

IN THE ENVIRONMENT COURT OF NEW ZEALAND CIV-2018-AKL-000276
AUCKLAND REGISTRY

I MUA I TE KŌTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF an application for declaration under sections
310 and 311 of the Act

BETWEEN TŪPUNA MAUNGA O TĀMAKI MAKAURAU
AUTHORITY

Applicant

AND

AUCKLAND COUNCIL

Respondent

AFFIDAVIT OF TANIA EVELYN RICHMOND

Affirmed: 12 October 2018

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I **TANIA EVELYN RICHMOND**, of Auckland, Planning Consultant, affirm:

1. My full name is **Tania Evelyn Richmond**.
2. I am a Director of Richmond Planning Limited, a position I have held since 2003. Prior to that, from 1992 to 2002, I was employed by Auckland City Council in various planning roles, my last of which was Team Leader Planning Professional and Technical Services. Before that I held planning positions in central and local government.
3. I hold the qualification of Bachelor of Planning and I am a full member of the New Zealand Planning Institute. I have over 25 years of experience in planning and resource management.
4. I have provided planning advice and services to the Tūpuna Maunga o Tāmaki Makaurau Authority ("**Tūpuna Maunga Authority**") since 2015. This has included:
 - (a) the preparation of resource consents applications for capital works and renewals on the Tūpuna Maunga;
 - (b) advice on resource consents that may impact on the Tūpuna Maunga including the preparation of evidence and attendance at Auckland Council hearings; and
 - (c) advice on plan changes to the Auckland Unitary Plan ("**AUP**") that may impact on the Tūpuna Maunga including the preparation of evidence and attendance at Auckland Council hearings.
5. I am familiar with the background of the AUP, having attended mediation and presented evidence on Topics 032 Historic Heritage Schedules and Topic 081 Rezoning and Precincts to the Proposed Auckland Unitary Plan ("**PAUP**") before the Independent Hearings Panel ("**IHP**").
6. I confirm that I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note and that I agree to comply with it. I confirm that I have considered all the material facts that I am aware of that might alter or detract from the opinions that I express, and that this evidence is within my area of expertise.



INTRODUCTION

7. This affidavit is filed in support of Tūpuna Maunga Authority's application for declarations dated ~~5~~ ⁸ October 2018. *JB*
8. The Tūpuna Maunga Authority seek clarity on the interpretation of Activity Table D14.4.1 of the AUP. In particular, the declaration relates to the application of Table D14.4.1 where a proposed building both:
- (a) intrudes into a scheduled regionally significant volcanic viewshaft (to which rule D14.4.1(A3) of the Plan applies); and
 - (b) is also within a height sensitive area (to which rule D14.4.1(A7) of the Plan applies);
- (referred to in my affidavit as "overlap areas").
9. The issue is whether the Auckland Council has incorrectly read in a hierarchy between the rules in rules D14.4.1(A3) and D14.4.1(A7) (or rows A3 and A7 of Table D14.4.1).

TŪPUNA MAUNGA AUTHORITY

10. In 2014, following five years of Te Tiriti of Waitangi settlement negotiations, 14 Tūpuna Maunga¹ were transferred to the 13 iwi/hapū of Ngā Mana Whenua o Tāmaki Makaurau.² The Tūpuna Maunga are held in trust for the benefit of those iwi/hapū and people of Auckland.
11. Governance and administration of the Tūpuna Maunga is undertaken by the Tūpuna Maunga Authority. This is a co-governance body with equal representation from Mana Whenua and Auckland Council (together with a non-voting Crown representative).
12. In exercising its powers and carrying out its functions under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 ("**Redress Act**"), the Tūpuna Maunga Authority must have regard to the spiritual, ancestral,

¹ Matukutūruru/Wiri Mountain; Maungakiekie/One Tree Hill; Maungarei/Mount Wellington; Maungawhau/Mount Eden; Maungauika/North Head; Ōwairaka/Te Ahi-kā-a-Rakataura/ Mount Albert; Ōhinerau/Mount Hobson; Ōhūiarangi/Pigeon Mountain; Ōtāhuhu/Mount Richmond; Pukewīwi/Puketāpapa/Mount Roskill; Rarotonga/Mount Smart; Te Kōpuke/Tītīkōpuke/Mount St John; Takarunga/Mount Victoria; and Te Tātua a Riukiuta/Big King

² Ngā Mana Whenua comprises the following 13 iwi/hapū of Auckland:

Ngāi Tai ki Tāmaki; Ngāti Maru; Ngāti Pāoa; Ngāti Tamaoho; Ngāti Tamaterā; Ngāti Te Ata; Ngāti Whanaunga; Ngāti Whātua o Kaipara; Ngāti Whātua Ōrākei; Te Ākitai Waiohūa; Te Kawerau ā Maki; Te Patukirikiri; and hapū of Ngāti Whātua (other than Ngāti Whātua o Kaipara and Ngāti Whātua Ōrākei) whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri.

cultural, customary, and historical significance of the Tūpuna Maunga to Ngā Mana Whenua.³

INTEGRATED MANAGEMENT PLAN

13. Section 58 of the Redress Act requires the Authority to prepare and approve an integrated Management Plan ("IMP") for land under its administration. The purpose of the IMP is to establish how the Tūpuna Maunga will be cared for, managed and maintained both on an integrated basis while also identifying values specific to individual maunga.⁴
14. A single IMP⁵ which sets out the foundations for how the Tūpuna Maunga are valued, protected, restored, enhanced and managed in the future, was approved on 23 June 2016.
15. The IMP policies to protect the integrity of the landscape of the Tūpuna Maunga recognise that the Tūpuna Maunga are a part of a broader volcanic field, and that Mana Whenua and local communities wish to see the maunga and volcanic field in their entirety protected and enhanced.⁶
16. As set out in the IMP:
 - (a) The Tūpuna Maunga (ancestral mountains) of Tāmaki stand as the essence of Auckland. They are central to Auckland's identity and a point of difference around the world. Human occupation of Auckland spans around 1,000 years, and over that time the interaction of people with the maunga has changed from monumental and defensible settlements, to strategic maritime locations and source of resources (rock and water) through, to an unparalleled network of open spaces that all Aucklanders draw a sense of identity from.⁷
 - (b) The Tūpuna Maunga are among the most significant spiritual, cultural, historical, archaeological and geological landscapes in the Auckland region. The Tūpuna Maunga are sacred to Mana Whenua as taonga tuku iho (treasures handed down the generations).⁸
 - (c) The Tūpuna Maunga have come to be treasured and celebrated by all communities for their striking landscape and heritage features, the

³ Redress Act, section 109(3).

⁴ IMP, Page 53.

⁵ Approved 23 June 2016.

⁶ IMP, page 66.

⁷ IMP para 1.3, page 2.

⁸ IMP para 1.12, page 4.

distinct identity and sense of place they inspire and their value as open spaces for all Aucklanders to be active, and for respite, relaxation and escape from busy urban life.⁹

- (d) The Tūpuna Maunga o Tāmaki Makaurau hold a paramount place in the historical, spiritual, ancestral and cultural identity of Mmana Whenua, and define Auckland's identity and place.¹⁰
- (e) The Tūpuna Maunga were strategically important areas. Pā were built on high ground with palisaded fortresses ringed with (still visible) terraces supporting housing, storage pits and large gardens which extended onto the surrounding fertile soils. History records the various battles and strategic alliances as various tribes sought influence over Tāmaki. The maunga were also places of unity and connection with births and marriages taking place on them, as well as being places of interment.¹¹
- (f) The Tūpuna Maunga are revered by all peoples for their multiple layers of cultural, natural and built heritage. As Auckland continues to grow and intensify, the Tūpuna Maunga are increasingly important as spiritual and aesthetic anchors for all Auckland communities, and as valuable open spaces and places of refuge in an urban landscape. They will continue to be celebrated, treasured and valued for their defining heritage features and importance in shaping the character and identity of Tāmaki Makaurau.¹²
- (g) Auckland's key point of difference in the world is its unique Māori identity, with the Tūpuna Maunga being a tangible reminder of Mana Whenua occupation of Auckland over a millennia.¹³
- (h) It is for these reasons that the Tūpuna Maunga Authority supports progressing the bid for World Heritage inscription of the Tūpuna Maunga (as part of the Auckland Volcanic Field).¹⁴

17. The Tūpuna Maunga Authority therefore has a direct interest in protecting views to, from, and between the Tūpuna Maunga.

⁹ IMP para 1.15, page 4.

¹⁰ IMP para 2.5, page 9.

¹¹ IMP para 3.2, page 11.

¹² IMP para 3.10, page 13.

¹³ IMP para 3.11, page 13.

¹⁴ IMP para 3.12, page 13.

see PB

TŪPUNA MAUNGA AFFECTED AREAS

18. The Tūpuna Maunga Affected Areas ("TMAA") is a non-statutory layer on the Auckland Council Geomaps. This layer includes land administered by the Tūpuna Maunga Authority and land¹⁵ located around the lower slopes of each of Tūpuna Maunga. I understand the purpose of this layer is to recognise that:
- (a) the maunga are part of broader volcanic field extending beyond the legal boundary of the Tūpuna Maunga;
 - (b) changes to the landform and development within this area may impact on the Tūpuna Maunga, including its historical footprint; and
 - (c) the Tūpuna Maunga Authority has a direct interest in planning related matters within this area.
19. The TMAA includes, but is not limited to, the Height Sensitive Areas Overlay ("HSA"). In some instances, the HSA extends beyond the TMAA.
20. The Auckland Council produces a weekly resource consent report of lodged resource consent applications within the TMAA layer. This report is provided to the Tūpuna Taonga o Tamaki Makaurau Trust and the Tūpuna Maunga Authority. I regularly review this list and provide advice to the Tūpuna Maunga Authority on whether an application may be in conflict with the IMP.
21. For applications lodged on a non-notified basis, the usual process is that I provide feedback to the Auckland Council reporting planner to inform of conflicts with the IMP and, on occasion, provide my opinion on where modifications to a proposal would better address, protect, or restore the values of the maunga. I am mindful that I do not speak for iwi. Any opinions I express on the impact of an application on Mana Whenua values draws on references contained in the AUP and the IMP. Where an application within the TMAA is notified, the Tūpuna Maunga Authority is served with notice of that application, and I have assisted with the preparation of submissions for the Tūpuna Maunga Authority on such applications.
22. Where a resource consent application involves a building¹⁶ up to 9m in height that intrudes into a scheduled volcanic viewshaft, but consent has not been applied for under the volcanic viewshafts provisions, I have previously

¹⁵ A small portion of the Tūpuna Maunga Affected Areas layer is located within the Coastal Marine Area.

¹⁶ Excluding fences and walls, where their height does not exceed 2.5.

advised the Auckland Council reporting planner that the Tūpuna Maunga Authority considers this requires resource consent as a restricted discretionary activity under rule D14.4.1(A3). I have expressed the same position in applications for resource consent that I have prepared or reviewed. This is discussed further at paragraph 53 of this affidavit.

THE RELEVANT PROVISIONS

Introduction

23. The AUP was made operative in part on 15 November 2016. I understand outstanding appeals to this document do not relate to this declaration.
24. The AUP combines the regional policy statement, regional coastal plan, regional plans and district plans into one combined plan. The AUP has a hierarchical policy framework, with the regional policy statement at the top, which the regional and district plan provisions then give effect to.¹⁷
25. Those parts of the AUP that I consider relevant to this declaration are:
 - (a) Chapter A Introduction;
 - (b) Chapter B Regional Policy Statement, B4.3 Viewshafts;
 - (c) Chapter C General rules;
 - (d) Chapter D Overlays, D14 Volcanic Viewshafts and Height Sensitive Areas Overlay;
 - (e) Chapter L Schedules, Schedule 9 Volcanic Viewshafts Schedule; and
 - (f) The planning maps viewer.
26. A copy of the text of these provisions is attached marked **Exhibit A**.

General provisions and general rules

27. Chapter A1 Introduction provides information on the AUP, including its purpose, structure and relationship between its various parts. Clause A1.6.2 Overlays states that overlays generally apply more restrictive rules than the Auckland-wide, zone or precinct provisions that apply to a site, but in some cases, they can be more enabling.

¹⁷ Clause A1.3 of the AUP.

28. Overlays manage the protection, maintenance or enhancement of particular values associated with an area or resource. Overlays can apply across zones and precincts and overlay boundaries do not follow zone or precinct boundaries. Overlays also manage specific planning issues such as addressing reverse sensitivity effects between different land uses. Overlay provisions are located in Chapter D of the Plan and overlays are identified on the planning maps.¹⁸
29. Chapter C contains general rules that apply across the entire AUP, except for the RPS and where a rule specifically provides otherwise.¹⁹ Rule C1.6 Overall Activity Status states:
- (1) *The overall activity status of a proposal will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules.*
- (2) *Subject to Rule C1.6(4), the overall activity status of a proposal is that of the most restrictive rule which applies to the proposal.*
- (3) *The activity status of an activity in an overlay takes precedence over the activity status of that activity in a precinct, unless otherwise specified by a rule in the precinct applying to the particular activity.*
- (4) *Where an activity is subject to a precinct rule and the activity status of that activity in the precinct is different to the activity status in the zone or in the Auckland-wide rules, then the activity status in the precinct takes precedence over the activity status in the zone or Auckland-wide rules, whether that activity status is more or less restrictive.*

Previous declaration relating to these provisions

30. I understand the relationship between rules C1.6, C1.9 (not relevant to this declaration) and parts of Chapter D18 has been the subject of an Environment Court declaration.²⁰ I also understand that, while that previous declaration was prompted by the relationship between provisions in the Single House Zone and the Special Character Areas Overlay – Residential, the Environment Court directed the Auckland Council to undertake an analysis of the relationship between various overlays and underlying zones.²¹

¹⁸ A1.6.2 Overlays.

¹⁹ Rule C1.1 General rules.

²⁰ *Auckland Council v Budden* [2017] NZEnvC 209, *Auckland Council v Budden (No 2)* [2018] NZEnvC 3, *Auckland Council v Budden (No 3)* [2018] NZEnvC 30.

²¹ *Auckland Council v Budden (No 3)* [2018] NZEnvC 30 at [54].

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A draft of this analysis was attached to a Memorandum of Counsel for the applicant dated 27 July 2018. The Memorandum summarises the findings of the analysis, which identified potential issues with the implementation of seven overlays. I understand that Chapter D14 Volcanic Viewshafts and Height Sensitive Areas Overlay ("**Chapter D14**") is not one of the seven overlays where an issue has been identified by the Auckland Council as requiring a plan change.

Chapter D14, Schedule 9 and the planning maps

31. D14.4.1 Activity table, which is the subject of this declaration, is a rule within an overlay. The majority of overlays respond to a national direction. Chapter D14 Volcanic Viewshafts and Height Sensitive Areas Overlay appropriately recognises and provides for matters of national importance, as required by sections 6 (a), (b), (e) and sections 7 (c) and (f) of the Resource Management Act 1991 ("**RMA**").
32. Chapter D14 is structured under the following headings:
 - (a) description or background;
 - (b) objectives and policies;
 - (c) activity table;
 - (d) notification;
 - (e) standards;
 - (f) assessment criteria;
 - (g) special information criteria; and
 - (h) figures.
33. The overlay description sets out that Chapter D14 incorporates three elements:
 - (a) Regionally significant volcanic viewshafts;
 - (b) Locally significant volcanic viewshafts; and
 - (c) Height sensitive areas.

122 PB

34. Volcanic viewshafts have a point of origin at major public viewpoints. They traverse the city and converge often in overlapping segments at the tihi (top) of maunga. All but five are regionally significant volcanic viewshafts.
35. Regionally and locally significant volcanic viewshaft overlays are identified on the planning maps with an inverted **V** shape. The property summary within the planning maps also reference viewshafts. For example, A1 Mount Albert is described as:

Natural Heritage: Regionally Significant Volcanic Viewshafts And Height Sensitive Areas Overlay [rcp/dp] - A1, Mount Albert, Viewshafts

36. In addition to the regionally and locally significant volcanic viewshaft overlays identified on the planning maps, Schedule 9 Volcanic Viewshafts includes NZ Map Grid co-ordinates and surveying references for each viewshaft. It is my understanding that this information has been used to plot the height contours on the planning maps that generally accord with the floor of the viewshaft.²²
37. Height sensitive areas ("**HSA**") are areas of land located on the slopes and surrounds of the volcanic cones and Tūpuna Maunga. They are identified with an inverted triangular shape. ▼
38. As would be expected, on the planning maps there is an overlap between the volcanic viewshafts overlay and the HSAs. The property summary within the planning maps also references HSAs. For example, Mount Albert is described as:

Height Sensitive Areas Overlay [rcp/dp] - Mount Albert, Height Sensitive Areas

39. Consistent with other chapters in the AUP, Chapter D14.4.1 Activity table describes activities and assigns an activity status. Table D14.4.1 contains two sections with activities assigned a sequential referencing within the entire table:
- (a) Buildings (where they intrude into a scheduled volcanic viewshaft), excluding network utilities, electricity generation facilities, broadcasting facilities and road networks); and

²² This is consistent with section of the Practice note referred to in paragraph 46 of this affidavit.

- (b) Buildings in a height sensitive area, excluding network utilities, electricity generation facilities, broadcasting facilities and road networks.

40. Provisions that are directly relevant to this declaration are the following:

(A3) Buildings, except for fences and walls, up to 9m in height

(A7) Buildings up to 9m in height except as specifies in Standard D14.6.3

41. These provisions are shown in highlighted text (my own emphasis) in the extract below from the AUP.

Table D14.4.1 Activity table

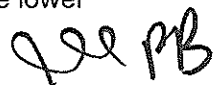
Activity		Activity status	
Buildings (where they intrude into a scheduled volcanic viewshaft), excluding network utilities, electricity generation facilities, broadcasting facilities and road networks)			
		Regionally Significant Volcanic Viewshaft	Locally Significant Volcanic Viewshaft
(A1)	Buildings that do not intrude into a viewshaft scheduled in Schedule 9 Volcanic Viewshafts Schedule	P	P
(A2)	Temporary activities	P	P
(A3)	Buildings, except for fences and walls, up to 9m in height	RD	P
(A4)	Fences and walls, where their height does not exceed 2.5m	RD	P
(A5)	Towers associated with fire stations operated by the New Zealand Fire Service that are no higher than the height allowed as a permitted activity in the zone	RD	P
(A6)	Buildings not otherwise provided for or that do not comply with the standards under D14.6	NC	RD
Buildings in a height sensitive area, excluding network utilities, electricity generation facilities, broadcasting facilities and road networks			
(A7)	Buildings up to 9m in height except as specified in Standard D14.6.3.	P	
(A8)	Buildings up to 13m in height in the areas identified in Figure D14.10.1	P	
(A9)	Temporary activities	P	
(A10)	Towers associated with fire stations operated by the New Zealand Fire Service that are no higher than the height allowed as a permitted activity in the zone	RD	
(A11)	Buildings not otherwise provided for or that do not comply with the standards	NC	

AUCKLAND COUNCIL ADMINISTRATION OF ACTIVITY TABLE D14.4.1

42. Auckland Council has prepared a practice note to deal with this issue. The Auckland Council Practice note – Auckland Unitary Plan (Operative in Part): Volcanic Viewshafts and Height Sensitive Areas D14 Overlay (“**practice note**”) provides guidance on Chapter D14. A copy of the practice note is

attached marked **Exhibit B**. Note, this Exhibit excludes what is Appendix 1 to the practice note, which are the maps of Schedule 9.

43. Auckland Council practice notes are generally intended for internal purposes and are not widely available. I understand their purpose is to provide guidance to staff and, in some circumstances, set a Council approach where a provision maybe open to more than one interpretation. I was provided a copy of this document in May 2018, after seeking clarification from Auckland Council staff on Table D14.4.1.
44. The practice note comprehensively addresses Chapter D14. The document includes background on the history and importance of the volcanic viewshafts, guidance on information requirements, guidance on assessing applications for resource consent and, importantly for this declaration, how to read Table D14.4.1. I consider sections 1, 2, 3 and 4 directly relevant to this declaration.
45. Section 1 includes information on the background to the HSA and its legacy plan origins permitting a maximum building height of 7.3m, 9m and 12m. The practice note refers to it being considered 'reasonable' (s85 of the RMA) to allow development up to these heights and this being changed to 9m in the AUP.
46. Section 2 provides practical information on how to identify the controls on the planning map viewer. This section also confirms my understanding that the contours, which represent the floor of the viewshaft, are indicative only, and that it is the location and survey co-ordinates in Schedule 9 that definitively establish the relevant rule, and in turn whether the activity is permitted under row (A1) of Table D14.4.1. I note that compliance can also be achieved by enabling rule D14.6.2, which provides for a surveyor to confirm that the building does not intrude the viewshaft due to the presence of landform. As the viewshafts apply to thousands of properties across the city, and in many instances are located well above the maximum zone height, the contours provide a very practical indication of whether there is any potential intrusion without the expense of the applicant engaging a surveyor.
47. Section 3 explains the difference between volcanic viewshafts and HSAs. It explains in practical terms aspects of the overlay description, and objectives and policies in Chapter D14. It also explains the reason why parts of Bucklands Beach is a HSA, even though it is not located around the lower slopes of a maunga.



48. Section 4 is particularly relevant to this declaration as it explains how to read Table D14.4.1, which is described as being "potentially unclear". As I understand from the practice note, as well as various discussions with Auckland Council staff, and opinions expressed in planning reports,²³ the Auckland Council position is that a building²⁴ up to 9m in height infringing a regionally significant volcanic viewshaft does not require resource consent as a restricted discretionary activity where it is also located in a HSA. Later in this affidavit, however, I set out where a contradictory approach has been taken by the Auckland Council.
49. The practice note explains the Auckland Council's position is that rule D14.4.1(A7) creates an exception to rule D14.4.1(A3), meaning that where a building is within an overlap area, only rule D14.4.1(A7) applies.
50. The sub-heading titled 'Reasonable use in height sensitive areas' contains further explanation of the Auckland Council position. Reference is made to the AUP carrying on the tradition of providing for reasonable use under s85 of the RMA and providing for buildings up to 9m²⁵ as a permitted activity (D14.4.1(A7)) in the HSA. The practice note states this is reinforced by the overlay description, and policies such as D14.3.4(c) and D14.3.5. Of particular relevance to this declaration are the last two sentences that directly address overlap areas:

The overlay description D14.1 also discusses enabling reasonable height in height sensitive areas even where the viewshaft height is less than 9m. It is in the context of these words that we read the activity table to explain the exception discussed above.

51. Further, in an Auckland Council section 42A report that includes this matter, the officer acknowledged "the contradiction" between rules D14.4.1(A3) and D14.4.1(A7), and noted that this can be resolved by the direction of the objectives and policies.²⁶ Extracts from that report are attached as **Exhibit C**.
52. I disagree with the Auckland Council position that D14.4.1(A7) creates an exception to rule D14.4.1(A3), and that the overlay description, and objectives and policies can be used to resolve this for the following reasons:
- (a) all parts of an activity table must read to determine activity status;

²³ Section 42A report BUN60078992, page 10, attached as Exhibit C.

²⁴ As defined in Chapter J Definitions.

²⁵ 13m in the case of the Devonport HAS.

²⁶ Section 42A report BUN60078992, page 10, attached as Exhibit C.



- (b) there is no rule in C1.6, the introductory text in D14.4, or in Table D14.4.1 that makes an exception to this approach;
- (c) the activity table contains two separate parts, consistent with the overlays serving two different purposes;
- (d) there is no hierarchy within Table D14.4.1 giving precedence to the HSA over the scheduled volcanic viewshaft; and
- (e) an overlay description, and objectives and policies cannot be used to determine whether a consent is required.

THE ISSUE

53. There is uncertainty around the way these provisions ought to be applied, and in two instance I am familiar with, this has led to inconsistency in their application. The Tūpuna Maunga Authority recently applied for and obtained resource consents for tihi closure and pedestrianisation works at Maungarei and Ōwairaka. I am familiar with these applications as I reviewed the Assessment of Environmental Effects prepared by my colleague.
54. In each application, consent was sought under rule D14.4.1(A3). In both applications, the works also occurred on land within the HSA. Each decision approached this differently:
- (a) Resource consent LUC60317866 is for works at Maungarei ("**Maungarei consent**"). The decision, issued by duty commissioner on 8 June 2018, included consent *"To construct a building up to 9m in height that intrudes into a regionally significant viewshaft is restricted discretionary under rule D14.4.1(A3). The height of the Toilet block is 2.54m."* A copy of this decision is attached as **Exhibit D**.
 - (b) Resource consent LUC60319903 is for works at Ōwairaka ("**Ōwairaka consent**"). The decision, issued by duty commissioner on 26 July 2018, did not include consent for a building (toilet block 2.54m in height) under rule D14.4.1(A3) but did include consent under rule D14.4.1(A4) for *"Fences and walls, where their height does not exceed 2.5m is a restricted discretionary activity in the regionally significant volcanic viewshaft under D14.4.1(A4). The retaining wall is a maximum height of 750mm."* A copy of this decision is attached as **Exhibit E**.

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55. I note the Auckland Council position with the Ōwairaka consent creates an anomaly that is not commensurate with the scale of effects. That is, a building up 9m in height would not trigger consent under the first part of Table D14.4.1 but the 750mm retaining wall located around the carpark required a resource consent as a restricted discretionary activity.
56. I am also aware of other an example where there has been a difference in approach between the Council, Tūpuna Maunga Authority, and applicants.²⁷
57. I am also aware²⁸ of resource consent applications for buildings which infringe the scheduled volcanic viewshaft and are located within the HSA. The applications I have reviewed were made on the basis of the Auckland Council position and therefore resource consent was not sought for an intrusion into the volcanic viewshaft under rule D14.4.1(A3).

Affected parties

58. I have been provided with information from the Auckland Council identifying the numbers of properties:
- (c) that are partly or fully covered by HSA (9420 properties);
 - (d) that are covered by a HSA and a viewshaft (5296 properties); and
 - (e) that are covered by a HSA and a viewshaft that is below 9m (i.e. within an overlap area) (3141 properties).
59. The issue to be resolved for the Tūpuna Maunga Authority and for the 3141²⁹ property owners within an overlap area is whether the Council position set out in the practice note is correct.
60. There is currently a risk to the holders of resource consent issued on the basis of the practice note if this later proves incorrect. I am not aware of the total number of consents this applies to but based on my view of the weekly resource consent report of lodged resource consent applications within the Tūpuna Maunga Affected Areas layer, I expect this to be less than 25 applications within the last 12 months. I note however, that as there is not directly alignment between the TMAA and the HSA, this number could be larger or smaller. This also does not include where a building did not require

²⁷ See an example of this difference in approach at Exhibit C.

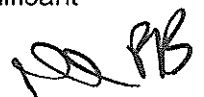
²⁸ Through a review of the weekly resource consent report of lodged resource consent applications within the Tūpuna Maunga Affected Areas layer.

²⁹ This figure includes 902 properties within the Bucklands Beach HSA, which is not an area of interest for the Tūpuna Maunga Authority.

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resource consent for other matters and therefore did not appear on the weekly list.

61. There is also a risk to the owners of 3141 properties that propose building works in the future and have not obtained necessary consents.
62. The Tūpuna Maunga Authority is also expending resources:
 - (a) applying for resource consent for under rule D14.4.1 Activity table (A3); and
 - (b) responding to resource consent applications where it considers the necessary consents have not been sought.
63. In the absence of resource consent under rule D14.4.1 Activity table (A3) where the building is less than 9m, but intrudes into a regionally significant viewshaft, adverse effects of the building on those viewshafts are not being considered in the context of the restricted discretionary activity criteria at D14.8.2, which is as follows:
 - (1) *all restricted discretionary activities:*
 - (a) *having regard to the viewshaft or height sensitive area statement in Appendix 20 Volcanic Viewshafts and Height Sensitive Areas – Values Assessments, whether the nature, form and extent of the building adversely affects the visual integrity of the maunga;*
 - (b) *whether the proposed building has a functional or operational requirement to be in the location proposed and the proposed height of the building is consistent with that requirement;*
 - (c) *whether there are practicable alternatives available that will not intrude into, or will minimise the intrusion into the viewshaft or exceedance of the maximum height of a height sensitive area;*
 - (d) *whether the proposed building will impact on Mana Whenua values associated with the maunga; and*
 - (e) *the relevant objectives and policies in B4.3, D14.2 and D14.3*
64. With regards to criterion (c), I refer to paragraphs 13 – 17 of this affidavit setting out the significance of the Tūpuna Maunga to the iwi who are part of the Redress Act. Finally, I note that the protection of regionally significant



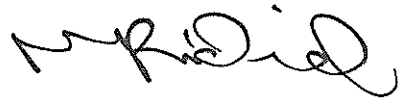
views of Tūpuna Maunga is a matter of national importance under Part 2 of the RMA and an issue of regional significance.

CONCLUSION

65. In conclusion, in my opinion:

- (a) the practice note is not correct in its approach to the application of rules D14.4.1(A3) and D14.4.1(A7) in an overlap area;
- (b) there is no rule that creates an exception to rule D14.4.1(A3) within the AUP or hierarchy within Table D14.4.1 Activity Table;
- (c) rule C1.6(2), which states that the most restrictive applicable activity status of a proposal is the one that prevails, applies to Table D14.4.1; and therefore
- (d) where a proposed building is located within an overlap area, that building would require a resource consent as a restricted discretionary activity, in accordance with rule D14.4.1(A3).

AFFIRMED at Auckland
this 12th day of October 2018 before
me:

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TANIA EVELYN RICHMOND



A Solicitor of the High Court of New Zealand

Pierce Jack Bedogni
Solicitor
Auckland