

# Decision on notification of an application for resource consent under the Resource Management Act 1991



## Discretionary activity

<b>Application number:</b>	LUC60345670 (s9 land use consent)
<b>Applicant:</b>	Manatū Taonga Ministry for Culture and Heritage
<b>Site address:</b>	2 Judges Bay Road, Parnell
<b>Legal description:</b>	Lot 1 ALLOT 1,4,5 SEC 2 Suburbs AUCKLAND, PT ALLOT 4 SEC 2 Suburbs AUCKLAND, PT ALLOT 24 SEC 2 Suburbs AUCKLAND, PT ALLOT 4 SEC 2 Suburbs AUCKLAND, PT ALLOT 1 SEC 2 Suburbs AUCKLAND, PT ALLOT 24 SEC 2 Suburbs AUCKLAND

## Proposal:

Sarah Heritage of Boffa Miskell has provided a description of the proposal and subject site on pages 4-10 of the Assessment of Environmental Effects (AEE) titled: *National Erebus Memorial Application for Resource Consent and Assessment of Environmental Effects Prepared for Manatū Taonga - Ministry for Culture and Heritage, Sarah Heritage, 16 September 2019.*

Resource consent is required for the following reasons:

## Land use consent (s9) – LUC60345670

### Auckland Unitary Plan (Operative in part)

#### *Notable Trees Overlay*

- Work within the protected root zone not otherwise provided for is a **restricted discretionary** activity under rule D13.4.1(A9)
  - (a) *Some of the works required within the rootzone of a notable Pohutukawa tree are not expected to meet the standards under D13.6.2.*

#### *Land Disturbance*

- Land disturbance within a Significant Ecological Area greater than 5m<sup>2</sup> is a **restricted discretionary** activity under rule E11.4.3(A28)
  - (a) *Some of the earthworks required to establish the memorial are located within Significant Ecological Area (SEA\_T\_6060). These cover an area of 76.5m<sup>2</sup>.*
- Land disturbance within a Significant Ecological Area greater than 5m<sup>3</sup> is a **restricted discretionary** activity under rule E11.4.3(A30)

- (a) *Some of the earthworks required to establish the memorial are located within Significant Ecological Area (SEA\_T\_6060). This involves a volume of 45.67m<sup>3</sup>. 26.6m<sup>3</sup> relates to the removal and re-spreading of topsoil, whilst 19.07m<sup>3</sup> is required for fill in these areas.*

#### *Vegetation Management and Biodiversity*

- Any vegetation alteration or removal within the Significant Ecological Area overlay not otherwise provided for is a **discretionary** activity under rule E15.4.2(A43)
  - (a) *Works are required within the protected root zones of a Coral tree (tree 1), Totara tree (tree 7) and notable Pohutukawa tree (tree 2). Works within the protected root zone are not specifically provided for in activity table E15.4.2. It is also proposed to remove a 6m tall Karo tree (tree 6).*

#### *Trees in Open Space Zones*

- Works within the protected root zone that do not comply with Standard E16.6.2 are a **restricted discretionary** activity under rule E16.4.1(A8).
  - (a) *The proposal involves works within the protected root zone of a Coral tree (tree 1) and a notable Pohutukawa tree (tree 2). The works do not comply with Standard E16.6.2.*
- Tree removal of any tree greater than 4m in height or greater than 400mm in girth is a **restricted discretionary** activity under rule E16.4.1(A10).
  - (a) *To establish the memorial, the removal of three Mexican Fan Palm trees (trees 3-5) and a Karo tree (tree 6) over 4m in height is required.*

#### *Infrastructure*

- Works within the protected root zone of notable trees and trees in open space zones for the construction of network utilities not otherwise provided for is a **restricted discretionary** activity under rule E26.4.3.1(A88).
  - (a) *The proposal involves works within the protected root zone of a Coral tree (tree 1) and a notable Pohutukawa tree (tree 2). The works do not comply with Standard E26.4.5.2.*

#### *Open Space Zones*

- To construct a new building that does not comply with one or more standards is a **discretionary** activity under rule H7.4.1(A39).
  - (a) *The structure would increase the impervious area of the site by 60m<sup>2</sup>, with the existing impervious area not complying with the 5000m<sup>2</sup> maximum (currently 8427m<sup>2</sup>) within the standard.*

The reasons for consent are considered together as a **discretionary** activity overall.

## Preamble

This application was referred to me on the basis of correspondence received from a number of interested parties requesting public notification. I have reviewed this correspondence and visited the site and locality of the application (on 29 February 2020). In response to specific correspondence received from Russell McVeagh Ltd on behalf of Ms. Anne Coney, I requested legal advice from the Council on matters relating to the special circumstances provisions in sections 95A and 95B of the RMA; I did not feel it appropriate to ask the Council's planner to respond to matters of legal technicality likely to be beyond their expertise. I also sought clarification from the applicant's landscape architect in terms of the conclusions expressed in the Landscape and Visual Assessment, in relation to View 2.

When considering whether or not to publicly notify (s.95A RMA) or limited notify (s.95B RMA) an application for resource consent, I must satisfy myself that I have sufficient information, including of suitable probative value, to make a reasonable decision on the facts. In that respect and with particular regard to the concerns raised by the interested parties, I find that I have been provided with sufficient information, analysis and reasons to make a sound decision on the question of notification. In reaching that conclusion I have also read the relevant provisions of the Auckland Unitary Plan: Operative in Part ("**AUP: OP**") and considered the application and associated reports and recommendations in light of the outcomes that the Plan seeks, and the particular consents that are required for the activity – acknowledging that consent is required as a fully Discretionary Activity and that I must have regard to all relevant environmental effects.

I have also taken into account only those conditions of consent and other mitigating measures proposed by the Applicant. I have not taken into account any additional conditions of consent or changes to the activity that could be subsequently found to be appropriate at a determinative s.104 and s.104B RMA stage, as those sit beyond what I could consider. Lastly, I confirm that I have found there to be no relevant 'permitted baseline' under sections 95D(c) and 95E(2)(a) RMA given the range of consents required and the context of the land within the reserve that it is proposed to locate the memorial on.

Having very carefully considered all of the matters raised in correspondence from interested parties and the arguments they have made in favour of public notification, including the allegedly high level of public interest associated with the proposal, I prefer the case in support of non notification under both s.95A and s.95B RMA. I find that the case in favour of non notification to be substantiated and directly related to the relevant provisions of the AUP: OP and RMA. I make particular reference here to the experts on behalf of both the Applicant and the Council that have given specific reasons why they consider adverse effects would be no more than minor (public notification), and less than minor (limited notification) respectively, and why there are no special circumstances associated with the proposal.

In particular, I decline to publicly notify the proposal under special circumstances because of alleged defects in the actions of either the Applicant or the Council as a landowner. I find that this particular argument sits beyond my purview and is not related to the resource management issues raised by the application and that my decision on notification must be focused on.

I have overall accepted the recommendations of the Applicant's expert planner Ms. Heritage, and the Council's planner Mr. Gregg. In the detailed reasons that follow, I have largely adopted the recommendations of Mr. Gregg.

## Decision

I have read the application, correspondence, supporting documents, and the report and recommendations on the application for resource consent. I have visited the Site. I am satisfied that I have sufficient information to consider the matters required by the Resource Management Act 1991 (RMA) and make a decision under delegated authority on notification.

### Public notification

Under section 95A of the RMA, this application shall proceed without public notification because:

1. Under step 1, public notification is not mandatory as:
  - a. the Applicant has not requested it;
  - b. there are no outstanding or refused requests for further information; and
  - c. the application does not involve any exchange of recreation reserve land under s15AA of the Reserves Act 1977.
2. Under step 2, public notification is not precluded as:
  - a. there is no plan rule or regulation in an NES that specifically precludes public notification of the application; and
  - b. the application is for an activity other than those specified in s95A(5)(b).
3. Under step 3, public notification is not required as:
  - a. the application is for an activity that is not subject to a plan rule or regulation in an NES that specifically requires it; and
  - b. the activity will have or is likely to have adverse effects on the environment that are no more than minor because:
    - The proposal would introduce a new built element within a public reserve. It is modest when taken in the context of the reserve as a whole (175m<sup>2</sup> including structures and pathways within the 55,669m<sup>2</sup> reserve) and would provide for additional recreation activities within the reserve, including by providing a vantage point for views over the harbour. It is sited well away from any sensitive receiver or neighbour, and will not visually dominate the reserve. The majority (roughly 80%) of the adjacent open lawn would be retained. The use of the reserve to accommodate memorials or artworks is not unusual, and the existence of a number of such installations within the wider reserve is noteworthy. Because of all of the above, the introduction of this new memorial would not adversely detract from the existing character and amenity values of the park, or the wellbeing benefits it provides the community (including regular reserve users), in a way that would be beyond minor.

- The application is supported by a 'landscape and visual assessment' (LVA) prepared by Studio Pacific Architecture dated 11 October 2019. The LVA notes that partial views to the site are possible from Tāmaki Drive and the Waitemata Harbour, with views from the site similarly back towards the harbour over the lower-level vegetation of the escarpment. The LVA notes that the visual impact from all viewpoints apart from view 2, would be at most low, in relation to view 2, this is from Teal Park (I note this is zoned Business – City Centre Zone) which sits opposite and at sea level, on the opposite side of Tāmaki Drive. The LVA notes for this view that the proposal would be centred within this view and would be clearly visible, although the proposed materiality minimises its perceived mass as does its siting, which means it would not alter the skyline. It would however be visible with other built elements, including street lighting, fencing and the railway infrastructure. The LVA concludes that in this one view the proposal would have a “moderate/high visual impact with only a partial change to the existing character and a small reduction in the perceived amenity”. I find that a moderate to high visual impact resulting from a new development changing the status quo is not the same thing as creating a more than minor adverse effect based on the overall context of the view; it is a measure of the degree of visual change proposed rather than its severity. I am satisfied that the proposal in its urban context will be quite visible from some viewpoints but that this visibility will not result in adverse effects that could be more than minor from any individual viewpoint or in an overall sense.
- The proposal is supported by an 'Arboricultural assessment' prepared by Peers Brown Miller Limited, dated 6 September 2019', and a number of volunteered conditions of consent. The proposal involves works within the root zones of a notable Pōhutukawa, and a semi-mature Totara and mature Coral tree, the removal of three Mexican fan palms and a karo tree. The Council's Heritage Arborist has reviewed the proposal and concludes that the proposal's adverse effects can be managed and mitigated through implementation of the measures proposed within the Arboricultural Assessment. In relation to the removal of the Mexican Fan Palms and Karo trees, the Council's Arborist has reviewed the proposal and notes that Mexican Fan Palms are exotic species and are not significant in terms of their size or local importance. The Karo tree is relatively small in size and given the replacement tree planting proposed by the Applicant of a 1:1 ratio the level of tree cover within the site would be maintained. Adherence to the works methodology, for works within the root zone of the Coral Tree, and the tree protection methodology, would manage and mitigate other adverse arboricultural effects. The proposed tree removals would not have adverse amenity effects due to the species and size of the trees and given the significant quantity of established trees that would remain in the reserve. On the basis of the above and noting that vegetation within public reserves varies and is subject to removal and re-planting from time to time, any adverse arboricultural effects would be at most minor.
- In relation to sediment and erosion effects, the Council's Regional Earthworks Specialist has reviewed the proposal including the Erosion and Sediment Control

Plan (ESCP), noting this is comprehensive and consistent with technical document GD05. Adverse effects would be appropriately managed and mitigated through the ESCP proposed by the Applicant which has minimised sediment runoff and as such any adverse sediment / erosion effects would be less than minor taking into account the modest size and scale of the works.

- The proposal would increase the impervious area across the whole site by 60m<sup>2</sup> or 0.1% from 8427m<sup>2</sup> to 8487m<sup>2</sup>. The proposal would not create any adverse downstream effects from the additional impervious area, and water quality, quantity and amenity values would be only negligibly adversely affected when compared to the existing situation.
- The Council's Ecology Specialist has reviewed the proposal and concluded that the native Karo tree is typical within this ecosystem, but that the overall contribution of this single tree within the wider area and ecosystem is very low. Through replacement planting proposed by the Applicant, adverse effects on the ecological values of the SEA will be remedied and mitigated. I accept this analysis and find that any adverse ecological effects would be less than minor.
- The AEE (section 7.6) notes that Applicant has engaged with Ngāti Whātua Ōrākei since the early design stages and that it has been consulted prior to this application. A supporting letter from Andrew Brown, Planning Manager at Ngāti Whātua Ōrākei has been submitted with the application (Appendix 11), with support offered subject to conditions of consent relating to cultural monitoring and site induction, both of which have been volunteered by the Applicant. Ngāti Whanaunga responded in an email dated 14 August 2019, Mike Barker of Ngāti Whanaunga noted the significance of the site for the iwi and requested to undertake a review of the proposal from the iwi perspective. Mr Brodie Stubbs (Project Manager at the Ministry for Heritage and Culture) responded to this in an email dated 27 August 2019 and no further response from Ngāti Whanaunga was received. Given this record of consultation with iwi, I am satisfied that there are likely to be no adverse effects on mana whenua/cultural values that might be more than minor.
- The proposal is supported by an Archaeological Assessment by Charlotte Judge of Clough & Associates Ltd dated November 2019, this notes that the works are located within proximity of two previously recorded archaeological sites, being Mataherehere Pa R11/84 and the site of Kilbryde House R11/2681, although neither of these are scheduled under the AUP: OP, and concludes that the site is considered to have 'high archaeological and wider historic heritage value based on its historical associations with Sir John Logan Campbell, knowledge potential and contextual values.' The Council's Archaeology Specialist has reviewed the proposal and notes that the proposal, including the temporary haul road, has been designed to avoid and minimise adverse effects on Kilbryde House, whilst ground truthing and further investigation has been offered by the Applicant prior to any construction works to investigate and record details, with further monitoring during construction to establish whether any unrecorded subsurface remains are present.

Based on the above, I find that the proposal would have no more than minor adverse effects on archaeological remains and associated cultural values, and that appropriate safeguards are in place to ensure that this would be the case through the site works period.

- Any physical effects from the project construction works will be discrete to the project area, and public access routes through the park would be maintained during the works and users of the reserve would still be able to enjoy use of it. The works will be undertaken in a confined area over a short duration. As such, the project works will not detract from public enjoyment and use of the wider park and rose garden during construction and adverse construction effects, including noise (predicted to comply with all relevant AUP: OP noise controls) would be less than minor.
  - In consideration of all of the above I have turned my mind to the question of whether there is a cumulative effect of any concern. I find that the proposal's adverse effects will not combine or interact in a manner whereby as a whole they could result in a more than minor adverse effect. I am satisfied that any cumulative effects would be minor or less than minor.
  - For completeness, I find that any other adverse effect not expressly mentioned above will be no more than minor based on the scale, siting, and context of the proposal, and the Applicant's proposed methodologies for undertaking the works.
4. Under step 4, in terms of special circumstances, I have considered whether any special circumstances exist, and that consideration has also included the following matters raised in correspondence from interested parties:
- the proposal
  - correspondence received
  - public ownership
  - public interest
  - national significance
  - alleged shortcomings in other legislation regarding consultation

I find that there are no special circumstances that would warrant the public notification of the proposal. In resource management terms there is nothing exceptional or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that public notification should occur. The consents required are provided for within the AUP: OP, and are relatively 'routine' matters that are commonly the subject of applications across Auckland including within other reserves. I wish to record in addition that I have not accepted that the level of interest that may or may not be associated with this memorial is itself a special circumstance. I also confirm that I find alleged shortcomings in consultation that may be required by the Applicant or the

Council as landowner outside of the resource consent process do not constitute special circumstances or warrant public notification of the application.

### Limited notification

Under section 95B of the RMA this application shall proceed without limited notification because:

1. Under step 1, limited notification is not mandatory as:
  - a. there are no protected customary rights groups or customary marine title groups affected by this proposal; and
  - b. no persons to whom a statutory acknowledgement is made is adversely affected by this proposal.
2. Under step 2, limited notification is not precluded as:
  - a. there is no plan rule or regulation in an NES that specifically precludes limited notification of the application; and
  - b. the application is for an activity other than those specified in s95B(6)(b).
3. Under step 3, limited notification is not required as:
  - a. this application is not for a boundary activity or prescribed activity; and
  - b. there are no adversely affected persons because any adverse effects on any person would be less than minor for the reasons set out in the above s.95A determination and in addition:
    - The reserve is large and during construction the vast majority of the reserve would remain unaffected and available for public use and enjoyment. After construction the reserve's overall characteristics would change but not in a way that would harm any user's ability to continue enjoying the reserve.
    - There will be construction within the park and onsite vehicle movements, however these would be over a short period and can be appropriately managed such that they would not spoil the reserve's amenity values or other qualities, or the ability of people to reasonably use and enjoy the space.
    - In terms of visual and landscape effects, the proposal is sited so that changes to the landscape of the park are localised and well away from any sensitive receiver. The addition of an additional artistic installation within the reserve will not compromise it or 'break the camel's back' in terms of it remaining a predominantly spacious and open-feeling space.
    - The works area is substantially removed from the nearest residential and commercial properties. Persons at 85-87 Gladstone Road (which is the Red Wall 1939 restaurant) are closest to the proposal, but are over 100m from the subject site, with other persons on Gladstone Road separated by the road reserve itself. I

find that this distance will significantly mitigate potential adverse effects on people to a level that would be less than minor.

- In terms of Mana Whenua values, applying Tikanga and Mana Whenua values during the works, as well as the planting of native trees, as per the consultation with the relevant Iwi/hapu and all as proposed by the Applicant, will ensure that the proposed land disturbance will not impact on Mana Whenua values to the extent that any specific Mana Whenua group (as an identifiable person) would be adversely affected.

4.

Under step 4, there are no special circumstances that warrant the application being limited notified to any other persons for the same reasons that I found there were no special circumstances under s.95A of the RMA that would warrant public notification. In reaching this conclusion I confirm that I have considered special circumstances under s.95B as a separate exercise to considering special circumstances under s.95A, and in particular considered the correspondence received from interested parties.

Accordingly, this application shall proceed on a **NON-NOTIFIED** basis.



**Ian Munro**

**Duty Commissioner**

4 March 2020