Decision No **A 13/96**

IN THE MATTER	of the Historic Places Act 1993
AND	
IN THE MATTER	of an appeal under section 20
BETWEEN	**NGATIWAI TRUST BOARD**
	(Appeal RMA 426/95)
	Appellant
AND	**NEW ZEALAND HISTORIC PLACES TRUST (POUHERE TAONGA)**
	Respondent
AND	**R A GREEN**
	Applicant

BEFORE THE PLANNING TRIBUNAL

Planning Judge D F G Sheppard (presiding)
Mr P A Catchpole
Dr A H Hackett

HEARING at WHANGAREI on 14 and 15 February 1996

COUNSEL

Ms P J Kapua for the appellant
Mr J J M Wiltshire for the respondent
Mr B I J Cowper and Ms J C Campbell for the applicant

DECISION

INTRODUCTION

This appeal under section 20 of the Historic Places Act 1993 challenges a decision by the New Zealand Historic Places Trust (Pouhere Taonga) granting authority to destroy or modify

parts of seven archaeological sites on Ngunguru Sandspit.

The appellant is a charitable trust for the Ngatiwai iwi. Te Waiariki hapu of Ngatiwai has manawhenua and manamoana over Ngunguru Sandspit. By this appeal the Trust Board seeks that the authority to modify or destroy the archaeological sites be cancelled.

The New Zealand Historic Places Trust (Pouhere Taonga) is constituted by the Historic Places Act. The decision the subject of the appeal had been made by its director under delegated authority from the Trust Board of the Historic Places Trust, so the Historic Places Trust is the respondent to this appeal.

The application for authority to modify or destroy the archaeological sites was made on behalf of the owner of the land comprising the Ngunguru Sandspit, Mr R A Green.

THE SITE

The Ngunguru Sandspit is located on the north-east (true right) bank of the Ngunguru River, opposite the settlement of Ngunguru on the east coast of Northland. The sandspit has been subject to active dune deflation and migration during the whole period of human settlement of this country. Apart from a caretaker's cottage, the land remains largely undeveloped, and has only been used for grazing cattle, and for casual use associated with shellfish gathering.

There is evidence of past human occupation of the sandspit and its hinterland. A Maori burial ground occupies part which has been set aside as a burial reserve. There is the site of a former pa on an area of high ground. There are a large number (probably in excess of 50) of middens (consisting of pipi and cockle shells and heat-shattered stones) present on the sandspit.

The sandspit was the site of an inter-tribal battle in the 19th century, and because the remains of warriors are buried there, the whole area is regarded by tangata whenua as waahi tapu.

SEQUENCE OF EVENTS

The applicant's property on the sandspit has a total area of 118.8033 hectares. It comprises four parcels in separate titles, described as Horahora lA4A, lA4B, lA4E, and lA4F blocks. The sandspit block lA4A was transferred from Maori owners to E A Lambert in 1964 and

then to Ngunguru Seaside Estate. Mr Green took up an option to buy that property in 1968. In 1980 blocks lA4B and lA4E were bought by Mr Green from G W and J H Amos, and the lA4F block was purchased from multiple Maori owners. Mr Green took title to it in May 1981.

In 1963 the Maori Land Court had made an order for laying out a roadway to give access from the nearest public road, Ngunguru Ford Road, to the sandspit block lA4A across (among others) blocks lA4B and lA4F. When Mr Green bought blocks lA4B, lA4E and lA4F, he successfully applied to the Maori Land Court for the roadway order to be cancelled.

When Mr Green took an option to purchase block lA4A, he intended to develop it as a seaside resort. However in 1969 the Whangarei County Council designated that block and parts of the lA4B and lA4E blocks in its district scheme under the Town and Country Planning Act 1953 as proposed public open space, and in 1970 an appeal to the Town and Country Planning Appeal Board against that designation was disallowed. In 1974 the Minister of Works and Development required further areas to be designated, including the remainder of the lA4B and lA4E blocks. Those designations effectively prevented Mr Green from pursuing his original intention of developing a resort on his land, and during the 1970s and 1980s various attempts by him to have the land bought for public use were unsuccessful. In 1994 all of Mr Green's land was offered for sale, but the Department of Conservation was unable to raise the funds to purchase it, so they removed the designation for public open space. Edward Fenton Holdings Limited entered into a conditional agreement to purchase the property, but that transaction was never completed and the land remains in Mr Green's ownership.

The blocks that make up the four titles are not convenient shapes for the limited farming or forestry uses of the land that are permitted by the Rural AC zoning under the district plan, now that the designation has been lifted. In July 1994 a surveyor's plan for adjusting the boundaries of the four lots was submitted to the Whangarei District Council. The plan showed a right-of-way from the existing roadway, and indicated access tracks to serve each of the new lots. The alignment of the right-of-way partly follows the route of an old track presently being used by the adjoining Maori owners, and is located to be less obtrusive when viewed from the beach or river. Its position has been varied to avoid as many middens as possible. The plan also shows possible house sites on each of the four proposed lots. Those sites have also been selected to avoid major middens.

The District Council has not given a decision on the proposed boundary adjustment, or on a request for certificates of compliance to verify that a house can be erected on each of the new

lots. The council required to be satisfied that consent is available under the Historic Places Act to carry out the works necessary to establish the building sites, right-of-way and access tracks on the proposed rights of way. Mr Green therefore engaged archaeologists, who identified that the works would involve interfering with eight middens on the property. On 3 February 1995 application was made to the Historic Places Trust by Mr Green for authority to modify those middens, and in effect to destroy them.

THE PROPOSAL

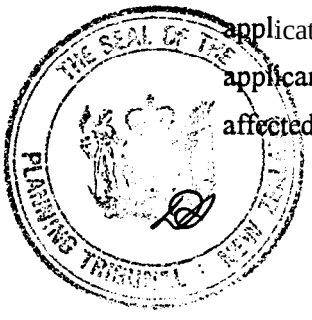
Although the application referred to destroying or modifying eight middens, two of them have been allocated a common identification on the archaeological register and are treated as parts of the one deposit. Five of the middens are surface scatters of shell and stone, representing former intact deposits which have been deflated through wind erosion. The remaining two are substantially or partly intact. All consist mainly of shell, with some heat-shattered stone; and bird bone is evident in one.

Although the application to the Historic Places Trust was for authority to modify or destroy the eight middens, it is intended that the intact middens, and those containing bone and stone material, would be carefully explored by qualified archaeologists, and the archaeological details recorded. That would be done prior to carrying out the works involved in forming the right-of-way alignment, access tracks and house sites.

The selection of the middens to be modified or destroyed was made by a consulting archaeologist, Dr C Fredericksen, who had been engaged by the applicant. He deposed that the planned house sites and access routes had been adjusted to minimise the damage to known archaeological sites, and although it was recognised that there is a high possibility of other sites being found in the course of the works, the application and the primary decision do not authorise any modification of any other site. Separate authority would be needed.

THE APPLICATION AND PRIMARY DECISION

Mr Green's application to the Historic Places Trust was originally expressed to be an application under section 12 of the Historic Places Act. However in a letter to the Trust, the applicant confirmed that the application should be dealt with under section 11, as the sites affected were able to be identified individually.



The application was accompanied by a report by Dr Fredericksen of the archaeological survey that he had made of the sites, an assessment by him of the archaeological value of the middens affected, and a report of his consultations with the tangata whenua. The Trust asked for confirmation of the outcome of further consultations with the tangata whenua and their views of the Maori values of the sites and the effects of the proposed works on those values. Dr Fredericksen responded that the tangata whenua might object on the ground that skeletal remains may be present in the middens.

In accordance with the Trust's standard practice in such cases, a report on the application was prepared for the Director of the Trust by two of its officials, the Maori Sites Officer (Mr D N Robson) and the Archaeological Sites Officer (Mr W Gumbley). Their report covered evaluations by those officers of the assessments provided by the applicant on the Maori and archaeological values of the site and the effect of the proposed works on those values. The report also addressed the consultations undertaken by the applicant on the Maori values, and other relevant information.

Mr Robson had himself telephoned Mrs Te Rapu Pitman, who had been identified by the applicant as the contact for the tangata whenua, and although he had been unable to speak with her, had left a message for her. He had also telephoned the Ngatiwai Trust Board and explained the Trust's procedures to the convenor. The Historic Places Trust received a report of Ngatiwai's cultural assessment of Ngunguru Spit, and Mr Robson sought details from them of the alienation of the land from Maori ownership, the protection of any waahi tapu, and any additional views they considered necessary. In addition, as part of the Trust's assessment process, the Chairman of the Trust's Maori Heritage Council, Mr J Klaricich, was also consulted about the application.

The report by Mr Gumbley and Mr Robson gave their opinions that the cultural heritage values of the individual sites were not such as to require their preservation, and recommended that authority to modify the sites on the proposed Lots 1, 2 and 3 on the boundary adjustment plan be granted subject to a number of conditions. The conditions included a requirement that a qualified archaeologist is to be present during all on-site works to inspect and identify any archaeological evidence uncovered; that in the event that unrecorded archaeological material is uncovered, a new authority must be sought from the Historic Places Trust; and that an archaeological investigation of the archaeological sites be carried out.

The report and its recommendations were approved by the Director of the Historic Places Trust who had been given delegated authority to make a decision on the application. His

decision expressly stated that the authority applied only to the specified sites, and that any further sites identified during the development are protected under the Historic Places Act, and further applications may need to be lodged. No authority was granted in respect of any archaeological site on proposed Lot 4, which would be the largest of the new lots, occupying the head of the sandspit. It is the Director's decision which is the subject of the present appeal.

RELEVANT STATUTORY PROVISIONS

The Historic Places Act 1993 contains an extensive long title. Relevantly, it is an Act "to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand...".

In that Act, the term "archaeological site" is defined in section 2 as follows:

> " 'Archaeological site' means any place in New Zealand that -
> (a) either -
> (i) was associated with human activity that occurred before 1900; or
> (ii) is the site of a wreck of any vessel where that wreck occurred before 1900; and
> (b) is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand."

The Act contains an express statement of its purpose and principles in section 4:

> " (1) The purpose of this Act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.
> (2) In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise-
> (a) The principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
> (b) The principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should-
> (i) Take account of all relevant cultural values, knowledge, and disciplines; and
> (ii) Take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
> (iii) Safeguard the options of present and future generations; and
> (iv) Be fully researched, documented, and recorded, where culturally appropriate; and
> (c) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga."

The Historic Place Act is structured in parts, and the part relevant to the present proceedings is Part I entitled Protection of Historic Places. That topic is treated separately from the topic

of Part II: Registration of Historic Places, Historic Areas, Wahi Tapu, and Wahi Tapu Areas. The sections in Part II that concern archaeological sites are sections 9 to 20. We note that section 9(1) provides that:

> "(1) Sections 10 to 20 of this Act shall apply to every archaeological site, whether or not the site is entered on the Register."

The key provision for the protection of archaeological sites is section 10(1):

> "(1) Except pursuant to an authority granted under section 14 of this Act, it shall not be lawful for any person to destroy, damage, or modify, or cause to be destroyed, damaged, or modified, the whole or any part of any archaeological site, knowing or having reasonable cause to suspect that it is an archaeological site."

Sections 11 and 12 contain separate provisions for applications for authority under section 14. Section 11 governs applications for authority to destroy, damage or modify the whole or any part of a particular archaeological site. The section specifies the information to be included in the application, including a description of the archaeological site, an assessment of any archaeological, Maori or other relevant values and the effect of the proposal on them, and a statement as to whether consultation with tangata whenua and any other person likely to be affected has taken place. Section 12 applies to applications for general authority to destroy, damage or modify all archaeological sites within a specified area of land, or any class of archaeological site within a specified area of land. Subsection (2) stipulates that the section applies "notwithstanding that some or all of the sites or possible sites within the specified area of land have not been recorded or otherwise previously identified".

The powers of the Historic Places Trust on applications for authority to destroy, damage or modify any archaeological site or sites are conferred by section 14. We quote the first three subsections:

> " 14. Powers of Trust in relation to authority application-(1)On receipt of an application for an authority to destroy, damage, or modify any archaeological site or sites under section 11 or section 12 of this Act, the Trust may, subject to subsection (3) of this section, exercise one or more of the following powers:
> (a) Grant an authority in whole or in part, subject to such conditions as it sees fit:
> (b) Decline to grant an authority in whole or in part:
> (c) Exercise all or any of the powers specified in any of sections 5, 16, 17, 18, and 21 of this Act.
> (2) Where an application is made for a general authority, under section 12 of this Act, the Trust shall grant that application only if it is satisfied on reasonable grounds that there is no particular benefit to justify the likely cost of locating and identifying-
> (a) Every individual site present within the specified area of land; or
> (b) Every individual site of the class to which the application relates that is present within that area.

(3) Where an application made under subsection (2) of this section relates to a site or sites that the Trust considers to be a site of Maori interest, the Trust shall refer that application to the Maori Heritage Council to make such recommendations as the Council may consider appropriate, following such consultation as the Council considers appropriate."

Section 15 authorises the Historic Places Trust,

"if satisfied on reasonable grounds that an archaeological investigation in that case is likely to provide significant information as to the historical and cultural heritage of New Zealand"

to grant authority subject to a condition requiring that an archaeological investigation of the site be carried out by or on behalf of the Trust. Section 16 provides that the holder of authority may apply to the Trust for change or cancellation of any condition, and that the Trust itself may initiate a review of all or any of the conditions of an authority.

Rights of appeal against decisions of the Historic Places Trust are conferred by section 20, relevant parts of which are:

"(1) Any person who is directly affected by any declaration, decision, condition, or review of any decision made or imposed by the Trust under-

(c) Paragraph (a) or paragraph (b) of section 14(1) of this Act (which relates to the Trust's powers in respect of an authority application); or
(d) Section 15 of this Act (which relates to the Trust's power to grant an authority subject to the condition that an archaeological investigation be carried out); or

may appeal against that declaration, decision, condition, or review to the Planning Tribunal.
(2) Notice of appeal under this section shall-
(a) State the reasons for the appeal and the relief sought; and
(b) State any matters that regulations made under the Resource Management Act 1991 require to be stated in the case of an appeal under section 120 of that Act; and
(c) Be lodged with the Planning Tribunal and served on the Trust within 15 working days of receiving any decision of the Trust to which subsection (1) of this section relates.

(4) Without limiting the powers of the Tribunal under the Resource Management Act 1991, but subject to subsection (6) of this section, in considering an appeal under this section the Tribunal may confirm or reverse a decision appealed against or modify the decision in such manner as the Tribunal thinks fit.
(5) Subject to subsections (2), (3), and (6) of this section, every appeal shall be made, heard, and determined by the Planning Tribunal in the manner prescribed by the Resource Management Act 1991 and the regulations made under that Act.
(6) In determining an appeal under this section in respect of a decision made under paragraph (a) or paragraph (b) of section 14(1) of this Act, the Tribunal shall have regard to any matter it considers appropriate, including (but not limited to)-
(a) The historical and cultural heritage value of the site and any other factors justifying the protection of the site:

(b) The purpose and principles of this Act:
(c) The extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose:
(d) The interests of any person directly affected by the decision of the Trust.

It is relevant to notice that the New Zealand Historic Places Trust (Pouhere Taonga) is continued by section 38 and the general functions of the Trust (which are undertaken by the New Zealand Historic Places Board of Trustees) are described in section 39 and include:

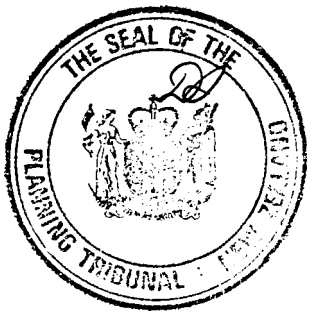
"(a) To identify, record, investigate, assess, register, protect, and conserve wahi tapu areas, historic places, and historic areas or to assist in doing any of those things, and to keep permanent records of such work:
(b) To advocate the conservation and protection of wahi tapu areas, historic places, and historic areas:

It may be noted that because Mr Green's application was treated as an application under section 11, not section 12, the Historic Places Trust had no obligation to refer the application formally to the Maori Heritage Council. It may also be noted that although on this appeal the Planning Tribunal is to have regard to the matters described in paragraphs (a) to (d) of section 20(6), the Historic Places Trust, in making its primary decision under section 14, had no corresponding duty. However, as good practice, did in fact consult informally with the Maori Heritage Council on the application; and in reaching a decision on the application, its delegate did have regard to the matters listed in section 20(6)(a) to (d).

TIME FOR APPEALING

On behalf of the applicant, Mr Green, counsel sought that the appeal be dismissed on the grounds that it had been lodged outside the time limit prescribed by section 20(2)(c).

The Trust's decision was sent to Mr Green by letter dated 8 June 1995. A copy of the letter was sent to the appellant, the Ngatiwai Trust Board, but the evidence of Mr H Parata, to whom it was addressed, was that the decision was received by the Trust Board on 14 June 1995. That evidence was not challenged or contradicted. The Trust Board's appeal was lodged with the Registrar of the Planning Tribunal on 3 July 1995, thirteen working days after receipt of the decision. We therefore find and hold that the appeal was lodged within time, and the application to dismiss it on that ground is declined.



STATUS TO APPEAL

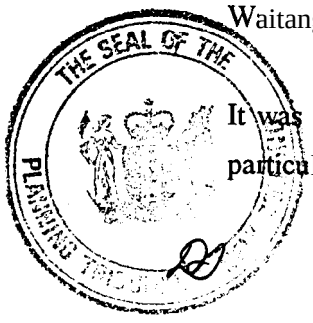
Counsel for the applicant also sought that the appeal be dismissed on the grounds that the appellant does not have standing to bring the appeal, not being a "person who is directly affected" by the Historic Places Trust's decision.

The notice of appeal did not state what status the Ngatiwai Trust Board claimed to have, to be eligible to appeal. However section 20 confines the right of appeal to any person who is directly affected by the decision. For the applicant, Mr Cowper submitted that by contrast with Part II of the Historic Places Act, which makes provision for people who may participate in registration procedures, in Part I of the Act Parliament has deliberately considered the range of persons who should receive notice of applications for authority to modify archaeological sites, and has not required applications to be notified but has relied on the Maori Heritage Council for appropriate advice in cases of Maori interest. He therefore submitted that the right of appeal is intended for applicants, owners of the land, and others having a legal interest in the land; and that it did not intend to give a right of appeal to bodies such as the appellant. He argued that at the most, earlier owners of the land who had sold it could only be said to be indirectly affected; and that a Trust Board representing their interests must be even less affected. He also submitted that it is the appellant itself which must be directly affected, and that the appellant is unable to derive status from any interest its members may have, citing *Australian Conservation Foundation v Commonwealth of Australia* (1980) 146 CLR 493; 28 ALR 257, which had been applied by the Planning Tribunal in *Purification Technologies v Taupo District Council* [1995] NZRMA 197.

In reply, there were two main submissions made by counsel for the appellant, Ms Kapua. First, she referred to the language of section 11(2)(d) "...tangata whenua and any other person likely to be affected...", and contended that this phrase shows that it is presumed that tangata whenua are likely to be affected. Counsel also disputed Mr Cowper's submission that the right of appeal is confined to owners and others having a legal interest in the land, as that is not what the words "person who is directly affected" say.

Secondly counsel sought to show that in fact the appellant is directly affected in two respects: as tangata whenua they are directly affected, it was claimed, in the cultural, spiritual and historical sense; and they are also affected by virtue of a claim to the land under the Treaty of Waitangi Act 1975 made in 1984.

It was the evidence of Mr H Te M Parata, for the appellant, that Ngunguru Sandspit has particular significance for Te Waiariki hapu of Ngatiwai because it was the scene of a battle



which ended a sustained campaign by southern tribes against Te Waiariki; and that the devastation caused by that campaign had almost resulted in decimation of Te Waiariki. The witness explained that the tapu of the sandspit will always remain due to the numerous midden there "which undoubtedly contain the remains of Te Waiariki warriors". That evidence was not challenged or contradicted, and we accept it.

We do not accept the applicant's submission that for a person to be directly affected by a Historic Places Trust decision he or she needs to have a legal interest in the land where the archaeological site is found. We agree with Ms Kapua's submission that if that had been intended, different language would have been used.

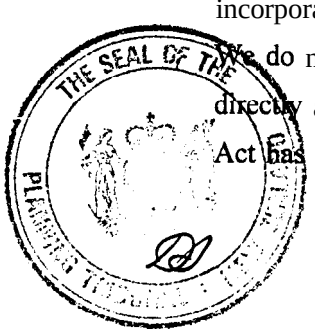
However we do not accept that the language of section 11(2)(d), which appears to contemplate that tangata whenua and other persons would be likely to be affected, means that tangata whenua are necessarily *directly* affected by every application under that section. We consider that the question whether tangata whenua are directly affected is one of fact to be established in a particular case.

However that is not a question that arises in this appeal. This appeal has not been brought by persons of tangata whenua claiming to be directly affected as such.

This appeal has been brought, not by a natural person, but by an artificial body, constituted under the Charitable Trusts Act 1957. Section 13 of that Act describes the effect of incorporation of a Trust Board in language which makes clear that it is separate from its members.

We accept that one of the activities of the Ngatiwai Trust Board is to advocate the interests of the Ngatiwai iwi, or hapu or whanau of that iwi, in proceedings before the Planning Tribunal. While that is convenient both for Ngatiwai and for the Tribunal, it cannot give the Trust Board a right of appeal. Only Parliament can do that.

In the Historic Places Act, Parliament has given a right of appeal to the Planning Tribunal only to any person who is *directly* affected. There is no right of appeal for a person who represents others who are directly affected. The appellant has itself to be affected, and directly affected. The present appellant the Ngatiwai Trust Board has not shown that as an incorporated body, independent of its members, it is itself directly affected by the proposal. We do not accept that the claim under the Treaty of Waitangi Act shows that the Board is directly affected. It is not for the Planning Tribunal to decide whether the claim under that Act has merit. That must be for the Waitangi Tribunal to consider. However, on the facts



before us, the Waitangi Tribunal could not even recommend that the subject land be vested in the Trust Board - being private land, that would be precluded by section 6(4A) of the Act. Nor would it be right for the Planning Tribunal to attempt to prejudge any response to the claim, by the Waitangi Tribunal, or by the Government. We cannot find that the Ngatiwai Trust Board is itself directly affected by Mr Green's proposal.

We find that the appellant has not established that it is directly affected by the Historic Places Trust's decision granting Mr Green's application, and we hold that it was not eligible to bring this appeal.

THE APPELLANT'S CASE

Having held that the appellant was not eligible to bring this appeal, we could end this decision at that point. However the parties joined in asking that we hear the challenge to the appellant's status in the course of the substantive hearing, rather than hearing it as a preliminary matter, and we have heard the cases of the parties on the merits. We therefore prefer to give our decision on the substance of the dispute, rather than merely dismissing the appeal on the ground that the appellant was not entitled to bring it.

In summary, it was the appellant's case that the historic and cultural heritage values of the site justify its protection in the sense of keeping it safe from injury; that the property as a whole contains a large amount of archaeological material, that neither the applicant nor the respondent have identified with any certainty what may be destroyed, and there is insufficient information to enable a decision in accordance with the purpose of the Historic Places Act; that the sandspit as a whole is regarded as waahi tapu by tangata whenua and because of its extent it cannot be adequately protected by the proposed conditions, and there should be a full archaeological survey of the whole property. The Ngatiwai people are opposed to any damage, modification or destruction of the archaeological sites, as they are regarded as waahi tapu because of their cultural, historical and spiritual heritage.

THE STATUTORY CONSIDERATIONS

We have already quoted the contents of section 20(6) which directs that in an appeal such as this, the Tribunal is to have regard (among other things) to certain specified matters. We now do so.

Heritage value

The appellant's case about the historic and cultural heritage value of the site was directed to the heritage value of the sandspit as a whole, rather than to the individual middens the subject of the application and the Historic Places Trust's decision. However the present application is not for general authority (in terms of section 12) to destroy, damage or modify all archaeological sites within the whole sandspit. Rather it is an application, in terms of section 11, for authority to destroy, damage or modify seven particular recorded archaeological sites that were identified in the application following Dr Fredericksen's survey.

It is particular archaeological sites, all being middens, which the Historic Places Trust's decision authorised Mr Green to destroy, damage or modify. That is the decision which is challenged by this appeal. The decision does not authorise any effect on any other archaeological site on the property. Indeed what condition 2 expressly stipulates is the law anyway, that in the event that unrecorded archaeological material is uncovered, further authority to destroy that site must be sought.

Section 20(6)(a) has to be applied to the context of the particular appeal before the Tribunal. In the context of an appeal arising from an application made in terms of section 11, the word "site" in section 20(6)(a) refers to the archaeological site (or sites) the subject of the application. The issue in the present appeal is whether or not the applicant is to be authorised to destroy, damage or modify the particular middens identified in his application, and if so, on what terms and conditions. In determining this appeal the Tribunal is to have regard to the heritage value of those particular archaeological sites. The heritage value of other archaeological sites that exist elsewhere on the applicant's property does not bear on that issue. We hold that the heritage value of those other sites is beyond the proper scope of this appeal, and should not influence our decision on it.

We therefore focus on the historic and cultural heritage value of the seven middens the subject of the Historic Places Trust's decision, and other factors justifying the protection of those middens.

It was Dr Fredericksen's evidence that the midden identified as site Q06/436 is a 12.5 square metre shell scatter consisting of pipi, cockle and heat-shattered stones; that QO6/438 consists of shell lenses and a scatter 25 metres by 25 metres in extent; and he described the other five as small scatters of shell and heat-shattered stone which represent former deposits which have been deflated through wind erosion. He gave the opinions that they do not stand out from the other middens on the sandspit in terms of their composition, size, or state of preservation; and

that the conditions imposed by the Historic Places Trust are adequate to ensure that the work is carried out properly under qualified supervision, and with due respect to the archaeological significance of the sandspit. In cross-examination by counsel for the appellant, Dr Fredericksen stated that he had ascertained the size of other middens on the sandspit that were not in the area of his survey to make comparisons of size; and he told the Tribunal that the seven middens are scattered and less significant than intact middens; and in re-examination he stated that he had no reason to suspect that if a fuller survey was done, the importance of these seven middens would increase.

Mr Robson deposed that his opinion had been influenced by there being no evidence that the sites contain koiwi (skeletal remains); that a burial reserve has been set aside on the sandspit; that burials could be present anywhere on the sandspit; that the condition of the middens was such that their spiritual or cultural values did not merit their protection; and that the modification of those individual sites would not adversely affect the significance of the waahi tapu because the pa site, burial ground and other archaeological sites on the spit can be protected from disturbance. In cross-examination by counsel for the appellant, he accepted that there is a possibility that in carrying out the proposed works, other as-yet unrecorded archaeological sites may be uncovered, and possibly damaged inadvertently.

It was Mr Klaricich's evidence that if the conditions are complied with there would not be a significant impact on the heritage or Maori customary values of the sandspit.

None of the witnesses called by the appellant gave any specific evidence about the historic or cultural heritage value of any of the seven particular middens the subject of the Historic Places Trust's decision.

On the totality of the evidence concerning the seven middens that would be affected by exercising the authority, we find that they have some historic and cultural heritage value, but not as much as many other middens on the sandspit that are bigger or more intact, or contain deposits of greater value; and that the proposed archaeological investigations, curation and storage of material removed from them, as required by the conditions imposed by the Historic Places Trust, would provide a valuable record of them.

PURPOSE AND PRINCIPLES

We have already quoted section 4 of the Historic Places Act which sets out the purpose and principles of the Act. We accept that they need to be understood according to their context. Relevantly, the references to protection and preservation need to stand with the provisions of

Part I of the Act which empower the Historic Places Trust to authorise destruction of archaeological sites in appropriate cases. The Act contemplates that any destruction or modification will be done under controlled circumstances, so that the full historical record that may be available is obtained. However as invited by Mr Wiltshire, we take official notice that it is an unavoidable result of archaeological investigation of middens that the very act of investigating them to obtain their historical record also damages or destroys them.

The principles of the Act are stated in paragraphs (a) and (b) of section 4(2). Counsel for the appellant submitted that paragraph (c) of that subsection is also a principle of the Act, but we do not accept that. Functionaries are directed by section 4(2) to recognise the relationships described in paragraph (c), and that is an important duty. However, Parliament has specifically identified the contents of paragraphs (a) and (b) as principles, and in the same subsection has avoided describing the content of paragraph (c) as a principle. The structure of the Act has been developed with care, and we must take it that references to the principles of the Act, such as that in section 20(6)(b), are references to what have been expressly identified as such. While accepting the duty imposed by section 4(2)(c), we hold that the contents of that paragraph are not a principle of the Act. The relationships described in that paragraph are to be recognised in the process of deciding this appeal.

Returning to the principles described in paragraphs (a) and (b), we were favourably impressed with the careful and systematic consideration that had been given to Mr Green's application by the Historic Places Trust, and particularly by the reporting officers Mr Gumbley and Mr Robson, by the chairman of the Maori Heritage Council Mr Klaricich, and by the Director, Mr Whitehouse, who had given it his personal attention. The report prepared by the first two of them, the conditions imposed on the grant of authority, and the evidence of the latter three of them at the appeal hearing, show full recognition of and attention to the principles of the Act.

The principles of the Act do not necessarily require the retention in situ of all archaeological remains. Depending on the intrinsic value of the site, the principles may be recognised by providing for careful investigation, recording of deposits under appropriate supervision, reporting of findings, and curation and storage of selected materials. That is what the conditions imposed by the Historic Places Trust require on the exercise of the authority which it granted. We find that in the circumstances of this case those conditions are an appropriate recognition of the statutory principles.

RESTRICTION OF LAWFUL USE

The Tribunal is required to have regard to the extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose. The applicant's property is in the Rural AC zone, in which only farming and forestry are permitted activities, and one dwelling per lot is permitted. Without dwellings, and vehicle access to them, the four lots are of very limited value.

We accept the unchallenged and uncontradicted evidence of the applicant's surveyor, Mr Benton, and find that the proposed right-of-way, access tracks and house sites have been selected to minimise disturbance to known archaeological sites.

If protection of the seven middens prevented the formation of the accesses and house sites, probably the only permitted use of the applicant's property that would be practicable without them would be forestry. That is a use of the land which would have much more adverse effects on archaeological sites than the present proposal.

INTERESTS OF PERSONS DIRECTLY AFFECTED

The persons who are directly affected by the decision of the Historic Places Trust are the owner of the land, Mr Green, and possibly tangata whenua with an interest in any remains of their ancestors that might be uncovered in the course of the proposed works.

Mr Green's interests have evidently been met by the limited grant of his application. He has not appealed against the conditions and limitations of the Historic Places Trust's decision, so we take it that he is willing to accept that it adequately serves his interests in balance with the competing interests of protection of heritage values.

The interests of tangata whenua have been considerably recognised and provided for by the Historic Places Trust's decision. Without repeating details already given earlier in this decision, we refer particularly to the limitation of work to proposed Lots 1, 2 and 3; to provision for tangata whenua participation in the archaeological investigations; to requirements for advice to tangata whenua of curation and storage of material removed from the sites; and for provision for supply to them of reports on the investigations and interpretation of the results.

OTHER APPROPRIATE MATTERS

Section 20(6) contemplates that in determining an appeal, the Tribunal is not limited to the matters described in paragraphs (a) to (d) of that subsection, but may also have regard to any other matter it considers appropriate. There are two matters that were raised by the appellant which we consider should not influence our decision on this appeal; and it is appropriate for us to explain why.

Survey of whole property

The Department of Conservation had offered to make an archaeological survey of the whole property, and the appellant sought that it should be a condition of any authority granted to Mr Green that this should be done first. The evidence did not establish that the Department's offer to do so is still open.

On the appellant's behalf the complete survey was urged because it was claimed that the proposed access tracks will open up the sandspit to development, and that the subsequent impact of those who purchase the lots would inevitably result in the destruction of many more archaeological sites, and debasement of the spiritual significance of the land.

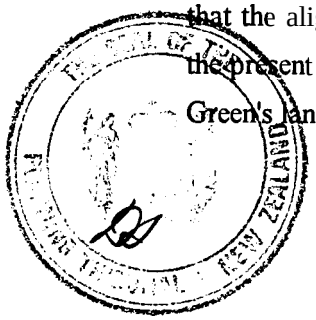
However a power conferred on a statutory decision-maker to impose conditions is impliedly limited to conditions which fairly and reasonably relate to what is permitted, which are not for an ulterior object, and which are not so unreasonable that no reasonable decision-maker, properly advised, could have imposed them *: Newbury District Council v Secretary for the Environment* [1981] AC 578; [1980] 1 All ER 731. We do not accept that a condition that Mr Green allow an archaeological survey of the whole of his property would meet those tests. A wish to avoid the possibility that future purchasers of the four lots would damage other archaeological sites is ulterior to the proper purpose of conditions imposed on authority to destroy the seven middens in the course of forming access tracks and house sites. A condition requiring a survey of the whole property would not fairly and reasonably relate to authority to destroy those middens. We accept Dr Fredericksen's uncontradicted evidence in cross-examination that a wider survey would not increase knowledge of what may be encountered during the proposed development; and we bear in mind that no authority was granted by the Historic Places Trust to affect any archaeological site on the largest of the four lots, proposed Lot 4. In our judgment, no reasonable decision-maker, properly advised, could require a survey of Lot 4 as a condition of authority to do things on Lots 1, 2 and 3.

The limitations on the power to impose conditions that we have mentioned relate to the lawfulness of conditions. However, on this appeal the Planning Tribunal is not confined to deciding questions of law. By section 20(4) the Tribunal has authority (corresponding to that which it exercises under the Resource Management Act) to confirm or reverse the decision appealed against, or to modify it. So the Tribunal's authority extends from questions of lawfulness to deciding the merits of the application and the primary decision. Section 20(6) contemplates a decision-making process which weighs and balances conflicting considerations. Often (though not always) a balance between conflicting considerations can be struck by imposition of conditions. Such a process involves a judgment of degree, including an assessment of whether an imposition on a grantee is disproportionate in the circumstances.

It is our judgment that to withhold authority to destroy the seven middens on proposed Lots 1, 2 and 3 until there has been a full archaeological survey of the whole sandspit would be disproportionate in all the circumstances. The purpose for which the applicant sought, and the Historic Places Trust granted, authority to destroy the middens was to enable formation of house sites and access tracks to them. Future owners of the lots would be bound by section 10(l) of the Historic Places Act in the same way as Mr Green is bound by it. If a future owner wishes to do anything governed by that subsection he or she, too, would need to obtain authority from the Historic Places Trust. The making of such an application would provide an appropriate occasion for considering whether a further survey may be required for that purpose, and if so, whether a requirement for a further survey fairly and reasonably relates to what was then proposed. The present appeal does not provide an appropriate occasion for doing so. The circumstances of such an application cannot be foreseen now with any reliability. In short, the consideration would be too remote, and we decline to entertain it on this appeal.

Cancellation of Maori roadway

The appellant sought to make something of Mr Green's earlier application to the Maori Land Court for cancellation of the Maori roadway. We accept that his application (and the Maori Land Court's granting of it) were understandable in the circumstances of that time, as Mr Green had become the owner of all four blocks; though it is also to be remembered that the Maori roadway did not give access to the lA4E block. We also accept Mr Benton's opinion that the alignment of the Maori roadway was not necessarily in the best place, and note that the present proposal partly follows a route which is used by adjoining Maori owners over Mr Green's land.



There is no evidence before us that the former Maori roadway could be formed without interfering with archaeological sites. An owner is entitled to put forward a boundary adjustment proposal which will meet his or her wishes for lawful development without being held to a former proposal that was subsequently cancelled by the court of competent jurisdiction. The owner's proposal has then to be judged on its own merits, and not on a comparison with what had lawfully been cancelled. There is no evidence of any impropriety about the application for cancellation, and we discard the event as irrelevant to the present application and appeal.

CONCLUSION

In our judgment, the decision made by the Historic Places Trust to grant limited authority to destroy the seven middens, subject to the conditions imposed, struck an appropriate balance between the public interest (shared by tangata whenua) in the historical and cultural heritage values of those archaeological sites and the private interests of the landowner, serves the purposes and principles of the Act, and recognises the relationships of tangata whenua and their culture and traditions with their ancestral lands, sites, waahi tapu and other taonga. The appellant's case has not persuaded us that the application should be refused, nor that the Historic Places Trust's decision or the conditions imposed by it should be modified.

As the appellant lacked the required status to bring it, the appeal is therefore dismissed. If it had not been dismissed on that ground, we would disallow the appeal on the merits.

The question of costs is reserved. Any application may be made in writing and served within 15 working days after the date of this decision; and may be responded to within 10 working days after receipt.

DATED at AUCKLAND this 11th day of March 1996

D F G Sheppard
Planning Judge

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