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

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Registrar/Deputy Registrar

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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
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> (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.

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[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),

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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

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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]

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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.

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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

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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

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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.

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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;

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[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 lwi 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".

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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

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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

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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.

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[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:

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[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