who was the decision-maker on the resource application, states in his affidavit evidence:[130]

> While the proposal involves removal of a large number of exotic trees and replacement plantings and requires consent for a range of reasons in relation to the Auckland Unitary Plan provisions that in itself did not, in my opinion, take the proposal into the realm of special circumstances that would warrant the Application being publicly notified.

[187] Overall, I do not think that these arguments, in themselves, take the applicants' submission any further. I conclude that this is not a "truly exceptional" case, such as *Pascoe*[131] where a common law duty to consult runs concurrently with the various statutory obligations to consult.

Third ground of review: Council cannot follow an unlawful direction

[188] This ground of review turns on grounds one and two; whether the decision was unlawful in terms of ss 17 and/or 42 of the Reserves Act, and/or there was a failure to comply with the duty to consult, in relation to the decision.

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128 Reply Affidavit of Andrew Francis Barrell, 14 February 2020 at [9].
129 Unsworn Affidavit of Brooke James MacDonald Dales, filed 3 April 2020 at [68].
130 Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020 at [30].
131 *Pascoe Properties Limited v Nelson City Council* [2012] NZRMA 232 (HC).

[189] Given my conclusion above that the first and second grounds of review do not succeed, this ground of review must fall away.

Fourth ground of review: non-notification of resource consent application

[190] The fourth ground of review challenges the Auckland Council's decisions to require neither public nor limited notification of the application for resource consent for the Ōwairaka restoration project under ss 95A - 95E of the RMA. Before turning to those provisions and the parties' submissions, I set out the application process, the Notification and Substantive Report supporting it and the Council's substantive decision.

The application process

[191] In October 2018 the Maunga Authority and the Council jointly applied for resource consent "To remove exotic vegetation and undertake restoration planting on Ōwairaka-Te Ahi-kā-a-rakataura/Mount Albert (Ōwairaka) at 27 Summit Drive Mount Albert" (the Application").

[192] Antony Yates acted as the consultant planner for the Maunga Authority during the resource consent application process. Mr Yates' affidavit evidence discusses his project management and coordination and various specialist technical reports supporting the Application and the production of the Assessment of Environmental Effects (AEE) that accompanied the application documentation that was lodged with the Council.

[193] The Application sought consent for exotic vegetation removal and rehabilitation planting on Ōwairaka. The AEE noted:[132]

> In summary, the proposal will include:
>
> - The removal of approximately 345 exotic trees from the Maunga;

[132] Tūpuna Maunga o Tāmaki Makaurau Authority *Ōwairaka/Te Ahi-kā-a-Rakataura/Mt Albert Vegetation restoration and exotic vegetation removal works: Assessment of Effects on the Environment and Statutory Assessment* (October 2018) at [1.1.3].

- The restoration of the central and historic quarry faces with indigenous plantings to create a WF7 Pūriri broadleaf forest ecosystem.
- Mound planting is proposed for on [sic] a small area of the south eastern face.

[194] In his affidavit evidence Mr Yates discusses the primary premise underpinning the Application which was:[133]

> … to achieve the cultural, spiritual and ecological restoration of Ōwairaka-te Ahi-kā-a-Rakatarua, whilst avoiding adverse effects on in-situ archaeology and the high landscape, geological and visual values of the Maunga. Important parts of the project are retaining the tihi in grass to restore and enhance the cultural and spiritual restoration of the Maunga, and the replanting of 13,000 mixed natives (2,700 of which have already been planted) to mitigate and enhance ecological values on the Maunga, in an area where in situ archaeology had been destroyed by historic quarrying.

[195] The AEE appended the expert technical reports obtained by the Maunga Authority. They covered such subjects as tree removal methodology (prepared by Bradley Beach); heritage impact assessment (prepared by Brent Druskovich); landscape visual assessment (prepared by Sally Peake); ecological effects and planting plan (prepared by Richard Mairs); noise effects assessment (prepared by Jon Styles); and an herpetology assessment (prepared by Trent Bell of EcoGecko Consultants Ltd).

[196] The Application was lodged in October 2018 and, as described in the Council's evidence, processed by Brooke Dales, a senior planner and consultant planner to the Council.[134] Mr Dales and the Council's experts undertook site visits and the Council issued a request for further information under s 92 of the RMA, regarding exotic tree locations, landscape and visual matters, and the potential impact on volcanic viewshafts. The Maunga Authority responded to the information request on 17 December 2018.

[197] The Council commissioned independent expert peer reviews of the technical assessments appended to the AEE which were provided to Mr Dales.

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133 Affidavit of Antony Bernard Yates, 30 January 2020 at [17].
134 Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020.

The RMA provisions

[198] For clarity I summarise the RMA provisions relevant to the notification and consent process here.

[199] Section 95A governs the public notification of consent applications. It provides that the consent authority must consider and decide a number of questions, including whether:

(a) the activity will have or is likely to have adverse effects on the environment that are more than minor;[135] and/or

(b) special circumstances exist in relation to the application that warrant the application being publicly notified.[136]

[200] If the consent authority's answer to either of those questions is yes, the application must be publicly notified. Public notification requires publishing all relevant information on a freely accessible internet site, and a short summary of the notice in one or more local newspapers.[137]

[201] Section 95B sets out a similar process for "limited notification" of an application to particular groups or persons. The consent authority must consider and decide, among other questions, whether:

(a) there are "affected persons".[138] A person is an affected person "if the consent authority decides that the activity's adverse effects on the person are minor or more than minor";[139] and/or

(b) special circumstances exist in relation to the application that warrant notification of the application to any other persons not already determined to be eligible for limited notification.[140]

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135 Resource Management Act 1991, s 95A(8)(b), determined in accordance with s 95D.
136 Section 95A(9).
137 Section 2AB.
138 Sections 95B(7)–(9).
139 Section 95E(1).
140 Section 95B(10).

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

The notification report and decision

[203] Mr Dales was appointed by the Council as the reporting planner responsible for processing the Application.

[204] Mr Dales prepared a notification and substantive report dated 11 February 2019 (Notification and Substantive Report). In his affidavit evidence Mr Dales gives an overview of his involvement with the Application.[141] He noted that the resource consents required by the proposal overlapped and so, under his discretion, he considered them together.[142] This approach is known as "bundling", which he says is common practice where multiple resource consents are required for a single proposal.

[205] Mr Dale sets out his assessment of the notification provisions of the RMA, and his recommendation that the Application should be granted without either public or limited notification (Notification Recommendation).

[206] The first part of this assessment, required under ss 95A, 95C and 95D of the RMA, is whether the application should be publicly notified. Mr Dales set out an assessment of the adverse effects of the Application, under the following headings:

(a) Effects on Landscape Values and Visual Amenity;

(b) Effects of construction – Noise, and Public Access and Recreational Amenity;

(c) Effects on Ecology;

(d) Effects on heritage;

(e) Effects on Arboriculture;

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141 Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020.
142 At [43].

(f) Effects arising from Land Disturbance; and

(g) Effects on the Stability of the site.

[207] The Notification and Substantive Report concludes that the Application should be processed without public notification for the reasons that:

- In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor;
- Any adverse ecological effects arising from the proposal can be appropriately managed as part of the works programme to ensure that any adverse effects are less than minor;
- Any adverse effects on public access and recreation will be short term in nature and can be considered to be less than minor;
- The proposed works have been designed to be sympathetic to the heritage values of the Maunga, and can be managed to ensure they are less than minor;
- The tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects are therefore considered to be less than minor;
- Any effects associated with land disturbance and stability can be appropriately managed to ensure they are less than minor; and
- There are no special circumstances.

[208] Mr Dales then made an assessment under ss 95B and 95E of the RMA as to whether to give limited notification of the application. In short, this requires determining whether particular persons will be adversely affected in terms of the statute. The Notification and Substantive Report concludes that no persons stand to be adversely affected, giving reasons as follows:

- … adverse noise effects on people arising from the proposal are short term in nature and can be managed so that they are less than minor.
- Although public access to the Maunga will be temporarily disrupted, this disruption will be short term in nature, and necessary for health and safety reasons, and the applicant has proposed a communications plan to ensure that users of the reserve are aware of any restrictions. Overall, it is considered that any adverse effects on people accessing the Maunga will be less than minor;

- As outlined with respect to the tests of public notification, any landscape and visual effects of the tree removals experienced by people with an outlook to or using the Maunga are likely to be short term in nature and it is considered that these effects are mitigated by the proposed restoration planting, and in the context of the volcanic cone landform that will be exposed, any adverse effects are less than minor;

- Given the scale and nature of the works, any construction traffic associated with the removal of the processed trees, and that associated with the necessary machinery, will be limited in volume, short term in nature, and occur only in the hours of work (7:30am–6pm Monday to Friday with no work on weekends or public holidays), and as such can be considered to be less than minor; and

- The applicant has engaged with local Iwi groups and the general public as part of the consultation process for the Tūpuna Maunga Integrated Management Plan (IMP). Having reviewed the IMP, this document makes clear the expectations with respect to exotic vegetation and cultural significance of the restoration of the Maunga, and the outcomes of this engagement have been incorporated in the application.

[209] The Notification and Substantive Report sets out that there are no special circumstances warranting any persons being given limited notification of the Application.

[210] The Notification and Substantive Report's conclusions are that:

(a) under s 95A the Application may be processed without public notification; and

(b) under s 95B limited notification is not required.

[211] Accordingly, Mr Dales recommended that the application be processed non-notified.

Notification Decision

[212] Barry Kaye was appointed by the Council to make the notification decision on the Application (Notification Decision) under delegated authority. His evidence sets out his experience, noting that he regularly carries out s 95 notification assessments and has reviewed hundreds of s 95 assessments in resource consent applications that

he has dealt with as a Duty Commissioner.[143] He has been an Independent Hearings Commissioner for Auckland Council since 2006.

[213] Mr Kaye also made the decision to grant consent under ss 104 and 104B of the RMA (Substantive Decision). Mr Kaye's affidavit evidence sets out an overview of his involvement with the Application. He confirms in the Notification Decision that he had read "the report and recommendations" on the Application, the Notification and Substantive Report, and a range of other material including:

(a) the Application and its supporting documents (including the AEE and supporting expert reports and all correspondence);

(b) the Maunga Authority's response to the Council's request for further information under s 92 of the RMA;

(c) the specialist reports prepared on the Council's behalf;

(d) the IMP; and

(e) the draft decisions report template prepared by Mr Dales.

[214] Mr Kaye made the Notification Decision on 20 February 2019. He decided that:

(a) Under s 95A the Application should proceed without public notification because "the activity will have or is likely to have adverse effects on the environment that are no more than minor", and "there are no special circumstances that warrant the Application being publicly notified, because "there is nothing exceptional or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that public notification should occur".

[143] Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020 at [3].

(b) Under s 95B the Application should proceed without limited notification because there are no adversely affected persons and no special circumstances that warrant the Application being limited notified to any persons.

[215] As a result, Mr Kaye decided that the Application should proceed on a non-notified basis. He also made the Substantive Decision granting consent. In his affidavit Mr Kaye states that:[144]

> The Substantive Decision confirmed my understanding of the proposal in relation to making the Notification Decision in so far as embedding a number of key aspects of the proposal into relevant consent conditions. Those conditions ensured that the identified effects [with potential to adversely affect people] would be mitigated/managed in the manner that I envisaged when making the Notification Decision.

[216] I note that the Substantive Decision has not been challenged by the applicants.

The submissions

The applicants' submissions

Public notification – "adverse effects no more than minor"

[217] The applicants challenge Mr Kaye's decision (for the Council) under s 95A that public notification was not required because "the activity will have or is likely to have adverse effects on the environment that are no more than minor". They say the decision was flawed for four reasons:

(a) it was based on inadequate information;

(b) it reflected an unlawful balancing of positive and negative effects;

(c) it applied an incorrect definition of "effect" by dismissing effects perceived as "short term"; and

(d) it was unreasonable.

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144 At [37].

[218] I set out the submissions and my analysis on each of these issues in turn.

(a) Inadequate information

[219] Before setting out the submissions I briefly address the legal approach to the issue of inadequate information in the context of notifying a consent application under the RMA.

[220] In *Mills v Far North District Council*, Fitzgerald J reviewed the applicable principles when considering the adequacy of the information before a consent authority making a decision as to whether or not to publicly notify an application for resource consent.[145] She concluded:

> [142] … while there is no separate ground for judicial review based on the (now repealed) statutory requirement for a consenting authority to be satisfied as to the adequacy of the information, a decision to notify a resource consent, and to grant a consent itself, must nevertheless be reached on the basis of adequate and reliable information. As Glazebrook and Arnold JJ observed in *Auckland Council v Wendco (NZ) Ltd*, "sound public administration permits nothing less." (footnotes omitted)

[221] Her Honour referred to *Gabler v Queenstown Lakes District Council*,[146] in which Davidson J said:[147]

> [65] … While a consent authority does not have to be "satisfied" of the "adequacy" of information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects. I recognise there is room for debate whether the word "satisfy" as opposed to "decides" indicates a higher degree of certainty was required before the amendment, but a decision whether adverse effects are, for example, "less than minor" could not be reached unless the decision maker was "satisfied" of that. I do not see how a Council could decide something unless it was satisfied that it was sufficiently and relevantly informed and satisfied of the decision it makes. A Council could not say it was "not satisfied" about those matters but nevertheless go on to make a decision which affects the rights of others.
>
> [66] In short, I agree with Wylie J that the obligation on the Council to be "satisfied" that it has adequate information is no longer a separate and reviewable element of its decision making process. I do not consider that this in any way altered the need for a decision maker to be sufficiently and relevantly informed. It does not alter the need for the decision maker to apply relevant and not irrelevant considerations, and make a decision which stands up to the test of "reasonableness". Being sufficiently and relevantly informed

145 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453.
146 At [141].
147 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 10 ELRNZ 76 at [65].

> does not ensure these elements of decision making will be lawfully undertaken. In these respects *Discount Brands* in my view has undiminished force. It recognised a distinct step in the (repealed) legislation, but there must always be a secure foundation for such important decisions. Parliament cannot have intended to remove that foundation. That is not to endorse a counsel of perfection, but of sufficiency and relevance, and that is how I conclude the decision in this case should be judicially reviewed. It is fundamentally a test of the quality of the decision.

[222] I turn now to the submissions.

[223] The applicants say Mr Kaye had inadequate information, first, as to the effects of cutting down the 345 trees on the use, enjoyment and amenity value for users of and visitors to the reserve. That should have been central to his consideration given the classification of the reserve as a recreation reserve, with a focus on conserving the recreation value of the reserve to visitors. Second, the reserve is an "open space zone" under the Auckland Unitary Plan (AUP), which required Mr Kaye to consider "the loss of amenity values" resulting from the removal of the trees. Third, the long and extensive use of the reserve by the local community and others for recreation should have been considered.

[224] The applicants say the consideration in fact given to the amenity effects on visitors was only cursory. Mr Blakely for the applicants says the assessment made by Ms Peake, a landscape architect, which was provided to the Council was inadequate.[148]

[225] The evidence of Mr Barrell for the applicants is that Mr Kaye also had inadequate information as to the arboricultural effects of the felling.[149] While the respondents produced a report for Mr Kaye from their tree removal contractors, Treescape, that addressed only how best to remove the trees, not whether they should be removed or the effects of removal.[150] No arboricultural assessment of those matters was provided. Nor was the Application referred to the Council's arboricultural

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148 Affidavit of Philip Ronald Blakely, 17 February 2020. Mr Blakely has 35 years' experience as a practising landscape architect. A focus of his work has been the management and design of natural and historic areas, both within the Conservation Estate and public reserves administered by councils.

149 Affidavits of Andrew Francis Barrell, 6 December 2019, 18 December 2019, 14 February 2020 and 21 April 2020. Mr Barrell has around 35 years' experience as an arborist and in the tree management and arboriculture industry.

150 Further Affidavit of Andrew Francis Barrell, 18 December 2019 at [13]–[17]; and Reply Affidavit of Andrew Francis Barrell, 14 February 2020 at [10].

specialists for advice.[151] No consideration was given to the environmental benefit which the 345 mature trees provide for the remaining native trees.[152] No consideration or weight was given to the effect on the 345 trees themselves, as part of the "environment". Finally, in relation to arboricultural effects, no reference is made to the Council's Urban Forest (Ngahere) Strategy, which provides for the retention and protection of mature, healthy trees, regardless of origin.[153]

[226] The applicants also say that there was inadequate information before Mr Kaye as to the heritage value of the 345 trees.

[227] Acting on inadequate information, the applicants say, also amounts to a failure by Mr Kaye to take into account relevant considerations.[154]

The Council's submissions

[228] The Council notes that "inadequate information" is no longer in itself a separate ground of judicial review or jurisdictional threshold, but, accepts that a notification decision and substantive decision on a resource consent must "nevertheless be reached on the basis of adequate and reliable information".[155]

[229] The required threshold was clearly reached here, given the comprehensive application submitted to, and expert peer reviews obtained by, the Council as consent authority.[156]

[230] In his affidavit, Mr Dales lists the information he had before him when making the Notification Recommendation.[157] He also explains the process he undertook to

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151 Reply Affidavit of Andrew Francis Barrell, 14 February 2020 at [8].
152 Affidavit of Andrew Francis Barrell, 6 December 2019 at [46]; and Further Affidavit of Andrew Francis Barrell, 18 December 2019 at [15].
153 Affidavit of Andrew Francis Barrell, 6 December 2019 at [30]; and Further Reply Affidavit of Andrew Frances Barrell, 21 April 2020 at [16].
154 See *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 at [10].
155 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73 at [37]–[41]; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114]; *Classic Developments NZ Ltd v Tauranga City Council* [2020] NZHC 945 at [24].
156 As required by *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [142]; and *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
157 Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020.

request further information from the Maunga Authority under s 92 of the RMA. He then confirms that in his opinion he had adequate information on which to base his assessment. He says:[158]

> In assessing the Application, I had adequate and reliable information to understand the nature and scope of the proposed development, to assess the magnitude of any adverse effects on the environment associated with the Application, and to identify the extent of effects it may have on people.

[231] Mr Kaye confirmed in his affidavit evidence that he:[159]

> … read the Application, all supporting documents including correspondences, and the reports prepared on behalf of the Council including Mr Dales' Notification and Substantive report. I also confirm I undertook a site visit. I was satisfied that I had sufficient information to consider the matters required by the RMA and to make my decisions under delegated authority on the Application.
>
> My view remains that the detailed and expert information that was provided to me was sufficient for me to make a proper and informed decision and addressed all relevant matters adequately.

[232] Mr McNamara's submission is that the information before the Council was sufficiently comprehensive to enable Mr Dales, as reporting planner, and Mr Kaye, as decision-maker, to consider on an informed basis the nature and scope of the proposed activity as it relates to the AUP, to assess the magnitude of any adverse effect on the environment, and to identify any persons who may be more directly affected.[160] As such, they were legally competent to determine the Application should proceed without public or limited notification. The Council's submissions then address the individual matters on which the applicants say the Council had inadequate information.

Use, enjoyment and amenity value

[233] As to the applicants' submission that the Council's consideration of the amenity effects on visitors was "cursory", the Council refers to evidence which it says

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158 At [76].
159 Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020 at [34]–[35].
160 As required by *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114].

shows that effects on reserve users, and key "amenity effects" (adverse effects on "amenity values" as defined in the RMA) were considered.

[234] The information before the Council included Ms Peake's Landscape and Visual Assessment for Proposed Tree Removal Ōwairaka (Landscape and Visual Assessment). Ms Peake assessed the visual amenity effects of the Application and in doing so identified and considered visual effects on three viewing audiences – visitors, users of the open space network and residents/users of the surrounding street network.

[235] In the part of the Landscape and Visual Assessment regarding the visual effects on visitors to Ōwairaka, Ms Peake:

(a) considered the different types of routes that visitors would take and made general observations about the extent of visual change on each route;

(b) made general comments about the extent of visual change resulting from the vegetation removal;

(c) commented that, generally, the removal of the exotic vegetation will reinstate the natural character of the volcanic feature and mountain, and has the opportunity to enhance the visitor experience;

(d) acknowledged that the trees being removed may be perceived by some viewers as providing some amenity; and

(e) concluded "that the visual effects of the vegetation removal on visitors will "range from positive through to low adverse".

[236] The Landscape and Visual Assessment also separately considered the visual effects of vegetation removal on users of the open space on the Maunga. Ms Peake concluded that for this group visual context was "a secondary and minor element so that the removed trees would have low impacts". Ms Peake then considered in detail effects on residents and users of the surrounding street network, providing assessments from a range of viewpoints. She noted there would be a range of visual changes, from positive to moderate adverse, but that "from most viewpoints the removal of

vegetation, particularly from the crest of the tihi, will enhance the profile and legibility of the volcanic feature", resulting in positive effects. She noted that some residents would likely view the visual effects of removal of vegetation as positive, and some as negative, depending on the nature of their view and whether they appreciated the difference between native and exotic vegetation. The Landscape and Visual Assessment concludes the visual effects of the vegetation removal would "range from positive through to low adverse, depending on the location of the viewer". It also notes that there will be some negative temporary effects associated with the various methods of tree removal, but these will be only for a limited time.

[237] Mr Dales relied on this assessment in his Notification Recommendation, together with the peer review carried out by Peter Kensington, the Council's Consultant Landscape Architect, in reaching the conclusion that any adverse visual effects will be less than minor.[161] Mr Dales' evidence is that, in his opinion, that was sufficient information and a more "fine-grained" assessment of effects within the reserve was not required for him to make his recommendation.

[238] Those assessments were also before Mr Kaye when he made the Notification Recommendation.

[239] The Council says that Mr Dales and Mr Kaye also had information before them that assessed the noise, public access and recreational amenity effects of the tree removal as effects that would affect visitors' use or enjoyment of the reserve. The AEE addressed recreational effects and public access, noting that the proposed works would lead to "parts or all of the park being closed for temporary periods". Mr Dales, in the Notification Recommendation, included a separate section addressing the construction effects of the proposal (in terms of noise, public access and recreational amenity). He concluded that effects on public access were "short term in nature and can be considered less than minor".

[240] Other sections of the Notification Recommendation addressed expert assessments of ecological effects, including effects on avifauna (referred to in some of the applicants' evidence of their experience visiting Ōwairaka) and effects on heritage.

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[161] Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020 at [64].

The AEE also addressed potential effects on cultural and spiritual values. All these aspects of amenity, which warranted consideration given the RMA definition of "amenity values", were considered and referred to by Mr Kaye in the Notification Decision.

Arboricultural effects

[241] The Council says that the Notification Recommendation and Notification and Substantive Report reflect that sufficient information as to the "arboricultural effects" of the tree removal was available to, and considered, by the Council. Counsel points to Mr Dales' evidence regarding his understanding of "arboriculture effects" – the effects of the tree removal work (as detailed in the tree removal methodologies prepared by Treescape) as it relates to the management of the effects of the removal process on the native trees being retained,[162] and that he reviewed the Arboricultural Assessment and Removal Methodology provided with the Application before concluding he was "satisfied that the tree removal works can be undertaken in a manner that is consistent with best arboricultural management to ensure that any adverse arboriculture effects on will be less than minor".[163]

[242] The Council says that Mr Dales' decision not to seek input (such as a peer review) from a Council arboricultural specialist does not mean that the Council did not have adequate information about these effects, or that they were not adequately considered.[164] Counsel points to the Notification Recommendation which notes that the proposed tree removal methodologies in the Arboricultural Assessment and Removal Methodology, prepared by Treescape, are consistent with those confirmed as appropriate by the Council Arboriculture specialist in relation to recent resource consent applications by the Maunga Authority for tree removal on Māngere Mountain and Maungarei (Mt Wellington).

[243] The Council says that Mr Kaye had this information before him when he made the Notification Decision, and also gave explicit consideration to arboricultural effects. His decision records that "the tree removals methodologies are considered

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162 Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020 at [53].
163 At [50].
164 At [52].

consistent with best arboricultural practice, and any adverse effects are therefore considered to be less than minor".

[244] As to other matters that the applicants say should have been considered as part of the assessment of "arboricultural effects", beyond the effects of the removal process on the trees being retained, the Council responds that those matters were assessed by the appropriate experts:

(a) the landscape and visual effects of the removal of the trees were assessed by Ms Peake on behalf of the Maunga Authority, and peer reviewed by Mr Kensington on behalf of the Council; and

(b) the ecological effects of the removal of the trees, including the effects on the flora and fauna of Ōwairaka, were assessed by Mr Mairs of Te Ngahere (2009) Ltd on behalf of the Maunga Authority[165] and peer reviewed by Sarah Budd of Wildlands Consultants Ltd on behalf of the Council.[166]

[245] Mr Dales and Mr Kaye took those assessments into consideration when making the Notification Recommendation and Notification Decision respectively.

[246] The Council also addresses the applicants' submission that no consideration was given to the "environmental benefit which the 345 mature trees provide" for the remaining native plants and for the native plants yet to be planted. The Council says this is incorrect, as the assessment of the ecological effects prepared by Te Ngahere and included as part of the AEE clearly identified as a possible adverse effect "potential damage to existing large native trees such as pōhutukawa, pūriri, and tōtara through the removal process of the exotic trees".

[247] Further, the Council peer reviewer Ms Budd identified as one of three primary adverse ecological effects to be considered, "temporary loss of vegetation cover and habitat for native fauna". Notwithstanding that this matter was considered, the Council submits that the tests under ss 95A and 95B required it to focus on "adverse

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165 Affidavit of Richard John Mairs, 31 January 2020.
166 Ms Budd's review is affixed to the Affidavit of Antony Bernard Yates, 30 January 2020.

effects" for the purposes of notification decision-making, rather than looking at positive benefits provided by the trees which it was proposed to remove. Similarly, counsel says the Urban Forest (Ngahere) Strategy had limited relevance as consistency with Council strategy documents is not a focus under the statute.

[248] Finally, the Council submits that the effects on the 345 trees themselves was clearly considered, in that they would be removed and this was not overlooked. The Council points to Ms Budd's report which highlighted temporary loss of vegetation cover and habitat for native fauna. Counsel goes on to say that, equally, the Council as consent authority considered the broader effects (on the environment, and on people) of the removal and restoration planting project.

Heritage values

[249] As to the heritage value of the trees to be removed, the Council notes that in the Notification and Substantive Report and Notification Decision, Ōwairaka is scheduled as a Category A historic heritage place in the AUP.

[250] In the peer review prepared by the Council's Historic Heritage Specialist Joe Mills the historic heritage of Ōwairaka is described as follows:[167]

> Ōwairaka is one of the Auckland region's most significant historic heritage places with a rich history of pre-European Maori occupation resulting in highly significant archaeological remains covering much of the maunga. Ōwairaka is scheduled as a Category A* Historic Heritage Place (01576) in the Auckland Unitary Plan with archaeological controls. Large sections of the maunga have been historically quarried or otherwise excavated, resulting in sections with less intact archaeological remains.

[251] The Notification Recommendation includes a section entitled "Effects on heritage". This section refers to the Heritage Impact Assessment prepared by Mr Druskovich and provided as part of the Application, and Mr Mills' peer review. After considering their assessments Mr Dales concluded in the Notification Recommendation that he was satisfied that any adverse effects associated with the heritage values of the site can be managed so that they are less than minor.

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[167] Mr Mills' review is affixed to the Affidavit of Antony Bernard Yates, 30 January 2020.

[252] Mr Kaye similarly concluded in the Notification Decision that the proposed works have been designed to be sympathetic to the heritage values of the Maunga and can be managed to ensure they are less than minor.

[253] The applicants have alleged that in addition to the consideration of effects on the heritage value of the Maunga the Council should have had information before it addressing the effects on the heritage values of the trees to be removed, and given consideration to those effects.

[254] The Council's response is that none of the trees on the Maunga (whether exotic or native species) are ascribed heritage significance in the AUP:

(a) the trees are not referred to at all in the Ōwairaka entry in the AUP's Schedule 14.1 Schedule of Historic Heritage, and in particular are not referred to in the description of the scheduled historic heritage place or listed as a "primary feature" of it; and

(b) none of the trees that are proposed to be removed are scheduled in the Schedule 10 Notable Trees schedule in the AUP. This was noted in the AEE. Mr Dales notes in his affidavit that is the usual way that trees with heritage value would be recorded and protected.[168]

[255] There was no information in the public domain to indicate the significance of the trees:

(a) Mr Dales says he saw no signage, plaques or similar on the site when he undertook his site visit indicating when any particular trees or groups of trees on Ōwairaka were planted, who planted them, or the circumstances in which they were planted.[169]

(b) Mr Yates' evidence is that when he undertook his planning assessment in September 2018 there was no record of the trees' heritage value as

[168] Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020 at [61].
[169] At [61]–[63].

described by the applicants in statutory documents, and no other historical evidence publicly available.[170]

(c) Mr Druskovich's evidence is that he had not been able to find any further information about who planted the trees and why.[171]

[256] Dr Philip Mitchell, an experienced planner and hearings commissioner, gave evidence for the Maunga Authority of undertaking a "notification peer review". He considers the statements made in evidence on behalf of the applicants regarding "heritage trees" and concludes that the Council "could not have been expected to consider this matter when such information was simply not available in any part of the public domain".[172]

[257] Dr Mitchell's evidence canvases the opportunities available, but not taken, by which the trees could have been identified and recorded, including through the IMP process and the process for the AUP (the schedule of historic heritage relating to Ōwairaka and the schedule of notable trees).[173] Because those steps were not taken, the information was not available to the Maunga Authority when it made the decision to fell the trees, or to Auckland Council when it was preparing the Notification Decision. On that point, Mr Yates notes that the AUP also has a process for scheduling notable trees.[174]

[258] Mr Dales has confirmed that he remains satisfied that, notwithstanding that the Application involves the removal of these and other exotic trees on Ōwairaka, the heritage effects of the Application would be less than minor.[175]

[259] As to the alleged failure by Mr Kaye to take into account relevant considerations, the Council says the applicants give no further explanation or analysis as to how this ground of review is made out. The evidence establishes that the Council did consider and take into account the matters identified by the applicants, with the

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170 Unsworn Further Affidavit of Antony Bernard Yates, filed 3 April 2020 at [7].
171 Affidavit of Brent Dale Druskovich, 30 January 2020, at [54].
172 Unsworn Affidavit of Dr Philip Hunter Mitchell, filed in April 2020 at [29].
173 At [27].
174 Unsworn Further Affidavit of Antony Bernard Yates, filed 3 April 2020 at [6].
175 Affidavit of Brent Dale Druskovich, 30 January 2020, at [53].

exception of the effects on the heritage values of the trees identified in the applicants' evidence, about which there was no information available.

Analysis

[260] I conclude that the Council did have sufficient relevant information before it in order to make the Notification Decision on an informed basis.

[261] Mr Dales and Mr Kaye are both very experienced planners, as is Mr Yates who prepared the AEE. Their experience in the notification of applications is set out above.

[262] Mr Dales, who processed the Application and prepared the Notification and Substantive Report that went to Mr Kaye, had comprehensive information before him. Various specialist technical reports supported the AEE and the Application, which included analysis of the adverse effects. The Council sought independent peer reviews of each of those specialist reports.[176]

[263] Mr Dales undertook a site visit. He also made a further information request of the Maunga Authority under s 92 of the RMA. Mr Dales' Notification Recommendation was peer reviewed by the Council's principal specialist planner.

[264] Mr Kaye in turn had access to Mr Dales' Notification and Substantive Report, alongside the Application, the AEE, the supporting expert reports and the peer reviews. He also had the information received in response to the s 92 request and the Council's specialist reports. He had a copy of the IMP, which he specifically sought from the applicant. He carried out a site visit. Mr Kaye then made the Notification Decision and the Substantive Decision. He says in his evidence "I was satisfied that I had sufficient information to consider the matters required by the RMA and to make my decisions under the delegated authority on the Application."

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[176] These were from Peter Kensington, the Council's Consultant Landscape Architect, who reviewed Ms Peake's Landscape and Visual Assessment; Joe Mills, the Council's Specialist, Historic Heritage, who reviewed the archaeological assessment provided by Mr Druskovich; Peter Runcie, a Consultant Accoustics specialist, who reviewed the noise effects assessment provided by Styles Group; and Sarah Budd, consultant Senior Ecologist, Wildlands, who reviewed the Effects on Ecology assessment.

[265] I take confidence in the breadth and depth of the expertise and information which the Council utilised in its notification process, including the making of the Notification Decision. I do not consider the applicants have pointed to any further relevant information without which the Council could not:

(a) understand the nature and scope of the proposed activity as it relates to the District Plan;

(b) assess the magnitude of any adverse effect on the environment; and

(c) identify the persons who may be more directly affected.[177]

[266] On the specific question of the heritage value of the 345 exotic trees, I am satisfied that there was no such information in the AUP Schedule of Historic Heritage or the AUP Notable Trees schedule, the sources of information which the Council would look to in the normal course. Nor was any information drawn to their attention. The appellants have not pointed to a serious failure on the part of the Council to be sufficiently and relevantly informed as to any heritage issues.

(b) Unlawful balancing of positive and negative effects

[267] The applicants say that Mr Kaye committed an error of law by balancing positive and negative effects when considering whether to notify the Application. They refer to that part of the Notification Decision where Mr Kaye concluded that the adverse effects on the environment of the activity were minor because, among other things:

> In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered short term in nature and effectively mitigated by the proposed restoration and replanting, such that they can be considered to be less than minor.

[177] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114]; *Classic Developments NZ Ltd v Tauranga City Council* [2020] NZHC 945 at [24].

Applicants' submissions

[268] The applicants say that while Mr Kaye used the language of "mitigation" in the Notification Decision, that was wholly inapt to explain what he was actually doing: using the positive effects of "the proposed restoration and replanting" to offset or justify the possibility of "adverse landscape and visual effects" resulting from removing the trees. In the applicants' submission the proposed planting did not "exclude" or "eliminate," in terms of *Bayley v Manukau City Council*, any of the "short term" adverse landscape and visual effects from removing the trees.

[269] The applicants rely on the Court of Appeal's decision in *Bayley* where, in relation to gauging the effects of an activity for the purposes of determining whether an application should be notified, the Court said:[178]

> … whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional soundproofing.

[270] The applicants also refer to *Kawau Island Action Inc Soc v Auckland Council*, in which a proposed condition did not result in the decision-maker being satisfied that the adverse effects would be "excluded" – merely that they would be reduced in effect.[179] Justice Gordon held the decision-maker was wrong to take them into account at the notification stage.[180]

The Council's submissions

[271] The Council accepts that positive effects are not relevant to notification decisions and that it is not permissible for consent authorities to carry out a "balancing" exercise between positive and negative effects when determining the level of adverse effects for the purposes of notification. However, it is permissible to take into account mitigation measures that form part of the proposal and reach a conclusion as to the overall level of adverse effects.

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178 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580.
179 *Kawau Island Action Inc Soc v Auckland Council* [2018] NZHC 3306, (2018) 20 ELRNZ 848.
180 At [142].

[272] The Council says Mr Kaye considered the restoration planting as providing *mitigation* for the adverse visual effects of the tree removal. He then, quite properly, reached a conclusion as to the overall level of effects. Counsel says the *Bayley* and *Kawau Island* decisions are of very limited relevance here.[181]

[273] The Council contends that in this case the proposed mitigating conditions are inherent in the Application, being prospective conditions of consent for the proposed activity, and the case is more akin to *Auckland Regional Council v Rodney District Council*.[182] There the Court of Appeal considered the question of whether, on a notification decision, the consent authority can take into account prospective conditions of consent as mitigating the effects of the activity. It held that the answer was yes, "in respect of conditions that are inherent in the application, and no, in respect of those which are not".[183]

[274] The Court of Appeal referred to *Montessori Pre-School Charitable Trust v Waikato District Council*:[184]

> It would defy common sense if when making a s 93 decision the consent authority could not have regard to the practical reality of what adverse effects on the environment would be. To determine that self-evidently requires considerations of conditions that would affect such reality.

[275] Here, the "Proposal" as described in the Notification Decision was "to remove exotic vegetation and undertake restoration planting on Ōwairaka". While a number of separate land use consents were required because different rules under the AUP were engaged, there was a single proposal involving both vegetation removal *and* restoration planting.

[276] Mr McNamara submits it would be artificial to consider the effects of the vegetation removal separately from the mitigation that has been proposed and is required by the conditions of consent. He says that, as noted by Blanchard J in *Bayley*,

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181 For completeness I note that since the hearing of this case *Bayley* has been applied by the High Court in *Trilane Industries Ltd v Queenstown Lakes District Council v Nature Preservation Trustee Ltd* [2020] NZHC 1647.

182 *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 453 at [140]–[142].

183 At [53].

184 *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12]; quoted in *Auckland Regional Council v Rodney District Council*, above n 182, at [59].

failing to consider a proposal involving multiple resource consents as a whole "would be for the authority to fail to look at the proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces".[185] I note that those comments deal with the reverse situation – an application which might appropriately be processed without notification in a vacuum, but might require notification due to being part of a package of applications, the others of which should be notified.

[277] In his Notification and Substantive Report Mr Dales said that the "resource consents required by the proposal overlap", and, as an orthodox exercise of discretion he considered them together.[186] Counsel says Mr Kaye's conclusion as to the *overall* level of effects of the Application, having regard to both the vegetation removal and the restoration planting that comprised the proposal, was properly reached. There was no impermissible balancing, rather an approach reflecting what the Maunga Authority's proposal actually was.

Analysis

[278] I conclude that the Council did not unlawfully balance positive and negative effects, for the following reasons.

[279] Mr Hollyman contends that the resource consent application was for two different things:

- removal of exotic trees from the Maunga; and
- planting of native trees and shrubs.

He says that the respondents were in error when they grouped those two activities as a single proposal.

[280] As above in the context of the first three causes of action,[187] I do not agree.

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185 *Bayley v Manukau City Council* [1998] NZRMA 513 (CA) at 580.
186 Unsworn Affidavit of Brooke James Macdonald Dales, filed 3 April 2020, at [94].
187 At [34].

[281] As the Maunga Authority's evidence and the Application itself made plain, the removal of the exotic trees was a part only of what the Maunga Authority referred to as a "cultural, spiritual and ecological restoration of Ōwairaka." The decision to fell the trees cannot be carved off from the decision to undertake restoration replanting. They are both part of the same project.

[282] The test under ss 95A and D of the RMA is whether "the activity is likely to have adverse effects on the environment that are more than minor".

[283] As the Court of Appeal said in *Bayley*:[188]

> … it is important in considering effects to identify the scope of the activity for which consent is sought.

[284] The Court of Appeal in *Auckland Regional Council v Rodney District Council* said "the activity is what the applicant wishes to do as expressed in its application".[189]

[285] The Application was "To remove exotic vegetation and undertake restoration planting on Ōwairaka-Te Ahi-kā-a-rakataura/Mount Albert (Ōwairaka) at 27 Summit Drive, Mount Albert." There was a single proposal before the Council, involving both exotic tree removal and planting of native trees and plants. Although a number of separate land use consents were required, what was sought was consent to undertake a single activity. The draft conditions as to planting annexed to the AEE were an inherent part of the proposal for which resource consent was sought and ultimately required by the conditions of the consent. The draft conditions included requirements that the planting be undertaken in accordance with the finalised Planting Plan (a draft of which was submitted with the Application) and maintained thereafter.

[286] While the Council imposed the planting as a condition on the grant of the Application, it is plain it is not and was never intended to be a limitation or an afterthought. The planting is an integral part of the Ōwairaka resoration project. As Mr Kaye noted in relation to his Substantive Decision the conditions "embedd[ed] a number of key aspects of the proposal."[190]

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188 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576.
189 *Auckland Regional Council v Rodney District Council* [2009] NZCA 999, at [55].
190 Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020, at [37].

[287] I agree with the Council that it would be artificial to consider the effects of the vegetation removal separately from the planting that has been proposed and indeed is required by the conditions of the consent. This is a case, like *Auckland Regional Council*, where it can properly be said that the condition was inherent in the Application. It is clearly distinguishable from *Bayley*.

[288] Mr Kaye was entitled to take into account prospective mitigating conditions inherent in the Application when considering its potential adverse effects.[191] He was also entitled to consider the practical reality of the Application as a whole.[192]

[289] There is an additional factor in support of my conclusion. In *Bayley* the Court of Appeal characterised the distinction as between "good" and "bad" effects.[193] The applicants' insistence that the removal of exotic trees and the planting of native trees and shrubs should be viewed as two different things, invites an assessment in those terms, where removal of the exotic trees is "bad" and planting is "good".

[290] But this is not a case where the cutting down of the exotic trees is a necessary, but unfortunate and "bad" effect of the activity for which consent is sought. It is an integral and essential part of the activity. While some of the replanting will have a mitigatory effect, the removal of the exotic trees in itself achieves a desired and positive effect. As I have already noted, the project as a whole is intended to facilitate the restoration of the "natural, spiritual and native landscape". It will open up viewshafts and defensive sight lines from Maunga to Maunga across Tāmaki Makaurau, open up terracing and other important archaeological features of the Maunga.

[291] Ms Peake notes that the overall aim of the project is to facilitate restoration of the natural, spiritual (cultural) and indigenous landscape of the Maunga. She also notes that there are positive visual effects derived from the enhanced profile and legibility of the Maunga as an identified outstanding volcanic feature.

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191 *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 453 at [53].
192 *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12].
193 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580.

[292] That categorisation does not reflect the reality of this case. As Ms Peake's Landscape and Visual Assessment makes clear that is not the case. For example, she says:

- From most viewpoints, the removal of vegetation, particularly from the crest of the tihi, will enhance the profile and legibility of the volcanic feature. This will result in positive visual effects.

  And

- Generally, the visual effect of the removal of vegetation may be perceived as positive by some and negative by others, depending on the nature of the view and whether they appreciated the difference between native and exotic vegetation.

[293] In her affidavit Ms Peake says:[194]

> The landscape strategy for the Tūpuna Maunga, and the conclusions of the landscape and visual assessment are dependent on restoring and enhancing the authenticity and visual integrity of the Maunga which includes making its cultural and natural features visually apparent.

[294] I have already referred to Mr Turoa's evidence where he notes that a very important element of the restoration project is opening up viewshafts and defensive sight lines from Maunga to Maunga while also opening up the terracing and other important archaeological features of the Maunga.[195]

[295] Mr Kaye had regard to Ms Peake's assessment (endorsed by Mr Kensington) and he too notes in his Notification Decision that there is potential for the visual effects to be viewed positively or negatively. To my mind, that highlights that this case involves the balancing of different qualities and different values.

[296] In conclusion on this point, plainly Mr Kaye as decision-maker did turn his mind to the landscape and visual effects of the Application and the mitigation provided within the activity for which consent was sought. As Mr Kaye noted, the conditions on the consent simply embedded what were key elements of the Application.

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194 Affidavit of Sally Barbara Peake, dated 31 January 2020, at [30].
195 Above at [31].

[297] In the overall context of this case it was, in my view, clearly open to the decision-maker to conclude that the adverse effects are no more than minor.

(c) Failure to apply or take into account the correct definition of "effect"

[298] The applicants say Mr Kaye discounted or ignored "any adverse visual effects" of the Application on the environment because they would, in his view, be temporary. That approach was wrong because it failed to apply or take into account the wide definition of "effect" in the RMA, which includes "any temporary or permanent" effect.[196]

[299] "Environment" is also defined widely, to include:[197]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (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

The Council's submissions

[300] The Council accepts that the definition of "adverse effects" in the RMA includes "temporary effects" but says that Mr Kaye did not discount or ignore any adverse landscape and visual effects of the Application because they were temporary. The conclusion he reached in the Notification Decision was that:

> Any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor.

[301] Mr Kaye took into account the duration of any adverse landscape and visual effects that would arise, and the mitigation that was proposed as part of the Application, as part of his assessment of the overall level of adverse landscape and visual effects. This approach was lawful and correct in the context of this Application.

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196 Resource Management Act 1991, s 3(b).
197 Section 2.

[302] Mr McNamara says the weight Mr Kaye gave to adverse landscape or visual effects, on account of those effects being temporary or for any other reason, is not a justiciable matter.

Analysis

[303] I conclude that the Council did not apply an incorrect definition of "effect" by dismissing effects perceived as short term.

[304] I accept that the fact that an effect will only be temporary in nature does not in itself mean it cannot be adverse. In *Kawau Island Action Incorporated Society* the fact that a helicopter's flight path and noise levels were to be restricted, and flights were to be limited to three flights during the day-time in any seven-day period, were insufficient to give the decision-maker confidence that the adverse noise effects would *excluded*, such that the balancing exercise was impermissible.[198]

[305] I reiterate my conclusion in relation to the applicants' submission that there was an unlawful balancing of positive and negative effects.

[306] Mr Kaye plainly did consider the duration of any adverse landscape and visual effects, based on the extensive material before him, and weighed that factor in his overall assessment of those effects. The weight he gave to the likely duration of any such effect, and their mitigation, was properly a matter for him. As Panckhurst J said in *Just One Life Ltd v Queenstown Lakes District Council*:[199]

> [79] … A more fundamental issue is that it is not my function to re-examine the merits of the various decisions reached. Rather I must determine whether such decisions involve reviewable error. That is whether the decision-making process itself involved an erroneous approach in law, was deficient on account of matters not considered or improperly considered, or produced an outcome which was plainly unreasonable. Errors of this ilk aside, the weighting to be given to competing considerations and the merit-based decisions reached are not justiciable in this forum.

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198 *Kawau Island Action Inc Soc v Auckland Council* [2018] NZHC 3306, (2018) 20 ELRNZ 848 at [141].

199 *Just One Life Ltd v Queenstown Lakes District Council* [2003] 2 NZLR 411 (HC), at [79]. That decision was overturned on appeal, but these comments were not addressed.

(d) The decision was unreasonable

[307] In addition to the alleged inadequacy of information, unlawful balancing of positive and negative effects and incorrect definition of "effect", the applicants say Mr Kaye was aware of other factors, which meant that the decision not to notify must be considered unreasonable. These were that:

(a) the Application was for consent to cut down 345 mature trees;

(b) the trees comprised almost half of those in the reserve;

(c) the respondents would be able to cut down the trees all at once; and

(d) the trees were situated in a popular urban public space, classified as a recreation reserve, a Significant Ecological Area, and an "open space zone".

The Council's' submissions

[308] The Council points to the high threshold to establish unreasonableness as a ground of judicial review in this context. In *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* Toogood J stated:[200]

> In my view, the principles to be applied to the plaintiff's contention that the Council's decision in this case was unreasonable are well-settled and follow the *Wednesbury* test. The Council's decision may be set aside if the decision was so irrational that no decision maker, acting reasonably, could have arrived at that decision.

[309] In *Webster v Auckland Harbour Board* Cooke P framed this as a decision "outside the limits of reason".[201]

[310] Mr McNamara says there is nothing to suggest, based on the information Mr Kaye had before him, that his assessment of the level of adverse effects was so irrational that no decision-maker, acting reasonably, could have arrived at the

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200 *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 113 at [52] (footnotes omitted).

201 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131; cited in *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [190].

Notification Decision he did. The Council's decision that the adverse effects were no more than minor was one that was reasonably open to it.

[311] *Mills v Far North District Council* involved evidence filed by members of the community in order to challenge the reasonableness of a council's conclusion that the environmental effects of a proposal were minor or less-than-minor.[202] Justice Fitzgerald dismissed the relevance of those affidavits, stating:[203]

> Nor are the subjective and non-expert views of members of the community, expressed in several additional affidavits adduced by the applicants, relevant or persuasive for these purposes. While I accept those views are no doubt genuinely and firmly held, many activities for which resource consent is sought will be unpalatable to some members of the community. That does not make them unreasonable.

[312] Her Honour was not satisfied, on the available evidence, that the Council's notification decision was a decision no reasonable consent authority could have reached.[204]

[313] In the Council's submission the same conclusion must be reached here. The Council's determination as to the level of adverse effects was not so irrational that no decision-maker, acting reasonably, could have arrived at it. Nor was it outside the limits of reason.

Analysis

[314] The applicants acknowledge that Mr Kaye was aware of the factors set out at [307] above. They say that having that knowledge it was unreasonable for him to reach the Notification Decision he arrived at.

[315] An articulation of the reasonableness test in this context is contained in *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council*:[205]

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202 *Mills v Far North District Council* [2018] NZRMA 113, at [52] (footnotes omitted).
203 At [192].
204 At [193].
205 *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 113 at [52] (footnotes omitted).

> [52] … In my view, the principles to be applied to the plaintiff's contention that the Council's decision in this case was unreasonable are well settled and follow the *Wednesbury* test. The Council's decision may be set aside if the decision was so irrational that no decision maker, acting reasonably, could have arrived at that decision.

[316] The evidence of the applicants' experts Mr Barrell and Mr Blakely provides the basis for their view that the Council's decision not to notify the Application was unreasonable.

[317] On the other hand, the Maunga Authority has provided affidavit evidence from Dr Mitchell, who has extensive experience in the planning and resource management area. Dr Mitchell reviewed the information that was before Mr Kaye and comments on the process undertaken for the resource consent. He concludes:[206]

> "20. On the basis of those technical assessments, the conclusions reached in the notification decision regarding adverse effects are, in my opinion, logical and appropriate. I would add further that in light of the conclusions of the various technical specialists, I consider that it would have been inappropriate for the notification decision to have reached a different conclusion.
>
> 30. In my opinion, the Auckland Council followed a valid and appropriate process when determining that the subject resource consent application should be processed without public notification."

[318] In *Mills*, as in this case, the Court was faced with competing expert evidence as to whether the effects on the environment would be more than minor. Justice Fitzgerald noted:[207]

> What that analysis invites, however, is no more than a "battle of experts". I anticipate that in areas such as this, which involve value judgements and subjective views, a range of experts could come to a range of conclusions.

[319] As in *Mills*, the issues in dispute in this case involve judgements and subjective views. A range of experts can come to a range of conclusions. Ms Norman, as an applicant, and other members of the community, have filed affidavits in support of the application for review, setting out what are plainly genuine and strongly held views on these questions. However, they are not relevant or persuasive for this purpose. Many activities for which resource consent are sought will be undesirable from the

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206 Unsworn Affidavit of Dr Philip Hunter Mitchell, filed April 2020.
207 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [191].

perspective of some members of the community. That does not make the Council's decision unreasonable.

[320] On the evidence before me I am not satisfied that the Council's Notification Decision was a decision that no reasonable consent authority could have reached. I do not discern any error of approach or unreasonableness in the conclusion reached. It is not enough that others may have reached a different conclusion. The decision is not unreasonable or irrational in the sense required.

Public Notification: "special circumstances"

[321] The applicants challenge Mr Kaye's decision (for the Council) under s 95A that public notification was not required because there are no special circumstances that warrant public notification.[208]

[322] The relevant passage from the Notification Decision reads:

> Under step 4, there are no special circumstances that warrant the application being publicly notified because there is nothing exceptional or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that public notification should occur. The proposal reflects the directions and purposes set out in the approved Integrated Management Plan (IMP) administered by the Tūpuna Maunga o Tāmaki Makaurau Authority.

[323] That was informed by the relevant passage of the Notification and Substantive Report, which read:

> Special circumstances are those that are:
>
> - exceptional or unusual, but something less than extraordinary;
> - outside of the common run of applications of this nature; or
> - circumstances which makes notification desirable, notwithstanding the conclusion that the adverse effects will be no more than minor.
>
> In this instance I have turned my mind specifically to the existence of any special circumstances and conclude that there is nothing exceptional or unusual about the application, and that the proposal has nothing out of the ordinary run of things to suggest that public notification should occur as:

[208] Under the Resource Management Act 1991, s 95A(9).

> • The proposed tree removals and ancillary works (including management techniques), and the management of the open space zoned land is generally consistent with the direction of the AUP:OP as applied through the discretion of the relevant activities of the AUP:OP, with the range of matters relevant to the development provided for in the plan specifically as either restricted discretionary or discretionary activities. Furthermore, the assessment above has not identified any aspect of the receiving environment or any other factor that would give rise to special circumstances. Therefore, I consider that making of an application for the activity cannot be described as out of the ordinary and giving rise to special circumstances. Therefore in this instance I conclude there are no special circumstances.

[324] The challenge is based on two submissions:

(a) that the portion of the Notification Decision regarding special circumstances failed to take into account relevant considerations; and

(b) it was unreasonable.

Law

[325] Special circumstances are not defined in the RMA. The parties agree that the Court of Appeal's explanation of "special circumstances" in *Far North District Council v Te Rūnanga-ā-Iwi o Ngāti Kahu* applies:[209]

> A "special circumstance" is something … outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification.

[326] There is limited scope for judicial review of a decision as to whether special circumstances exist. Justice Venning in *Urban Auckland, Society for the Protection of Auckland City and Waterfront v Auckland Council* observed that such a decision:[210]

> … involves the exercise of discretion based on the Council's assessment of the factual position and use of its expertise and judgment.

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209 *Far North District Council v Te Rūnanga-ā-Iwi o Ngāti Kahu* [2013] NZCA 221 at [36] (footnotes omitted); citing White J's decision below in *Te Rūnanga-ā-Iwi o Ngāti Kahu v Carrington Farms Ltd* (2011) 16 ELRNZ 664 (HC) at [84], in which White J applied *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 at 536; and citing *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 310; affirmed [1999] 3 NZLR 325 (CA).

210 *Urban Auckland, Society for the Protection of Auckland City and Waterfront v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [137]; citing *S&M Property Holdings Ltd v Wellington City Council* [2003] NZRMA 193 (HC) at [48].

[327] I also note also Simon France J's observation in the High Court judgment of *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council*, that a Council's decision as to special circumstances is not immune from review, it "is an area where experience is an important component in assessing whether an application gives rise to special circumstances" and any review "must recognise the familiarity a Council has with resource consent applications". [211]

[328] I turn to the applicants' submissions.

Failure to take into account relevant considerations

[329] The matters the Commissioner is said to have failed to take into account were, first, the absence of consultation with the public, including local residents and users of the reserve. The applicants refer to the statement in the AEE and statutory assessment provided to Mr Kaye where the Maunga Authority and the Council said that the Authority had engaged with the general public as part of the consultation process for the formation of the IMP, which has "clear expectations with respect to exotic vegetation and the cultural significance of the restoration of the Maunga…"

[330] The applicants say this is assertion rather than information.[212] The actual content of the IMP did not reflect "clear expectations with respect to exotic vegetation." As a consequence, Mr Kaye evidently failed to consider the IMP and what was consulted on.

[331] Second, Mr Kaye failed to take into account the actual content of the IMP. The applicants criticise the statement in his written decision that the proposal "reflected the directions and purposes" of the IMP, when it did not.

[332] Third, Mr Kaye failed to take into account the inconsistency of the Application with the directions set by the AUP. Mr Barrell, who gave expert evidence for the

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211 *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-636, 21 November 2007 at [131]. That case was upheld on appeal in *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* [2009] NZCA 73, (2009) 15 ELRNZ 144.

212 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [146] per Tipping J.

applicants, states that the Application was inconsistent with the direction set by chapter E.16 of the AUP.[213] That was a matter relevant to whether there were special circumstances warranting public notification.

[333] Fourth, Mr Kaye failed to take into account the fact that there was almost certain to be a strong public interest in the Application, given the substantial, historic and widespread use of the Maunga by the people of Auckland. The applicants rely by analogy on the finding in *Kawau Island Action* that:[214]

> In particular, it is the location of the boatshed incorporating the helicopter landing pad on a public beach which gives rise to special circumstances. To that extent, the proposal differs from the example [of a helipad elsewhere in Herne Bay] given by the Council in its decision…which is a more isolated location away from a main beach.

[334] The applicants submit that the felling of 345 mature trees in an urban public space clearly affects users, at least to the same degree as the construction of a helipad on a beach in Herne Bay, and therefore must constitute special circumstances warranting public notification.

The decision was unreasonable

[335] The applicants rely on their previous submissions and Mr Barrell's evidence that, in his experience of dealing with hundreds of consent applications relating to trees, the Application was "clearly exceptional".[215]

The Council's submissions

[336] The Council emphasises the limited scope of review in this context and that Mr Dales and Mr Kaye are both very experienced resource management practitioners, with many years of experience in their respective roles as reporting planner and independent commissioner. In particular, Mr Kaye has given evidence that he has been the decision-maker on a large number of resource consent applications to remove and/or alter trees. Both are well placed to determine whether a resource consent

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213 Unsworn Further Reply Affidavit of Andrew Francis Barrell, filed 21 April 2020, at [8].
214 *Kawau Island Action Inc Soc v Auckland Council* [2018] NZHC 3306, (2018) 20 ELRNZ 848 at [168].
215 Unsworn Further Reply Affidavit of Andrew Francis Barrell, filed 21 April 2020, at [5].

application is outside the common run of things, exceptional, abnormal or unusual. Their determination was that the Application was not.

[337] Whether there were "special circumstances" was considered in the Notification Recommendation which was received and taken into account by Mr Kaye for the Notification Decision. Both the Notification and Substantive Report and the Notification Decision discuss "special circumstances" in language mirroring the definition in *Far North District Council v Te Rūnanga-ā-Iwi O Ngāti Kahu*,[216] assessing whether the Application featured anything "exceptional or unusual" and whether the proposal featured anything "out of the ordinary run of things".

[338] The Council submits this was sufficient. The decision-maker turned his mind to the statutory test and reached a clear conclusion, based on his assessment of the factual position and use of his expertise and professional judgement. There is no requirement for a decision-maker to set out and dismiss a range of circumstances (such as those listed in the Amended Statement of Claim or the applicants' written submissions) that he or she has found not to meet the threshold of special circumstances.

[339] The Council addresses the applicants' specific allegations regarding the decision in the following terms.

Failure to take into account relevant considerations

[340] The Council says that the true ground for judicial review is a failure to take into account *mandatory* relevant considerations – those for which consideration is explicitly or impliedly required by the statute in the context.[217]

[341] For the applicants to be successful, it is not enough to show that a consideration:[218]

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216 *Far North District Council v Te Rūnanga-ā-Iwi o Ngāti Kahu* [2013] NZCA 221 at [36], [38] and [39].
217 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
218 At 183.

(a) was open to the Council to take into account (a permissible relevant consideration); or

(b) would have been sensible or desirable for the Council to take into account; or

(c) is one which another person, including an expert, considers should have been taken into account; or

(d) the Court would have taken into account if it were the primary decision-maker.

[342] Rather, the applicants must establish that Parliament, through the RMA, has required the Council to take the matter into account. Given the limited statutory guidance as to mandatory relevant considerations in this context, this is a very high threshold to overcome.

[343] Further, the RMA must be interpreted in a sensible and practical way. The 2009 amendments to the RMA were intended "to provide greater certainty to councils in relation to non-notification decisions and to facilitate the processing of resource consents on a non-notified basis".[219] Counsel says that the Act's workability would be undermined if decisions were vulnerable unless they addressed a long list of considerations devised by those who wish to challenge their decisions.

[344] Counsel submits that the Council is a specialist body empowered to make the Notification Decision by Parliament. The mandatory relevant considerations for notification and substantive decisions on resource consent applications under the RMA are accordingly framed in reasonably broad terms to reflect that dynamic – such as "adverse effects on the environment". Through this broad expression, Parliament intended to give consent authorities latitude to determine what matters are appropriate to take into account, and what weight to give them (subject to overall reasonableness).

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[219] *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [40].

[345] As to the specific matters the applicants claim the Council failed to take into account when determining there were no special circumstances warranting public notification, Mr McNamara makes the following submissions.

Alleged absence of consultation

[346] The Council submits there is nothing in the RMA, nor in the case law, that suggests that the nature or extent of consultation (whether under the RMA or any other legislation) that has been carried out is a mandatory relevant consideration when considering whether special circumstances exist. In fact, the RMA specifically provides that a resource consent applicant has no duty under that Act to consult any person about an application.[220] An argument that a lack of consultation is in itself a special circumstance warranting public notification is also difficult to support in light of that provision.

Actual content of the IMP

[347] The Council notes that:

(a) the Notification Decision records that Mr Kaye did review the IMP;

(b) Mr Kaye's affidavit confirms that not only did he consider the IMP, he obtained a copy on his own initiative as a copy was not provided in the materials provided to him by the Council,[221] and he amended the draft decision that had been provided to him by Mr Dales to include, when determining there were no special circumstances that warranted public notification, an additional statement confirming his opinion that "the proposal reflects the directions and purposes set out in the approved [IMP] administered by the [Maunga Authority]"; and

(c) in any event the content of the IMP was not a mandatory consideration when deciding whether there were special circumstances that warranted public notification.

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220 Resource Management Act 1991, s 36A.
221 Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020 at [27] and [33].

Alleged inconsistency with the direction set by the AUP

[348] The Council does not accept that the Application is inconsistent with the direction of the AUP, and relies on the conclusions reached in the Substantive Decision that the proposal was considered to provide for an acceptable outcome in respect of the relevant statutory documents; consistent with the outcomes anticipated by the "Outstanding Natural Features" and "Heritage" overlay provisions of the AUP and with the relevant matters for consideration under the AUP.

[349] However, the Council says that even if the Application was inconsistent with the direction of the AUP, it does not necessarily follow that this was a mandatory consideration the Council should have taken into account when determining if there were special circumstances, or that the inconsistency itself was a special circumstance. In *Mills* Fitzgerald J considered whether inconsistency with the general policy of the relevant planning documents would give rise to special circumstances and held:[222]

> I do not consider the mere fact that construction of the sheds does not "fit" within the general policy of the District Plan means their construction is exceptional, abnormal or unusual, in the sense of giving rise to special circumstances.

Public interest

[350] The Council says the case law is clear that public interest or concern about an application does not of itself constitute a special circumstance.[223]

[351] The Council submits that neither the likelihood of public interest, nor the fact that Ōwairaka is visited or used by large numbers of people, is sufficient to constitute a special circumstance, or are mandatory relevant considerations, nor special circumstances.

[352] As to *Kawau Island Action Inc Society*, the Council says not only are the facts not analogous, but the fact that one consent application has been considered by the

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222 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [179].

223 *Classic Developments NZ Ltd v Tauranga City Council* [2020] NZHC 945 at [53]; *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [137]; and *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 575.

High Court to be unusual, exceptional or outside the ordinary run of things to warrant public notification provides no assistance and creates no precedent as to whether a completely unrelated consent application might also.[224]

Unreasonableness

[353] In the Council's submission, the applicants have failed to meet the high threshold to establish unreasonableness. The Notification Decision's conclusion that there were no special circumstances that warranted public notification was a decision that was open to Mr Kaye, in light of the factual circumstances, the information before him and on the basis of his experience. Notwithstanding the contrary opinion held by Mr Barrell, Mr Kaye's decision (for the Council) was not so irrational that no decision-maker, acting reasonably, could have arrived at that decision.

Analysis

[354] The broadness of "special circumstances" in the RMA and the degree of discretion afforded to a council making the determination limit the scope of judicial review in this context. A report providing no elaboration for a conclusion that there are no special circumstances leaves itself open to criticism.[225] But "this is an area where experience is an important component in assessing whether an application gives rise to special circumstances: "any review must recognise the familiarity a council has with a resource consent application".[226]

[355] Both Mr Dales, in his Notification Recommendation, and Mr Kaye, in his Notification Decision, specifically addressed whether there are special circumstances. They use the language of *Far North District Council v Te Rūnanga-ā-Iwi o Ngāti Kahu*. I am satisfied that this was more than formulaic. Mr Kaye confirms in his affidavit that he turned his mind to this question.[227]

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224 *Kawau Island Action Inc Soc v Auckland Council* [2018] NZHC 3306, (2018) 20 ELRNZ 848.
225 *Royal Forest & Bird Protection Society Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-636, 21 November 2007 at [131].
226 At [131].
227 Unsworn Affidavit of Barry Lloyd Kaye, filed 3 April 2020 at [30].

[356] I address each of the applicants' specific grounds in turn. In relation to the submission that the Council failed to take into account relevant considerations, the starting point is Cooke J's statement in *CREEDNZ v Governor-General*:[228]

> It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision…

[357] The specific concerns the applicants point to under this head are lack of consultation with the public, failure to have regard to the actual content of the IMP, inconsistency with the AUP and the strong public interest.

[358] I accept the Council's submission that neither the RMA itself, nor relevant case law, requires that the decision-maker consider the nature and/or extent of any prior consultation when considering whether special circumstances exist.

[359] It is clear that Mr Kaye did review the IMP. He specifically sought a copy of it and amended the draft decision prepared by Mr Dales to add a specific statement that in his opinion "the proposal reflects the directions and purposes set out in the IMP]". What the submissions reveal is a difference of view as to what the IMP conveys, but there is nothing to suggest that I should go behind Mr Kaye's clear statement which, on its face, reflects that he had read and considered the IMP.

[360] I accept that, as in *Mills*, consistency with the directions set by a general policy such as the AUP was not a mandatory consideration. While Mr Barrell was of the view that the Application was inconsistent with the direction of the AUP, that was not Mr Dales' view. In his decision he concluded that the Application was generally consistent with the direction of the AUP. It is not the Court's function on judicial review to substitute one expert opinion with another.[229]

[361] The applicants say too that the strong public interest in the subject of the Application was a relevant consideration for the Council decision-maker. However, it

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228 *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
229 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453 at [113].

is plain from the authorities that public interest in and of itself does not constitute a special circumstance:[230]

> Further, even major levels of public interest cannot of itself give rise to special circumstances. If that was so, every application where there was any concern expressed by people claiming to be affected would have to be notified.

[362] As to the unreasonableness argument, the applicants rely on the four factors set out at [307] above. I reject that argument for the reasons given at [314]–[320] above.

[363] Finally, the applicants point to Mr Barrell's expert evidence where he says that the Application was "clearly exceptional". As above, I consider this an area where a range of experts could come to a range of conclusions.[231] Mr Kaye's decision that there were no special circumstances warranting public notification was one that was open to him. It could not be said to be a decision "outside the limits of reason".

[364] Overall, I am satisfied that, having regard to the extent and nature of the material that was before Mr Dales and Mr Kaye, and having regard to their expertise, it was open to Mr Kaye to conclude that there were no special circumstances for the purposes of s 95A(4).

Section 95B limited notification: adversely affected persons

[365] Section 95B(8) provides, relevantly, that a consent authority must determine whether "a person is an affected person in accordance with s 95E". Such persons must be notified under s 95B(9).

[366] Section 95E(1) says:

> For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section95B(4) and (9) (as applicable), a person is an **affected person** if the consent decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

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230 *Classic Developments NZ Ltd v Tauranga City Council* [2020] NZHC 945 at [53]; citing *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [137]; and *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 575

231 At [319].

[367] Mr Kaye decided, with respect to limited notification, that "there are no adversely affected persons." The applicants say that decision was flawed on four bases, being that:

(a) it was based on inadequate information;

(b) there was a failure to take into account relevant considerations;

(c) it reflected an unlawful balancing of positive and negative effects; and

(d) it was unreasonable.

[368] The applicants' submissions in relation to (a), (c) and (d) on this head mirror the submissions in relation to s 95A:

(a) Mr Kaye as the Commissioner had inadequate information as to the effects of the tree removal on the use, enjoyment and amenity value for users of and visitors to the reserve.

(b) Mr Kaye failed to take into account the actual content of the IMP and the absence of consultation with the public, including users of the reserve.

(c) Mr Kaye balanced the positive effects arising from the proposed restoration planting against "any landscape and visual effects of the trees removal experienced by people … using the Maunga." That was an error; the positive effects do not mitigate any negative effects on users, as those effects are not "excluded" or "eliminated."

(d) Mr Kaye's decision (for the Council) that cutting down what amounts to almost half the trees in the reserve would not even have a minor effect on users of the reserve was unreasonable.

[369] The applicants also say that Mr Kaye was aware that the proposal was to cut down almost half of the mature trees on the reserve and that the positive effect of the

native planting plan would only be achieved in many years' time. In those circumstances, they submit any reasonable decision-maker would have concluded that the adverse effect on visitors would be at least "minor."

Inadequate information

[370] On this point the applicants allege that the Council had inadequate information as to the effects of the tree removals on the use, enjoyment and amenity value for users of/visitors to Ōwairaka and rely on the reasons given in relation to the allegation of inadequate information in respect of the public notification decision.

[371] In response, the Council repeats its submissions that Mr Dales and Mr Kaye had sufficient information on these effects to make the Notification Recommendation and Notification Decision.

Failure to take into account relevant considerations

[372] The applicants claim that the alleged absence of consultation with the public, and the content of the IMP, were relevant considerations that should have been taken into account when deciding whether there were any adversely affected persons.

[373] The Council repeats the submissions made in relation to s 95A and says neither the extent of public consultation, nor the content of the IMP, were mandatory considerations that the Council was required to consider when making the decision whether there were any persons on whom the adverse effects of the Application would be minor or more than minor.

Unlawful balancing

[374] When considering the landscape and visual effects of the tree removals that would be experienced by people with an outlook to, or using Ōwairaka, the Notification Decision includes a reference to "positive effects". The applicants allege that Mr Kaye has carried out an unlawful balancing of positive and negative effects, and rely on the submissions made in respect of their similar claim regarding the public notification decision.

[375] As noted above, the Council accepts that only the adverse effects of the Application are relevant to notification under the RMA, but repeats its submission that the emphasis in the Notification and Substantive Report and Notification Decision was on the mitigation of the adverse visual effects, and the *overall* level of effects on people using the Maunga. This approach, the Council says, was not unlawful.

Unreasonableness

[376] The applicants also challenge the Notification Decision's conclusion that there were no adversely affected persons on the basis that it was unreasonable.

[377] The Council repeats its submission that the very high threshold for unreasonableness is not met. While there may be members of the public who use Ōwairaka for recreation and consider that the Application will have at least a minor adverse effect on them (including some of those that have given evidence on behalf of the applicants), this is not determinative of the reasonableness of the decision.

[378] The Council's decision that there were no persons on whom the adverse effects would be minor, or more than minor was not so irrational that no decision-maker, acting reasonably, could have arrived at that decision. Nor was it outside the limits of reason.

Analysis

[379] "Minor" is at the lower end of major, moderate and minor effects, but must be something more than de minimis.[232] The assessment of whether an effect is "minor" is one of fact and degree, requiring an exercise of discretion by the decision-maker. As Priestly J said in *Green v Auckland Council*:[233]

> The statutory tests of "minor", "more than minor" and "less than minor" can only be informed by context. One is dealing with degrees of smallness. Where the line might be drawn between the three categories might not be easily determined.

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232 *King v Auckland City Council* (1999) 11 ELRNZ 122; [2000] NZRMA 145 (HC), at [29](e).
233 *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1, at [126] (footnotes omitted).

[380] I repeat the findings I reached in respect of the submissions advanced in relation to public notification. I am not satisfied that the Notification Decision's conclusion that there were no persons on whom the adverse effects would be minor, or more than minor, was a decision no reasonable consenting authority could have reached.

Limited notification: "special circumstances"

[381] The applicants' submissions as to the special circumstances test under s 95B mirror those advanced in relation to s 95A. That is, Mr Kaye failed to take into account relevant considerations and made an unreasonable Notification Decision.

Council's response

[382] The Council relies on the submissions made in relation to the s 95A analysis as to whether there were no special circumstances that warranted public notification and says there were no special circumstances requiring limited notification. This was a decision that was open to Mr Kaye for the Council on the basis of the information available to him and in light of his experience.

Analysis

[383] I repeat my findings on the same issues canvassed at [354] to [364] above. I am not satisfied that the Council erred in reaching its decision that there were no special circumstances that required limited notification.

Result

[384] I decline to make any of the orders sought by the applicants against the first and second respondents.

Costs

[385] I invite the parties to agree costs but, failing agreement, the respondents are to file submissions on costs, each of no more than 10 pages in length within 14 working days of the date of this decision, with the applicants having 14 working days in which to reply with submissions of no more than 10 pages.

[386] Finally, and as I noted at the conclusion of the hearing, I am grateful to all counsel for their comprehensive and helpful written and oral submissions.

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Gwyn J

Draft Amendments to the Tūpuna Maunga Authority's Integrated Management Plan

1. Within the Integrated Management Plan, insert at the conclusion of paragraph 10.2, page 88, as follows:

   An ecological restoration programme will assist the cultural, spiritual and ecological restoration of the Tūpuna Maunga, including the planting of native species and removal of non-native trees. The detail of the programme is set out in Appendix 5.

2. Insert a new Appendix to the Integrated Management Plan as follows:

Appendix 5

Native restoration of Tūpuna Maunga

Returning native vegetation is a key step in healing the Tūpuna Maunga.

Over many decades, native trees species have been removed from the Maunga. Non-native trees have been randomly planted without any comprehensive plan for their future management or consideration of the cultural landscape. Many non-native trees, including weed species (some being identified in the Regional Pest Management Plan (RPMP)), have been allowed to self-seed by legacy administering entities. This has seriously adversely affected the integrity of the cultural landscapes of the taonga tuku iho that are the Tūpuna Maunga.

The purpose of the Native Restoration Programme is to facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga. This will include massive plantings of native species and the removal of non-native trees that negatively impacting the cultural features of the Maunga. This will help restore and enhance the mauri and wairua of the Tūpuna Maunga.

The restoration programme will ensure that the remaining cultural and archaeological fabric on the Maunga is protected, and made visible by removing non-native trees that are having a negative impact. Sight lines from the Maunga to other Maunga/pā will be opened to ensure that the connection from Maunga to Maunga is prominent.

All plant species identified in the RPMP will be removed.

Further guidance has been given regarding non-native trees as part of the Tūpuna Maunga Biosecurity Strategy[1].

As a matter of priority, non-native trees on the outer slopes of the Maunga will be removed to emphasise and protect the cultural features of the Maunga such as terracing and rua. To protect the

[1] Pg 34 section 6 of the Biosecurity Strategy states: 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.

archaeological values and the health and safety of people on the Maunga native and non-native trees may also need to be removed.

Ōwairaka/ Te Ahi-kā-a-Rakataura/Mt Albert

To achieve the cultural, spiritual and ecological restoration of Ōwairaka-te Ahi-kā-a-Rakataura, an exemplar WF7 Pūriri ngāhere[2] will be created as a representation of the forest that once stood on and near the Maunga:

- Approximately 13,000 native plants will be planted (of which approximately 5,180 have already been planted and are maturing well).
- Among the native plantings, culturally significant species will be planted to ensure that cultural traditions such as whakairo, raranga, and rongoa collection can continue into the future.
- Habitats for mokomoko and other native fauna will be restored.
- Pest control will be intensified over time to ensure the protection of the continuous ngāhere established near the tihi.
- All native trees will be retained.
- Approximately 345 exotic trees will be removed, including weed species identified in the RPMP.
- The methodology of the programme will include:
    - Retaining the tihi in grass.
    - Planting in areas where in situ archaeology has been destroyed by historic quarrying.
    - Selecting appropriate plants that can be planted near archaeological features.
    - Removing trees in a way that avoids ground disturbance and has minimal impact on archaeological features.
    - Ensuring that all trees that present a health and safety risk are removed.

Artist impression of the native restoration programme of Ōwairaka/ Te Ahikā-a-Rakataura/Mt Albert

[2] A WF7 Pūriri ngāhere forest type is a broadleaf forest that occurs in warm frost-free areas on fertile soils of alluvial and volcanic origin.

Pukewīwī / Puketāpapa / Mt Roskill

To achieve the cultural, spiritual and ecological restoration of Pukewīwī/ Puketāpapa / Mount Roskill a range of native species will be planted as a representation of the forest and ecosystems that once stood on and near the Maunga:

- Approximately 7,400 native plants will be planted (of which 4,800 have already been planted and are maturing well).
- Among the native plantings, culturally significant species will be planted to ensure that cultural traditions such as whakairo, raranga, and rongoa collection can continue into the future.
- A pā harakeke will be established on the Maunga.
- A mara kai will also be established on the Maunga, which will include amenity native tree plantings and traditional Māori kai.
- Several large native specimen trees will also be planted.
- Further planting sites will be identified in the future.
- Pest control will be intensified over time to ensure the protection of the continuous ngāhere established near the tihi.
- All native trees will be retained.
- Approximately 160 non-native trees (not all) will be removed, including weed species identified in the RPMP.
- The methodology for the programme will include:
    - Retaining the tihi in grass.
    - Planting in areas where in situ archaeology has been destroyed by historic quarrying.
    - Selecting appropriate plants that can be planted near archaeological features.
    - Removing trees in a way that avoids ground disturbance and has minimal impact on archaeological features.
    - Ensuring that all trees that present a health and safety risk are removed.

Artist impression of native restoration programme of Pukewīwī/ Puketāpapa / Mt Roskill

Ōtāhuhu/ Mt Richmond

To achieve the cultural, spiritual and ecological restoration of Ōtāhuhu/ Mt Richmond, a range of ecosystem planting will be represented in the restoration programme, including a large area of wetland species and a WF7 Pūriri ngāhere forest type as a representation of the forests and wetlands that once stood on or near the Maunga:

- 39,000 native plants will be planted on the Maunga (of which 12,000 have already been planted and are maturing well).
- Culturally significant species will be planted to ensure that cultural traditions such as whakairo, raranga, and rongoa collection can continue into the future.
- Habitats for mokomoko and other native fauna will be restored.
- Pest control will be intensified over time to ensure the protection of the continuous ngāhere established near the tihi.
- All native trees will be retained.
- Approximately 443 non-native trees and shrubs (not all) will be removed, including weed species identified in the RPMP.
- The methodology for the programme will include:
    - Retaining the tihi in grass and native species.
    - Planting in areas where in situ archaeology has been destroyed by historic quarrying.
    - Selecting appropriate plants that can be planted near archaeological features.
    - Removing trees in a way that avoids ground disturbance and has minimal impact on archaeological features.
    - Ensuring that all trees that present a health and safety risk are removed.

An artist impression of native restoration of Ōtāhuhu / Mt Richmond

Te Tātua a Riukiuta / Big King[3]

To achieve the cultural, spiritual and ecological restoration of Te Tātua-a-Riukiuta/ Big King a WF7 Pūriri ngāhere forest type will be planted as a representation of the forests that stood on or near the Maunga:

- 9000 native plants will be planted on the Maunga.
- Culturally significant species will be planted to ensure that cultural traditions such as whakairo, raranga, and rongoa collection can continue into the future
- Habitats for mokomoko and other native fauna will be restored.
- Pest control will be intensified over time to ensure the protection of the continuous ngāhere established near the tihi.
- All native trees will be retained.
- Approximately 197 non-native trees and shrubs (not all) will be removed, including weed species identified in the RPMP.
- The methodology for the programme will include:
    - Retaining the tihi in grass and native species.
    - Planting in areas where in situ archaeology has been destroyed by historic quarrying.
    - Selecting appropriate plants that can be planted near archaeological features.
    - Removing trees in a way that avoids ground disturbance and has minimal impact on archaeological features.
    - Ensuring that all trees that present a health and safety risk are removed.

[3] An artist impression will be included in the final appendix to the document.