

IN THE ENVIRONMENT COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

[ENV-                    ]

I MUA I TE KŌTI TAI AO O AOTEAROA  
TĀMAKI MAKĀURAU 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 MAKĀURAU  
AUTHORITY

Applicant

AND

AUCKLAND COUNCIL

Respondent

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**MEMORANDUM OF COUNSEL ACCOMPANYING APPLICATION FOR  
DECLARATIONS**

**8 October 2018**

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## **MAY IT PLEASE THE COURT:**

1. This memorandum accompanies the application by the Tūpuna Maunga o Tāmaki Makaurau Authority ("**Tūpuna Maunga Authority**") for declarations relating to the interpretation of provisions contained in the Auckland Unitary Plan ("**the Plan**").
2. In particular, the declarations sought relate to D14 Volcanic Viewshafts and Height Sensitive Areas Overlay and the implementation of the D14.4.1 Activity table.
3. This memorandum sets out a brief summary of the relevant background information to the Tūpuna Maunga Authority and the declarations sought, and addresses the directions sought in relation to the service of the application.

### **The Role of the Tūpuna Maunga Authority**

4. As a result of the Tāmaki Collective Treaty settlement, 14 Tūpuna Maunga (ancestral maunga/volcanic cones) in Tāmaki Makaurau were vested in the Iwi of the Tāmaki Collective.
5. The Tūpuna Maunga Authority is the statutory authority established under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 ("**Tāmaki Collective Redress Act**") to provide governance for the Tūpuna Maunga.
6. In carrying out its functions under the Tāmaki Collective Redress Act, the Tūpuna Maunga Authority must have regard to "*the spiritual, ancestral, cultural, customary, and historical significance*" of the Tūpuna Maunga to Ngā Mana Whenua o Tāmaki Makaurau.
7. The provisions of the Plan that relate to volcanic viewshafts are particularly important to the Tūpuna Maunga Authority given its statutory functions in relation to the Tūpuna Maunga. This is the basis for the Tūpuna Maunga Authority's interest in this interpretation of these provisions of the Plan.

## Status of the Tūpuna Maunga

8. As indicated in the Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan 2016:
- (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.<sup>1</sup>*
  - (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).<sup>2</sup>*
  - (c) *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.<sup>3</sup>*
  - (d) *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.<sup>4</sup>*

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<sup>1</sup> Para 1.3, page 2.

<sup>2</sup> Para 1.12, page 4.

<sup>3</sup> Para 3.2, page 11.

<sup>4</sup> Para 3.10, page 13.

## **Volcanic Viewshafts**

9. The rules that apply to volcanic viewshafts operate to protect views to and from Auckland's Maunga. As identified in the Chapter B: Regional Policy Statement provisions contained within the Plan,<sup>5</sup> the volcanic viewshafts help to ensure that the views to the Maunga are maintained in order to recognise their importance to Mana Whenua and the region as a whole. The provisions of the Plan aim to achieve this by restricting the height of buildings that intrude into the scheduled viewshafts (which are classified as either regionally or locally significant).
10. Rule D14.1.1(A3) of the Plan states that buildings up to 9m in height (where they intrude into a scheduled regionally significant volcanic viewshaft) are a restricted discretionary activity.<sup>6</sup>

## **Height Sensitive Areas**

11. The purpose of height sensitive areas is to limit development in a way that protects the natural contours of Auckland's Maunga.<sup>7</sup> Height sensitive areas are intended to ensure that development follows the contours of the Maunga, so that the underlying landscape can be seen from a distance. The height sensitive areas also protect local views to the Maunga.<sup>8</sup>
12. For the purposes of this application, the relevant rule in respect of height sensitive areas is Rule D14.1.1(A7). This rule states that buildings in a height sensitive area that are up to 9m in height are a permitted activity.

## **Overlap areas**

13. The application for declarations relates specifically to areas that fall within both a scheduled regionally significant volcanic viewshaft and a height sensitive area ("**overlap areas**").

## **Outcome sought**

14. In summary, the Tūpuna Maunga Authority seeks declarations from the Court confirming that in overlap areas, the more restrictive activity status

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<sup>5</sup> Chapter B4: Te tiaki taonga tuku iho – Natural Heritage, Auckland Unitary Plan.

<sup>6</sup> Note that within this same rule, buildings up to the same height (9m) within a locally significant volcanic viewshaft are classified as a permitted activity, however for the purposes of this application the focus is on the aspect of the rule relating to buildings within regionally significant viewshafts.

<sup>7</sup>Chapter B4: Te tiaki taonga tuku iho – Natural Heritage, Auckland Unitary Plan. See also Practice note – Auckland Unitary Plan (Operative in Part): Volcanic Viewshafts and Height Sensitive Areas D14 Overlay at Section 3, page 4.

<sup>8</sup> Practice Note – as above.

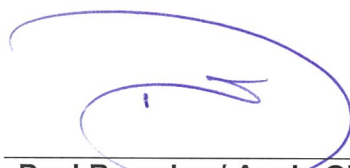
(restricted discretionary) in Rule D14.1.1(A3) prevails over the less restrictive activity status (permitted) in Rule D14.1.1(A7).

15. The Authority's position is based on, inter alia, Rule C1.6(2), which provides that where more than one rule applies to an activity, the activity status of a proposal is that of the most restrictive rule. Consequently, the application seeks confirmation that any proposed building up to 9m in overlap areas would need to be assessed and considered by the Council as a restricted discretionary activity.

#### **Directions as to Service**

16. Section 312 of the Resource Management Act requires an applicant for declaration to serve notice of the application on "*every person directly affected by the application*" within five working days after the application is made.
17. However, given the nature of the declarations sought and the difficulty involved in identifying and serving all directly affected parties, directions as to service are sought from the Court under section 281 of the RMA.
18. As set out in the application, the declarations sought will apply to all people with property interests in the overlap areas, estimated to amount to more than 3000 people. Further, it is not practicable to identify those persons with current or future development aspirations.
19. Accordingly, the application seeks directions allowing for service to instead be provided by way of public notice, which the Tūpuna Maunga Authority intends to carry out in consultation with the Council.
20. Additionally, there may be merit in the appointment of an *Amicus* who could provide a broader perspective on the application. That approach has been taken in similar declaratory proceedings before the Court.

**DATED** this 8<sup>th</sup> day of October 2018



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**Paul Beverley / Annie O'Connor**

**Counsel for Tūpuna Maunga o Tāmaki Makaurau**