

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 120

IN THE MATTER of appeals under Clause 14(1) of the First
Schedule of the Resource Management
Act 1991 (**the Act**)

BETWEEN GAVIN H WALLACE LIMITED
(ENV-2009-AKL-000505)
(ENV-2010-AKL-000011)
(ENV-2010-AKL-000031)

MAKAURAU MARAE MAORI TRUST
BOARD INCORPORATED
(ENV-2010-AKL-000024)
(ENV-2010-AKL-000027)

THE TRUSTEES OF THE ERNEST
ELLETT RYEGRASS TRUST AND
OTHERS
(ENV-2010-AKL-000030)
(ENV-2010-AKL-000147)

EVELYN MENDELSSOHN (BY THE
EXECUTORS OF HER ESTATE)
(ENV-2009-AKL-000502)

Appellants

AND

AUCKLAND COUNCIL (as successor to
Auckland Regional Council and Manukau
City Council)

Respondent

Hearing: At Auckland, 28 November – 2 December 2011, 5 – 8 December 2011,
26 – 29 March 2012, 4 May 2012

Court: Environment Judge R G Whiting
Environment Commissioner M Oliver
Environment Commissioner K Prime



Counsel: Ms M J Dickey & Mr M C Allan for Auckland Council (**the Council**)
 Mr P Cavanagh QC for The Trustees of the Ernest Ellett Ryegrass Trust and Others (**the Ellett Interests**)
 Mr K R M Littlejohn for Evelyn Mendelssohn (by the Executors of her Estate) (**the Mendelssohn Estate**)
 Mr M E Casey QC and Ms A J Davidson for Gavin H Wallace Limited (**Gavin H Wallace**)
 Mr R B Enright for Makaurau Marae Maori Trust Board Incorporated and Te Kawerau Iwi Tribal Authority Incorporated (s 274 party) (**the Maori Appellants**)
 Ms J Bain for the New Zealand Transport Agency (NZTA) (s 274 party)

DECISION OF THE ENVIRONMENT COURT

- A. **The MUL is to be extended to include the land subject to appeal;**
- B. **The land subject to appeal is to be zoned Future Development Zone;**
- C. **The NOR is cancelled as it affects the land subject to appeal**
- D. **The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:**
 1. **A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and**
 2. **A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as “Ihumātao Peninsula”. The amendments to the District Plan are to provide for:**
 - a. **A succinct description and explanation of the subzone and its context which:**
 - i. **Identifies and provides for the significant characteristics of the area, including:**

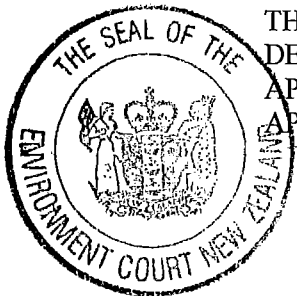


- **Maori cultural associations with the area, including wahi tapu;**
 - **Heritage and historic associations;**
 - **The Otuataua Stonefields Historic Reserve;**
 - **Landscape and amenity values;**
 - **The Manukau Harbour and coastal environment; and**
 - **The Auckland International Airport and business zoned lands.**
- ii. **Requires that a future structure planning process for the subzone:**
- **Further identifies and recognises these significant characteristics;**
 - **Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and**
 - **Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).**
- b. **The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).**
- c. **Any consequential amendments to the District Plan.**
- E. **The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.**
- F. **Costs are reserved, but in our tentative view should lie where they fall.**



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REASONS FOR THE DECISION

INTRODUCTION

[2] This hearing concerned appeals against three planning instruments that relate to an area at the end of the Ihumātao Peninsula encompassing land to the west of Oruarangi Road and to the west of Auckland International Airport. The area was termed in the evidence as the *Western Gateway Area*. The Ihumātao Peninsula generally forms part of what is referred to as the *Mangere Gateway Heritage Area (MGHA)*.

[3] The MGHA has recently come under increasing development pressure for a number of reasons, including:¹

- [a] Continued expansion at Auckland International Airport, including the proposed second runway, and expansion of airport commercial activities to the north of the second runway as provided for under the Airport Designation;
- [b] The associated need to plan for the realignment of several public roads which will be affected by the development of the second runway;
- [c] The upgrading of the Mangere Wastewater Treatment Plant and the establishment of an Odour Buffer Area, which creates the opportunity for potential development of land for business purposes in the Kirkbride Road area;
- [d] The rapid development of business land in the vicinity of the Airport, and of the emerging shortage of business land available in Auckland, particularly for large-scale business uses such as distribution activities and warehousing in close proximity to major transport infrastructure; and
- [e] The desire by the Council to reduce employment related trips out of the Mangere area by increasing employment opportunities within the MGHA.

¹ Reaburn, EIC, at [5.3]



[4] As a consequence of the development pressure, the then Manukau City Council initiated Plan Change 14 (**PC14**) which introduced urban zones – the Airport Activities Zone and the Mangere Gateway Business Zone. To accommodate PC14, the Manukau City Council applied to the then Auckland Regional Council for a change to the Metropolitan Urban Limit (**MUL**). Change 13 to the Auckland Regional Policy Statement was notified to give effect to the MUL change. Both PC14 and Change 13 were notified on 18 October 2007.

[5] Following the Councils' decisions there were a number of appeals to this Court. All but the appeals which are the subject of this hearing have been settled resulting in consent orders. As a consequence, the MUL has been extended out to a line along Oruarangi Road. Thus, the subject land which is to the west of Oruarangi Road is outside the MUL.

[6] The appellants wish to have their land included within the MUL and some of the appellants have sought a change of zoning of their land from the current rural zoning.

[7] In addition to the current rural zoned land of the appellants, the land to the west of Oruarangi Road contains the Otuaataua Stonefields Historic Reserve (**the Stonefields or OSHR**). To the west and north, the land is bounded by the Manukau Harbour coastline.

[8] It is accepted by all that the land to the west of Oruarangi Road, as is all the land in the MGHA, is of special significance to Maori and also contains important historical associations to post-European settlement.

[9] Recognising the cultural and historical significance of the area and to protect and preserve the public open space and landscape characteristics of the appellants' land and the neighbouring Stonefields, the former Manukau City Council issued a Notice of Requirement (**NOR**) over the appellants' land on 18 October 2007. The NOR was for "*Otuaataua Stonefields Passive Public Open Space and Landscape Protection Purposes*".

[10] The Council released its decision on the NOR on 27 March 2009. The appellants' whose land is subject to the NOR have appealed and seek the removal of their land from the designation and its cancellation.



[11] There are thus three major issues:

- [a] The line of the MUL;
- [b] The appropriate zoning of the appellants' land; and
- [c] The cancellation of the NOR.

[12] It was common ground that there is a close relationship between Change 13, PC14 and the NOR. Thus it was appropriate that they be considered together. Further, there were a number of matters where we heard disputed evidence which relate to all three, such as cultural, historical, landscape, and the planning context. We propose to deal with the general matters first before assessing the merits of the competing planning options.

THE APPELLANTS AND THE SUBJECT LAND

[13] We attach as **Appendix 1** a map produced by Mr Reaburn, planning consultant for the Council, which shows the subject land.

The land belonging to the Ellett Interests

[14] Mr Ellett's family have farmed land owned by the Ellett Interests for approximately 147 years. These interests include:

- [a] Mr Ellett himself;
- [b] the Ernest Ellett Ryegrass Trust;
- [c] Scoria Sales Limited; and
- [d] Johnston Trust Quarry.

Parcel 1 – Ernest Ellett Ryegrass Trust

[15] Parcel 1 is a 5.61ha site owned by the Trust. It is relatively flat pasture land bounded by the Manukau Harbour to the west, Parcel 7 (owned by the Mendelssohn Estate) to the east, and Ihumātao Road to the south. To the north it is bounded by the Stonefields. The Elletts originally owned part of the Stonefields which were acquired by the then Manukau City Council in 1999.



[16] The land is zoned *Mangere–Puhinui Rural* and is subject to the NOR. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, the cancellation of the NOR, and that all the land be included within the MUL.

Parcel 2 – T R Ellett

[17] Parcel 2 is a 30.30ha site owned by Mr Ellett. It is generally rolling pasture land bounded by the Manukau Harbour to the west, and the Ellett land to the southeast. It is zoned *Mangere–Puhinui Rural*. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, and that all the land be included within the MUL.

Parcel 3 – Scoria Sales Limited & Parcel 4 – Johnston Trust

[18] Parcel 3 is a 24.58ha site owned by Scoria Sales Limited, Mr Ellett being the sole director. Parcel 4 is a 6.59ha site owned by the Trust. Together, these parcels contain an active quarrying operation. Parcel 3 adjoins the Ellett land to the north and extends to the coastal edge to the southwest. Parcel 4 adjoins land owned by the Auckland International Airport to the southeast, which has recently been designated for airport purposes. This land is zoned *Mangere–Puhinui Rural*. The appellants seek to rezone the land to *Future Development (Ellett Holdings) Zone*, or similar, and that all the land be included within the MUL.

Parcel 5 – T R Ellett

[19] Parcel 5 is a 14.2ha site owned by Mr Ellett. It is generally flat pasture land bounded by Ihumātao Road to the north, the quarry to the southwest, and other Ellett land to the northwest. This land is also zoned *Mangere–Puhinui Rural*. The appellants seek to have it rezoned *Future Development (Ellett Holdings) Zone*, or similar, and that it be included within the MUL.

Parcel 6 – T R Ellett

[20] Parcel 6 is a 0.45ha residential site owned by Mr Ellett, containing Mr Ellett's house. It is zoned *Mangere–Puhinui Rural*. The appellant seeks the same relief as the owners of Parcels 2 – 5.



The land belonging to the Mendelssohn Estate

Parcel 7 – E Mendelssohn Estate

[21] Parcel 7 is a 9.06ha site owned by the E C Mendelssohn Estate and has been in the Mendelssohn family for over 50 years. It is relatively flat pasture land bounded by Parcel 1 (owned by the Ellett Rygrass Trust) to the west, Ihumātao Road to the south, and the Stonefields to the north.

[22] The land was originally farmed as a 55 acre dairy block. A large part of the original farm was acquired by the then Manukau City Council in 1999 to form part of the Stonefields. The remaining 9.06ha of the land is subject to the NOR.

[23] The land is zoned *Mangere–Puhunui Rural*, but the Plan reserves a controlled activity subdivision opportunity for the land to be divided into two parcels, without which the subdivision would be non-complying. The subdivision entitlement was provided by Variation 5 as part of the agreement with the Manukau City Council acquiring the balance of the land for the Stonefields.

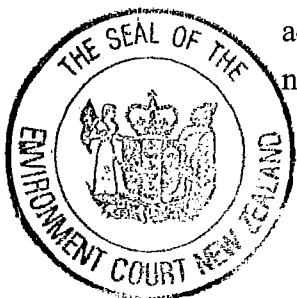
[24] The appellants seek the cancellation of the NOR. The Estate is not a participant in the Change 13 (MUL) or PC14 (Zoning) proceedings.

The land belonging to Gavin H Wallace

Parcel 8 (including the adjacent parcel) – Gavin H Wallace Limited

[25] Parcel 8 is a 24.2ha site owned by Gavin H Wallace Limited. The Wallace family have had a long association with the land for some 145 years. In 1999 a significant portion of the land was acquired by the then Manukau City Council for the Stonefields. This parcel is generally flat to gently rolling pasture land, bounded to the north by the Stonefields, and to the southeast by Oruarangi Road. This land is zoned *Mangere-Puhunui Rural* and is subject to the NOR.

[26] It will be noted from Appendix 1, that there is an adjacent parcel of land (identified as “Wallace”) owned by Gavin H Wallace Limited which is also zoned *Mangere-Puhunui Rural*, but it is not included in the NOR. It is bounded on the east by the Papakainga Zone housing land. It was the intention of the Council to zone this adjacent parcel of land residential, but the proposal was not carried through to the notified version of PC14.



[27] By its appeal, Gavin H Wallace Limited challenged the decisions of the former Manukau City Council to designate its land, and of the former Regional Council to exclude the land from the MUL. At the hearing it was contended, subject to jurisdictional objections, that the appropriate zoning for this land was a Future Development Zone.

Other Parties

Makaurau Marae Maori Trust Board Incorporated (Makaurau)

[28] Makaurau filed two appeals relating to Change 13 (MUL) and PC14. The appeals challenged the decisions of the Auckland Regional Council and the Manukau District Council respectively. Settlement was reached on all matters, with the exception of the Western Gateway Area.

[29] Before us, Makaurau opposed any urban development on the subject land and any extension of the MUL to include the subject land.

Te Kawerau Iwi Tribal Authority Incorporated (Kawerau)

[30] Kawerau were a Section 274 party to the appeals relating to Change 13 and PC14. Before us, they also opposed any urban development on the subject land and any extension of the MUL to include the subject land.

The New Zealand Transport Agency (NZTA)

[31] The NZTA is a Section 274 party with respect to two of the appeals filed against Change 13 and PC14.

[32] The NZTA's principal concern was the potential traffic and transportation effects of the proposed re-zoning of land as Future Development Zone.



GENERAL MATTERS

[33] We now propose to deal with the general matters that pertain to all three planning instruments.

Statutory Framework

[34] Mr Reaburn, Mr Putt and Mr Jarvis (planning witnesses) analysed the rezoning of the land in terms of what is referred to as the *Long Bay* tests² and also as these are set out by the Court in *Clevedon Cares*³ for the post 2005 Amendment to the Resource Management Act 1991. Those cases set out fully the now well settled framework which begins with Sections 72 – 76 and incorporates, by reference, Sections 31 and 32.

[35] Those cases related only to district plan changes. In this case we are also considering a change to the Regional Policy Statement and hence Section 30 (Regional Functions) and Sections 59 – 62 (relating to Regional Policy Statements) are also relevant to the shift in the MUL.

[36] In terms of the NOR, Section 171(1) of the Act sets out a list of matters to have regard to when considering the effects on the environment of allowing the requirement.

[37] Finally, recognising the structure of the Act, Part 2 matters provide overarching directives to be considered in terms of all of the proposed planning provisions.

[38] We propose to discuss the relevant statutory provisions in more detail, where appropriate, when we deal with each of the proposed planning instruments.

Planning Documents

[39] In the Planners' Joint Witness Statement (JWS) it was agreed that the Auckland Regional Policy Statement (*ARPS*) and the Auckland Council District Plan (Manukau Section) (*District Plan*) contained the primary assessment framework for addressing the issues. The relevant provisions were included in the Agreed Bundle of

² *Long Bay Okura Great Parks Society Inc. v North Shore City Council*, A078/2008
³ *Clevedon Cares Incorporated & Ors v Manukau City Council* [2010] NZEnvC211



documents prepared by the parties. Towards the end of the hearing Mr Reaburn provided an updated version of relevant provisions, particularly the recently operative version of Change 6 to the ARPS, as agreed in the Planners JWS.

[40] Reference was also made to provisions in the New Zealand Coastal Policy Statement (NZCPS) in relation to section 6(a) of the RMA and the natural character of the coastal environment, and to the Auckland Regional Plan: Coastal.

Auckland Regional Policy Statement (ARPS)

[41] The updated operative provisions provided to the Court were dated 21 March 2012. The Chapters referred to included:

- [a] *Chapter 2 – Regional Overview and Strategic Direction, and in particular Sections 2.2 (The Setting – Auckland Today); 2.3 (The Auckland Regional Growth Strategy); and 2.6 (The Strategic Direction)*

Chapter 2 of the ARPS states that the function of that chapter is to integrate the management of the various components and specifically address growth and development issues. The subsequent chapters deal with the effects of growth and development on the natural and physical resources. These other chapters provide for the management of specific resources.

Subsequent chapters highlighted in this case were:

- [b] *Chapter 3 – Matters of Significance to Iwi*
A suite of directions to give regional effect to the strong directions relating to Maori matters in Part 2 of the Act.
- [c] *Chapter 6 – Heritage*
Directions aimed at protecting and providing for heritage matters as required by Part 2 of the Act.
- [d] *Chapter 7 – Coastal Environment*
Directions relating to the preservation of the natural character of the coastal environment and protection from inappropriate development, and public access, as required by Part 2 of the Act.



Auckland Council District Plan (Manukau Operative Section)

[42] Relevant Chapters included in the Planners' JWS included:

- [a] Chapter 2 – the City's Resources
- [b] Chapter 3A – Tangata Whenua
- [c] Chapter 6 – Heritage
- [d] Chapter 16 – Future Development Areas
- [e] Chapter 17.3 – Mangere-Puhinui Rural Area
- [f] Chapter 17.13 – Mangere Gateway Heritage Area

[43] The District Plan provisions give effect to the NZCPS and the ARPS. Chapters 3A and 6 particularly recognise the significance to be accorded to Maori matters including the relationship of Tangata Whenua and their taonga, culture and traditions. The wide range of matters encompassed in the Act's definition of historic heritage is also recognised in Chapter 6. Many of these district-wide provisions are given local meaning in Chapter 17.13 – Mangere Gateway Heritage Area which contains extensive provisions detailing the significance of the area's heritage, public open space, social, cultural and natural resources and by reference to the comprehensive list of resources and features included in 17.13.1.1. Chapter 17.3 contains the current rural zone provisions applying to the subject land and Chapter 16 details the manner in which this District Plan identifies areas for future development and the structure planning process to be undertaken prior to specific zonings and development.

LANDSCAPE, CULTURE AND HERITAGE

[44] Two landscape architects gave evidence – Ms Absolum, called by the Council, and Mr Scott, called by the landowner appellants. As directed, the landscape architects caucused on 24 November 2011. As a consequence of the caucusing, they produced a joint landscape architect witness statement which set out the agreed key facts and the areas where agreement was reached.



Agreement Key Facts – Cultural, Heritage, Landscape and Context

[45] The following facts were agreed by the landscape architects:⁴

2 AGREED KEY FACTS

...

Characteristics of the subject land

The majority of the land is within the Coastal Environment.

The majority of the land has a gently rolling, subtle landform, with remnant volcanic cones within the OSHR and a working quarry on parcels 3 and 4, shown on Figure 1.

The subject land is currently used for farming purposes, apart from the quarry, with public access provided for on the OSHR.

The landscape character is open, rural, gently rolling with few buildings, extensive dry stone walling, scattered specimen trees, copses and shelterbelts. There are no permanent water courses on the subject land.

The long history of occupation and use of the subject land, by both Maori and European settlers has left numerous tangible heritage features across the subject land.

The history of occupation by Maori and European settlers has also left intangible associations and meanings ascribed to the land or parts of it. These are described in the evidence of other expert witnesses.

Context of the subject land

The land lies between the Manukau Harbour to the north-west, west and south-west, the Makaurau Marae and Papakainga to the north-east and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the south-east.

The proposed Mangere Gateway Heritage Route passes along the boundary of the subject land and accesses the OSHR.

Te Araroa Walkway passes through the subject land, utilising, the recently reinstated coastal edge of the OSHR.

[46] The cultural and heritage characteristics, although largely agreed, occupied a considerable amount of the evidence and deserves some comment. Mr Murdoch, a historian called by the Council, described how the wider Mangere-Puhunui area has rich human historical and cultural associations that have developed over eight centuries.

[47] He said:⁵

⁴ Joint Landscape Architects Witness Statement

⁵ Murdoch, EIC, at [3.1]



- 3.1 In my opinion the undeveloped Ihumātao portion of [the area] is collectively a cohesive cultural heritage landscape of regional significance ...

[48] Mr Murdoch then set out in some detail an historic narrative that identified both Maori and European associations with the land.

[49] We heard evidence from an archaeologist, Dr Clough. He described in detail the archaeological values of the area and concluded:⁶

- 9.1 In reviewing the archaeology and history of the general "Mangere Gateway Heritage Area", it is evident that this is a rich historic heritage landscape interweaving numerous strands of history from the earliest settlement of New Zealand, to the earliest European contact and beyond, incorporating evidence for pre-European subsistence and cultivation, the response of Maori to the introduction of European crops, animals and farming practices, for the activities of missionaries, and for those of early European farmers and their descendants still living on the land today.

[50] The Maori dimension is of particular importance. There was no dispute that the subject lands are part of a peninsula which has significance to Maori. We heard a considerable quantity of evidence telling us of the Maori perspective. A summary of that evidence is attached as **Appendix 2**.⁷

[51] As will be seen from **Appendix 2**, a number of Maori witnesses gave evidence at a special sitting of the Court on the Makaurau Marae. This included a statement of evidence by Te Warena Taua, chairman of Te Kauwerau Iwi Tribal Authority Incorporated. He outlined the Maori associations with the subject land. Importantly, Mr Taua identified a number of waahi tapu sites, some of which were situated on, or partly on, the subject land. These sites included:⁸

- The sacred mountain, Maungataketake, also known as Te Ihu a Mataoho;
 - Ancient and contemporary (20th century) burials;
 - Ancient and more recent (19th century) pa sites;
 - Battle sites;
 - Subterranean caverns that contain ancestral taonga –
- ...

⁶ Clough, EIC, at [9.1]

⁷ Appendix 2, headed "Summary of Evidence Relating to Maori Issues"

⁸ Taua, EIC, at [31]



[52] He then said:⁹

33 Furthermore, given that the subject site is part of a wider network of sites of significance, and that it contains a number of interrelated waahi tapu, from the perspective of tangata whenua the subject area is considered waahi tapu in its entirety.

[53] We acknowledge Maori have strong associations to the land subject to these appeals and that there are particular sites of special significance. However, it is also clear from the evidence that Maori lived, worked, fought and played there. It was at all times a working and lived in landscape which seems incompatible with the whole area being of waahi tapu status.

[54] Mr Taua was cross-examined on this at the Marae. In our view his answers were general and not specific. He tended to exaggerate at times and habitually refused to make even the slightest concession. Even if the whole area is waahi tapu as he claimed, it is still a working and lived in landscape and the waahi tapu status needs to be considered in this context.

[55] Ms Absolum considered that the Ihumātao Peninsula, including the subject land, the Stonefields and the Papakainga constitutes a Heritage Landscape that is at least of regional and possibly national significance. She said:¹⁰

5.21 In my opinion the Ihumātao Peninsula, including the land subject to these appeals, the OSHR and Papakainga constitutes a heritage landscape that is of at least regional and possibly national significance. I base this opinion on the following evidence:

- Both the archaeological and historical record indicate that the volcanic soils of the Ihumātao Peninsula were intensively cultivated over the generations, and that the resources of the adjoining marine environment provided a varied and bountiful harvest.
- The only areas that were not cultivated were the defensive areas of the cone pa, the settlements themselves, and sacred burial areas, several of which lie within the NOR land and on the land surrounding Maungataketake.
- The evidence of both Mr Murdoch and Dr Clough that the Wesleyan Mission Station, established in 1847, is significant as one of the few archaeologically intact mission sites on the Tamaki Isthmus that retains its rural context and farmstead.

⁹ Taua, EIC, at [33]

¹⁰ Absolum, EIC, at [5.21]



- Ihumātao retains a special place in the history of the Tainui people because of its direct association with Te Wherowhero and the foundation of the Kingitanga (Maori King Movement).
- The Ellett, Montgomerie (later Mendelssohn), Rennie and Wallace properties have a historical coherence in that they were all developed and farmed in a similar manner for well over a century, and remained in the ownership of the same families for most of this time.
- The large number of scheduled and listed heritage sites and items found in the area, and the range of early vernacular farm buildings, including barns and cowsheds, as well as an unusually large number of former windmill sites and cisterns.
- The high potential for archaeological remains surviving under the pasture throughout the subject land, particularly on the Ellett block (Parcels 2, 5 and 6).
- The archaeological, architectural, cultural, historic, scientific and technological values associated with the natural and physical resources of Ihumātao that relate to both the Maori and the European occupation and use of the land.
- The historic farmscape which, as well as the scheduled buildings, also contain the extensive 19th century dry stone wall field boundaries and a number of historic trees associated with existing and former house sites.
- The extensive regionally significant coastal edge which retains a high degree of natural character.

[56] It would appear from the Joint Witness Statement that there was disagreement between the landscape architects as to the extent to which the heritage, cultural and archaeological values identified by the expert witnesses, contribute to the subject land being identified as a heritage landscape. However, that apparent difference evaporated at the hearing.

[57] First, in his evidence Mr Scott acknowledged the basis of Ms Absolum's opinion.¹¹ He said:¹²

36 To this extent I support the respondent's evidence that the landscape (subject to these appeals) is dominated by its historical associations and its heritage features.

¹¹ Scott, EIC, at [35]

¹² Scott, EIC, at [36]



[58] He went even further in his evidence as is evidenced from this exchange from the Court:¹³

QUESTIONS FROM THE COURT:

Q. Mr Scott, listening to the cross-examination from Mr Allan and from Mr Enright, I got the clear impression that as far as you are concerned as an expert witness you are in agreement with the heritage and cultural values that have been, and archaeological values, that other witnesses had averred to?

A. Yes.

Q. And in fact you don't profess to have any of those areas of expertise?

A. No.

Q. And to the extent that there are cultural and archaeological and historical nodes in the subject land, you accept that to that extent it is a heritage landscape?

A. Yes.

Q. The next question is of course whether it is a heritage landscape which is elevated to a s 6 status, are you able to give an opinion on that?

A. I think it does have a s 6 status –

Q. Yes, thank you.

A. - yes. Well I'm sure it does, yes.

Q. You are therefore in complete agreement with Ms Absolum?

A. Yes.

Q. And you defer to Dr Clough and Mr Murdoch?

A. Yes.

Q. The difference between you and the other witnesses that I have mentioned is that it being a heritage landscape they say it should be conserved –

A. That's correct.

Q. - and conservation, total conservation should apply>

A. That's correct.

Q. Whereas you say no, some development should be allowed providing adequate protection is made for the heritage, historical, and archaeological values?

A. That is correct.

Q. So that's the difference between the two of you?

A. And it's more than protection. It's actually enhancement.



[59] Thus, there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. In addition to Ms Absolum, Mr Murdoch and Dr Clough sought that the Court determine the land, the subject of the appeals, to be part of a *Cultural Heritage Landscape*. And indeed, Mr Scott appeared to acquiesce to such a suggestion.

[60] The construct *Cultural Heritage Landscape* is of relatively recent origin. Its use as a concept in landscape analysis stems from a trial study conducted in Bannockburn, Central Otago, commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.¹⁴

[61] The primary purpose of the Bannockburn Study was to trial a newly developed methodology for investigating heritage in a landscape scale. The monograph described its content:

Identification. The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[62] It defines heritage landscape as:

A **heritage landscape** is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[63] The authors of the monograph entered into a complex and detailed interdisciplinary methodology of spatial analysis, using connectivities between super-imposed layers of history.

[64] This division of the Court, although differently constituted, has held that it is open to us to find, on sufficiently probative evidence, that a landscape, or part of it, is a heritage landscape under Section 6(f) of the Act.¹⁵ However, it was stressed that decision-makers should exercise a degree of caution before determining such a landscape to be a heritage or cultural landscape and to recognise the need to avoid

¹⁴ Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004

¹⁵ See *Wairakei Valley Preservation Society Incorporated & Ors v Waitaki District Council & Otago Regional Council*, C58/09, at [224] – [231], and *Clevedon Cares Incorporated v Manukau District Council*, NZEnvC211, 2010



double counting of Maori issues. Maori issues are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[65] Another division of the Court, led by Judge Jackson, signalled the following note of caution:¹⁶

[208] The phrase 'heritage landscape' is often used when speaking of the surroundings of historic heritage ... However, we consider this usage may be dangerous under the RMA where the word 'landscape' is used only in Section 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word 'landscape' is used generally in respect of section 6(f) of the Act.

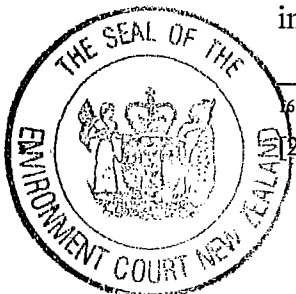
[66] On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

- [a] *Heritage Landscape* is not a concept referred to in the Act;
- [b] Outstanding landscapes and features are protected from inappropriate subdivision use and development by Section 6(b) of the Act;
- [c] Maori values are recognised and protected by Sections 6(e), 7(a) and 8 of the Act;
- [d] Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and
- [e] There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

[67] To introduce a new concept not recognised explicitly by the statute would in our view add to the already complex web of the Act and make matters more confusing.

[68] Suffice it to say therefore, that in this case there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. There

¹⁶ *Maniatoto Environmental Society Incorporated v Central Otago District Council*, C103/09, at [208]



is no dispute about the importance of the coastal edge. There is no dispute as to the open rural character and amenity.

[69] There is no dispute as to the context of the subject land. It lies between the Manukau Harbour to the northwest, west and southwest; the Makaurau Marae and Papakainga to the northeast; and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the southeast.

Areas of Disagreement

[70] What is disputed is the extent to which the acknowledged landscape, cultural and heritage values should prevent any prospect of the land being developed for urban purposes.

[71] On the one hand, the Council, supported by the Maori parties, with its suite of techniques, seek to protect landscape, heritage and amenity values by way of an overall development exclusion approach.¹⁷ This suite of techniques will fundamentally lock up the land.

[72] On the other hand, Mr Scott identifies an opportunity to protect the sensitive characteristics of the subject land while enabling careful development through a long-term planning approach. He said:¹⁸

25 While, in my opinion, the subject land does comprise a relatively sensitive coastal and rural character, incorporating clear legibility of significant historic heritage and cultural values, therein also lies the opportunity. The opportunity, in my opinion, is that this is an appropriate time to reconsider this regressive landscape planning and management option in favour of a positive, creative and innovative approach to the long term planning and management of the subject land.

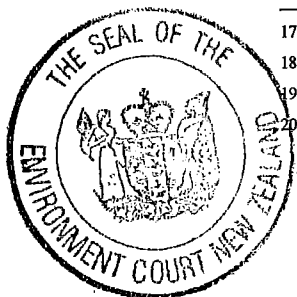
[73] Mr Scott pointed out that the current zoning enables some unacceptable development, particularly in relation to land coverage opportunities by built structures (e.g. greenhouses) given the heritage and landscape characteristics.¹⁹ He also made the point that the subject land, in a landscape sense, is very much located within an urban context.²⁰ In addition to the obvious infrastructural focus of the Auckland

¹⁷ Scott, EIC, at [24]

¹⁸ Ibid, at [25]

¹⁹ Ibid, at [24]

²⁰ Ibid, at [27]



Airport and its national importance as the nation's primary port, is the auxiliary business development provided for by PC14 and earlier District Plan zone changes on the eastern side of Oruarangi Road.²¹ He concluded:²²

30 I also recognise and support "fresh voices" communicating a new relevance to the current perception of the nation's landscapes, and how landscape is an important element to us all as individuals and as diverse and interacting different cultural and social groups and therefore as a society. **In this sense, I have no debate with much of the respondent's heritage and archaeological assessments, including many of the perceptions and assertions underlying the assessment of the landscape and visual issues. However, this does not require the land to be locked away.**

[our emphasis]

[74] Mr Scott then undertook a detailed land use and landscape planning, design and management strategy which he put forward as "*a realistic development scenario*"²³ for the subject land. This strategy recognised the urban, coastal and open space contextual location; the biophysical, visual, cultural and heritage sensitivity of the land; and the effects of development. He concluded:²⁴

119 ... This landscape is significant. The opportunity for the collective land holdings "sandwiched" between the two critical land use entities – the urban/infrastructural (airport and associated service industry) and the historic/heritage landscape of the OSHR – is yet to be imagined. Our view of the world can be too simple and so reductionist that we often avoid the exploration of loftier options. This is the interface of significant open space, heritage, private rural holdings and significant infrastructure.

120 In my opinion, to pause and preserve the NOR land as public open space does not do justice to the outstanding future use, development and management opportunity for the area. I support the requests for new zones and inclusion within the MUL as set out in the appellant's relief.

[75] Ms Absolum, Mr Murdoch and Dr Clough all supported the suite of techniques put forward by the Council to protect the subject land from development. Ms Absolum considered the protection of the land would:

[a] be a perfect response to the relationship of the proposed heritage route and the Stonefields;²⁵

²¹ Ibid, at [28]

²² Ibid, at [30]

²³ Ibid, at [117]

²⁴ Ibid, at [119] – [120]

²⁵ Absolum, EIC, at [6.7]



- [b] would ensure the retention of clear visual connections for the residents and visitors;²⁶
- [c] would enhance the interface between the business development zone to the east of Oruarangi Road and the Stonefields;²⁷ and
- [d] would provide an open space frontage to the Stonefields which would ensure the open, expansive and strongly rural character of the Stonefields and enhance the relationship between the Stonefields and important heritage features.²⁸

[76] In summary, Ms Absolum said:²⁹

6.7 In summary, the NOR land forms the foreground of public views to the OSHR from the southern part of Oruarangi Road and from lhumatao Road. As such, it complements the open pastoral character of the OSHR and in fact, carries many of the same landscape features, such as mature trees, stone boundary walls and grass paddocks. In order to protect the integrity of the OSHR it is appropriate to keep this foreground land similarly open and rural in character. In other words, the introduction of any sort of development on to the land, other than that directly related to the appreciation of the important cultural heritage characteristics of the OSHR and surrounding area, would be inappropriate.

[77] In her rebuttal evidence, Ms Absolum criticised the long-term planning approach of Mr Scott. She was of the view that despite Mr Scott's comprehensive descriptive material, at no point in his evidence does he demonstrate a causal link between his description of the subject land and its context and the Preliminary Development Opportunities exhibited to his evidence.³⁰

[78] Ms Absolum concluded:³¹

2.20 In summary, by my reading of Mr Scott's evidence, he has concentrated his attention so strongly on the degree to which the landscape of the nine parcels of land has changed since human occupation of the area began, that he has lost sight of heritage, rural, open space and amenity values inherent in the landscape of today. While we both acknowledge the inevitable changes about to occur in the landscape context of the subject land, as a result of settled parts

²⁶ Ibid, at [6.3]

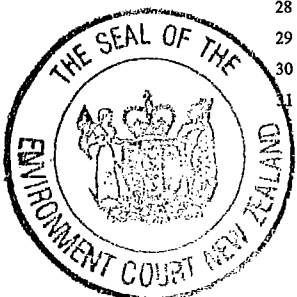
²⁷ Ibid, at [6.6]

²⁸ Ibid, at [6.6]

²⁹ Ibid, at [6.7]

³⁰ Absolum, Rebuttal Evidence, at [2.3]

³¹ Ibid, at [2.20] – [2.21]



of Plan Change 14 and the Airport expansion programme, Mr Scott has seen this as sufficient reason to propose extending intensive urban development across the appeal area.

2.21 I remain fundamentally opposed to this approach, because of the reasons set out in my evidence in chief.

[79] We do not agree with Ms Absolum's criticism that Mr Scott has lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development. The Bannockburn Report, after finding the area was an important heritage landscape, then asked what the implications of such findings should be. Referring to the Conservation Act and ICOMOS, the authors observed:³²

The practice of conservation ... is usually applied to historic places which are limited in extent – most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).

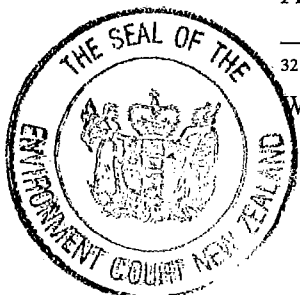
... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this. It is not possible to regard it simply as a heritage artefact – it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape.

[80] That approach reflects the approach taken by Mr Scott. We consider that sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from the Stonefields, could be undertaken under the right planning regime. Such a regime needs to ensure that the development would have to be such that the area remains an appropriate buffer to the Stonefields from the business development proposed to the east of Oruarangi Road. This would mean providing for areas of open space and protecting the coastal environment. Such a regime would reflect the fact that this is a living landscape.

Part 2 Assessment

[81] We need to be satisfied that such a finding is in accordance with the single purpose of the Act – sustainable management. This term is defined in Section 5 of the Act and that definition is informed by the remaining sections in Part 2.

³² Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004, at pages 100 - 101



[82] Part 2 of the Act involves an overall broad judgment of whether or not some form of constrained development promotes the sustainable management of natural and physical resources.

[83] In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from *inappropriate subdivision, use, and development*.

[84] With regard to Section 6(a) of the Act, the protection is for the natural character of the coastal environment. A carefully and constrained development could be undertaken, that is sensitive to and protects the character of the coastal environment.

[85] The protection of Maori relationships under Section 6(e) of the Act is already largely provided for on the Stonefields Reserve. The evidence establishes that by far the majority of identified archaeological and Maori spiritual sites are located there. Those that are located on the subject land are more widely dispersed, and could be catered for by sensitive development. In fact, by cautious and thoughtful development, their status and historical association could be enhanced.

[86] Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.

[87] Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.

[88] This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.



Overall finding on Landscape, Culture and Heritage

[89] We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.

SHOULD THE MUL BE EXTENDED?

[90] The ARPS, as amended by Change 6³³ provides for the containment of urban activities within the MUL. While *Urban Activities* and *Rural Activities* are defined in the Policy Statement, the case law³⁴ reflects a continuing debate as to what is an *Urban Activity* or a *Rural Activity*, and therefore allowed outside the MUL.

[91] The definition of MUL in the ARPS is:

... the boundary between the rural area and the urban area. The urban area includes both the existing built-up area and those areas committed for future urban expansion in conformity with the objectives and policies expressed in the Regional Development chapter of the RPS. The metropolitan urban limits are delineated on the Map Series 1, Sheets 1 – 20. Also see definitions of Urban area and Rural lands/area.

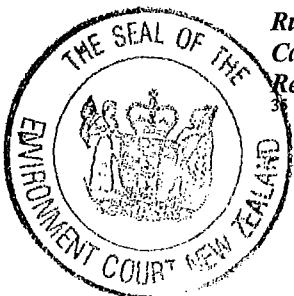
[92] The Strategic Policy of the ARPS provides a framework for limited extension to the MUL. Policies 2.6.2 provide the policy direction which is based upon not compromising the strategic direction of containment and intensification, supporting the integration of land use and transport, and avoiding adverse effects on the environment.³⁵

[93] In accordance with *Methods 2.6.3 – Urban Containment*, the then Manukau City Council made a request to the Auckland Regional Council to change the ARPS which included, relevantly for these proceedings, extending the MUL northwards to include the Airport area and land to the north. The request was considered by the Regional Council on 27 August 2007. The Council agreed to accept the request in

³³ Change 6 was made operative by the Council 21 March 2012

³⁴ See *Roman Catholic Diocese of Auckland v Franklin District Council*, W61/04, 29 July 2004; *Runciman Rural Protection Society Inc v Franklin District Council*, [2006] NZRMA 278; *Roman Catholic Diocese of Auckland v Franklin District Council*, W18/07, 22 March 2007; *Auckland Regional Council v Roman Catholic Diocese of Auckland*, [2008] NZRMA 409

³⁵ ARPS at page 2 – 32; *Reasons 2.6.4 – Urban Containment*



part, and Change 13 was notified on 18 October 2007 as a private change. The period for further submissions closed on 14 March 2008.

[94] A number of submissions sought that the Bianconi land (on the southeast side of Oruarangi Road) be included within the MUL, but the Council in its decision³⁶ decided not to include the land for the following reasons:³⁷

4.26 We consider that the inclusion of this land in the MUL and its subsequent development will have adverse effects on the heritage resources of the area (including the Otuaataua Stonefields) and will not appropriately provide for the relationship between the Makaurau Marae and its peoples relationship with their ancestral lands. We consider that the Makaurau Marae is a rare if not unique resource in the Auckland Region as its relationship with its ancestral land is largely intact. The surrounding land has not been significantly developed and we recognise that this relationship is under pressure from development in the airport area. We heard considerable evidence from the Marae about the importance of the Marae peoples' relationship with the area and its landscape that was not challenged in our view.

[95] Appeals were lodged by the Bianconi submitters, and consent orders were made, reflecting negotiated agreements, resulting in the land being brought within the MUL. The result is that the MUL line now follows Oruarangi Road. The land is thus identified for urban purposes and is now zoned *Mangere Gateway Business Zone*. This together with the expansion of the *Airport Zone*, the second runway and associated service industry development, now effectively creates a hard edge to the current open space patterns of the subject land – save for a small and, in our view, ineffective buffer area within the Bianconi land.³⁸

[96] All of the land northwest of Oruarangi Road falls outside the MUL. This constitutes the land, the subject of these appeals, a small piece of land purchased by the Council to be used as a reserve contiguous to the Stonefields and the Stonefields Reserve itself.

[97] Of the appellants, the Ellett Interests and Gavin H Wallace submitted on Change 13 seeking that their land be included within the MUL. The Council in its decision decided not to include the land, for the following reasons:³⁹

³⁶ See Decision Report, 17 November 2009 at [4.23] – [4.29]

³⁷ At [4.26]

³⁸ See Scott EIC, at [7]

³⁹ At [4.36] - [4.39]



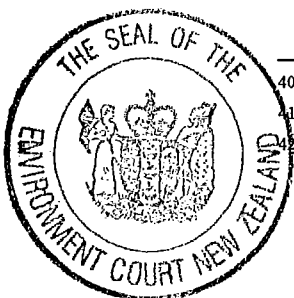
- 4.36 We are satisfied on the basis of the evidence that this land should remain outside of the MUL. We consider that urban development on this land has the potential to have adverse effects on the landscape and heritage values in the area.
- 4.37 We also consider that the inclusion of this land will have adverse effects on the heritage resources of the area and specifically on the relationship between the Makaurau Marae and its relationship (and their peoples' relationship) with their ancestral lands. We consider that the Makaurau Marae is a unique resource in the Auckland Region in that its relationship with its ancestral land is largely intact and we recognise that this relationship is under pressure from development in the Airport area. We heard considerable evidence from the Marae about this relationship that was not challenged in our view.
- 4.38 We also consider that the landscape values associated with the coastal edge in this area together with the location and relationship of the Otataua Stonefields are such that inclusion of the land within the MUL is not warranted.
- 4.39 We are also satisfied that we were not presented with any convincing evidence concerning the need for this land to be included within the MUL and note that a portion of this land is used as a quarry, the consent for which has some time yet to run. This activity is not compatible with urban development in our view.

[98] Hence, the appeals to this Court.

[99] We note that the Council in its decision, assessed Change 13 against *Methods* 2.6.3 of the ARPS, and the relevant comprehensive provisions of the ARPS. Importantly, it found:

- [a] The Airport is regionally significant infrastructure;⁴⁰
- [b] Because of the synergistic nature of modern airports and the related need for a broader range of activities in the Airport area, it is appropriate that the land within the existing Airport zonings and designations should be within the MUL;⁴¹
- [c] There is a recognised shortage of business land in Auckland, especially for activities that require large sized sites;⁴²
- [d] The Airport is an appropriate location for such activities;⁴³

⁴⁰ At [4.2]
⁴¹ At [4.2]
⁴² At [4.3]



[e] Some expansion of the MUL is generally consistent with the criteria set out in the ARPS and Change 13;⁴⁴ and

[f] It is not appropriate to extend the MUL into the area south of the Stonefields (the Bianconi and appellant's land), as to do so would have the potential to have significant adverse effects on the Marae.⁴⁵

[100] It is the findings from the Council's decision that relate to the subject land that form the basis of the appeals. Clearly, the Council's panel of Commissioners found that urban development on the land has the potential to have adverse effects on:

- [a] Landscape and heritage values;
- [b] The relationship of Maori with their ancestral lands;
- [c] The landscape values of the coastal edges; and
- [d] The Stonefields.

[101] It is not surprising, that before us, by far the bulk of the evidence was directed at the Maori values, heritage and landscape issues and whether a development exclusion approach should be adopted, or whether the subject land should be zoned to allow for some development while protecting the sensitivities of the landscape.

Current Zoning and Usage

[102] The land is currently zoned Mangere – Puhunui Rural. Apart from the quarry operation, the land is largely used for grazing. We are satisfied from the evidence⁴⁶ that the size of the holdings are such that the current use is far from economic.

[103] Mr Hollis, a farm management consultant and registered valuer, carried out an assessment of other land use options, including:

- [a] Pastoral farming;



⁴³ At [4.3]

⁴⁴ At [4.5]

⁴⁵ At [4.7] – [4.10]

⁴⁶ See T R Ellett, EIC; R G Hollis, EIC; J Blackwell, EIC

- [b] Dairy support;
- [c] Arable;
- [d] Intensive food production; and
- [e] Sheep farming.

[104] We summarise his findings:

- [a] Farming in such close proximity to urban development and the International Airport has significant limitations and liabilities;
- [b] The scale of the activity also makes farming uneconomic;
- [c] The obstacles to farming are not only financial, with high rates relative to marginal returns, but also a growing environment somewhat hostile to normal farming activities;
- [d] There is no possible return on capital for any farming enterprise.

[105] He concluded:⁴⁷

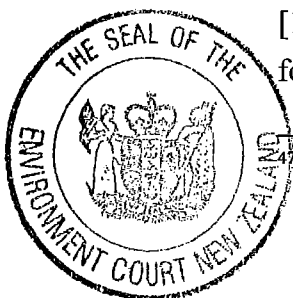
The areas being considered are already isolated, almost trapped within an environment of urban development on one side, the harbour and Otutataua Stonefields on the other, each with their own constraints to good farming. This is not conducive to the land being utilised economically for primary production.

It is my conclusion that the subject farms are uneconomic with no viability in the foreseeable future. At best their future is hobby farming only.

[106] While Mr Hollis was cross-examined, there was really no dent made on his findings, which were effectively incontestable. Further, if, as is the most feasible, some form of intensive farming was undertaken, this would give rise to large buildings, such as glasshouses, which would not ensure that an open space character would be retained on this land.

[107] We conclude that the farms are uneconomic with no viability in the foreseeable future. Clearly, with the advance north and west of the Airport related

Hollis, EIC, at page 17



land to provide industrial and commercial support to the Airport, this pocket of existing rural land has become sandwiched between that expansion and the Stonefields and the coast. It is therefore an anomaly.

[108] We are satisfied on the evidence, that to keep this relatively small piece of land outside the MUL would affect its value considerably, to the detriment of the owners.

Protectionism v Sensitive Development

[109] We have already discussed this debate in some detail where we found that some form of urban development, sensitive to the special landscape characteristics of the land, could be undertaken. We discuss the bounds of such development in the next part of this decision.

[110] Suffice it to say, we found that the witnesses for the Council and Maori appellants were too narrowly and intensively focussed on the subject land's heritage, cultural, archaeological and landscape values. Other potential land use scenarios were not adequately analysed. In our view, the evidence of the Council and the Maori appellants has underplayed the scale of the Airport and commercial development in contrast to, what they considered to be the main determinant, the landscape and heritage matters.

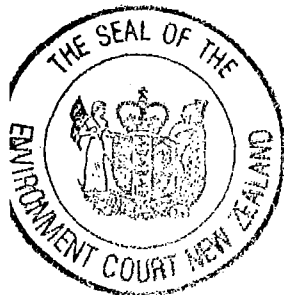
[111] We agree with Mr Scott,⁴⁸ that the heritage route will be the future connection that opens this *cultural treasure* to public attention. Such an opportunity could be extended to accommodate a range of appropriate high quality development opportunities set within an open space framework that identifies and respects the heritage features. As we make clear in the next part of this decision, such opportunities need to be constrained by appropriate controls. We consider, keeping the land outside the MUL would be too constraining in view of the continuous debate as to what is, or is not, an *urban activity*.

Is the current MUL line defensible?

[112] Again, we agree with Mr Scott, that the MUL in its current location, creates an anomaly in landscape management and land use terms.⁴⁹ The MUL does not relate to physical constraints in the landscape, such as a coastal edge, mountain range or

⁴⁸ Scott, EIC, at [22]

⁴⁹ Ibid, EIC at [12]



prominent ridge. Its inherent instability is exacerbated by the difference in property value that is created by allowing development on one side of the line and not on the other. If the property values become significant, those outside the line inevitably strive to be included.

[113] We agree that the close proximity of the land to the nationally significant infrastructure of the Airport and other urban activities will further exacerbate the unstable nature of the MUL in this landscape.

[114] The most defensible line for the MUL in this area is the coastal edge. The Stonefields would be protected by its reserve designation. The landscape and heritage characteristics of the subject land could be protected by an appropriate zoning of the land. However, because of the jurisdictional difficulties raised by the Council,⁵⁰ we are limited in the scope of these appeals to extending the MUL to include the Ellett land and the Wallace land, unless we invoke Section 293 of the Act. We conclude that the MUL line should be extended to include all of the subject land, which also includes the Mendelssohn land for which a direction under Section 293 will be necessary.

Should a shift in the MUL be restricted without appropriate zoning in place?

[115] In her opening submissions, Ms Dickey, counsel for the Council, said:

... a shift in the MUL should ... be restricted where there is no clear evidence-based zoning proposed to accompany it.

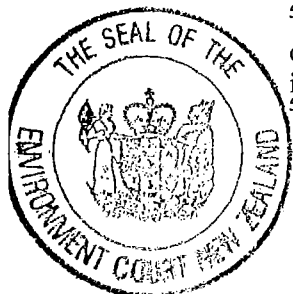
[116] In reply, counsel for the Wallace interests quoted the following passage from an earlier decision of this division of the Court in *Clevedon Cares*:⁵¹

[96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside of the MUL ... requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would ... shift the MUL ... This two-fold procedure would reflect the integrated management approach envisaged by the ARPS.

[117] We think the position is as stated in that quote. There is no fundamental reason why a shift in the MUL should not precede a change of zoning. Nor is that

⁵⁰ The Ellett and Wallace appeals only sought the MUL to be extended to include their land. The land owned by the Council and zoned MPRZ (shown as Parcel 9 on the plan at Appendix 1 to this decision) is not part of the subject land.

⁵¹ [2010] NZEnvC211 at [96]



approach unprecedented, with the Long Bay area having been brought within the MUL some years before the specific zonings for its development were devised.

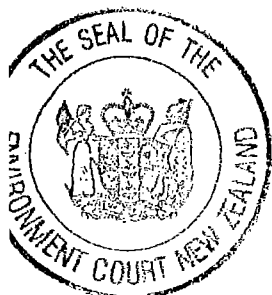
[118] We agree with Mr Casey QC, that there are two main reasons why in this case it is appropriate that the MUL shift precede, rather than parallel, the zone change, namely:

- [a] While the land is proposed to be brought within the MUL now, it is not proposed to be released for development immediately. It would be premature to write into the District Plan a highly specific structure plan when actual development might not take place for up to a decade. The particular details should be devised closer to the time when the receiving environment would be better known;
- [b] The shift is not being pursued by the territorial authority, but by private land owners. Should we hold that the MUL cannot be shifted in the absence of what amounts to a fully developed structure plan exercise, it would place an insurmountable hurdle to anyone other than a Council to seek its extension; and
- [c] We would add a third reason – namely, that the extension sought by the appellants arises out of Change 13 which has been preceded by the request sought by the then Manukau City Council in accordance with *Methods 2.6.3*.

Should there be a thorough assessment under Method 2.6.3.3?

[119] The general answer to this is yes. Method 2.6.3.3 is the springboard for a local authority to request a Change. It was the basis for the Council to make the request in 2007. The request was assessed by the Council before notifying Change 13. Method 2.6.3.3 was also assessed by the Commissioners appointed by the Council to hear Change 13 at the first instance hearing. The Council's decision, together with the analytical findings in the many reports that have been put before us, form the background of this hearing. There has been a cumulative aggregation of data which is available to us.

[120] The findings contained in the decision of the Council are generally accepted, save for the finding that the MUL should not extend beyond the line sought as notified



in Change 13. Even that finding has, in part, been compromised by the consent orders bringing the Bianconi land within the MUL.

[121] This leaves just the subject land in issue. The challenge to the Council's decision is focussed on one underlying issue – whether the sensitive landscape and heritage characteristics are such, that the land should be protected from any form of urban development.

[122] We are satisfied that we have sufficient information before us to make an informed decision on that fundamental issue.

Application of our findings in the context of Part 2 and the ARPS

[123] The whole focus of the ARPS, and indeed the RMA itself, is to ensure that decision makers give effect to the single purpose of the Act – sustainable management. As we have said, this term is defined in Section 5 of the Act and that definition is inferred by the remaining sections in Part 2.

[124] By achieving the purpose of the Act, any proposal would:

- [a] Assist the Council to carry out its functions of achieving integrated management of the natural and physical resources of the region;
- [b] Assist the council to carry out its functions in relation to any actual or potential effects of the use, development, or protection of land which is of regional significance; and
- [c] Has a purpose of achieving the objectives and policies of the Regional Policy Statement.

[125] We are required to be satisfied that excluding the subject land from the MUL better achieves the purpose of the Act than bringing it within the MUL. This involves the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned land against locking the land up from any urban development to protect heritage and landscape characteristics.



[126] We are conscious of the strong directions contained in Part 2 protecting historic heritage from inappropriate development,⁵² and recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.⁵³

[127] These strong directions are emphasised in the Strategic Objectives and Policies and other provisions of the ARPS. However, we are satisfied that Maori values and heritage characteristics can be provided for and/or adequately protected by sensitive development with appropriate constraints. This will, at the same time, enable the landowners to provide for their social and economic needs in accordance with Section 5 of the Act. A need which cannot be achieved while this land has a rural zoning because appropriate rural uses are not a viable option.

[128] To keep the land outside the MUL, with a rural zoning, would without further constraints, offer less protection to the characteristics protected by Section 6(e) and (f) of the Act. To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being.

[129] We are also conscious of the strong directions relating to amenity and the coastal environment in Part 2 of the Act. These directions are also emphasised in the provisions of the ARPS. Again, we are satisfied, that some urban type development with proper constraints could adequately satisfy those directions.

[130] We accordingly find that an extension of the MUL to include the subject land would reflect the sustainable management provisions provided for in the framework of Part 2 of the Act.

[131] We consider it appropriate for all the subject land to be so included. This means that the Mendelsohn land would need to be activated by a notification under Section 293 of the Act. Accordingly, we make such a direction.



⁵² Section 6(f) of the Act

⁵³ Section 6(e) of the Act

Overall finding on MUL

[132] For the reasons given we find that the MUL should be extended to include the subject land. We direct the Council, under Section 293 of the Act, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Regional Policy Statement to amend the location of the MUL accordingly.

ZONING

Jurisdictional Matters

[133] As outlined earlier in this decision not all of the parties had requested a change to the zoning for all of the land.

[134] The appeals by the Ellett Interests sought a *Future Development (Ellett Holdings) Zone* or similar, for all of Parcels 1 to 6. The Planners' Joint Witness Statement⁵⁴ noted that the only direct rezoning outcome sought in appeals was in respect of the Ellett land south of Ihumātao Road, that is excluding Parcel 1 affected by the NOR. This reflected the submissions lodged with the Council which did not seek a change to the zoning of Parcel 1.

[135] The Mendelssohn appeal (Parcel 7) did not seek a change to the zoning.

[136] For the Wallace land (Parcel 8 and the adjacent land to the east) an amendment to the MUL notice of appeal was allowed by the Court to include a consequential prayer for relief that, should the Court decide to include the land within the MUL, the Court should then consider making;

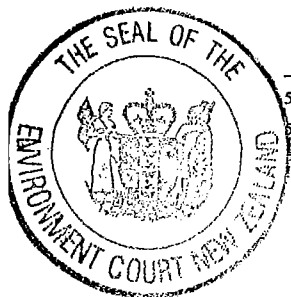
... appropriate orders and/or directions as to the appropriate steps to re-zone the appellants' land.

[137] In its decision allowing the amendment the Court noted that the question of whether the Court had jurisdiction to make the order sought by the amendment was a matter to be decided at the substantive hearing.⁵⁵

[138] In terms of the appeals filed the zoning options before us were to retain the current *Mangere –Puhinui Rural Zone (MPRZ)* on all of the land, or apply a *Future*

⁵⁴ Joint Witness Statement Planners, 8 November 2011, at [2]

⁵⁵ [2011] NZEnvC 336



Development (Ellett Holdings) Zone, or similar (**FDZ**), to some of the Ellett land (Parcels 2 -5).

[139] During closing submissions, in response to matters raised by the Court, all Counsel agreed that if the Court found that a zoning other than the current rural zone was appropriate for all of the subject land then Section 293 would be an appropriate way forward given the jurisdictional limitations.

[140] Therefore at this stage we propose to assess the appropriate zoning for all of the subject land affected by these appeals without being restricted by the jurisdictional limitations.

Zoning Evaluation

[141] The current MPRZ rules (Rule 17.3.10) allow, as a permitted activity, one household unit, farming, greenhouses, breeding and boarding of domestic pets, farmstay accommodation, horse riding clubs/schools, pig keeping, produce stalls, production forestry (more than 500m from the coast) and open space. The front yard requirement is 10 metres, the side and rear yards are 3 metres and the coastal setback is 30 metres. The height requirement is 9 metres. Building coverage is not controlled on sites over 5,000m², it is 10% for sites less than 5,000m².

[142] Mr Reaburn noted that under this rural zoning greenhouses are a potential use and that substantial greenhousing already exists in the area, although not on the subject land. He was concerned about substantial buildings for farming activities. Ms Absolum expressed similar concerns about the possibility of greenhouses.

[143] Mr Reaburn acknowledged that the current grazing activities may not be sustainable for much longer. He noted that the rural zoning potentially allows for significant building development. He considered that the major threat to the heritage, cultural, archaeological and landscape values would arise from more intensive development of the land.

[144] In terms of public access to the coast, the rural zoning only provides for enhanced access if subdivision occurs and Mr Reaburn confirmed that there are limited subdivision possibilities under the rural zoning for this land. Mr Reaburn also held concerns about whether the current MRPZ adequately addressed heritage,



cultural, archaeological and landscape values, noting in particular that the wahi tapu rules were weak.⁵⁶

[145] Mr Reburn advised that prior to his involvement in the plan change the Council had proposed zoning the land to FDZ. The section 32 report to PC 14 makes it clear that the then Manukau City Council's preference was for a wider area to be within the MUL and zoned for urban development. This included the Ellett land south of Ihumātao Road and the small part of the Wallace land adjacent to the Papakainga Zone. It did not include the NOR land. This expanded area was rejected by the then ARC. After lodging an appeal against the ARC decision the Manukau City Council decided to progress a reduced rezoning in line with the ARC decision rather than await the outcome of the appeal.⁵⁷

[146] However in this hearing Mr Reburn, whilst acknowledging the region's shortage of business land and the potential suitability of the subject land for business use from a "*purely physical and servicing point of view*",⁵⁸ stated that he

... came to the opinion, informed by my consultation, that the cultural, heritage and landscape values of this land made it inappropriate to continue with a Future Development Zone proposal.

The same concerns have led me to the conclusion that re-zonings (and an associated MUL extension) to provide for an urban scale of development are not appropriate on any part of the land subject to these appeals. ...⁵⁹

[147] Taking into account the research and reports which have culminated in the evidence presented at this hearing, Mr Putt proposed a FDZ as being more appropriate than the current MPRZ. In addition to a FDZ, primarily for the Ellett and Mendelsohn lands, Mr Putt also proposed specific zonings for other parts of the subject lands. This included the Main Residential Zone for the piece of Wallace land outside of the NOR and adjacent to the Papakainga Zone, and the Oruarangi Sub-Zone for the Wallace land affected by the NOR.

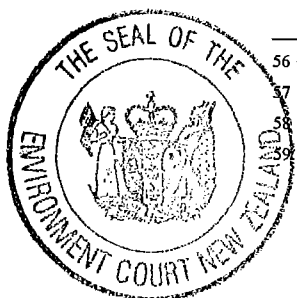
[148] A FDZ is already provided for in Chapter 16 of the District Plan. It is effectively a "holding" zone and it requires a structure plan to be prepared as the basis for a subsequent plan change and specific zoning provisions. The process is set out in

⁵⁶ Reburn, EIC, at [8.5], [8.7], [9.5] – [9.7]

⁵⁷ "Special Note" at page 8

⁵⁸ Reburn EIC at [8.8] and Rebuttal at [4.3(b)]

⁵⁹ Reburn Rebuttal at [4.10] & [4.11]



Part 16.6.1.2 and has been used in a number of other parts of the Manuaku District to date.

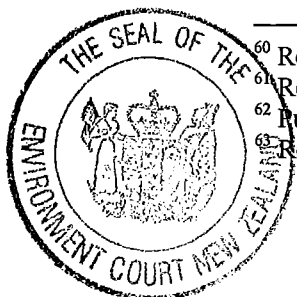
[149] We do not agree with Mr Reaburn when he states that the effects of urban zoning and development are almost certainly likely to be greater on the heritage, cultural, archaeological and landscape values of the subject area than would be the case with activities possible under the current MPRZ provisions.⁶⁰ Indeed we have some difficulty reconciling Mr Reaburn's concerns about the effects of permitted activities under the current rural zoning with his support for retaining the MPRZ on this land.

[150] Mr Reaburn accepted that visitor accommodation/tourist destination facility and clustered residential development were possibilities on some parts of the subject land, although he saw them as being at a rural or rural-residential density rather than an urban density.⁶¹ This was repeated in his conclusion that there will likely be a future need to look at a targeted zoning for the land, as an improvement on the MPRZ, but that this would need to be more of a rural zone than an urban one.

[151] We think Mr Reaburn and Mr Jarvis exaggerate the degree of "urbanness" across all of the land that could follow on from a FDZ and a subsequent structure planning and plan change process. We are satisfied that a FDZ can adequately recognise the particular values of the land and provide for more appropriate management and development than is presently provided for under the MPRZ.

[152] On the basis of the information presented through this hearing we do not think it is appropriate to select specific urban zones for some parts of the subject land at this stage. The evidence indicates that the whole of the subject land would benefit from being included in a FDZ and made the subject of a more detailed structure planning exercise in the future.

[153] Mr Putt's amended FDZ illustrates how a set of provisions might be tailored to this land as a subzone and fit within the structure of the District Plan.⁶² We recognise that Mr Putt prepared his provisions primarily for the Ellett lands but we consider that many of Mr Reaburn's criticisms are valid.⁶³ We agree that there needs to be a better recognition of the context of the subject land and the significant Maori, heritage,



⁶⁰ Reaburn EIC at [8.9]

⁶¹ Reaburn, EIC, at [9.21]

⁶² Putt, EIC, Appendix A

⁶³ Reaburn, Rebuttal, at [6.3] and [6.4]

coastal and amenity values. We do not consider it appropriate to signal that all of the subject land will be developed in the future for conventional urban activities or densities. However, neither do we consider it appropriate to signal that all of the subject land should be developed at a countryside living scale. As we have previously stated we consider that selective development will be required with some parts of the land likely to be able to be developed for urban activities and other parts managed as open space and lower intensity development. Whilst we understand the reason for the focus on traffic details included in Mr Putt's proposal, we consider that to be unnecessary and premature at this stage. It is more than sufficient to acknowledge that traffic and transport, along with other servicing matters, will be assessed, as usual, as part of a future structure planning process.

Overall finding on Zoning

[154] Accordingly, we find that all of the subject land would be more appropriately zoned FDZ; with the provisions being further amended to better recognise the significant values of the area; to provide guidance to the future structure planning process; and also to limit the interim use and management of the land. This will require amendments to the District Plan Chapter 16 – Future Development Areas.

[155] The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone' within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

- [a] A succinct description and explanation of the subzone and its context which:
 - [i] Identifies and provides for the significant characteristics of the area, including:
 - Maori cultural associations with the area, including wahi tapu;
 - Heritage and historic associations;
 - The Otutāua Stonefields Historic Reserve;



- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

[ii] Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

[b] The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

[c] Any consequential amendments to the District Plan.

[156] A FDZ in accordance with these directions will assist the Council to carry out its functions and is the most appropriate way to achieve the single purpose of the Act, as espoused in Part 2.

SHOULD THE NOR BE CONFIRMED?

Introduction and History

[157] On 18 October 2007, the then Manukau City Council issued a Notice of Requirement (**NOR**) for a designation for *Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes*. The NOR applies to the subject land to



the west of Oruarangi Road and to the north of Ihumātao Road, bordering the Otuaataua Stonefields Historic Reserve.

[158] The objective is to *create public open space adjacent to the Otuaataua Stonefields ... and to protect the landscape, the cultural heritage landscape, and the visual amenity of the Mangere Gateway Heritage Area*. It is clear from the requirement that its purpose is to extend the Stonefields Reserve so that it includes all of the lands from the coast to Oruarangi and Ihumātao Roads.

[159] The land which constitutes the Stonefields Reserve was acquired from the appellants in 1999.⁶⁴ It appears from the evidence,⁶⁵ that the Stonefields Reserve has its genesis from investigations and identification of the area for protection by the New Zealand Historic Places Trust (NZHPT) in the early 1980s. The Stonefields was listed as an historic place – Category 2, by the NZHPT in November 1991.

[160] It would appear that the Council relied on the work done by the NZHPT and the Department of Conservation as a basis for issuing the NOR for the existing Stonefields in June 1995. The boundary of the designation was similar to, but not the same as, the boundary shown on the NZHPT Plan. The issue of the NOR was accompanied by complementary provisions in the notified version of the 1995 Proposed Manukau City District Plan.

[161] Despite opposition, including from the appellant landowners, the designation was confirmed by Council on 20 May 1998. The Council then embarked on a process of negotiation with the appellants and settled the purchase of all the Stonefields land in late 1999.

[162] Variation 5 to the then Proposed District Plan was promulgated in late 2000. The Variation rezoned the Ellett and Mendelssohn land from Mangere-Puhinui Heritage Zone to Mangere-Puhinui Rural Zone, removed the waahi tapu identification from the Ellett and Mendelssohn land, and introduced site specific land use and subdivision rules for the Ellett and Mendelssohn land. This was part of a negotiated agreement which included that Council would:⁶⁶

- [a] Take all reasonable steps, by way of consent order, to zone the residue land Mangere-Puhinui Rural Zone;



⁶⁴ There was one other landowner – Rennie

⁶⁵ See Reaburn, Supplementary Evidence, Part 3

⁶⁶ Reaburn, Supplementary Evidence at [3.6]

- [b] Take all reasonable steps, by way of consent order, to permit the creation of two lots from the residue land, including one lot of 1ha; and
- [c] Consult with tangata whenua requesting their consent to either remove the waahi tapu notation from the residue land or to agree to the creation of two lots referred to above, including the construction of a single dwelling and garage on the 1ha lot.

[163] In accordance with the negotiated agreement, a kaumatua of the Makaurau Marae *conducted a ceremony to uplift the waahi tapu on the site ... namely Part Allotments 170 and 171 Parish of Mamurewa.*⁶⁷

[164] All of the landowners testified to the fact that, in their view, the negotiated agreement set a price well below market value, hence the agreed concessions by Council. More importantly, an assurance was given that no more land would be taken for reserve.

[165] However, by December 2006 the Council's attitude changed. As part of the process relating to Plan Change 14, the Council sought further landscape reviews. The *Peake Design Landscape Assessment*, dated March 2006, and the *Nick Robinson Landscape and Visual Assessment*, dated November 2006, were obtained. Both attributed high values to the NOR land. Two further reports were obtained, one by Buckland and McMillan in July 2007, and one by Absolum in March 2009.

[166] Buckland and McMillan state:

... while previous landscape assessments have focussed on individual heritage sites and landscape units, none have focussed on the heritage value of the open space as part of a wider context, a network of high quality open space which includes the Manukau Harbour.

[167] Mr Scott, in his evidence-in-chief, had three major criticisms of the landscape reports relied upon by the Council:

- [a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;⁶⁸

⁶⁷ See Council Report introducing Variation 5, Section 1.1, Exhibit G to Reburn Supplementary Evidence



- [b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;⁶⁹ and
- [c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

[168] According to Mr Reaburn, the Council decided to initiate the NOR in November 2006. He said:⁷⁰

- 4.3 Amendments to proposed Plan Change 14 and associated processes were considered (as confidential items) by the Council in November and December 2006. It is at that time that the Council decided to initiate the NOR. This decision was based on the landscape assessments referred to above, the November 2005 Louise Furey archaeological appraisal and a February 2006 Social and Cultural Impact Assessment Report prepared by Integrated Research Solutions Limited for the Makaurau Marae.

[169] Informal notice was given to the landowners by letter dated 30 November 2006 giving them until 11 December 2006 to communicate their views. The Urban Design Committee of the Council resolved to notify the NOR at a meeting in March 2007.

[170] It is against this contextual background that we now look at the contested issues.

Notice of Requirement

[171] Section 168A of the Act⁷¹ relevantly provides as follows. The **bolded** portions are those which identify the contested issues:

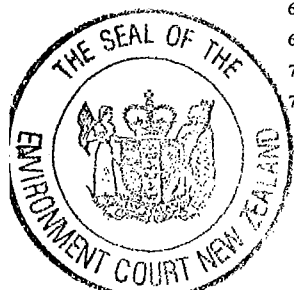
- (1) When a territorial authority proposes to issue a notice of requirement for a designation –
- (a) **for a public work within its district and for which it has financial responsibility;** or
- (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work –

⁶⁸ Scott, EIC, at [19]

⁶⁹ Ibid, EIC, at [20]

⁷⁰ Reaburn, Supplementary Evidence, at [4.3]

⁷¹ As it applied at the relevant time



It shall notify the requirement in accordance with s.93(2); and the provisions of s.168, with all necessary modifications, shall apply to such notice.

...

- (3) When considering a requirement and any submissions received, a territorial authority must, **subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—**
- (a) any relevant provisions of—
 - (i) a national policy statement:
 - (ii) a New Zealand coastal policy statement:
 - (iii) a regional policy statement or proposed regional policy statement:
 - (iv) a plan or proposed plan; and
 - (b) **whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—**
 - (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
 - (ii) it is likely that the work will have a significant adverse effect on the environment; and
 - (c) **whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and**
 - (d) **any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.**
- (4) The territorial authority may decide to—
- (a) confirm the requirement:
 - (b) modify the requirement:
 - (c) impose conditions:
 - (d) withdraw the requirement.

[172] Under Section 174(4) of the Act, the Court is to have regard to the matters set out in Section 171 which are the same matters set out in Section 168A(3), and the Court may cancel or confirm the requirement, and may modify it or impose conditions.

Is the designation a public work?

[173] Public work is defined in the RMA as:

... the same meaning as in the Public Works Act 1981, and includes any existing or proposed public reserve within the meaning of the Reserves Act 1977 and any National Park purposes under the National Parks Act:



[174] The RMA definition expressly includes existing or proposed public reserves under the Reserves Act 1977. The NOR document needs to be considered robustly and in the round. We are satisfied that it is clear from a reading of the NOR documentation in the round, that the work proposed by the Council is an extension of the Stonefields Reserve.⁷²

[175] We thus consider that the NOR is for a public work.

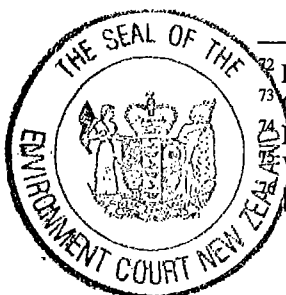
Does the Council have financial responsibility?

[176] As a requiring authority, the Council may notify a requirement for the designation of a public work within its district for which it has financial responsibility (Section 168A(1)(a)). Counsel for Wallace submitted, that the Council has made no financial provision for acquiring the land and has not accepted financial responsibility now or in the reasonably foreseeable future for the work on the designated land.⁷³

[177] There is no evidence before us that would suggest the Council has disclaimed financial responsibility for the works. The Council continues to actively pursue the designation. Ms Bowers confirmed that the Council has always accepted, and continues to accept, financial responsibility for the NOR.⁷⁴ Council Senior Acquisitions and Disposals Adviser, Mr Alan Walton, repeats this confirmation in his rebuttal evidence.⁷⁵

[178] We agree with the submission of counsel for the Council, that the purpose of the reference to financial responsibility in Section 168A is to avoid situations where a requiring authority issues a NOR but seeks, in some way to disclaim any responsibility for it. As the Environment Court noted in *Re Waitaki District Council*, citing earlier High Court authority:⁷⁶

[31] The reason why financial responsibility is important was explained in *Waiotahi Contractors Limited v Owen* [(1993) 2 NZRMA 425]. There the High Court was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council has refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:



⁷² Bowers, EIC, at [5.1] and Reaburn, EIC, at [10.2] – [10.3]

⁷³ Opening Submissions, at [50] and [51]

⁷⁴ Bowers, EIC, at [4.13]

⁷⁵ Walton, Rebuttal, at [3.2]

⁷⁶ [2007] NZRMA 68, at [31]

... The provision in a District Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[179] The Town and Country Planning Appeal Board put the matter well in an early decision, *Newspaper House Limited v Wellington City Council*⁷⁷:

By designating land in its district scheme, on its own motion, for a proposed public work, the council thereby records that vis a vis the owners of the land, it accepts the financial responsibility for the acquisition of the land for the proposed work. But this Board has no jurisdiction positively to order a council to execute a proposed work. The only positive power the Board has is in certain circumstances to order the council to acquire land ... but it does not follow that the designation of the land required for a work binds the Minister or public body to execution of the proposed work. Designation of land for a public work is a planning action. Construction of a public work is an executive action.

[emphasis ours]

[180] The acceptance of financial responsibility is evident from the fact that it is the Council (and not some other entity) that has requested the designation, and the fact that, if approved, the Council will be the party that holds the designation. The Council has not disclaimed financial responsibility for the designation.

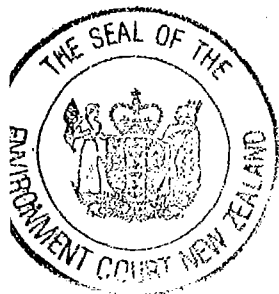
Are the works and designation reasonably necessary to achieve Council's objectives?

[181] Under Section 171(1) of the Act, we are required to determine whether both the public work and the designation are reasonably necessary for achieving the objectives of the Council for which the designation is sought.

What are the Council's objectives?

[182] It is clear from the NOR and the submission for the Council, that the public work (reserve land) is required to achieve the objective of protecting and preserving the public open space and landscape characteristics (which include the

⁷⁷ (1977) 1 NZTPA 289



cultural/historic heritage landscape characteristics) of the land and, importantly, the adjacent Stonefields Reserve.⁷⁸

Is the public work reasonably necessary to achieve the objective?

[183] We consider that the reasonably necessary test is an objective, but qualified one. In *Watkins v Transit New Zealand*⁷⁹ the Court noted:

... In short "necessary" falls between expedient or desirable on the one hand, and essential on the other, and the epithet "reasonably" qualifies it to allow some tolerance.

[184] We are also aware of the limits of any enquiry into the merits of the objectives. It is now well settled that the Act neither requires or allows the merits of the objectives themselves to be judged by the Court. For instance, in *Babington*, the Planning Tribunal said:⁸⁰

... It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.

[185] We have already considered some of the evidence base relevant to the historic landscape, and the threat to that landscape. Ms Bowers introduces the NOR in her evidence, describes its purpose,⁸¹ and explains the contribution the land will make in practical terms if it is added to the OSHR. Mr Reaburn discusses the need for the NOR and whether it is necessary to achieve the objectives in his evidence-in-chief.⁸² The evidence of Mr Murdoch (historic heritage), Dr Clough (archaeology) and Ms Absolum (landscape), provides direct support for the NOR.

As for the protection of the Stonefields Reserve

[186] We are well aware of the value of the Stonefields as an historic reserve. Its acquisition by the Council from the landowner appellants was preceded by some 20 years or so of research and reporting of its heritage values. These reports consistently referred to the Stonefields as a nearly complete Stonefields system of about 100 acres. The boundaries of the Stonefields were defined in 1984 when Historic Places Trust gave the land a Category 2 registration under the transitional provisions of the

⁷⁸ Dickey, Opening Submissions, at [4.19] and [4.83]

⁷⁹ A54/03, at [47]

⁸⁰ (1993) 2 NZRMA 480, at [486]

⁸¹ Bowers, EIC, at [4.8] and onwards

⁸² Reaburn, EIC, at [10.11] – [10.13] and [10.4] – [10.7]



Historic Places Trust Act 1993. The acquisition followed nearly the same boundaries as the Historic Places Trust schedule.

[187] The evidence established, and this was confirmed by our observation on our site visit, that the Stonefields are very well contained, as was pointed out by counsel for Wallace.⁸³ From the approach to the Stonefields there is already a buffer of sorts in the remnant volcanic cones at Otuaataua and Pukeiti (former quarry sites), the former water and quarry reserves and the Wallace land acquired as part of the reserve.

[188] The NOR for the Stonefields identifies that the public works may include an interpretation centre, a carpark, public toilets, and a cultural/heritage centre. Suitable areas for all of these activities were identified within the reserve, areas which had lesser remnants of the Stonefields due to the past farming practices.

[189] We are satisfied that the Stonefields themselves, well contained as they are, can be adequately protected by sensitive development that recognises and provides for their value.

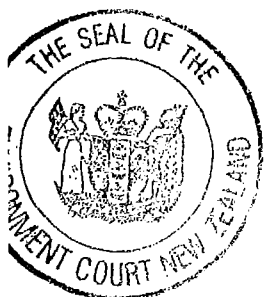
As for the subject land

[190] As for the subject land itself, we are conscious that, notwithstanding the availability of a Mangere-Puhinui Heritage zoning, which is applied to some land within the Mangere-Puhinui Heritage area, the subject land was given a less restrictive *rural zoning* – a zoning that does not protect the heritage and cultural aspects espoused by all the witnesses. This would tend to indicate that the heritage aspects of this land are ranked as less important.

[191] We are also conscious that the Council arranged for a kaumatua to carry out a ceremony over part of the land to lift any tapu. While such a ceremony is not determinative or binding on all Maori, it does reflect the worth of the land in cultural terms to the Council at that time.

[192] In our view, the Council witnesses have over-emphasised the need for a reserve to protect and preserve the special characteristics of this land. By focussing on the special cultural, historical and landscape characteristics of the land, they have closed their minds to the possibility of sensitive development of the properties. In other words, they have not adequately factored in sensitive development of the

⁸³ Opening Submissions, at [79]



properties. Development that would need to be carried out in compliance with the Historic Places Trust Act, may well require further archaeological survey work and the obtaining of a resource consent. A well thought out Structure Plan could recognise significant features and values and could address landscape buffers, setbacks, height controls, view shafts, and access to the coastal marine area and the Stonefields.

[193] The Council Commissioners in their decision relied heavily on the landscape, heritage and archaeological reports for their finding that the designation is reasonably necessary to achieve the Council's objective of protecting the cultural, heritage and landscape values of the land and the Stonefields Reserve. We have already averred to Mr Scott's three major criticisms of these reports, namely:

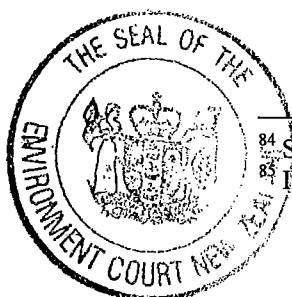
- [a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;⁸⁴
- [b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;⁸⁵ and
- [c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

Criticisms that we consider on the evidence to be valid for the reasons we have given in our discussion on the MUL line.

[194] For the above reasons, we conclude that the public work is not reasonably necessary to achieve the Council's objectives.

Has adequate consideration been given to alternatives?

[195] Where, as in this case, the requiring authority does not have a sufficient interest in the land, Section 171(1)(b) of the Act requires the Court to examine what consideration has been given by the Council to alternative sites or methods for



⁸⁴ Scott, EIC, at [19]

⁸⁵ Ibid, EIC, at [20]

achieving its objectives. In *Bungalo Holdings Limited v North Shore City Council*, the Environment Court observed:⁸⁶

[111] We understand that Section 171(1)(b) calls for a decision maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily or giving only cursory consideration to alternatives. A proponent is not required to eliminate speculative or suppositious options.

[196] The test is whether *adequate consideration* has been given. As counsel for Wallace pointed out, the entire consideration given to alternatives in the NOR is:

The council considers that this land is part of a cultural heritage landscape, with landscape values and a unique visual amenity. There are no other sites that meet these criteria.

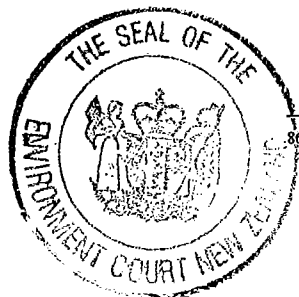
No mention is made of *alternative methods* for achieving the objective, which do not involve designation and the prevention of any reasonable use of the land. He said, it is difficult to describe such an analysis as anything more than *cursory*.

[197] All counsel for the land hold appellants referred to the limited consideration by Mr Reaburn to alternatives. He devoted three paragraphs in his evidence-in-chief and one paragraph in rebuttal. In rebuttal, Mr Reaburn was dismissive of alternatives being practically achieved, but the point is, they were not considered at all, or at most in a very cursory way, prior to issuing the NOR.

[198] The most obvious alternative methods include:

- [a] To acquire the land by private treaty;
- [b] To acquire the land under the Public Works Act; or
- [c] To address the proper zoning of the land which could have been done as a prelude to Plan Change 14.

[199] Any one of these options could have preserved and protected the open space and landscape characteristics of the appellants' land without driving down the price of the land and disabling the landowners from any benefit.



⁸⁶ A052/01, at [111]

[200] The lacuna left by the Council was addressed in part by the evidence of Mr Scott and Mr Putt. They advocated a *future development zone*. A matter that was peremptorily dismissed in the Council decision:⁸⁷

Counsel for Mr Ellett et al. suggested that there had been no real consideration of alternatives for achieving the Council's purposes and suggested that an appropriate zoning with particular controls could achieve the same result. However, the Commissioners do not consider Counsel is seriously suggesting that Council has been remiss in its choice of method to achieve its goals, noting that zoning itself provides no opportunities for the purchase of the properties. ...

[201] On the other hand, we have found that a *future development zone* would be in accordance with the purpose of the Act having regard to the relevant provisions of Part 2. This is a matter, that we have already discussed in some detail.

[202] We accordingly find that adequate consideration has not been given to alternative methods.

Overall finding on NOR

[203] For the above reasons, we cancel the requirement as it affects the subject land.

THE COUNCIL DECISIONS

[204] Under Section 290A of the Act, we are required to have regard to the decisions that are the subject of the appeals. As we have decided differently on the underlying general issue relevant to the appeals, we have, not surprisingly, come to a different conclusion.

[205] The fundament of the Council's decisions were that protection from all development was the most appropriate way:

- [a] to protect the Stonefields;
- [b] to protect Maori associations with the land; and
- [c] to protect heritage values.



[206] We have already averred to parts of the Council's decisions in earlier sections of this decision. In the decision of the Commissioners on the NOR dated 27 March 2009, they said:⁸⁸

Section 6(f) The protection of historic heritage from inappropriate use and development: The NoR will ensure the protection of the Stonefields and provide a buffer from adjoining Airport and other development.

And:

The Commissioners have carefully carried out this evaluation and accept that Maori have a relationship with the NoR land; that that relationship is no more or less important than the relationship with all of the land in the Mangere-Puhinui area, carrying as it does a rich historical narrative as described in Mr Murdoch's evidence. Given its location adjoining the Stonefields, a recognised wahi tapu, care must be taken to ensure that activities which could be 'intrinsically offensive' are avoided.

The Commissioners find that maintaining this land in a rural zoning will not necessarily maintain the section 6(e) relationship; and that the only way to achieve this is through the passive public open space designation.

[207] The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development. They are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.

[208] We have had the benefit of lengthy, and at times, detailed cross-examination on the major underlying issue. At all times we have been conscious of the Council's decisions. However, after careful consideration of the evidence before us, we have, for the reasons given in this decision come to a different conclusion.



⁸⁸ At page 30

DETERMINATION

[209] We make the following determination:

- A. **The MUL is to be extended to include the land subject to appeal;**
- B. **The land subject to appeal is to be zoned Future Development Zone;**
- C. **The NOR is cancelled as it affects the land subject to appeal**
- D. **The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:**
 1. **A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and**
 2. **A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as “Ihumātao Peninsula”. The amendments to the District Plan are to provide for:**
 - a. **A succinct description and explanation of the subzone and its context which:**
 - i. **Identifies and provides for the significant characteristics of the area, including:**
 - **Maori cultural associations with the area, including wahi tapu;**
 - **Heritage and historic associations;**
 - **The Otuaataua Stonefields Historic Reserve;**
 - **Landscape and amenity values;**
 - **The Manukau Harbour and coastal environment; and**



- The Auckland International Airport and business zoned lands.
- ii. Requires that a future structure planning process for the subzone:
- Further identifies and recognises these significant characteristics;
 - Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
 - Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).
- b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).
- c. Any consequential amendments to the District Plan.
- E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.
- F. Costs are reserved, but in our tentative view should lie where they fall.

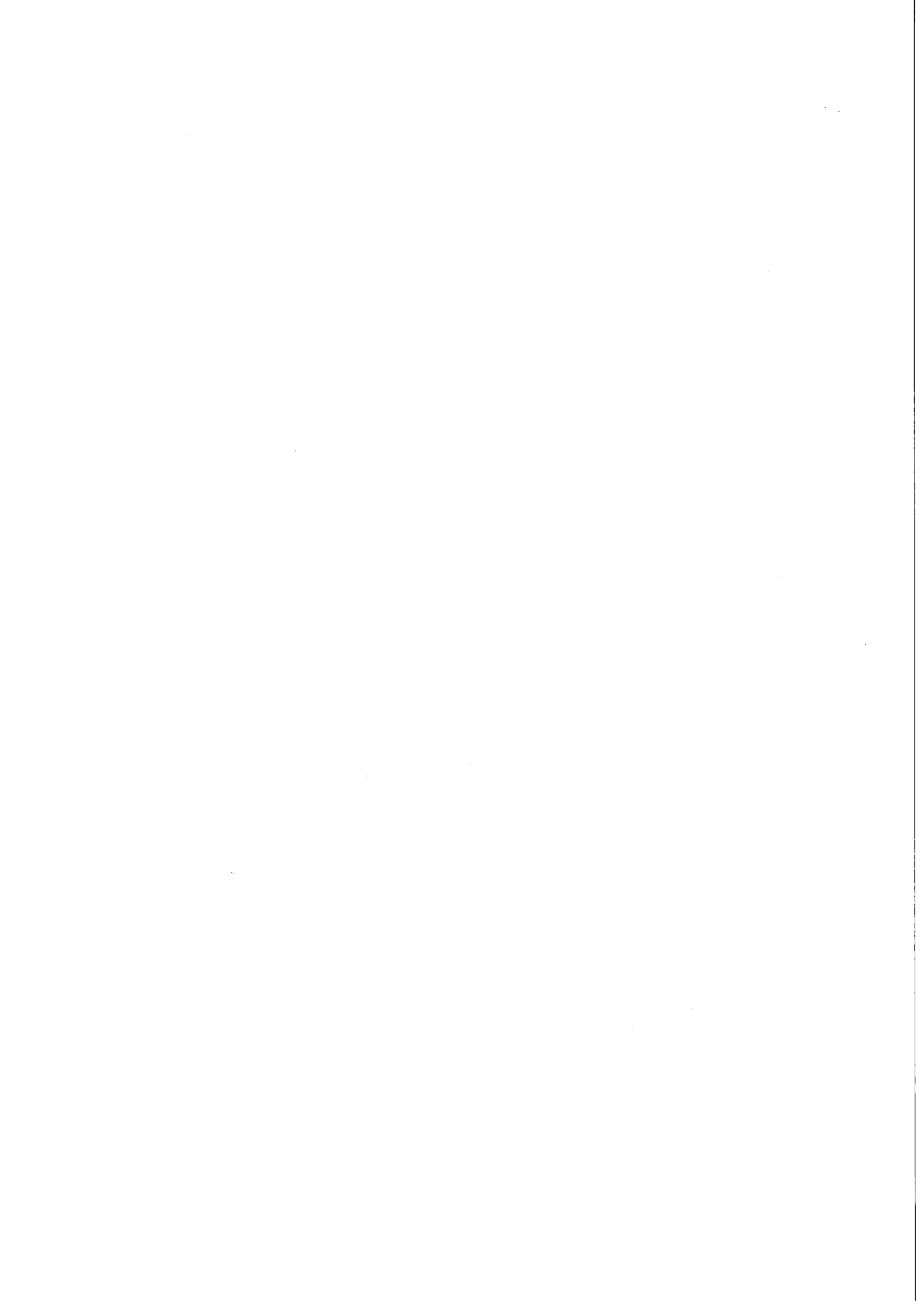
SIGNED at AUCKLAND this 15th day of June 2012

For the Court:

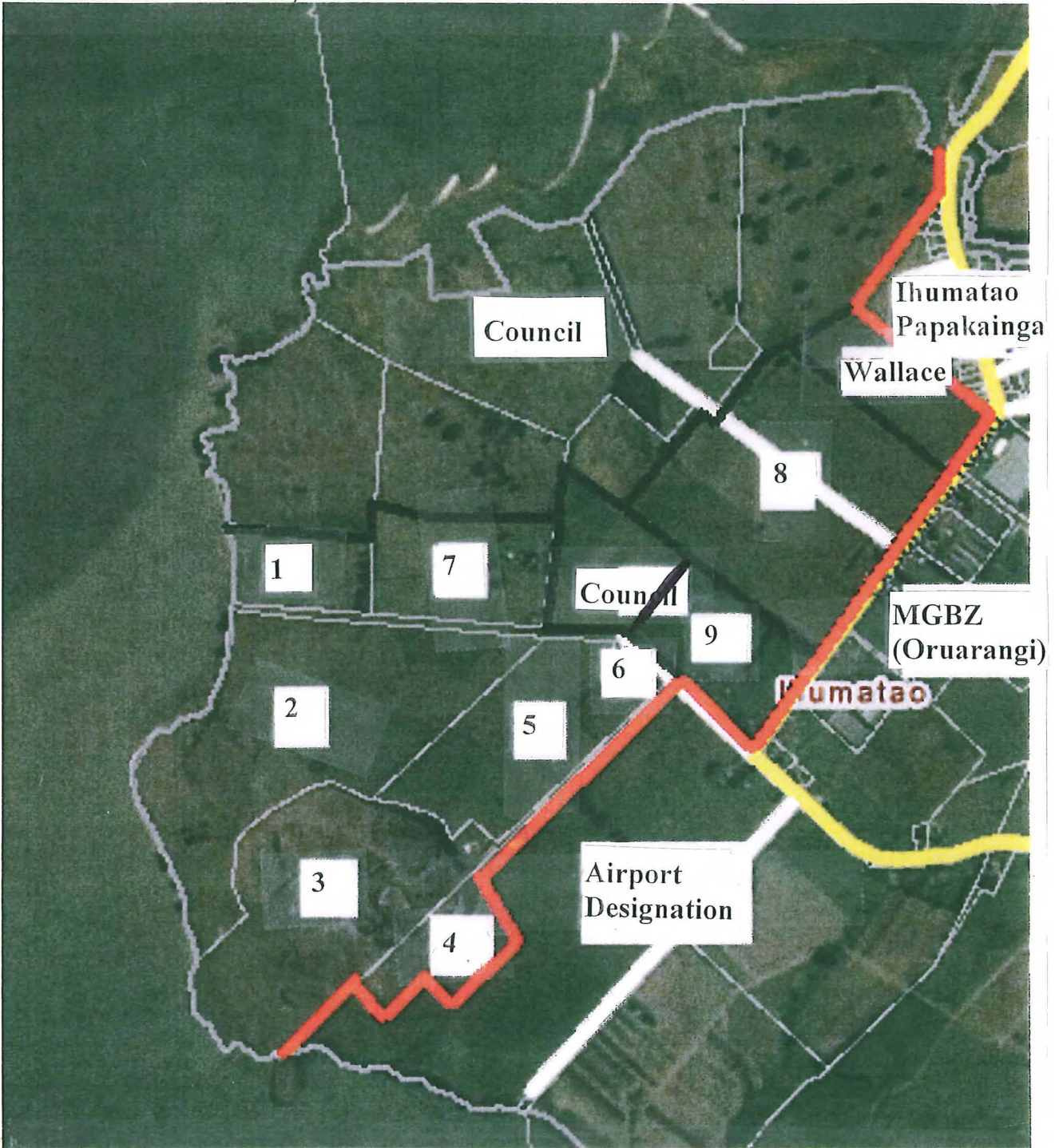


R G Whiting
Environment Judge.





APPENDIX 1 – The subject land



APPENDIX 2
SUMMARY OF EVIDENCE RELATING TO MAORI ISSUES

Ko Maungataketake te maunga
Ko Rakataura te tangata
Ko Te Kawerau a Maki me Te Waiohua nga iwi
Ngati Te Ahiwaru me Te Akitai oku hapu
Ko Makaurau te Marae (Warena Taua, Mihi eic)

Maungataketake is the mountain
Rakataura is the person
Te Kawerau a Maki and Te Waiohua are the tribes
Ngati Te Ahiwaru and Te Akitai are my sub-tribes
Makaurau is the Marae

[1] Over 8 centuries several iwi and hapu have occupied the Ihumātao area and the wider Auckland Isthmus.

[2] These iwi and hapu include Ngati Rori (later called Te Ahiwaru), Te Kawerau a Maki, Ngati Te Ata, Ngai Tai, Ngati Poutukeka (abbreviated to Ngati Pou then later changed to Te Wai o Hua), Te Akitai, Ngati Paretaua, Ngati Tamaoho, Ngati Huatau, Te Aua, Ngati Tahuu, Ngati Kaihua plus others.

[3] There is little doubt that Ngati Ahiwaru, the inhabitants of this area in 1853, were unfairly treated by the Crown but such matters cannot be addressed through this RMA process.¹

[4] On Wednesday 7 December we sat at the Makaurau Marae. We heard evidence on Maori issues from Mr Hori Winikerei Taua, Mr Hare Paewhiri Huia Tone, Ms Dawn Maria Matata, Mr Rapata Roberts, and Mr Te Warena Taua.

[5] **Te Warena Taua** of Te Kawerau a Maki, Ngati Te Ahiwaru, and Te Akitai of Waikato, and Chairman of Te Kawerau a Maki Tribal Authority gave evidence on their whakapapa, history and tradition which he had learnt from his grandfather and Waikato elders.

¹ Murdoch, EIC, at [6.7]



[6] Having been brought up in te ao Maori by his parents and elders, he trained as an ethnologist and has published history of the Auckland tribes, and Maori history of the Howick, Pakuranga and surrounding area.²

[7] His evidence is that Makaurau and Kawerau reached settlement with the landowners and Auckland International Airport Ltd regarding the rezoning of the Metropolitan Urban Limits but consider that protecting the remaining land is of critical importance to them. This land is directly adjacent to the Stonefields reserve, and contains significant wahi tapu. He states, “*Both Kawerau and Makaurau have unbroken ancestral relationships with this land and assert mana whenua over this area*” and because Maungataketake has been desecrated through quarrying they prefer minimal invasive future development on this land.³

[8] Mr Taua gave evidence on the historic occupation of their people in this Ihumatao area since the arrival of the Tainui waka up to present day. We received a confidential map setting out waahi tapu sites and sites of special significance within the subject land and adjacent land. This included burial sites of ancestors, sacred caves and tunnels, and other matters of importance to Kawerau and Makaurau. The numerous, and great significance of the, wahi tapu has lead them to regard the whole area as wahi tapu.⁴

[9] He was cross-examined at length regarding the wahi tapu by counsel for the appellants.

[10] When questioned by Mr Cavanagh as to whether food and tapu were able to mix, Mr Taua replied:

... Te Rau-anga-anga, King Potatau’s father, now he was a General in the wars, and while they were eating at Kaitotehe, the old pā of theirs, they were eating food and kumara. They summoned the heads and hence, his name Te Rau-anga-anga, of 100 heads. They asked for the heads to come, be put in front of them while they ate. They have that right, they are the chiefs. They can determine whatever they wish. They can make tapu, they can break tapu. The right is solely theirs.⁵

[11] Mr Littlejohn queried the validity of the tapu lifting ceremony performed by Mr Wilson on the Mendelssohn property in 1999 given Mr Taua’s earlier comments that tangata whenua were able to “*make tapu or break the tapu*”. Mr Taua replied:

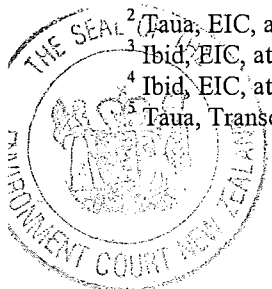
... Please understand that when he went there, it was to placate the owners of the land, because they feared somewhat that a tapu had been put over by the Māoris who were

² Taua, EIC, at [6] – [7]

³ Ibid, EIC, at [12]

⁴ Ibid, EIC, at [14] – [19]

⁵ Taua, Transcripts at page 450



involved with the Stonefields. His karakia was simply to make the family feel happy, by offering a karakia...⁶

[12] Mr Enright argued that there were two separate entities represented at this hearing and that “any waiver of wahi tapu by the Makaurau Marae kaumatua does not bind Kawerau”.⁷

[13] Mr Casey in his closing submitted that no wahi tapu or sites of significance have been identified on the current Wallace land other than part of the slopes of Puketapapa.⁸

[14] While he accepted Mr Taua’s “broad understanding of the meaning of tapu”, he submitted that this “expansive understanding does not fit with the meaning ascribed in Section 6(e)”, citing *Serenella Holdings Ltd v Rodney District Council*.⁹

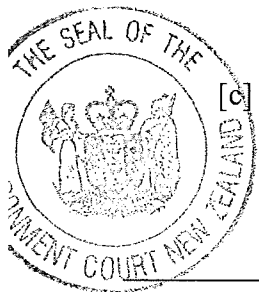
It is important however to record that the matters of national importance in s 6(e) that are to be recognised and provided for, should not generally include everyday activities and wide-spread but long lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious, it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[15] The ancestral relationship and cultural relevance of an area is often reflected in the named localities.¹⁰ We note some of these names in the following examples:¹¹

[a] Mataoho - Te Kawerau a Maki and the people of Ihumātao regard this area as part of the creation of the atua Mataoho, as portrayed in many of the landmarks of the Auckland Isthmus;

[b] Te Ihu a Mataoho (Mataoho’s nose, later abbreviated to Ihumatao, then Maungataketake, then Elletts Quarry);

[c] Te Pane a Mataoho (The Head of Mataoho or Mangere mountain);



⁶ Ibid, Transcripts, at page 464

⁷ Points of Reply by Counsel for Makaurau Marae Maori Trust Board Inc & Te Kawerau a Iwi Tribal Authority Inc, at [1]

⁸ Casey, Closing Submissions, at [38]

⁹ Ibid, Closing Submissions, at [39]

¹⁰ Murdoch, EIC, at [4.59]

¹¹ Taua, EIC, at [22]

[d] Kouora and Pukaki Craters are Nga Tapuwae a Mataoho (The footprints of Mataoho); and

[e] Te Kapua Kai a Mataoho (Mataoho's Food Bowl or Mt Eden Crater).

[16] Other examples include:¹²

[a] Te Tahuhu o Tainui, now called Otahuhu (alluding to the Tainui waka being carried upside down from Tamaki River to Manukau Harbour);

[b] Te Manukanuka a Hoturoa, now Manukau Harbour (where Hoturoa, the captain of the Tainui waka became anxious due to the treacherous conditions);

[c] Nga Hau Mangere, now Mangere (the lazy winds, named by Rakataura, the Tainui waka tohunga);

[d] Te Motu a Hiaroa, (Hiaroa's Island) named after Rakatarua's sister Hiaroa, now called Puketutu Island.

[17] Mr Murdoch expanded on Puketutu as follows:¹³

What we now know as Puketutu Island is really known as Te Motu a Hiaroa, the island of Hiaroa, who was a woman on the Tainui canoe, and that's the proper name for the island. The highest point of the island was one of, I think, three or four cones and it had a very sharp pointed peak on it, and that was called Puketutu. And so Puketutu is a landmark on Te Motu a Hiaroa, and as we so often do, we shift and cut and paste Māori names and in the same way Puketapapa has become Ihumatao [Ihumatao] and so on.

[18] The wahi tapu within the area include sacred mountains, battle sites, burial sites, Pa sites and subterranean caverns that contained taonga.¹⁴

Whilst wahi tapu such as Maungataketake have been desecrated and physically destroyed, we hold fast to the tikanga that tapu associated with those sites remains intact.¹⁵

[19] Of significance to Te Kawerau a Maki and Makaurau is that one of the hui to select the first Maori king was held at Ihumātao and Potatau Te Wherowhero lived there prior to his accepting the mantle as king.¹⁶

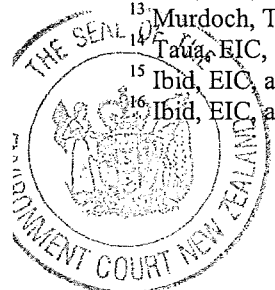
¹² Ibid, EIC, at [26]

¹³ Murdoch, Transcripts, at page 269

¹⁴ Taha, EIC, at [31]

¹⁵ Ibid, EIC, at [32]

¹⁶ Ibid, EIC, at [37] – [38], Murdoch, EIC, at [5.2.2]



[20] Mr Taua cited a number of development ventures in this area that have been detrimental to their iwi. These included:¹⁷

- [a] the Auckland Airport;
- [b] the Mangere Sewerage Treatment Facility;
- [c] the destruction of Maungataketake for a quarry.

[21] The common elements of these examples are:¹⁸

- [a] Imposition of decisions that directly impact on tangata whenua;
- [b] Prioritisation of regional amenity over the values of tangata whenua;
- [c] Destruction of significant landmarks;
- [d] Environmental degradation, which in turn effects water quality and the availability of natural resources such as kai moana, which are fundamental to our way of life;
- [e] Desecration of wahi tapu and other sites of spiritual, cultural and heritage significance;
- [f] Marginalisation of tangata whenua from ownership and development opportunities; and
- [g] Encroachment of development on the oldest papakainga in the Auckland region, which impacts the character of the area and the quality of lifestyle of tangata whenua.

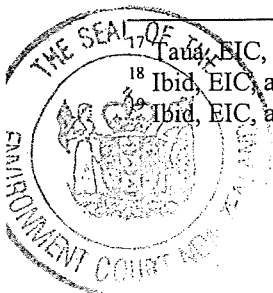
[22] In summary, Mr Taua concluded that Te Kawerau Iwi Tribal Authority and Makaurau Marae Trust as representatives of the ahi ka:

- [a] oppose urbanisation of the Ellett, Wallace and Mendelssohn lands;¹⁹
- [b] support the acquisition of those lands as public open space;²⁰

¹⁷ Taua, EIC, at [40]

¹⁸ Ibid, EIC, at [41]

¹⁹ Ibid, EIC, at [44]



[c] emphasise the significance of the area because of

[i] the number of wahi tapu,²¹ and

[ii] wrongful confiscation by the Crown.

[23] **Mr Graeme Murdoch** a noted scholar and historian provided a detailed summary of the pre and post European human and cultural history of the Mangere-Puhinui, Ihumātao block and the wider Auckland region on behalf of the Auckland Council.

[24] He had the added advantage of being proficient in the Maori language and having learnt from a life long association with the elders of Ngati Ahiwaru, Te Akitai, Te Kawerau a Maki and other iwi in the greater Auckland Isthmus.

[25] Mr Murdoch opines that sacred knowledge acquired through discussion with kaumatua has “*equal validity*” and often “*greater importance*” in Section 6(e) RMA matters than academic and archaeological sources.²²

[26] In his youth he was aware that the volcanic features of the Ihumātao were recognised as taonga by local Maori²³ and that the subsequent modification and destruction of these features have caused “*immense distress*” and “*ongoing grief*” to the tangata whenua.²⁴

[27] Examples of these modifications include the creation of the sewerage ponds and the water treatment plant, the quarrying of various maunga (Maungataketake and Puketutu) and building the second runway for the Auckland International Airport.

[28] Another cultural icon, Te Kahui Tipua “*assemblage of spiritual guardians*” Haumia, Papaka and Kaiwhare were destroyed when the Mangere Wastewater Treatment Plant sewerage ponds were built.²⁵

[29] Similarly Te Punga o Tainui – “*the anchor stone of Tainui*” situated just off the Oruarangi Creek was “*tragically*” destroyed during the construction of the Mangere Wastewater Treatment Plant sewerage ponds.²⁶

²⁰ Ibid, EIC, at [44]

²¹ Taua, EIC, at [46]

²² Murdoch, EIC, at [4.1.1]

²³ Ibid, EIC, at [4.2.3]

²⁴ Ibid, EIC, at [4.2.4]

²⁵ Ibid, EIC, at [4.2.5]

²⁶ Ibid, EIC, at [4.2.7]



[30] When Tainui waka left Ihumātao and ventured on to Kawhia, two “*illustrious founding ancestors*”, Rakataura their leading tohunga, and a younger rangatira named Poutukeka, remained. Their direct descendants are the people of Ihumātao connected with the Pukaki and Makaurau Marae.²⁷

[31] Poutukeka was the eldest son of Hoturoa the captain of the Tainui waka.²⁸ His descendants, Ngati Poutukeka, lived in this wider Mangere-Puhinui area.²⁹

[32] Rakataura later became known as Hape. Puketapapa or Te Puketapapatanga a Hape (the hilltop resting place of Hape) “*imbues the wider Ihumatao Penninsula with particular mana, spiritual unity and significance*”.³⁰

[33] In spite of the Crown confiscation of the 1100 acre Ihumātao block in 1865 the hapu associated with Makaurau Marae have maintained an unbroken “*ahi ka roa*” in this area for over 6 centuries.³¹

[34] Mr Murdoch also narrated the tribal interactions and occupations arising from the musket wars,³² and the alienation of lands in the Tamaki-Manukau area.³³

[35] He gave evidence on the Te Waiohua practice of shifting agriculture in a seasonal cycle of gardening and resource gathering and how they left aside the defensive areas of the cone pa, the settlements and the sacred burial areas.³⁴

[36] He cautioned against relying solely on archaeological site records for identifying heritage areas citing the discovery of the largest burial found in the district during earthworks for the Airport second runway as an example.³⁵

Archaeological sites and their qualities and values of course provide only one component of the historic and cultural heritage values of the Ihumatao cultural landscape of significance to Tangata Whenua.³⁶

[37] Mr Murdoch emphasises the importance of Maori identity through ancestral relationships to cultural landscapes regardless of whether or not the land is in Maori ownership.³⁷

²⁷ Ibid, EIC, at [4.2.8]

²⁸ Taua, Transcripts, page 469

²⁹ Murdoch, EIC, at [4.3.2]

³⁰ Ibid, EIC, at [4.2.9]

³¹ Ibid, EIC, at [4.3.1]

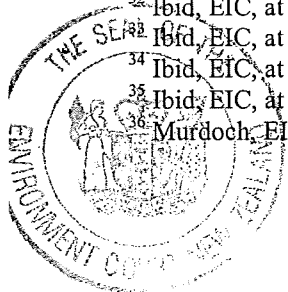
³² Ibid, EIC, at [4.3.6] – [4.3.8]

³³ Ibid, EIC, at [4.4.1] – [4.4.7]

³⁴ Ibid, EIC, at [4.5.5]

³⁵ Ibid, EIC, at [4.5.8], Taua, EIC, at [42]

³⁶ Murdoch, EIC, at [4.5.9]



[38] In Section 5, EIC, he detailed the post European occupation of the Ihumātao area including their interactions with local iwi.

[39] With reference to Section 6(f) matters he states:

... the archaeological, architectural, cultural, historic, technological, and to some degree scientific qualities associated with the natural and physical resources of Ihumatao, relate to both the Maori and European occupation and use of the land. The Maori ancestral relationship that is held with the land, waters and other taonga associated with Ihumatao, forms a significant and integral component of these values. It is inextricably linked to all of these natural and physical resources, and not just to their “cultural and historical qualities”.³⁸

[40] He opines that the post-European component of the cultural heritage landscape of Ihumātao illustrates the early adaptation of Maori to the colonial economy and social change, adding that the Maori mission station is the finest remaining example of a nineteenth [century] complex left in the Auckland region.³⁹

[41] He summarised that the cultural heritage landscape of Ihumātao is a significant example of “*a coherent and legible landscape that covers the entire continuum of human history and settlement in the region*” and that:⁴⁰

The Maori ancestral relationship with Ihumatao extends well beyond the nationally significant archaeological assemblage and landscape associated with the OSHR, to all parts of the Ihumatao peninsula and its natural and physical resources, including those areas modified by quarrying.

[42] He closes with the observation that the area is rich in human historical and cultural associations that have developed over nearly eight centuries that reflects the full range of Maori and post European heritage⁴¹ and a quote from the Heritage Chapter of the District Plan:⁴²

Titiro ki nga wa o mua
Ki te whakamarama I tenei ao
Rapua te mea ngaro
Hei maramatanga mo nga Ao e eke mai

Look to the past to understand the present and seek answers for the future

³⁷ Ibid, EIC, at [4.5.10]

³⁸ Ibid, EIC, at [6.3]

³⁹ Ibid, EIC, at [6.10]

⁴⁰ Ibid, EIC, at [6.14]

⁴¹ Ibid, EIC, at [7.5.9]

⁴² Ibid, EIC, at [7.5.10]

