

**BEFORE THE ENVIRONMENT COURT**

Decision No. A     **001** /2009

**IN THE MATTER**     of the Resource Management Act 1991

**AND**

**IN THE MATTER**     of an appeal under section 120 of the Act

**BETWEEN**     HOWICK RESIDENTS AND  
RATEPAYERS ASSOCIATION INC.

(ENV-2007-AKL-000532)

Appellants

**AND**

MANUKAU CITY COUNCIL

Respondent

Hearing at     Auckland on 20 and 21 November 2008

Court:     Environment Judge R G Whiting  
Environment Commissioner A J Sutherland  
Environment Commissioner K Prime

Counsel:     Ms M J L Dickie and Ms K Lowen for the Manukau City Council  
Mr R Wylie for Howick Residents and Ratepayers Association Inc.  
Ms R McIvor for herself and Te Roopu Awhina o Wairoa (s.274 party)

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**DECISION OF THE ENVIRONMENT COURT**

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- A.     The appeal is dismissed.
- B.     Costs are reserved. But it is our tentative view that costs should lie where they fall because of the community aspect of these proceedings.



## **Introduction**

[1] This appeal concerns an application for a resource consent to demolish an existing fire damaged building and construct a new building in a reserve known as “**The Emilia Maud Nixon Garden of Memories**”.

[2] A resource consent was granted by the Council in a decision by an Independent Commissioner, the Honourable Peter Salmon QC, on 15 August 2007. That decision has been appealed by the Howick Residents and Ratepayers Association Inc. In the lengthy and detailed submissions of Mr Wylie, for the Ratepayers Association, nineteen issues were contended. Many of them overlapped and contended non-compliance with the relevant statutory instruments and the Council’s reserve management plan, entitled “*The Emilia Maud Nixon Management Plan*”.

[3] It appeared to us, that underlying the nineteen issues was a concern that the proposal will provide a mono cultural facility in the reserve, that would tend to overwhelm, what has been termed, this bicultural legacy<sup>1</sup>. The reserve was left to the people of Howick by Ms Nixon in her Will “*to hold the same as an endowment in perpetuity for the benefit of the public by way of preserving and developing the same as a recreational reserve and park to be known officially as “The Emilia Maud Nixon Garden of Memories” but popularly as “The Garden of Memories” and if possible as a museum and cultural education and historical centre . . .*”<sup>2</sup>.

## **Background**

[4] The Emilia Maud Nixon Garden of Memories has been administered by the Manukau City Council since 1989. It is located at 37 Uxbridge Road, Howick. The garden is located within easy walking distance of the main street of Howick. The garden was developed by Ms Nixon, a school teacher with a great love of music, history and the arts, between 1935 and her death in 1962. Ms Nixon created a unique place, which at the time of her death reflected her passion for the history of Howick, her values and those of the tangata whenua, the Ngai Tai people.

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<sup>1</sup> See Management Plan, page 3.  
Paragraph 6 of Will.



[5] The top area of the garden was dedicated to the Fencibles<sup>3</sup> and early pioneers whilst the lower area, known as Torere Valley, was dedicated to Tainui. For this reason the Torere Valley is also known as the Tainui Garden of Memories. A rose garden and a perennial border have been established in the top garden and a number of paths lead down into the Torere Valley. The valley itself contains mainly mature native trees with some exotic species. The garden is a popular place for wedding photographs.

[6] There are 3 buildings in the garden. These are:

- (i) Te Whare Ora (Ms Nixon's former residence) - now used by the Senior Citizens Service Club of Howick.
- (ii) Te Raukohekohe (the treasure room -or (museum) - a small split-level wooden building located behind the Whare Ora and above the Torere Valley. It contains information and displays of the garden's history and the history and lore of the Tainui people.
- (iii) Te Whare o Torere (Torere) (the damaged building the subject of this application) - located near the rear of the garden, above the Torere Valley. There is a paved courtyard and some seating in front of Torere to allow for formal gatherings. Torere is the newest of the buildings in the garden; being built in 1989 - 1990 on the site previously occupied by a miniature double unit Fencible cottage. The existing Torere replaced the original Torere that was located further down the Torere Valley about 15-20 metres to the south-west.

### **History and uses of Whare Torere**

[7] The original whare was a carved house built in 1932 in the Torere Valley. In 1936, the site was officially dedicated by Māori elders. In so doing the elders placed into the land and all things on it, including the buildings their personal mauri (life force). By the late 1980s rot and vandalism had left the whare significantly damaged. In 1989 the Council demolished the original structure, and rebuilt a new whare - the Whare Torere.

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The first military garrison established in Howick.

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This was built at the top of the valley and retained where possible old carvings and panels from the original whare.

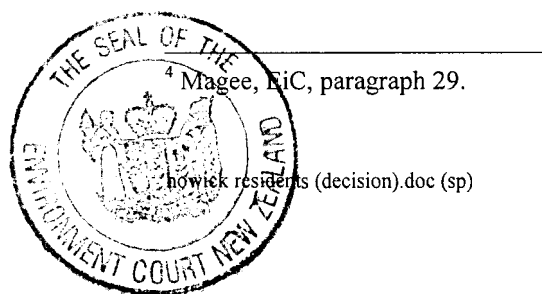
[8] In June 1991, the new whare was opened. A cultural learning programme was developed by the Council in liaison with Ngai Tai, Te Roopu Awhina o Wairoa, and volunteers from the wider Howick and Eastern Manukau communities. The learning programme involved a variety of classes and activities, including Te Reo Māori, waiata, kapahaka and local Māori history and traditions. Until 2004, the programme was utilised by 35 Eastern Manukau schools who made regular visits. A number of other community programmes were also undertaken at the whare.

[9] In October 2004, the whare was subject to an arson attack which left it extensively damaged. Since 2004, the whare has remained boarded up, and the learning programme and other activities that would usually have been undertaken in the garden have been relocated.

[10] Following the damage to the whare, a project control group and a project design group were set up to provide detailed design options. A number of meetings and workshops took place throughout April, May and June 2005, involving discussions about whether to rebuild or repair the whare. The project control group reported back to the Howick Community Board which resolved that it would support, in principle, the rebuilding of the whare within the footprint of the existing whare. In 2006 the full Council resolved to rebuild Te Whare o Torere and agreed to fund the project<sup>4</sup>.

### **The proposed whare design**

[11] It is proposed that the new whare would be built within the existing building footprint, with excavation underneath in order to provide space for a lower basement level. The lower level would contain a kitchen, office, toilet, shower, laundry and storage room. Access to this level would be by bifold doors on the western side of the building. The proposed upper level of the whare would remain largely the same as the existing whare, with the addition of box seats along the northern and southern walls. A bay window with window seats would be created at the eastern end of the whare and tukutuku



<sup>4</sup> Magee, EIC, paragraph 29.

panels will line the walls. The upper level of the whare would essentially be one large room with an adjoining entry porch.

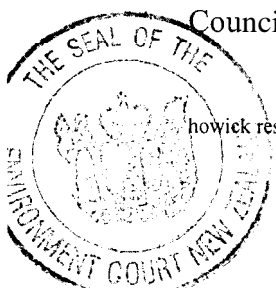
[12] It is proposed that a traditional Maori façade would be created on the western (front) side of the whare and would include a feature door and two windows. The proposal includes two wooden ramps, one providing access to the upper level and one access to the lower level for people with disabilities. One providing access to the upper level, would be located on the northern side of the building within the footprint of an existing ramp on the site, and the second will be constructed in a “V” formation wrapping around a protected kahikatea tree located to the south-west of the whare.

### **Changes to the proposal since public notification**

[13] In response to concerns raised by submitters in opposition to the application, the applicant amended its application in the following ways:

- (i) Originally, a wheelchair lift (“stair climber”) was to be installed in order to provide wheelchair access to the lower level of the site. Because a number of submitters expressed concern that the proposed device would attract vandals, would be an eye sore, and would be impractical and inappropriate in the garden, the applicant amended this aspect of the application. To address the submitters’ concerns it now proposes to construct a wooden ramp to the lower basement level.
- (ii) The effect of that change resulted in the need for the height of the basement elevation to be increased by 1 metre. The ceiling height in the basement level was lowered but the amendment resulted in a 600mm increase to the height of the proposed whare when compared to the existing whare.
- (iii) An acoustic noise wall is also now proposed, to mitigate the potential noise impact on a neighbouring property.

[14] The appellant has expressed concern about these changes which have been made to the proposal since public notification. Concern was also expressed by them at the Council hearing. The changes were addressed by the Honourable Peter Salmon QC in



paragraph 8 of his decision. He expressed the view that a number of these changes are minor and have been proposed in order to meet specific objections. He concluded that the changes were acceptable and permissible and within the scope defined by the original application. We agree with his conclusions.

[15] Amendments to an application after notification are permissible if they are within the scope defined by the original application. They must not increase the scale or intensity of the activity of the proposed building, or significantly alter the character or effects of the proposal. If a change is likely to affect the public generally or any individuals in a manner different from or to a greater degree than a building constructed in accordance with the original application, then amendments are not permissible<sup>5</sup>.

[16] We find that the amendments made to the application were as a direct result of submissions received by the Council, and amended site maps/plans were distributed to all submitters prior to the Council hearing. The planning report was written on the basis of the amended application. The v-shaped ramp has been designed in such a way, that by using appropriate materials, it would blend in with the surrounding environment. The ramp is located on the south side of the whare and descends into the valley below making it less visible from the garden as viewed from Uxbridge Road. The ramp will provide disabled access to the lower level of the whare and allow such access part the way down into the valley. We find that the ramps will not detract from the amenities of the garden and are within the scope of allowable amendments to the application.

[17] We find that the difference in height will be imperceptible, and the adjoining neighbour will not experience an increased sense of dominance from the whare. The whare will almost be completely screened by dense vegetation which is significantly taller than the proposed building. We accept the evidence of Mr Magee<sup>6</sup>, that the height difference between the existing whare and the new whare will be indiscernible when approached from Uxbridge Road and it is unlikely that the increase in height would force the whare to dominate the garden, especially when viewed with the surrounding taller vegetation as a backdrop. This was confirmed on our site visit. We also note that the

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<sup>5</sup> See *Darroch v Whangarei District Council*, Environment Court Decision A018/1993; *South British Auckland Property Co Ltd v Auckland City Council*, 12 NZTPA 94; *Haslam v Selwyn District Council* [1993] 2 NZRMA 628, and *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at paragraphs 30 and 35.

<sup>6</sup> Magee, EiC, paragraph 38.

amendments will result in less earth disturbance and a shorter path ramp to the lower level.

### **Classification and zoning**

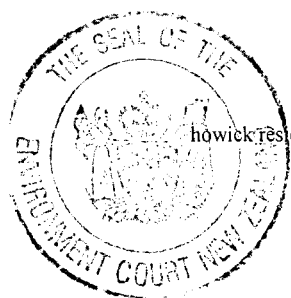
[18] The Garden of Memories is classified as a Local Purpose (Community Building) Reserve under the Reserves Act 1977. It is zoned as Public Open Space 4 (Community Purpose Buildings and Indoor Recreation Facilities) in the Manukau District Plan. This zone allows some public open space to be used for community purpose buildings, and provides opportunity for recreational, community, and cultural buildings and facilities to be established on public land.

[19] The gardens are subject to the Emilia Maud Nixon Garden of Memories Management Plan - a statutory document adopted by the Council in February 2001, after public consultation.

### **The issues**

[20] The nineteen issues addressed by Mr Wylie in his submissions, were contained in, what he termed, ten contentions. The contentions, as we have said, overlapped to some extent, but essentially addressed:

- (i) The provisions of the District Plan - it was alleged that the proposal would be contrary to:
  - (a) Policy 15.4.2(d) and Objective 15.3.6 (contention 6); and
  - (b) Policy 15.4.3 (contention 7).
- (ii) The Emilia Maud Nixon Garden of Memories Management Plan. It was alleged that the proposal would be contrary to:
  - (a) Major Management Objective 3.1, Usage Agreements Objective 3.2.2 and Land Management Objective 3.3.1: all of which require management of the garden in accordance with the intent of Ms Nixon's Will (contentions 2,3,4 and 5); and



- (b) Building and Structures Objective 3.3.2 and in particular Policy 2, which limit the construction of new buildings in the garden (contention 10).
- (iii) The Building Code - it was alleged that the wheelchair access proposed would be contrary to the provisions of the Building Code (contention 10); and
- (iv) The visual impact of the wheelchair access - it was alleged that would contravene the provisions of the Management Plan and the District Plan (contentions 6 and 10).

[21] The evidence and submissions addressed a wide-ranging number of matters all of relevance to the application. This included evidence relating to:

- (i) The site and locality;
- (ii) The provisions of the relative statutory instruments;
- (iii) The provisions of the Resource Management Act and in particular Part 2;
- (iv) The potential effects and conditions to avoid, remedy or mitigate the potential effects;
- (v) Arboreal evidence relating to protected trees;
- (vi) The historic background and operation of Te Roopu Awhina; and
- (vii) The history of the whare and Māori tikanga.

[22] While we have regard to the whole of the evidence in coming to our conclusion and determination we propose only to comment in this decision on the evidence that relates to the contested issues.

### **The District Plan**

[23] The relevant provisions of the District Plan were addressed in the evidence of the planning consultants who gave evidence, Mr Craig Magee and Mr David McPherson.





They addressed a wide ranging number of objectives and policies, methods and rules. We propose to address those objectives and policies that are relevant, and which need to be read in the context of, the objectives and policies that the appellant submits the proposal is contrary to.

[24] As the garden is zoned Public Open Space 4 (“POS”) within the District Plan, it is necessary to consider the proposal in relation to the objectives and policies that are relevant to it under Chapter 15 of the District Plan. The relevant objectives are as follows:

- (i) To ensure that the provision, development and distribution of public open space enables current and future residents, workers and visitors to Manukau City to provide for their social, cultural, spiritual, physical and psychological health and wellbeing (Objective 15.3.1).
- (ii) To ensure that the provision and development of public open space occurs in a way that maintains and enhances the quality of the City’s environment (Objective 15.3.2).
- (iii) To ensure tangata whenua are involved in the management of the provision and development of the public open space (Objective 15.3.3).
- (iv) To ensure the effective, efficient and safe use of public open space (Objective 15.3.4).
- (v) To maintain and enhance the amenity values of public open space areas (Objective 15.3.6).

[25] There are a number of relevant supporting policies namely:

- Policy 15.4.1 which states:

The provision and development of public open space should be managed so that it:

- (a) meets the recreational, social, cultural and educational needs and preferences of the local community and makes reasonable provision



for increasing populations without foreclosing future options for the use of public open space for future generations;

- (b) enables tangata whenua to assume their kaitiaki responsibilities;
- (c) preserves or protects heritage resources of cultural or natural value;
- ...
- (h) assists in mitigating the adverse effects of natural hazards such as flooding and subsidence;
- (i) is suitable for its intended purpose;
- (j) enhances the aesthetics of the public open space, the neighbouring streetscape and the City's landscape.

- Policy 15.4.2 which states:

- (a) enhance personal, pedestrian and vehicular safety;
- (b) avoid, remedy or mitigate the effects of glare, noise, visual intrusion or loss of sunlight/daylight to neighbouring residential properties;
- (c) enhance the use of buildings for a variety of purposes;
- (d) be compatible with the function and predominant purpose of the public open space;
- (e) ensure access for people with disabilities;
- (f) enhance the visual amenity of the public open space;
- (g) avoid blocking overland flowpaths or natural drainage systems;
- (h) avoid the loss, damage, desecration or deterioration of natural and cultural heritage resources (including the coastal environment margins of rivers and streams).

- Policy 15.4.3 activities:

Activities to be located on public open space that require buildings or structures should make efficient and effective use of existing buildings and structures.

- Policy 15.4.4 requires that landscape design and planting of public open space should occur in such a way that it:

- (a) enhances personal safety;
- (b) enhances visual amenity of the public open space, neighbouring streetscape and landscape;



- (c) does not impede the predominant function of the public open space;
- (d) assists in improving water quality in streams located on public open space and adjacent water bodies where possible;
- (e) assists in preserving the genetic purity of indigenous vegetation according to ecological districts identified by the Department of Conservation;
- (f) does not cause damage to archaeological sites.

[26] Part 15.9 of Chapter 15 is headed **Description and Explanation of Public Open Space zones**. The description and explanation of the Public Open Space 4 zone is:

This zone will protect some public open space for the siting of community purpose buildings and indoor recreation facilities. These spaces will provide opportunity for recreational, community, and cultural buildings and facilities to be established on public land. These buildings and facilities may accommodate local, regional or, at times, nationally focused events. The majority of buildings and facilities to be sited on public open space should be consolidated in areas zoned POS 4 leaving the other public open space zones relatively free of buildings.

Criteria for acquiring land to be zoned POS 4 include close proximity to public transport routes, road frontage, proximity to business areas and other community purpose buildings to enhance public opportunity for use. The POS zone 4 areas can accommodate a variety of community buildings and facilities such as: pre-school education facilities, marae, community houses, halls, scout dens and guide halls, swimming pools, recreation centres, arts and cultural centres.

### **The appellants' contention with regard to the District Plan**

[27] The appellants contended<sup>7</sup> that the proposed building will not be suitable for achieving the predominant purpose of the garden, and therefore would fail to meet the requirements of Objective 15.3.6 and Policy 15.4.2(d). For convenience we again set them out:

Objective 15.3.6

To maintain and enhance the amenity values of public open space areas.

Policy 15.4.2

Buildings and structures on public open space should be designed and/or sited in such a way as to:

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Contention 6.

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- (d) be compatible with the function and predominant purpose of the public open space.

[28] It was contended that the predominant purpose of the garden was to provide public recreation in an environment evocative of Howick's early history - its bicultural history. Mr Wylie submitted that the proposal would not be incompatible with the predominant purpose for the following reasons:

- It would not be suitable as a museum piece because it does not show what a traditional whare looks like;
- Because of its 20<sup>th</sup> century features and the concrete steps that its design necessitates it does not contribute to the old time New Zealand ambience;
- It would not demonstrate historic culture because no historic whare ever resembled it;
- The wheelchair access necessitated by the two-storey design will be difficult and unsightly;
- From an educational viewpoint its disadvantages would far outweigh any advantages; and
- While the proposed building would provide recreational opportunity for Maori, other arrangements could do so as well.

[29] We disagree with Mr Wylie's contentions. The predominant purpose of the garden can best be determined by reference to the Management Plan. The major management objective states:

### **3.1 Major Management Objective**

To manage the Emilia Maud Nixon Garden of Memories within the bicultural intent of her bequest for the physical, mental, cultural, spiritual wellbeing and enjoyment of the whole community.

[30] There next follows an objective and five policies under the heading **Visitor Experience**. Relevantly they say:



### 3.2.1 *Public Recreation and Use*

#### Objective

To provide recreational, cultural and educational activities that are appropriate to the character of the garden and to encourage the public to use the facilities available.

#### Policies

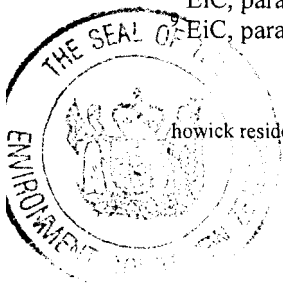
1. The open space area of the garden will be open to visitors 24 hours a day, except in special circumstances. For example, limitations on access may apply during special events.
2. The Manukau District Plan provides that passive recreational, cultural, and educational activities which are non-commercial and which do not compromise the enjoyment of other visitors, nor adversely affect the environment, are permitted as of right in the Emilia Maud Nixon Garden of Memories.
3. A Whare Wanaga programme, expressing the cultural and educational heritage of Tainui waka and Ngai Tai te iwi, may operate using the paved courtyard area, Torere House, the Torere Valley, also known as the Tainui Garden of Memories, and Raukohekohe, the museum.

[31] In our view the whare will provide a venue for cultural and educational activities. That this is so, is abundantly clear from the evidence of a number of witnesses, in particular the evidence of Mr Harre Williams, Mr Te Rangi Kaihoru and Ms Robyn McIvor. Mr Te Rangi Kaihoru told us of his involvement with Te Whare o Torere since 1986<sup>8</sup>. He told us of how he has since that time been involved in cross-cultural programmes with local schools. He has been actively involved as a master carver in fitting the carvings and art works of the original whare building into the present structure. After the fire he supervised the decommissioning of the whakairo/carvings and other art works from the whare.

[32] Ms McIvor told us of the background history and operation of Te Roopu Awhina<sup>9</sup>, a charitable Trust whose objectives are the formation of the awareness of Maori culture and values to children in the extended Howick/Pakuranga community. The contribution of the Trust to the Howick community was reinforced by the evidence of Mr Joseph Heays, Deputy Principal of Howick College.

<sup>8</sup> EiC, paragraph 2.1 and following.

<sup>9</sup> EiC, paragraphs 3.1 and following.



[33] The Trust, as one of the user groups, has according to Ms McIvor<sup>10</sup>, been intrinsically connected to Te Whare o Torere. The whare has been used as a base from which Te Roopu Awhina have operated their programmes. It is proposed that this will continue in the proposed building. Of the proposal Mr Heays said:

Torere in its current condition is not suitable for many of the activities that it has been providing. In its original condition it did provide an authentic experience but the experience was restricted due to lack of facilities. And being reconstructed to a higher standard it will not only provide authentic Maori art and culture and the whare wanaga but it would allow the tangata whenua to share their hospitality in a more customary manner."

[34] The matters put forward by the Trust were not supported by evidence. In any event we find that they have little substance and pale into comparison when compared to the cultural and educational benefit that will result from the proposal and which is in accord with the predominant purpose of the reserve.

### **Overall findings on District Plan**

[35] The six general public open space objectives in section 15.3 of the District Plan place an emphasis on:

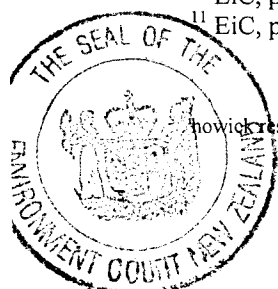
- (a) Providing and developing safe open space for current and future residents in a manner which provides for their social, cultural, spiritual, physical and psychological health and wellbeing;
- (b) Maintaining the quality of the City's environment and protects amenity values; and
- (c) The involvement of tangata whenua.

[36] In our view the proposal will:

- (a) Enable the current and future residents, as well as workers and visitors to Manukau to provide for their social, cultural, spiritual, physical and

<sup>10</sup> EiC, paragraphs 6.1 and following.

<sup>11</sup> EiC, paragraph 4.1.



psychological health and wellbeing by restoring an important and valued community resource;

- (b) Contribute to the provision and development of public open space occurring in a way that maintains and enhances the quality of the environment;
- (c) Enhance the quality of the environment by providing an attractive replacement whare, with upgraded paths and gardens. The ability to excavate out the slope under the whare means that the visual impacts on the garden of the basement level will be negligible;
- (d) Enable the Council to once again undertake a user agreement with tangata whenua, so that learning programmes can take place on the site for the benefit of the community particularly the younger community;
- (e) Ensure the effective, efficient and safe use of the garden by removing the existing whare, and constructing a new whare that provides greater safety and comfort for its users.

[37] We also note, that by replacing the present fire damaged building, it will replace what is clearly a present eye sore which diminishes the amenity and beauty of the gardens. It would thus be in accordance with Policy 15.4.3 that requires buildings and structures to make efficient and effective use of existing buildings and structures.

[38] We thus find that the proposal is consistent with the objectives and policies in the District Plan.

### **The Emilia Maud Nixon Garden of Memories Management Plan**

[39] It was contended by the appellants, that the proposal would be contrary to a number of the provisions of the Management Plan. Before considering their contentions, we first examined the status of the Management Plan and the weight we should give to it.

[40] The Emilia Maud Nixon Garden of Memories Management Plan is a statutory document prepared under the Reserves Act 1977, after public consultation. As such it is



not a statutory document that has any status under the Resource Management Act. This is self-evident from the definition of “*plan*” in section 2 of the Act. It is thus not a “*plan*” that we must have regard to under section 104(1)(b).

[41] It is a matter that we may have regard to under section 104(1)(c). However the weight we would normally give to such a document would depend on the circumstances. In the present circumstances, the weight we should give to the Management Plan, is influenced by regulatory Method 15.6.2.1 of the District Plan:

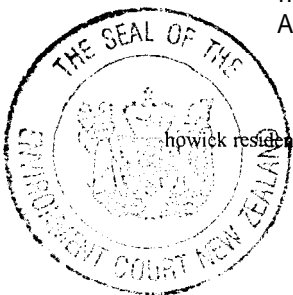
#### **15.6.2.1 Reserve Management Plans**

Reserve Management Plans are required for public open space areas classified as “reserve” under the Reserves Act 1977. The Manukau Parks Activity of Manukau City Council is responsible for developing and producing Reserve Management Plans for public open space areas administered by this Council. The Activity actively consults tangata whenua authorities in the development of Reserve Management Plans. It is envisaged that all major Manukau City administered public open space areas will have a Reserve Management Plan which will provide a comprehensive planning approach to the development of each particular public open space. In some cases a group of public open space areas (eg. Neighbourhood reserves) may be covered by one Reserve Management Plan.

Issues relating to the detailed allocation of space, landscape design, planting and specific uses of each public open space will be handled through the Reserve Management Plan process. The allocation of space within the Passive Outdoor Informal Recreation zone POS 2 zone, for active recreation (eg. Kilikiti are touch rugby training) is also managed by the Reserve Management Plan process. This is because costs outweigh the benefits of using District Plan rules, and it is considered that the Reserve Management Plan process is a more appropriate way of resolving more detailed issues of conflicts between different users of public open space.

[42] This reflects what the Plan calls the complimentary relationship between the Reserves Act and the Resource Management Act. This is further emphasised by the reference in the objectives and policies to such matters as the function and predominant purposes of the reserves, which may require reference to the Management Plan. Where the Reserves Act sits with respect to the RMA has been succinctly put in the Plan itself, when it says under the heading “*statutory context*”:

While the Reserves Act ultimately determines the types of uses appropriate for those public open space areas that are classified under the Reserves Act, the purpose and principles of the Resource Management Act must guide all environmental policy and management. However in doing so consideration must be given to any management plans and strategies prepared under other Acts (Resource Management Act section 74(2)(b).





[43] Mr Wylie submitted that the proposal was contrary to the Management Plan in two respects:

- (i) The provisions that require management of the garden in accordance with the intent of Ms Nixon's Will;
- (ii) The provisions limiting the construction of new buildings.

### **Ms Nixon's Will**

[44] We have previously referred to major management Objective 1, which is to manage the garden within the bicultural intent of her bequest for the physical, mental, cultural, spiritual wellbeing, and enjoyment of the whole community.

[45] The usage agreement objectives and policies state:

#### Objective

To manage the facilities on the Emilia Maud Nixon Garden of Memories in accordance with the intent of Ms Nixon's Will.

#### Policies

1. Council will develop a usage agreement with the Senior Citizens Service Club of Howick for the use of the Nixon Homestead or Whare Ora until 1 January 2008.
2. Council will develop a usage agreement with Ngai Tai Ki Tamaki Tribal Trust for the life of this plan, allowing for the expression of their heritage at the gardens in the spirit of the original bicultural understanding between Ms Nixon and Mrs Zister of Umupuia.

[46] Land management objectives and policies states:

#### Objective

To develop a management system which will achieve consensus within the community, allowing the various users to fulfil their individual goals and objectives whilst adhering as closely as possible to the expectations of Ms Nixon.



## Policies

1. Council is responsible for the development, maintenance and operation of the garden, except where these are devolved through lease agreements.
2. Council will seek resolution to any issues through dialogue and consultation with affected interested parties and the Howick Community Board. [Highlighting ours]

[47] Both the use and management of the garden requires the Council to consult to achieve a consensus within the community to adhere as clearly as possible to the expectations of Ms Nixon, whilst allowing for the various users to fulfil their individual goals and objectives. So far as use is concerned, the Council is required to consult with the Senior Citizens Service Club for the use of the homestead of Whare Ora, and with tangata whenua for their use of the gardens. This has been done. We are satisfied on the evidence that there has been extensive consultation and that the consultation has been sensitive to the bicultural intent expressed in the Will<sup>12</sup>.

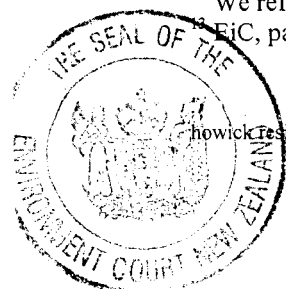
[48] As the decision to rebuild has been made after extensive consultation, it would in our view be against public policy for us to re-examine the Council's decision to rebuild by a fine interpretation of the terms of the Will. We should take the provisions in the management plan as giving effect to those intentions. Notwithstanding, if we were to do so, we would have no hesitation in finding that the proposal would not be contrary to the intent expressed in the Will.

[49] We also note, as did the Commissioner in his decision, that it is important when considering Ms Nixon's bequest, to note that she expressed wishes as to the use of the property and made it clear that these wishes did not create a binding trust, and she was not giving or making any binding directions. In other words the bequest was not to be frozen in time - a matter reflected by Mr Heays when he said:

The Howick community of today is vastly greater and more complex than it was in the days of Ms Emilia Maud Nixon. By rebuilding an enhanced whare the needs of a significant number of people in our community will be met more appropriately than they would if the whare were faithfully restored.<sup>13</sup>

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<sup>12</sup> We refer in particular to the evidence of Mr Magee and Mr McPherson.  
<sup>13</sup> EJC, paragraph 5.1.



[50] We have already made it clear that in our view the proposed whare is in accordance with major Management Objective 1. Like the facility that it is intended to replace, it would provide an important facility to enable the goals of Management Objective 1 to be implemented. The uses of the proposed whare are expected to be the same, or similar, to the uses which occurred in the previous whare, including the education of children in the local Howick community about the history of the area from both the settlers' perspective and that of the local Māori. Māori cultural history will be taught at the site. The general goals Ms Nixon was seeking to achieve with her bequest will in our view be met.

### **The construction of a new building**

[51] In part 3.3.2 of the Management Plan is the following objective:

To limit the number and extent of buildings and other structures on the Emilia Maud Nixon Garden of Memories.

This is supported by the following policy:

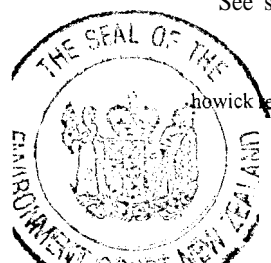
- (b) There will be no new buildings, extensions to buildings or structures erected in the Emilia Maud Nixon Garden of Memories, other than the miniature replica fencible cottage, the bridge of friendship and the Kauri log carving. The construction and placement of these additions will be subject to community input.

[52] Mr Wylie on behalf of the appellants submitted that the proposal would be contrary to both the above objective and policy.

[53] On a literal reading of the policy and objective the proposal appears to be inconsistent with their intent. However, we consider that this policy needs to be read in the context of the Management Plan as a whole and in the context of the current situation. The Management Plan was written before the existing whare was subject to arson. The historical significance of the whare is explicitly recognised in the Management Plan<sup>14</sup>. And in particular section 1.5.2 reads:

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<sup>14</sup> See sections 1.5.2, 1.2, and 1.5.



## Torere

The Torere is located near the rear of the garden, above the Torere Valley. There is a paved courtyard and some seating in front of the Torere to allow for formal gatherings. Torere is the newest of the buildings in the garden; being built in 1989 to 1990 on the site previously occupied by a miniature double unit fencible cottage. The existing Torere replaced the original Torere that was located further down in the Torere Valley. The original Torere was dedicated in a ceremony in 1936. Formerly known as Owairoa Marae, it is now considered desirable, after consultation with tangata whenua, that the Torere be considered part of Te Wananga o Owairoa Programme (House of Learning).

[54] Clearly the Management Plan was written in the expectation that the whare would remain in the garden. The Management Plan does not explicitly state what can or should happen, if a building on the garden is damaged and can no longer be used for its intended use. In our view the objective *“to limit the number and extent of buildings and other structures”* is clearly designed to avoid a proliferation of buildings in order to preserve the integrity of the garden.

[55] It is within this context, that we consider the reference in Policy 3.3.2.2. *“no new buildings”* is intended to refer to no new additional buildings, rather than replacements of existing buildings. The fact that the new building incorporates an excavated basement does not alter our view. It is not an extension to an existing building, merely a design element of the replacement building. Similarly, other design elements have been incorporated with the proposal. We consider that these will be no more intrusive than the whare.

[56] Mr Wylie further submitted that the effect of both the objective and policy was to preserve the small size of the buildings. In doing so this would promote the intention of Ms Nixon to keep buildings small and historic.

[57] We do not agree. The objective and policy limits the buildings to those existing at the time the plan was adopted. The whare was one of those buildings, and as we have said was explicitly recognised.



### **Determination on Management Plan**

[58] The replacement whare will not be a replica of the damaged whare. But it will occupy no greater area of the garden. And taken within the context of the whole of the Management Plan we consider that the limitation on new buildings cannot be intended to apply to a replacement of a building already specifically provided for within the plan.

[59] We find that the proposed whare, like the facility that it is intended to replace, will provide an important facility to enable the intent of Ms Nixon's bequest. The uses of the proposed whare are expected to be the same or similar to the uses which occurred in the previous whare, including the education of children in the local Howick community about the history of the area, from both the settler perspective and that of the local Maori. Maori cultural history will be taught at the site. The general goals Ms Nixon was seeking to achieve with her bequest will be met.

### **The Building Code**

[60] It was submitted by Mr Wylie on behalf of the appellants that the ramp failed to meet the standards required under the Building Code. Compliance with the building code is a matter to be determined by the Council on an application for a building permit. It is not a matter that is within the province of this Court.

### **The visual impact of the wheelchair access**

[61] The appellants submitted that the visual impact of the wheelchair access will have an adverse effect on the amenity of the garden. They called no evidence to support this contention.

[62] No landscape evidence was given, but we did hear evidence from the planning consultants particularly the evidence of Mr McPherson and Mr Magee. We have already referred to the evidence of Mr Magee<sup>15</sup>. We accept their evidence which reflects what we saw on our site visit<sup>16</sup>. Although the proposed whare will be 600mm higher than the existing one, we do not consider that it will have any detrimental effect on the character of either the garden grounds or the residential area. We consider that the proposal is

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<sup>15</sup> Paragraph 17.  
<sup>16</sup> EOC paragraphs 60, 61 and 84(c).



sensitive and will continue to protect the qualities and amenity of the garden. The access ramp will not in our view detrimentally affect the garden's visual amenity and open space character. There will be minimal disturbance of a very limited amount of vegetation, but based on the evidence of Mr Peers<sup>17</sup> there are mitigating circumstances, and replacement planting will mitigate any adverse effects resulting from the removal of this vegetation.

### **Determination**

[63] Having found against the appellants on all the contested issues, it follows that the proposal, subject to the conditions imposed by the Council, should be allowed. Even if we had accepted one or all of the arguments put forward by the appellants, we would nevertheless, in the exercise of our discretion, have found in favour of the proposal. This is because the many positive effects arising from the proposal, which reflect the provisions of Part 2 of the Act, particularly the amenity and Māori provisions of Part 2, would far outweigh the alleged shortcomings contended by the appellants.

### **A whare or a marae**

[64] A good deal of time at the hearing was taken up with cross-examination as to whether or not the proposed building would be a whare or a marae. Underlying this question we perceived a concern by the appellants, that a marae complex would overwhelm the bicultural use of the garden. We indicated during the hearing, and we reiterate now, that whether the whare comes within the definition of a marae or a whare in Maori lore is not a question we need to determine for the purposes of deciding this case. That is a matter of Māoritanga to be determined by people expert in Māoritanga.

[65] Clearly the whare prior to the arson, was being used as an educational facility to impart tikanga Māori and culture to the community of Howick. It is clear from the evidence, that from time to time some aspects of marae kawa (customs and procedures) have been performed in or in front of the whare. It is proposed that this will continue.

[66] We detected a concern from the appellants that the rebuilding of this whare may have the effect of establishing a full blown marae, with all the restrictions that may entail with regard to the whare's use by the whole community. If that was the case we also

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<sup>17</sup> An arborist called by the Council.

would have been concerned. It is important that the bicultural aspect of the whole of the garden be continued.

[67] We are confident that the conditions of consent provide for the bicultural aspect of the whole of the gardens and sufficiently limit the proposal accordingly.

### **Determination**

[68] We make the following determination:

- (a) The appeal is dismissed.
- (b) Costs are reserved. But it is our tentative view that costs should lie where they fall because of the community aspect of these proceedings.

**DATED** at Auckland this 6<sup>th</sup> day of January 2009.

For the Court:



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R Gordon Whiting  
Environment Judge

