Summary legal view – sites and places of value to mana whenua

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General powers under the RMA

The Resource Management Act 1991 confers broad powers on local authorities to regulate the use of land for the purpose of promoting sustainable management of natural and physical resources. The definition of sustainable management (s 5) extends the scope of the policies and rules to comprehend enabling people in communities to provide for their social, economic, and cultural well-being and their health and safety. Of further relevance are certain matters of national importance (s 6) which are to be provided for and these include the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. The protection of historic heritage is another matter to consider in preparing council plans.

The conventional method of recognising historic heritage and the relationship of Maori to ancestral lands (which includes lands no longer owned by Maori), is to list in the plan the buildings or sites of heritage significance which includes cultural heritage. The cases decided by the Environment Court indicate that a listing must reach a threshold for inclusion. It must be established that the heritage or cultural value is significant and specific as to the site, and the listing is justified in the context of affecting the property rights to development of the existing owner.

Presently the proposed Auckland Unitary plan includes a substantial collection of buildings and places under the conventional heritage listing provisions. Although individual owners may contest these listings where affecting private property, no objection is taken as to the legality of this type of provision.

Sites and places of value to mana whenua

The policies and rules relating to sites and places of *value* to mana whenua, inserted at the last minute in the Proposed Auckland Unitary Plan, which lists 3600 sites of value, is a substantial extension of the power of regulation, which does not have any precedent in earlier district plans or unitary plans in New Zealand.

As a precondition of making any policy or including any rule in a proposed plan, section 32 of the RMA requires the council to carry out an evaluation as to whether or not the proposed provisions are the most appropriate way to achieve the purpose set out. The evaluation must have regard to efficiency and effectiveness, and other methods which may be appropriate, and include a benefit and cost analysis of the proposal and possibly the risk of acting or not acting where there is insufficient information available.

The S 32 analysis carried out by Auckland Council contains extensive repetitive rhetoric justifying partly on a precautionary basis the inclusion of the new provisions relating to places of value to mana whenua. The analysis does not include any assessment of the individual 3600 sites, which is essential to comply with an adequate and complete assessment under s 32. This failure to provide any details of the qualifications of each of the 3600 sites can be the subject of submissions in respect of the proposed unitary plan, and that is what is happening at the present time.

It is appropriate for persons who may be affected by the inclusion of these sites, to require the council in terms of s 32 to justify the particular inclusion. Where the site applies solely to public property owned by the council or another public body and no objection is taken, it may be competent for the council to impose burdens upon itself of consultation before carrying out any development. However the rules may affect persons with private properties within 50 m of the sites, and this restriction is a legitimate ground for contesting the listings.

Nature of rules

Presently the rules transfer the burden of investigation from the council to an applicant for a resource consent. The applicant is required to obtain a "cultural impact assessment", and by terms of the rules the owner may be obliged to contact one or more iwi or hapu. The rules prescribe extensively the cultural considerations that must be addressed. These essentially require a comprehensive consideration of tikanga, which is the cultural view taken by the particular tribe, iwi or hapu. This obligation raises broad and indeterminate values which in the context of traditional RMA regulation could well be seen as unreasonable due to vagueness, uncertainty as to outcomes, and cost to the applicant.

Furthermore the rules specifically require that the applicant consult with mana whenua as part of this process. This obligation of consultation appears to be contrary to an amendment to the RMA in 2005, inserting section 36A. Section 36A states that an applicant for a resource consent does not have a duty to consult with any person about the application. This amendment was specifically intended by Parliament to remove a legal uncertainty as to whether applicants were required to consult with iwi. Unfortunately the Council may have the power to require further information if the cultural impact report is not produced.

Auckland Council response

The Auckland Council has responded to concerns by stating that the reports required from mana whenua do not involve consultation in terms of s 36A, and are merely a conventional type of report required from a technical expert. With respect this response is not satisfactory. Traditional reports required from experts will relate to matters of land stability, flooding risks, access, and other land hazards. Under the RMA there is a specific power (s 106) given to councils to refuse consents where land stability and flooding risks render the property unsuitable for occupation. In relation to a specifically listed heritage building a report may be desirable as to heritage consequences.

By contrast, a development which may be claimed to affect the values of mana whenua, as expressed in the PAUP, is wholly different. The sites and places are vague, and the merits for listing are not established in the plan. The cultural impact report cannot be justified as a technical report relating to natural and physical resources. The definition of "natural and physical resources" does not include any reference to cultural values held by a former occupier of the area.

Alternative procedures

In terms of section 32, the analysis could have looked at alternative ways of recognising

any historical interest by Maori in areas generally, which were mostly sold in the 1840s to the Crown. Firstly, under the Heritage New Zealand Pouhere Taonga Act 2014, a comprehensive procedure exists for applications to include wahi tupuna sites of traditional significance or value, on the New Zealand Heritage list of places, to be made to the Maori Heritage Council. The Maori Heritage Council must follow a prescribed process for evaluating the merits of the request, and must consider the interests of the present owner. If the merits of the application do not reach a threshold the application may not be affirmed. This validating procedure could be followed by Auckland Council before including any of the 3600 sites. Alternatively in relation to specific sites where the merits of listing can be proved, the Council could add those places to the existing lists of heritage buildings and places.

Another approach would be to follow the lead taken in the United Kingdom by UK Heritage. In relation to a place of historic value, the conventional process is for the heritage body or local authority to contact the property owner and to arrange by agreement for the inclusion of a small plaque on the wall or fence of the property to identify its historic association with former occupation. For example, it is common to see these small plaques relate to birth places or homes of famous people, or being sites of notable events. This alternative would be generally acceptable to most owners, and ought to be given serious consideration by Auckland Council.

The way ahead

Presently under the RMA the policies and rules relating to places of value to mana whenua have interim legal effect and must be observed by landowners affected. This is unsatisfactory, but may be unavoidable pending a decision of the Hearings Panel on submissions, and this could be over one or two years away. A recent response from Auckland Council (through the chief planning officer) that only 200 properties have been subject to this obligation to date, does not establish the legal validity of the present provisions, but does affirm that the provisions are affecting some land owners.

It could be possible to seek a declaratory judgment in the High Court or obtain clarification of the legal status upon judicial review, but the High Court might state that this type of action is premature as the mediation processes to be followed may result in some of the listings being omitted, the rules modified, or that the Hearing Panel may express a recommendation on the legality. At the present time Auckland Council does not appear to be resiling from its policy and prescription of the new rules relating to mana whenua in the Auckland Unitary Plan.

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