

# **Report of the Waitangi Tribunal on the Orakei Claim**

## **14 Remedies**

### **14.1 Principles to be applied**

#### 14.1 Principles to be applied

In considering remedies in this case some principles need first to be settled.

14.1.1 There is in our view, no requirement that compensation should be scaled down to what is 'practical'. The claimants state their first claim this way

As a result of the laws, policies and practices outlined in the preceding paragraph, and in spite of a partial settlement of our claims in 1978, we do not have today the tribal endowment which ought to have been our own inheritance and our provision both in material and spiritual terms for our descendants. Being cognizant of the Tribunal's obligation to make recommendations on the practical application of the Treaty of Waitangi to our claim, we do not seek the return of the entire 700 acre Orakei Block to Ngati Whatua but we claim that the Tribunal should declare that we are rightly entitled to the whole of it.

## 14 Remedies

### **Section 6(3) of the Treaty of Waitangi Act 1975, which enables us to make**

recommendations, does not use the word 'practical'. It says

If the Tribunal finds that any claim submitted to it under this section is well founded, it may if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

'Practical' appears in the preamble and short title to the Act and relates to claims not recommendations. Thus

...it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty ...

'Practical' in that context envisages claims in respect of circumstances not contemplated at 1840 - see opinion of Chief Judge Durie (1987:Ch 8) Waiheke Report and compare the comments of Richardson J in *New Zealand Maori Council v Attorney General* supra

Whatever legal route is followed, the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise (380).

and of Somers J in the same case

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What is changed are the circumstances to which those principles are to apply.

Recommendations may be made in our opinion, for full and just compensation untempered by the convenience of the result. We depart in this respect from an earlier opinion of the Tribunal that it is obliged to make practical recommendations (Manukau Report 1985:8.1).

14.1.2 The effective settlement of many claims will often depend upon the willingness of parties to seek a reasonable compromise, but it follows that the mana to propose a compromise vests not in the Tribunal but the affected claimant tribes. In this case the claimants themselves have made several compromises. Their claim is limited to the Orakei block and does not challenge other land deals of questionable propriety as outlined in 4.6.

In addition they seek not the return of the whole Orakei block but only certain parts that remain in public ownership. They have not sought to upset private vested interests.

Further in seeking the 'public lands' the claimants do not necessarily intend the ousting of public user. They ask that any such lands restored be held rate free for so long as public user is maintained and that recreational areas remain subject to existing leases and licences.

Those substantial concessions, indicative of a reasonable approach, were made by the claimants in their form of claim. It may be in other cases, that this Tribunal should make findings of fact and interpretation, and adjourn for the tribe and Crown to mediate a settlement if possible. There is not the need to do that in this case, but the options for mediation and an 'out of Court' settlement must always remain open to claimants.

14.1.3 The principles of the Treaty are relevant to the consideration of remedies. The restoration of land taken may not be the necessary consequence of proof that it was taken wrongly. It may need to be asked for example, whether it is contrary to the principles of the Treaty to dispossess an innocent land holder who bought in good faith, for value and without notice that a claim might lie - see Waiheke Report, 1987:Ch 8 where it is said

It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another.

14.1.4 The Tribunal is not constrained to considering only the particular remedies suggested by claimants, orally or in their form of claim. Our function is to determine whether persons are prejudiced through Crown actions contrary to the Treaty and if so, the action that might be taken to compensate for or remove that prejudice. In that respect we have a statutory brief, akin to the terms of reference given a Commission of Inquiry, and are not limited by the pleadings of parties. The constraints upon us are procedural not substantive and come rather from the rules of natural justice which warn against a proposed remedy the prospect of which was not disclosed to a person likely to be adversely affected by it.

In this case we notified an intention to consider alternative remedies to those the claimants proposed, in Directions of the Chairman of 8 August 1986 and the accompanying report (p 203) circulated to parties well prior to final hearing.

The point is important for another reason in this case. Though the greater part of the relief claimed is sought for Ngati Whatua and not the claimants, the claimants are not representative of Ngati Whatua (see para 2.2). Though tribal support was eventually given to the claim (see para 10.4), it was not clear that the particular remedies the claimants proposed had similar tribal sanction.

# 14 Remedies

## 14.2 Approaches to Reparation

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14.2.1 There are at least three approaches to reparation in this case, as we intimated in our background report to parties.

(a) That proposed by the claimants themselves, to 'return' lands still held in public ownership. There is room for conflict. They are mainly public parks and the public has considerable interest in keeping them.

(b) An alternative approach is to quantify the loss of the Orakei block of 700 acres (283 ha) in monetary terms with damages for injuries, lost use and missed development opportunities. A host of variables confront the programming of a just calculation in a case such as this; and the assessment of 'what might have been' is highly subjective.

(c) Another is to re-establish in modern context an objective in the Treaty appropriate to the case - in this case, surely, the duty on the Crown to ensure the retention of a proper tribal endowment. The rationale for this approach, which is directed more to tribal restoration than to reparation, is more fully explained in the Waiheke Report (1987:Ch 8).

14.2.2 The last approach commends itself to us in this case. It enables Ngati Whatua to pick up from where Tuhaere, one of the tribe's most prominent forbears left off - before public works and native land laws put paid to his tribal scheme. The worth of that scheme is proven in the results of the Anglican Church residential leasehold arrangements on nearby Church lands and which may have served as Tuhaere's model. Had Tuhaere's plans been allowed to work, without dismemberment of the capital asset, there is every prospect Ngati Whatua would be today a compact tribe, well provided for with homes, industries, community amenities and a continuing revenue for tribal programmes. In much the same way did the Church leaseholds fund church programmes and a theological college. We expect this approach to provide substantially less than reparation for the 700 acres (283 ha), but more than that which the claimants seek from the return of parklands, assuming the weight of public interest would deter any substantial development of them.

14.2.3 Any policy of tribal restoration must in our view be directed to assuring the tribe's continued presence on the land, the recovery of its status in the district and the recognition of its preferred forms of tribal authority. In particular, it must take into account in this case

(a) That the tribal losses are substantial. We found, at 12.1.4, that were all else equal Ngati Whatua today would be rightly entitled to the whole of the Orakei block. We found too that Ngati Whatua as such never sold,

for Ngati Whatua were denied the title that ought to have been guaranteed to the tribe.

(b) That but for the various breaches of the Treaty by the Crown, Ngati Whatua would likely have maintained a handsome endowment. By the 1860's many tribes had rallied in concerted opposition to further sales. At Orakei the evidence is clear of a strong pressure to maintain tribal control and of a viable endowment development plan.

(c) That land loss was not all Ngati Whatua suffered. They suffered a continuing denigration of their identity as a tribe. Any policy for tribal restoration must consider not only land recovery but the the restoration of the tribe's status.

(d) That there is a need to secure an adequate economic base for the tribe to ensure its continued presence. Had the block been retained they would have had that base today.

(e) That regard must be had to the tribe's current resources, and whether those resources can meet reasonable tribal needs.

14.2.4 We have also to consider in this case that the Crown did in fact make large payments to individual owners in the buying process, and that some reparation was made in the settlement of 1978.

14.2.5 We find the tribe's current resource is woefully inadequate to achieve what is reasonably required. To assist our assessment we engaged Mr N Guscott, Economic Consultant of Auckland. The tribe's current assets derive entirely from the 1978 settlement. They are all vested in the Ngati Whatua Trust Board. They consist of the former state homes on 2.68 hectares (Nos 101, 104 appendix III), 5.54 hectares (Nos 103 and 109) for future housing and 4.18 hectares (No 108) that is not to be developed (in terms of the Act) but kept as private open space. The Board has no substantial cash assets. On the debit ledger is the 'equivalence debt' of \$200,000. We also include as a liability an inexperience in asset administration and investment. Such an experience would have developed had Tuhaere's scheme proceeded.

The former state homes Mr Guscott considers, are in a very poor state of repair and require urgent attention. Some need recladding. To upgrade the area berms and paths need attention too and trees and shrubs should be planted. As we have seen the Board, with good reason, 'cut the rents to the bone' and rental returns barely meet outgoings. The houses serve social ends not profit making. As the Ngati Whatua Board fully appreciates there is an urgent need for more housing. The dismemberment of Ngati Whatua began last century. The Board has evidence that many would, if they could, 'move home'. It has plans to develop thirty residential leasehold units (on area 103) but has no cash. In Mr Guscott's opinion a substantial cash contribution is required. The prospect of developing the further area (No 109) is even more remote.

The Board has no substantial revenue source to assist in housing or in other projects that are badly needed, marae maintenance and development, formation and maintenance of the marae roadway, maintenance of the church and urupa and development and maintenance of the private park. Investment in job creating enterprises is also required to re-establish the people.

In brief, Ngati Whatua has insufficient land and cash with which to plan its proper restoration as a tribe.

With those matters in mind, and the principles considered in 14.1, we consider, first, the particular remedies the claimants proposed.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# 14 Remedies

## 14.3 The Claimants' Proposals

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The claimants seek to have vested in the Ngati Whatua Trust Board all land in the Orakei block at present vested in the Crown or in other bodies for some public use and which remains unused for housing or roading purposes, but excluding the M J Savage memorial. The total area claimed is some 67.25 ha, comprising public parks on the Bastion Point headland (38.5 ha), public parks at Okahu Bay (about 15 ha), vacant lands earmarked for public housing, a community house and Youthline hostel (about 3 ha) and certain scattered parks, reserves and public sites (about 10.8 ha). We consider the affected areas in turn.

#### 14.3.1 The Bastion Point Headland

(a) We here review the claim for the return of the Savage Memorial Park, Takaparawha Park, the open land to the south adjoining the Savage Memorial Park and the land above Kitemoana Street and adjoining the land vested in the Trust Board for housing purposes by the 1978 Act. These various pieces of land are numbered 20, 21, 22, 29 and 30 on the plan in appendix III. The total area is 38.5 ha. We will refer to this area compendiously as the Bastion Point headland. The whole of this land is owned by the Crown and administered by the Auckland City Council under the Reserves Act 1977. In November 1979 the Auckland City Council approved a final Management Plan for Bastion Point headland. Its management objectives are to maintain the reserve as a scenic focal point, to retain its predominantly open rural character, to encourage its use by the public for recreational pursuits which do not require buildings, pitches or other fixed facilities and to protect the natural features and landscape qualities of the reserve. The Auckland City Council in the period 1981-1986/87 has incurred expenditure totalling \$132,164 (including \$50,675 for the year 1986/87) for development and improvements to the Bastion Point headland reserve. This sum does not include the very substantial funds expended by the City Council for maintenance, development and improvements to the M J Savage Memorial Gardens.

(b) Few, if any, would dispute the unique environmental and associated qualities of the Bastion Point headland reserve. It has been well described in the 1977 Report of the Joint Planning Study Group on land-use proposals for Bastion Point in the following terms:

In addition to its unique historical associations, Bastion Point is an important public vantage place and an urban open space of regional and national significance.

Of all the major parks and reserves in Auckland, it is the only large area, close to the inner city, fronting the Waitemata Harbour. Nowhere else in the whole of Auckland is there a park or reserve of this size so readily accessible, linking two beaches and intensive harbour recreation, offering uninterrupted panoramic views, containing secluded spaces and sheltered pockets, separated from motor traffic and so easily developed for a variety of leisure-time activities and recreational pursuits. Bastion Point is a magnificent natural grandstand from which every year thousands of spectators watch the Auckland Anniversary Day Regatta, reputed to be the largest one-day event of its kind in the world. The high ground of Takaparawha Park and the Savage Memorial also commands superb views of the city and harbour that extend westward to the inner city, northward to Rangitoto, and eastward to the Hauraki Gulf and the Coromandel Peninsula beyond. The Savage Memorial is also a popular attraction for tourists and visitors to Auckland as a place from which to view the eastern suburbs, the harbour bridge and the inner islands of the Hauraki Gulf

In environmental terms, Bastion Point is probably the most important open space in Auckland.... (Report, 1977:14).

(c) There is however no acknowledgement that this is also ancestral land, at least in other reports. The Study Group's report, made at the height of Maori protests, naturally referred to the Maori claim, but there is nothing in the Final Management Plan approved by the Council in November 1974, or in the signs about the Parks, that recognises Ngati Whatua's role as founding partners in the establishment of Auckland, or the significance of this area to Ngati Whatua as part of what should have been their permanent reserve.

(d) Mr Hanna, Counsel for the Auckland City Council, suggested to us that the Committee of the Auckland City Council which has responsibility for the management of reserves might include representatives of Ngati Whatua. Section 104 of the Local Government Act 1974 makes provision for such a contingency. A Council Standing Committee or Special Committee may include persons who have a particular knowledge that will assist the Committee's work. Whether or not such a provision is made in any given case is, of course, entirely a matter for the local body concerned and no Council could bind its successors.

We will return to the issues affecting the Bastion Point headland shortly. For now it is convenient to consider certain other parks and reserves also the subject of claims.

14.3.2 'Orakei Sports Domain' This area, which we have called 'Orakei Sports Domain', is part of the Orakei Domain comprising approximately 8 ha (No 18, appendix III). It is zoned Recreational D for active as opposed to passive recreational pursuits. The claimants seek in paragraph (a)(v) to have it vested in the Ngati Whatua Trust Board. The southern half is occupied by the Orakei Bowling Club and the northern half has three rugby fields in winter and is used for cricket in summer. There is a pavilion in this part of the reserve. The Auckland City Council maintains the reserve. For the period 1941-

1985/86 it spent \$392,316 on the maintenance of the whole of the Orakei Domain at Okahu Bay and a further \$83,713 on improvements. Its estimated expenditure for 1986-87 is \$53,334. It has had no income from this land since the 1978/79 year.

These recreational facilities are widely used by the general public and by Orakei residents in particular.

14.3.3 'Okahu Park' We use the term 'Okahu Park' to refer to that part of the Orakei Domain on the flats of Okahu Bay where the marae and the main part of the papakainga once stood. We have seen that the area was split by the construction of a sewer and later of Tamaki Drive. On the seaward side of Tamaki Drive is a long narrow beach front (No 28, appendix III) while the main area (No 23) adjoins the south side of Tamaki Drive. The total area 6.3 ha zoned Recreation B and administered as a Reserve by the Auckland City Council. It is a passive park, supporting a good arrangement of trees and lawns, ideal for picnics and relaxation.

14.3.4 The main parks and reserves as a whole

(a) Pitted against the claim to the parks is the public interest in maintaining the open space character of the point with public access, and in maintaining access to both Okahu Park (no 23) and the Orakei Sports Domain (no 18).

(b) Mr Hanna for the Auckland City Council emphasised the main parks should be seen as national assets not merely local reserves. We agree. We were initially concerned that the parks might represent a reasonable quid pro quo for the reserve contributions that would have been required had the the Orakei block been developed privately. Mr Miller, a surveyor for the Council, explained after a careful analysis ... it may be reasonably assumed that if the development had been done privately, a level of reserve contribution of about 12 ha for the whole block would have been required and the reserves themselves would have vested in the Auckland City Council and not just the administrative control that the Council now has.

We find that the reserves pepper-potted through the housing estate by the Crown, with the addition of the Orakei Sports Domain, slightly exceeds the 12 ha required.

(c) We accept however that there has been a long record of complicated negotiations between the Council and the Crown for the creation of large reserves in the area, that the Council has spent substantial sums on improvement and maintenance and that the Council's resources will continue to be needed for maintenance and upgrading if the parks are to be retained.

(d) We feel we can also safely assume that many Orakei residents with freehold titles would have purchased in the reasonable expectation that the reserves shown on town plans would in fact be retained.

The maintenance of the open space character of the point and of the parks in Okahu Bay is not without advantage for the local residents of Ngati Whatua too.

(e) The other side of the coin of course is the Ngati Whatua search for land, a quite reasonable search in our view, in reparation for the loss of the whole block, their particular concern for Okahu Park which embraces the main part of their former papakainga, and the failure to recognise the particular status and interests of Ngati Whatua in the administration of the parks as a whole.

(f) Our main concern with the restoration of the lands to Ngati Whatua is the potential for conflict that results. Development would almost certainly lead to public antagonism. Non-development, in a concession to public pressure, may equally lead to a disaffected future generation of Ngati Whatua, a feeling that their forbears in this claim 'won' not the substance of the land but just the shadow, something they cannot use.

(g) Adhering to the recommended base for reparation (at 14.2), the restoration of the Ngati Whatua status and economic base, we consider both the public and tribal interests can be reconciled in the matter of the parks. Subject to the economic base being found in other areas, and that is a major qualification, we consider the parks serve best to re-establish the status of Ngati Whatua in Auckland. We propose that the Bastion Point Headland parks described in 14.3.1 and Okahu Park (Nos 23 and 28) be owned by the tribe in the name of the Ngati Whatua Board, but held as a park for the benefit of the tribe and of Auckland, the administration entrusted to a partnership of tribal and City Council representatives as more particularly set out in paragraph 14.4.2. We would exclude from that arrangement however the Orakei Sports Domain (no 18) (14.3.2).

We think it should be seen as a part of the Crown's expected reserve contribution to the district. The Ngati Whatua residents of course, as residents, remain entitled to share in the sports facilities.

14.3.5 Other Crown Land vested in the Council. The following lands should for the same reason be unaffected by the claims in our view, as part of that which the Crown ought to have contributed as reserves. They are numbered from 9 to 17 and 25 to 27 on the plan in appendix III. All are subject to the Reserves Act 1977.

Area 9 is in Kepa Street being designated for a community centre - Orakei. A community centre was recently erected on this land by the Auckland City Council. It is a valuable community amenity available to an residents of Orakei. Area 10 comprises 4.15 ha and is the cliff face between Paritai Drive, Ngapipi Road and Tamaki Drive. We were advised by the Auckland

City Council that the cliff face is unstable and needs careful attention to ensure the continued security of Paritai Drive. A portion of the cliff face has already been retained and further retaining is likely to be required in the future. Area 11 is zoned Recreation D, is leased to the Orakei Tennis Club and holds a number of courts and a club-house. It is a valuable community amenity.

Areas 12-17 are zoned Recreation B. Each is grassed open space. They are spread through the housing areas and have high amenity value.

Areas 25 and 27 comprise 2574 and 6927 m<sup>2</sup> respectively. They are Crown owned reserves zoned Recreation B. We were told by the Senior Land Surveyor of Auckland City Council which administers these reserves that both are unstable areas of land and unsuitable for housing. They are in the same category as Area 10.

Area 26 comprising 6070 m<sup>2</sup> has a small frontage to Ngapipi Road and adjoins Hobson Bay. The Auckland City Council which administers it, advised us that it was laid off as a foreshore reserve on subdivision of this area. They have very little information about it.

We come now to consider other lands considered in the claims that ought in our view to assist Ngati Whatua in finding the economic base, as already referred to.

14.3.6 Land Vested in the Housing Corporation. An area of some 1.79 ha was vested in the Housing Corporation for housing purposes by s 14 of the 1978 Act (No III, appendix III). It is immediately south of the land administered by the Auckland City Council under the 1978 Act as part of the Bastion Point headland reserve.

Geographically it is a separate entity, desirable land but located in a gully behind the headland plateau and without the latter's spectacular views. Because of its physical distinction, it was recommended in the 1977 Joint Planning Study Group Report (p 44) as land that should be available for low cost medium density housing through other than private interests.

The 1978 Act vested the land in the Housing Corporation, the Corporation being charged \$260,000 for it by the Lands and Survey Department.

Since acquiring the land the Corporation has undertaken preliminary subdivisional work at considerable cost. In 1982 it invited public tenders for the purchase and development of the land for housing purposes but there were public objections and no satisfactory tender was received. Since then the Corporation has had no further instructions as to the land's future use and disposal.

We were advised by the Corporation that the Government valuation of the land was \$1,100,000 as at 1 July 1985 and that as at November 1986 the valuation was estimated to be between \$1.7 and \$1.8m. We see no

impediment to the passage of this land to Ngati Whatua in partial compensation and in terms of the claim. Though near to the marae and other Ngati Whatua land it is also physically apart, being on the opposite slope that runs from the dividing Takaparawha ridge. It has potential for either Ngati Whatua housing or for development through a leasehold residential scheme for general public occupation. The latter use would provide an endowment not unlike that once proposed for the headland by Paora Tuhaere.

It is, incidentally, of approximately the same area as the 4 acres 36 perches gifted to the Church of England by Ngati Whatua in 1859 and subsequently sold by the Church to the Crown in 1926 and later developed by the Crown for housing.

14.3.7 Community House Reserve. Immediately adjacent to the western boundary of the Housing Corporation land is an area of approximately 7798 m<sup>2</sup> (No 31, appendix III). It is described in the Second and Tenth schedules to the 1978 Act and is vested in the Auckland City Council as a local purpose (site for community facilities) reserve by s.13 of that Act. We were informed by Mr Bradbourne, the Auckland City Council Director of Parks, that the Council has no proposals for the use of this land for community purposes. A community house, once proposed for this site, has now been built in the shopping area on Kepa Road at the southern end of the block (No 9, appendix III). We consider that this land too should pass to Ngati Whatua.

14.3.8 Youthline House Trust Land. Section 15 of the 1978 Act set aside 4304m<sup>2</sup> as a local purpose (community health) reserve and subsection (3) (as amended) appointed the trustees of the Youthline House Trust as the administering body for its control and management (No 110, appendix III). It is situated at the northern end of Kupe Street immediately adjacent to an area of 2.87 ha vested in the Ngati Whatua Trust Board for housing purposes and with which it naturally blends.

Notice of the claim was given to the Trust's Director. Though we received no response from the trustees, we were advised that the Youthline House Trustees no longer wish to be associated with this land. In these circumstances its present status is inappropriate. As land that might be vested in the Ngati Whatua Trust Board it would fit readily with the tribal housing scheme envisaged for the Board's adjoining land.

14.3.9 Other lands included in the claim and which should also in our view pass to the Ngati Whatua Trust Board are as follows

(a) THE MARAE. (Nos 105, 106, 107, appendix III), as discussed at 12.19.

(b) THE CHURCH AND URUPA AT OKAHU BAY. Prior to the 1978 Act, the Orakei Maori reservation at Okahu Bay (No 114, appendix III) comprised land reserved as a Church site for the common use of Maori in and around Orakei and for the purposes of a burial ground for the former owners of the Orakei No 1 Reserve Block and their descendants pursuant to s

439 of the Maori Affairs Act 1953 (see s 11(2) of the 1978 Act). Section 11(l) of the 1978 Act vested an adjoining area (No 102, appendix III) of 2012 m<sup>2</sup> in the Trust Board to add to the existing Orakei Maori reservation. The claimants seek to have the two pieces of land amalgamated and the whole vested in the Ngati Whatua Trust Board as a Ngati Whatua reserve for a Church and burial ground. A tribal meeting of June 1984 resolved that this should be done and the surviving trustees for the main reservation have agreed.

(c) THE CEMETERY RESERVE IN RUATARA STREET. This small piece of land was

part of the 4 acres gifted to the Anglican Church and later sold to the Crown. We find however that the Crown has since vested it in the Board.

(d) ACCESS STRIP. A small area (112, appendix III) to provide access to the marae from Kupe street.

#### 14.3.10 The Trust Board Debt of \$200,000 to the Crown.

One other item of relief was sought by the claimants. They ask that the liability of the Ngati Whatua Trust Board to pay \$200,000 to the Crown 'by way of equalisation' should be abrogated by the repeal of s 16 of the 1978 Act. Following the 1978 Act the Board executed a mortgage for about \$200,000 in favour of the Maori Trustee for a term of 40 years, principal and interest being repayable on a table basis by 40 annual payments of \$15,814. We have earlier described in 9.5 and 12.22.3 how this liability arose from an adjustment between the value of the Bastion Point and the 10 acre 'exchange block' sites compulsorily acquired by the Crown and not returned to Ngati Whatua, and land vested in the Trust Board in exchange. It will be recalled that this settlement resulted from a strictly limited claim based on legal not moral grounds. Nor was it a claim under the Treaty of Waitangi Act. We have already found that Ngati Whatua are not estopped by the 1978 settlement from advancing its present claims. While the obligation to pay the Crown \$200,000 resulted from the agreed principle of 'equivalence' that was in the context of a very limited claim. It is now superseded by the present proceeding brought on an entirely different basis. Given our opinion that much of the substantial Crown reserves land should remain as reserves we have no hesitation in recommending that the Board's statutory obligation under s 16 of the 1978 Act to pay \$200,000 to the Crown should be repealed. The Crown should settle with the Maori Trustee, not just the balance outstanding on the mortgage, but the whole of the principal sum secured together with interest that the Board has paid. The Maori Trustee should make an appropriate refund to the Board.

# 14 Remedies

## 14.4 Remedies We Propose

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We refer again to the objective in this case as introduced at 14.2, the restoration of Ngati Whatua through the affirmation of the tribe's status, provisions for homes, the establishment of an economic base and the recognition of tribal authority.

We refer also to our finding at 14.2.5 that Ngati Whatua lacks the necessary land and cash to undertake tribal restoration. The following remedies are based on the restoration of Ngati Whatua in terms of status, homes, investment and representation.

#### Status

14.4.1 We have earlier recorded the depth of spiritual attachment of Ngati Whatua to their traditional papakainga (No 23, appendix III) and have said that, given the nature of the site and the veneration in which it was then and is still held by Ngati Whatua, the Crown might reasonably have been expected, in vesting its administration in the Auckland City Council, to have imposed some restrictions recognising the special nature of the site and the mana of Ngati Whatua over it. We consider, given the deep affinity of the tribe for their papakainga, that the whole of area No 23 should be vested in the Ngati Whatua Trust Board under the arrangement described below as an historic reserve and for passive recreation purposes, to the end and intent that public user will still be provided but Ngati Whatua will have total control over any special use. As indicated in 14.4.2 the City Council will continue to maintain the area in return for the public enjoyment of it. It may be that the Trust Board would wish to signify the historic and continuing importance of this land by renaming it in a way which reflects its return to its traditional owner. While there is perhaps a less compelling case for vesting the seaward area (No 28), being the land severed from the papakainga by the sewer and later by Tamaki Drive, we believe it too should be vested in the Trust Board as a historic and recreational reserve but continue to be maintained by the Auckland City Council.

14.4.2 We would seek to affirm further the status of Ngati Whatua in Auckland and to recognise its traditional mana whenua and special place in Orakei by the establishment of a Ngati Whatua-Auckland City Council partnership regime for the administration of Okahu Park and the Bastion Point Headland reserves. We therefore propose

(1) That Okahu Park and the Bastion Point headland reserves (excluding the M J Savage Memorial) and being the areas marked 23, 28, 20, 21, 22, 29 and 30 on appendix III cease to be Crown land and be vested in the Ngati Whatua of Orakei Maori Trust Board as Maori land holding

historical and spiritual significance for Ngati Whatua of Orakei and available as a park for the benefit of Ngati Whatua and the citizens of Auckland..

(2) That administration of the lands be vested in a statutory Board called the Ngati Whatua of Orakei Reserves Board (or such other name as may be sought by the Ngati Whatua of Orakei Maori Trust Board).

(3) That the function of the Reserves Board be the control and management of the reserves vested in it for the purpose of their classification under the Reserves Act 1977 in accordance with the appropriate provisions of that Act.

(4) That membership of the Board comprise (say) six persons, three appointed by the Trust Board and three by the Auckland City Council, the chairperson to be elected by the Board members from among their number.

(5) That the funds necessary for the management and control of the reserves continue to be provided by the Auckland City Council. We note that in their Counsel's submissions to us the City Council offered to continue to meet the cost of maintaining these reserves even though the title to all or some of them might be transferred from the Crown to particular Maori interests.

(6) That provision be made for Ngati Whatua to hold community or cultural functions on the reserves at suitable times and places and to control attendance there. The provisions of s 53(l)(e) of the Reserves Act and of s 2 of the Auckland Domain Vesting Amendment Act 1986 may provide, with appropriate modifications, a suitable model.

(7) That the Crown pay fees to Trust Board appointees in accordance with the Fees and Travelling Allowances Act.

(8) That the land be exempt from payment of rates.

(9) That provision be made that notwithstanding the Trust Board's role, the Reserves Board may lease parts of the reserves for tribal farming purposes.

(10) That the reserves be re-named Ngati Whatua Park or such other name as the Trust Board may approve.

14.4.3 To affirm the mana of Ngati Whatua at Orakei (as well to repair a serious past mistake) we propose that the marae, Church and urupa, with the areas added to each, be vested by legislation in the Ngati Whatua Trust Board, freed from liability for all rates. To maintain marae access to Kupe Street we recommend the small area No 112 on appendix III be vested in the Board.

Homes

14.4.4 The area currently set aside for future housing is only marginally adequate for any substantial 'return home'. We would augment it by adding the Youthline Trust site. The added area, like the current housing estate, should be exempt from reserve contributions on any subdivision but it should also be freed from a liability for rates until development begins.

14.4.5 Only time will tell whether the then housing estate is adequate for current and future housing requirements and whether the Board will need to acquire, or assist its members to buy, other homes in the Orakei block. An open mind should also be kept on whether any part of the private park should later be available for homes.

14.4.6 A cash contribution is required for urgently needed new housing to begin. The amount is considered below. For now, and for the reasons given at 14.3.10 we recommend the refund of the \$200,000 debt.

#### Investment

14.4.7 An endowment is required for maintenance of tribal amenities, the marae, marae roading, church, urupa, private park and for general tribal programmes. An economic base is needed too for the inauguration of job creating industries whether 'in town' or on the tribe's own land, for the people would have that much at least had the original area been maintained.

14.4.8 To assist the establishment of an economic base and provide for an endowment fund on a scheme not dissimilar from that which Tuhaere began, we would vest in the Board the vacant Community House site and Housing Corporation land. Again, they adjoin substantial public reserves and should be exempt from reserve contributions. Ngati Whatua has virtually no cash assets and the land should also be rate free until development starts.

14.4.9 Mr Guscott was engaged to provide a succinct assessment of the minimum cash contribution required for housing and development projects to begin and to establish an appropriate economic base for the purposes described. That assessment had necessarily to be based on an assumed scenario. It is as follows

(a) For reasons earlier explained, returns from the existing homes do not provide for development elsewhere.

(b) The project for 30 units on area 103 needs to begin now, along lines proposed by the Board that is to say, with land development to be done by the Board and with unit development on residential leaseholds that enable members to own their own homes paying only a ground rent. Restrictions on lease transfers would keep ownership within the tribal group (though in some cases the Board may need to buy in when a sale is sought) but those same restrictions limit the availability of loans from the private sector. Those currently seeking homes in this development have existing equities and should on average contribute about one third

of the estimated building costs. The land is prime residential land and development should be of relatively high standard.

Some members would be hard put to meet mortgage outgoings on standard State terms and concessionary provisions would be required with mortgage terms exceeding 30 years in some cases. Many would not meet State lending criteria and second mortgages would also be needed.

(c) The second development stage (area 109) is much more costly. At current figures land development costs alone would exceed \$1,000,000. In addition the Board would need to build some homes of its own to house members lacking equity.

(d) The present land development cost of area 103 is approximately \$600,000. Building costs for the reasonable standard required and after deducting a one third members contribution is approximately \$1.8 million, with that amount to be raised from loans. Concessionary loan terms are needed. To fund eventually the second housing stage and to provide the concessionary mortgage terms needed on stage one, where required, we consider the Board itself must be in a position to provide the cash necessary to make those mortgage advances. It would also need to meet development costs from its own resources and the Board would therefore require in all, an estimated \$2.5 million.

(e) On this scenario, the development of area 109 is very much in the longer term and would be funded from outside borrowing and the accumulation and wise investment of ground rents and mortgage repayments from stage I. Properly, a further cash investment would need to be set aside now.

(f) Sale of development rights of the 'endowment lands' for general public user - the community house site and Housing Corporation land - would provide the further investment necessary for the eventual stage II housing development. Continuing ground rents from the 'housing endowment' would contribute to the maintenance of the marae, marae road, church, urupa and private park.

(g) Again, on this scenario, though it may be unacceptable to Ngati Whatua, some local industry would be engendered from developing the tourist potential of the marae. That would require an estimated \$0.5 million in completing urgent works, the upgrading of the Kitemoana Street homes, the approaches, the marae roads and the private park with any excess to be added to the provision of further facilities on the marae for tourist purposes. These improvements are urgent in any event.

(h) On the scenario proposed any major investment in job generating industries for the people and the funding of educational and other general tribal programmes would be in the very long term indeed, but

would come eventually from rentals accruing from the total housing estate.

14.4.10 Accordingly, with Mr Guscott's assistance, we have estimated \$3 million as the minimum figure required for Ngati Whatua to begin its proper re-establishment. Mr Guscott was at pains to point out to us that his estimate was very general and a much more comprehensive study was properly called for, but he also stressed that on the basis of his estimates, \$3 million represented the absolute minimum that would reasonably be required.

14.4.11 He also considered Ngati Whatua would require the services of a competent economic planner and adviser at least in the initial development stages.

14.4.12 We recommend

(a) payment to the Ngati Whatua Trust Board of \$3 million as a contribution to re-housing and endowment development programmes;

(b) that such payment be made in cash, in one lump sum, but if paid over time that it be made inflation proof;

(c) that the Crown meet the cost of an independent adviser and consultant on a four year contract to assist the Ngati Whatua Board.

14.4.13 The scenario described would initially provide homes only for tribal members with reasonable equities. It is important to assure a wide spectrum of people by age and income in community rebuilding but the existing rental homes are insufficient for those without capital and the provision of other rental homes must come in the much longer term. We also recommend therefore a policy of preference for Ngati Whatua in the allocation of the many other State homes in the Orakei block, as they become vacant.

#### Representation

14.4.14 To recognise in modern form the traditional tribal authority of Ngati Whatua, we would vest the lands referred to in the Ngati Whatua Trust Board and would extend the rationale for the Boards existence, and its powers, in the manner contemplated at 12.23. The Board should also be recognised as a charity for the purposes of taxation.

#### General

14.4.15 The above proposals, we emphasise, do not give recompense for the loss of the Orakei block, but exceed the concessionary claims in this case.

14.4.16 For reasons earlier given, we have declined to recommend that the whole of the park areas be vested in the Ngati Whatua Trust Board. We have upheld instead the public enjoyment of those areas under a partnership between Ngati Whatua and the Auckland City Council. Equity requires however that the Crown, in its capacity as a Treaty partner, should make a

substantial cash contribution to the Ngati Whatua Trust Board to assist in tribal rehabilitation on the ancestral home lands. The sum of \$3 million with waiver of a past debt, is, we consider, the minimum we can recommend.

14.4.17 We emphasise that our suggestions for the utilisation of lands and monies have been purely for the purpose of making an assessment. We do not presume to imply that Ngati Whatua should be committed to any development model we have suggested for how they finally deploy their own assets and revenues must be their business. That too is a matter of mana.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# 14 Remedies

## 14.5 Summary of Remedies Proposed

### 14.5 Summary of Remedies Proposed

Ngati Whatua we find, are properly entitled to reparation for the loss of the Orakei block of 283 ha.

In 1978 the tribe received some 11.4 ha being 2.68 with existing homes, 4.54 ha for future housing and 4.18 ha as private open space, but subject to a debt of \$200,000.

The claimants sought recovery of 'public owned' lands not used for housing or roads. The area so claimed is approximately 67.25 ha.

Under the recommendations proposed the public would retain access to the whole 67.25 ha currently held as public parks and reserves but ownership of Okahu Park of some 6.3 ha (Nos 23 and 28), and of the headland parks of Bastion Point, 38.5 ha (Nos 20, 21, 22, 29, 30), would vest in the Ngati Whatua of Orakei Maori Trust Board, while their control and management would vest in a new Reserves Board comprising Ngati Whatua and Auckland City Council representatives.

Ngati Whatua, through its Trust Board, would additionally receive some 3 ha for such development as it sees fit, remission of the \$200,000 debt, and \$3,000,000 to inaugurate programmes necessary for the tribe's rehabilitation. The Ngati Whatua of Orakei Maori Trust Board would be reconstituted as a tribal authority and would have vested in it the Orakei marae, church and urupa.

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*Waitangi Tribunal, Department of Justice, Wellington.*