

IN THE ENVIRONMENT COURT OF NEW ZEALAND
AUCKLAND REGISTRY

[ENV-]

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 declarations under sections
310 and 311 of the Act

BETWEEN TŪPUNA MAUNGA O TĀMAKI MAKAURAU
AUTHORITY

Applicant

AND AUCKLAND COUNCIL

Respondent

APPLICATION FOR DECLARATIONS BY TŪPUNA MAUNGA O TĀMAKI
MAKAURAU AUTHORITY

8 October 2018

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TO: The Registrar
Environment Court
Auckland

APPLICATION FOR DECLARATIONS

1. The Tūpuna Maunga o Tāmaki Makaurau ("**Applicant**") applies for the following declarations from the Environment Court relating to the D14 Volcanic Viewshafts and Height Sensitive Areas Overlay of the Auckland Unitary Plan ("**the Plan**"):

*Under the Auckland Unitary Plan ("**the Plan**"), where a proposed building:*

- (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);*

then both Rules D14.4.1(A3) and D14.4.1(A7) apply, and it follows that:

- (c) in accordance with Rule C1.6(2) in Chapter C: General Rules, the activity status of a proposal is that of the most restrictive prevails; and consequently*
- (d) such a proposed building is to be assessed as a restricted discretionary activity in accordance with Rule A3 and will require a resource consent.*

GROUNDS

2. The grounds for this application are:
 - (a) section 311 of the Resource Management Act 1991 ("**RMA**") makes provision for declarations of this nature to be sought;
 - (b) activity table D14.4.1 sits within the D14 Volcanic Viewshafts and Height Sensitive Areas Overlay of the Plan;
 - (c) within Table D14.4.1, Rule D14.4.1(A3) provides that "*Buildings (...) up to 9m in height*" that intrude into a regionally significant volcanic viewshaft are a restricted discretionary activity;
 - (d) also within Table D14.4.1, Rule D14.4.1(A7) provides that "*Buildings up to 9m in height (...)*" in a height sensitive area are a permitted activity;

- (e) Rules D14.4.1(A3) and (A7) are separate provisions and there is no hierarchy between the provisions indicated in the Plan;
- (f) Rule C1.6 relates to the determination of overall activity status of an activity and relevantly states at C1.6(1) that the activity status:

"(...) 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."

and at C1.6(2)

"(...) the overall activity status of a proposal is that of the most restrictive rule which applies to the proposal."

- (g) the Auckland Council issued a Practice Note on Volcanic Viewshafts and Height Sensitive Areas D14 Overlay in January 2018 which includes guidance on how to read Activity Table D14.4.1;
- (h) that Practice Note states that:
 - (i) the overlay activity table is potentially unclear;
 - (ii) the caveat in rule C1.6(1) that a rule may create a relevant exception to other rules applies in Table D14.4.1 applies; and
 - (iii) the rows in the bottom part of Table D14.4.1 (including Rule D14.4.1(A7)), create an exception to the rules in the top part of the Table (including Rule D14.4.1(A3));
- (i) to the contrary, where a proposed building intrudes into a scheduled regionally significant volcanic viewshaft and is also within a height sensitive area ("**overlap areas**"):
 - (i) the Plan should be interpreted on its face; and
 - (ii) in accordance with Rule C1.6(2), while both rules apply, Rule D14.4.1(A3) is the more restrictive, and on that basis the more restrictive activity status (restricted discretionary) must prevail;
- (j) the Practice Note may result in buildings being constructed in the overlap areas without the requisite resource consents and without impacts on the volcanic viewshafts being assessed or considered;

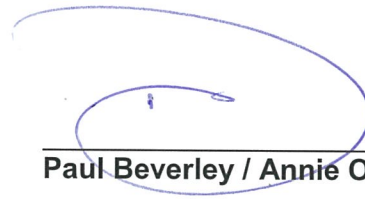
- (k) in light of the Council's Practice Note and the potential uncertainty in the interpretation of the Plan, the declarations should therefore be made to resolve that uncertainty and to provide for the proper interpretation and administration of the Plan and the RMA; and
- (l) the grounds and reasons set out in an affidavit providing expert planning evidence in support of this application, which will be filed as soon as possible.

APPLICATION FOR DIRECTIONS AS TO SERVICE

3. In addition, application is made under section 281 of the RMA for directions as to service of the application for declarations.
4. The reasons for this application are as follows:
 - (a) due to the nature of the declarations sought, it is not practicable for the Applicant to identify and notify all directly affected parties to the application, as required under section 312 of the RMA;
 - (b) that is because, inter alia:
 - (i) the plan maps currently available on the Auckland Council website show that the overlap areas contain a very large number of properties (estimated to be more than 3000), all of which may be affected by the declarations sought; and
 - (ii) it is not possible to ascertain those persons who may have current or future development aspirations.
5. For those reasons, directions are sought that:
 - (a) the Applicant should provide service by way of a public notice;
 - (b) the public notice be placed:
 - (i) in a newspaper circulating in the Auckland area; and
 - (ii) on the Auckland Council website (to be arranged in consultation with the Respondent); and
 - (c) the public notice sets out the general nature of the declarations sought and where a copy of the application for declarations may be obtained.

6. In addition, the Applicant will raise with the Court the potential for an *Amicus* to be appointed to provide for the views of those who may potentially be affected to be placed before the Court.
7. The following documents are attached:
 - (a) Memorandum of Counsel accompanying application for declarations.
8. An affidavit in support of this application will be filed as soon as possible.

DATED this 8th day of October 2018



Paul Beverley / Annie O'Connor

Address for Service of Applicant

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