

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT**

A20130010252

UNDER Section 338 of Te Ture Whenua Māori Act 1993

IN THE MATTER OF an application for recommendation to set apart
2,662m² of PARISH OF KOMAKORAU LOT
240B 2 BLOCK as a Māori reservation for the
purpose of an urupā

MARIA LEEANN GRAHAM AND MANIA
ORIWIA HOPE
Applicants

Hearing: 20 February 2014 (73 Waikato Maniapoto MB 77-107)
26 June 2014 (82 Waikato Maniapoto MB 106-147)
21 November 2014 (90 Waikato Maniapoto MB 8-9)
9 December 2014 (90 Waikato Maniapoto MB 227-233)
31 August 2015 (105 Waikato Maniapoto MB 99-106)
19 October 2015 (108 Waikato Maniapoto MB 290-337)
9 November 2015 (109 Waikato Maniapoto MB 173-201)
(Heard at Hamilton)

Appearances: Mania Hope and Maria Graham in person
Jane Stevens in person
David MacPherson in person
G Jones, Counsel for Waikato District Council

Judgment: 23 November 2015

RESERVED JUDGMENT (NO 2) OF JUDGE S R CLARK

Copies to:

Mania Hope and Maria Graham – By e-mail

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Introduction

[1] In August 2013, Russell Graham was buried at the Parish of Komakorau Lot 240B 2 Block (“the block”). At that time the block was not a burial ground within the meaning of that term as defined in the Burial and Cremation Act 1964 nor was it a Māori reservation set apart for the purposes of a Māori burial ground pursuant to Te Ture Whenua Māori Act 1993 (“the Act”).

[2] An application pursuant to s 338 of the Act was retrospectively filed on behalf of the trustees of the block seeking a recommendation to set apart part of the block as a burial ground.¹ I heard that application on 20 February and 26 June 2014 and subsequently issued a reserved decision on 2 July 2014.²

[3] In my decision I indicated that I was prepared to make a recommendation that an urupā be set apart subject to being satisfied about conditions relating to survey, planting/screening and the location and formation of an entranceway to the block.³ In addition I directed that the applicants also needed to provide the Court with a proposed trust order relating to the urupā.

[4] On 21 November 2014 I amended certain conditions relating to planting/screening. That was necessary to ensure that planting did not take place during the hotter part of the year and end up failing.⁴

[5] On 9 December 2014 I had to make further amendments to the planting and screening condition. By that stage it had become apparent that the process to achieve mature planting on the block for the purpose of providing an effective screen of the proposed urupā when viewed from the MacPherson/Stevens property, would take a number of years to achieve. Therefore I directed the trustees to erect a living ponga fence along the eastern boundary of the proposed urupā to a height of 1.80 metres.⁵

¹ Throughout this decision I will use the term “urupā”.

² *Graham – Parish of Komakorau Lot 240B 2* (2014) 80 Waikato Maniapoto MB 260 (80 WMN 260).

³ *Ibid* at [52] – [66] inclusive.

⁴ 90 Waikato Maniapoto MB 8-9 (90 WMN 8-9).

⁵ 90 Waikato Maniapoto MB 227-233 (90 WMN 227-233).

[6] In summary, the conditions relating to survey, the location and formation of an entranceway had to be complied with by 2 July 2015. The condition relating to planting and screening had to be complied with by 31 July 2015.

[7] By mid-August 2015 the Court had not received an update from the applicants concerning fulfilment of any of the conditions. A telephone conference was subsequently directed and held on 31 August 2015.⁶ On that day I noted that:

- a) Although survey work had been carried out, the Court had yet to receive an ML Plan approved as to survey by LINZ;
- b) Although an entranceway had been constructed the Court had not received any independent information confirming whether it met the TSG-E3 standard as directed; and
- c) It became obvious, from photographs filed by Ms Stevens, that the living ponga fence had not been constructed as directed.

[8] Therefore I set the matter down for a further hearing to review compliance with conditions previously imposed by the Court.

[9] That hearing was subsequently held on 19 October 2015.⁷ That morning, prior to the hearing formally starting, I undertook a site visit. My observations concerning the site visit are set out in a separate minute.⁸

The issues

[10] The issues as I see it are as follows:

⁶ 105 Waikato Maniapoto MB 99-106 (105 WMN 99-106).

⁷ 108 Waikato Maniapoto MB 290-337 (108 WMN 290-337).

⁸ 109 Waikato Maniapoto MB 173-201 (109 WMN 173-201). The minute records that the date of the site visit was 20 October 2015. That is incorrect, it was 19 October 2015. The date will be corrected pursuant to s 86 of the Act.

- a) Have the applicants satisfied the conditions previously set down by the Court? If so, am I now in a position to make a recommendation to set apart the reservation?
- b) If the conditions have not been met, should I refuse to make the recommendation?
- c) Should I refine the directions previously made and/or give the applicants further time to meet any conditions?

Survey

[11] The survey condition was straightforward. The applicants were directed to file a survey and cadastral survey data set approved by LINZ, as a non-primary parcel by 2 July 2015. I did not require the boundary points for the reservation to be ground marked.

[12] Maria Graham, one of the applicants, indicated that surveyors were approached in August 2014. Initial plans were made available to the trustees of the block in October 2014. It appears at some stage that the trustees instructed the surveyors that they wished to reduce the size of the urupā from 2,662m² to 1,075m².

[13] I was concerned that the Court had not seen any survey plan until the third affidavit of Mania Hope was filed on 16 October 2015. The delay was explained as being a misunderstanding between the trustees and the surveyor. Ms Graham informed the Court that the trustees requested that the proposed urupā be boundary marked so that they knew precisely where the boundaries of the urupā were. This may have led to confusion on the part of the surveyor, whom I am informed, thought that a survey plan would need to be prepared to the standard required to ensure that a full title (CFR) would issue for the urupā. Thus there was a delay in finalising plans.

[14] The latest iteration of a survey plan is attached to the affidavit of Mania Hope dated 15 October 2015. From my observations of the plan and during the site visits, it appears to be in order with one exception, that being that the Court has yet to receive an ML Plan

which has been approved by LINZ. The applicants and/or their surveyor need to move to achieve that step.

The entranceway

[15] I directed that the applicants were to meet with Waikato District Council staff in an effort to agree upon a suitable location for the entranceway. I then directed the trustees to construct a dual width entranceway to the TSG-E3 standard by 2 July 2015. Following that, the applicants were to provide the Court with a report confirming that the entranceway had been formed to that standard.⁹

[16] Mr Gatehouse, a Waikato District Council land development engineer, met with representatives of the trustees on site in August 2014, to identify a location for the entranceway. The site chosen was the existing entranceway.

[17] Following that, the Waikato District Council (via Mr Gatehouse) commissioned an independent report from GHD Limited (“GHD”). That report was received by the Council on 28 October 2014. It referred to matters such as the location of the driveway, sight lines, separation distances and crash history.

[18] It appears that in August 2015 work was then carried out to the entranceway. The trustees asked Mr Gatehouse to return to the block to see if the work carried out met the TSG-E3 standard.

[19] Mr Gatehouse carried out a site visit in early September 2015. At that stage he raised some concerns relating to the entranceway. He provided further advice to the trustees on 9 September 2015 as to how to remedy the issue.

[20] Further work was undertaken by the trustees in September 2015. On 18 September 2015 Mr Gatehouse carried out a further inspection and advised as follows:¹⁰

I have inspected the entrance and am satisfied that it is safe and fit for the purpose as intended. Thank you for taking the time to revisit and rework the site.

⁹ *Graham – Parish of Komakorau Lot 240B 2*, above n2 at [61]-[62].

¹⁰ Third affidavit of Mania Hope, 14 October 2015, Exhibit “X”.

[21] Mr Gatehouse gave evidence before me on 19 October 2015.¹¹ He conceded that although the entranceway did not meet the TSG-E3 standard, in his opinion it was fit for purpose. He explained that there are many urupā throughout the Waikato district and very few have an adequate entranceway and nor do they need to because of their intermittent use. Therefore the approach he took was to ensure that any entranceway was “fit for purpose”.

[22] Mr Gatehouse was closely cross-examined by Mr David MacPherson and challenged on a number of issues. Mr MacPherson also gave direct evidence in relation to the entranceway. His concerns relate both to the location of the entranceway and its formation. In summary those concerns are:

- a) Following the release of the reserved decision in 2014 he met with Mr William Bryant, a senior land development traffic engineer from Waikato District Council, who then had oversight of this matter. Mr MacPherson’s evidence was that the Waikato District Council staff agreed that the proper place for access was at the southern end of the block, that is closer to the MacPherson/Stevens property;
- b) Mr MacPherson challenged the GHD report concerning its crash history analysis. The GHD report referred to one minor and three non-injury ‘loss of control’ crashes at the location in the last 10 years. Mr MacPherson gave evidence that he was personally aware of two fatalities on that stretch of road and anecdotally about a number of other incidents;
- c) Mr MacPherson suggested that a traffic management plan was needed whichever entranceway was eventually chosen, if the urupā was approved;
- d) Mr MacPherson was critical of the design of the entranceway, the fact that it wasn’t sealed and that it did not meet the TSG-E3 standard;
- e) Mr MacPherson raised concerns at the speed limit being 100 kilometres in that general location. He indicated that the road was a high speed one and

¹¹ 108 Waikato Maniapoto MB 290-337 (108 WMN 290-337).

that he frequently observed cars cutting corners and straddling the centre line;

- f) Mr MacPherson raised concerns about cars being parked on the verge on both sides of the road which was an extremely unsafe practice in his opinion; and
- g) Mr MacPherson reiterated his concern that the Waikato District Council appeared to have changed its mind as to the location of the driveway and should have consulted him prior to doing so.

[23] The criticism made by Mr MacPherson that Mr Gatehouse “approved” the design and construction of the entranceway when it did not meet the TSG-E3 standard is a valid one. In the hearings I held prior to the release of the reserved decision on 2 July 2014, I received evidence from the Waikato District Council that the appropriate standard for the formation of the entranceway was to the TSG-E3 standard. After the applicants had carried out some work this year, they asked Mr Gatehouse to return to see if they met that standard.

[24] Whilst I accept that Mr Gatehouse was trying to be helpful towards the applicants when he “approved” the entranceway in his e-mail of 18 September 2015, that was not what I directed. Furthermore Mr Gatehouse confirmed in answer to a question from the Bench that sealing the entranceway does increase safety, albeit marginally. I see little reason to depart from the condition I previously imposed. I am conscious that will increase the cost for the applicants however, it is a condition which they and the Waikato District Council have been aware of for some time.

[25] On the issue of the location of the entranceway, I have evidence from three engineers all saying slightly different things. Mr William Bryant gave evidence before me on 20 February 2014.¹² Notwithstanding the fact that the safe sight stopping distances exceeded the Council requirements, he noted that the existing entranceway was placed alongside a safety barrier. This affected sight visibility to the north when vehicles were exiting from the property. For those reasons he recommended that the entranceway be

¹² 73 Waikato Maniapoto MB 77-107 (73 WMN 77-107).

relocated to the south to remove that visibility restriction. He provided an aerial photograph over which was superimposed the location and dimensions of an entranceway. I note that his proposal for the location of an entranceway was a few metres to the south of the existing entranceway and certainly not at the extreme south of the block.

[26] I do not doubt that Mr MacPherson and Mr Bryant had subsequent discussions after the release of my reserved decision on 2 July 2014. Having said that, I have not heard directly from Mr Bryant in relation to any subsequent post-decision discussions.

[27] Mr Gatehouse is the current Waikato District Council engineer tasked with overseeing this matter. Mr MacPherson raised questions which were critical of the analysis in the GHD report about the crash history at the site. The GHD report had referred to there being only one minor and three non-injury “loss of control” crashes at that location in the past ten years. Mr MacPherson was able to highlight that there had in fact been two fatalities on that stretch of road along with other traffic accidents. Thus Mr MacPherson queried Mr Gatehouse on whether he relied upon a flawed report in forming his conclusions.

[28] Mr Gatehouse’s evidence was that he had already formed the opinion that the proposed entranceway was a safe location. He commissioned the GHD report so that the Road Manager at the Waikato District Council had an independent opinion on the matter.¹³

[29] Mr Gatehouse conceded that after receiving the GHD report, he subsequently became aware of the fact that there had been a fatal loss of control accident in that area. Thus he was challenged as to whether or not the conclusions he had reached were flawed and/or whether they changed.

[30] In response to that line of questioning he said:¹⁴

C Gatehouse: To be honest, Mr Macpherson, no it wouldn’t. My understanding of the accident subsequently, and I’ve reviewed my opinion since I heard about that accident, was that it was a loss of control accident. It’s got nothing to do with the location other than there’s a bend there. It could have happened at any other bend on the road.

¹³ 108 Waikato Maniapoto MB 313 (108 WMN 313).

¹⁴ Ibid.

D Macpherson: So loss of control, someone coming off a motorcycle and having their body parts scattered down the road, is not something that will concern you about that particular area where the entrance is?

C Gatehouse: The entrance, as it stands, has perfectly safe sightlines. What happens to drivers on the road and what they do in driver behaviour has got nothing to do with my evaluation of whether people entering and exiting that entrance can see properly.

[31] The third piece of engineering evidence I have available to me is the GHD report. I accept a criticism levelled at it by Mr MacPherson which is that the crash history in the report is inaccurate. Having said that, the report does confirm that the entranceway has adequate sight distances to the north and south and those sight distances are in excess of what is required in the Waikato District Council Development Manual. The report also confirms that there are other entranceways to the north and south of the proposed entranceway and the separation of those entranceways conforms to the 80 metre separation required in the Waikato District Council Development Manual. I note the conclusion to the report which is that:¹⁵

... as long as the entranceway is constructed to Waikato District Council standards set out in the Development Manual, it is considered that the development of the urupā at this location and the existing position of the entranceway will not create safety issues along this section of River Road.

[32] On balance I do not propose to make any direction concerning the relocation of the entranceway. I accept that there was earlier evidence from Mr Bryant that in his opinion the entranceway should move a short distance to the south but I now have two further pieces of engineering evidence indicating that the proposed entranceway is and can be made safe, even if it may not be the optimum option.

[33] The concerns raised by Mr MacPherson are important but we should not lose sight of the fact that they relate to past driver behaviour on River Road. Those accidents had nothing to do with either the location of the existing driveway or vehicles entering or exiting the block.

[34] Traffic management plans were touched upon in the evidence before me, although little was provided in the way of direct evidence. This is a matter to which I will return.

¹⁵ Report of GHD, 28 October 2015 at 4.

[35] I also note the concerns raised by Mr MacPherson relating to speed limits on River Road. That is a topic over which I have no jurisdiction. Mr MacPherson was also concerned about what he considered to be a failure on the part of Waikato District Council to consult with him once they had “changed their mind” concerning the proposed location of the entranceway. Again that is an issue over which I have no jurisdiction. What I did do was direct Waikato District Council to consult with the applicants over the location of the entranceway, which is ultimately what they did.

[36] In summary a dual width entranceway must be constructed to the TSG-E3 standard. Once formed, the applicants must supply the Court with a report from the Waikato District Council confirming that the entranceway has been constructed to that standard. I make no direction requiring the entranceway to be relocated.

Planting and Screening

[37] The current condition for planting and screening is that the trustees were to erect a living ponga fence, along the eastern boundary of the urupā to 1.80 metres height.¹⁶ This condition is the latest touching on the issue of planting and screening. Previous conditions had to be amended, often because the trustees had been slow to fulfil them.

[38] It became apparent during the telephone conference held on 31 August 2015, after the Court received photographs from Jane Stevens, that the condition had not been met. At that stage only a portion of the eastern boundary of the urupā had been screened by a ponga fence.

[39] When I returned for the site visit on 19 October 2015, it was apparent that a considerable amount of further work had been carried out. Along the entire proposed eastern boundary of the urupā, a ponga fence had been erected. A number of plants had also been planted on that side immediately facing the MacPherson/Stevens property. Additional planting had also taken place along the proposed southern boundary.¹⁷

¹⁶ 90 Waikato Maniapoto MB 233 (90 WMN 233).

¹⁷ 109 Waikato Maniapoto MB 173-175 (109 WMN 173-175) minutes following site visit of 19 October 2015.

[40] Jane Stevens raised a number of concerns with the planting and screening that has taken place. In summary her concerns are:

- a) The Court originally directed that a planting plan be filed and planting take place. The only reason that a ponga fence was suggested (by her) is because of non-compliance with the previous planting direction;
- b) She is concerned about the structural integrity of the ponga fence and its aesthetics. She would like to see an independent report on the structural integrity of the ponga fence;
- c) Notwithstanding that a fence has been erected, parts of the urupā will still be visible from their property. She suggested an extension of the ponga fence along the southern boundary;
- d) She queried the bona fides and good faith on the part of the applicants. She was critical of the recent interaction with the applicants and their whānau;
- e) She asked that the Court not recommend that a Māori reservation be set apart.¹⁸

[41] In my reserved decision of 2 July 2014, I emphasised that it was naïve on the part of the whānau to bury Mr Graham in such close proximity to a neighbouring property and not expect an adverse reaction. For those reasons planting and screening conditions were put in place.

[42] As this matter has progressed it has been of concern to me that conditions have not been met. It was very apparent at the telephone conference held on 31 August 2015 that the current condition relating to the construction of the ponga fence had not been met. The reason proffered by the applicants was a lack of funding.

¹⁸ 108 Waikato Maniapoto MB 329-331 (108 WMN 329-331).

[43] Obviously further work has now been carried out. I have viewed the additions to the ponga fence and additional planting, the results of which are recorded in my site visit minutes dated 9 November 2015.

[44] I accept that the ponga fence achieves what the condition was aimed to ameliorate, that being providing an immediate form of relief to Ms Stevens and Mr MacPherson. Having said that, there are aspects of the fence as constructed and the planting which remain of concern. I record these matters as follows:

- a) That part of the ponga fence first constructed was built to a height of 2.10 metres. The top portion is also framed. The rest of the ponga fence, although not uniform in height, appears to be approximately 1.80 metres in height and is not framed. The differences in height and appearance can be clearly seen in the photographs attached to the site visit minutes;¹⁹ and
- b) Although the ponga fence provides effective screening viewed from some locations on the MacPherson/Stevens property, the further south one is on their property it is still possible to see part of the urupā. Although some planting has taken place along the proposed southern boundary of the urupā it will take some time for those plants to mature and provide any effective screening. I note the suggestion by Ms Hope that burial of tūpāpaku would not take part in that portion of the proposed urupā. Notwithstanding that offer, drafting or framing a condition to that effect is difficult.

[45] Having heard from the parties and taking into account their respective positions, I believe a position can be reached, which whilst it doesn't appease all concerned, will respond adequately to the situation. The conditions I now impose are:

- a) That portion of the ponga fence, which is 2.10 metres in height, situated on the proposed eastern boundary is to be lowered to a height of 1.80 metres. The top of the ponga fence, along its entire length, is to be framed in timber

¹⁹ 109 Waikato Maniapoto MB 177-201 (109 WMN 177-201).

by the trustees at their cost in a manner consistent with Photographs E6 and E7;²⁰

- b) The trustees of the block are also to erect a living ponga fence along a portion of the southern boundary of the proposed urupā, at their cost. That portion being from the southeast survey peg (marked “F” at 109 Waikato Maniapoto MB 176) to that point along the southern boundary where the double row of planting that bisects the proposed urupā has occurred (at approximately “G” at 109 Waikato Maniapoto MB 176). That fence is also to be 1.80 metres in height and is to be topped by a timber frame consistent with the ponga fence erected on the proposed eastern boundary.

[46] In reaching this decision I reviewed the previous evidence on this point and the conditions previously imposed. I gave consideration to directing further planting along the proposed southern boundary of the urupā rather than the harder form of screening in the form of a ponga fence. However I am conscious of two matters. Mr Graham has now been interred for some time and the planting which I have inspected on two occasions will take years to mature. I am also aware that conditions previously made in relation to planting have not been faithfully adhered to. Primarily I am concerned that these parties need to disentangle themselves. If I simply continue to impose conditions which will take time to fulfil it simply allows further opportunities for the parties to be at odds with each other. A living ponga fence, whilst not ideal does offer a more immediate form of screening and allow the parties to hopefully disentangle themselves.

[47] I make no other conditions in relation to planting. The trustees are of course at liberty to carry out any further planting in front of both portions of the ponga fence and along the balance of the southern boundary of the proposed urupā however I will not direct that as a condition.

Performance of the new conditions

[48] I have been concerned at the fact that the previous conditions have had to be amended and/or have not been complied with. In reviewing that non-compliance I had to

²⁰ 109 Waikato Maniapoto MB 187-188 (109 WMN 187-188).

ask myself whether in effect the trustees were taking a laissez-faire approach to compliance with the Court directions. Having seen and heard from them, although I am concerned at the tardiness in compliance with the conditions, I have not formed the impression that the trustees have sought to simply ignore the Court conditions. I accept the general position outlined by the trustees which is that they struggle to afford to meet the conditions that have been imposed.

[49] A recommendation by the Māori Land Court to set apart a Māori reservation requires an exercise of discretion by the Court. In this case due to the many and varied issues raised by a variety of persons and institutions, the exercise of discretion was a nuanced and finally balanced one.

[50] For those reasons I am prepared to give the trustees one further chance to comply with the conditions that I have imposed above. It is highly unlikely there will be any further extensions granted. The conditions I have imposed above must be complied with **no later than 30 June 2016**.

[51] I also direct the applicants to file and serve a memorandum **no later than 4.00pm, Friday 8 July 2016** on the issue of compliance with the conditions.

[52] Upon receipt of that memorandum I intend to carry out a final site visit to view the property. The applicants should note that if the conditions are met prior to 30 June 2016 they do not have to delay the filing of the memorandum.

Appointment of trustees/trust order

[53] A draft trust order must be filed with the Māori Land Court **no later than 30 June 2016** setting out the relevant powers, duties and obligations of the trustees. The trust order must contain conditions relating to the following:

- a) The maintenance and repair of the ponga fence;
- b) A suitable traffic management plan (either to be incorporated into the trust order and/or attached to it) which responds to the issues such as parking on

the verge, the provision of internal parking on the block and the exit and entry of a large number of cars on intermittent occasions.

Burial of further tūpāpaku

[54] I emphasise that I have yet to make a final recommendation to set apart a Māori reservation. Any final decision is dependent upon satisfactory fulfilment of the conditions which I have outlined above. Until that recommendation is made there is to be no burial of any further tūpāpaku prior to the publication of any notice setting apart the urupā in the Gazette.

Pronounced in open Court at 1.20 pm in Hamilton on the 23rd day of November 2015.

S R Clark
JUDGE