



Chief Ombudsman's opinion under the Ombudsmen Act

Legislation	Ombudsmen Act 1975, ss 13, 22
Agency	Auckland Council/Waitemata Local Board
Complaint about	Decision making in relation to the National Erebus Memorial
Ombudsman	Peter Boshier
Case number(s)	557680
Date	10 March 2023

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Summary

1. I have found that Auckland Council (the Council) did not act unreasonably in not recommending to the Independent Hearing Commissioner notification of the Ministry of Culture and Heritage/Manatu Taonga's (the Ministry) application for a resource consent.
2. I do not consider that the Council acted unreasonably in failing to insist that the Ministry seek notification of the application. In particular, the Heritage Policy said to require this did not apply.
3. I consider that Council officers' involvement and assistance to the Ministry in its search for a suitable Auckland location for the Erebus memorial in 2018 was appropriate.
4. I do not consider that there was predetermination or bias on the part of Council officers in the role that they played prior to the Waitemata Local Board's (the Local Board) in-principle support for landowner approval being granted to the Ministry. Nor do I consider that the Council was remiss in not following up its suggestion of a meeting with an appropriate iwi forum.
5. I do consider that the Council acted unreasonably in failing to inform the Local Board, before it expressed in-principle support for landowner approval, of an environmental consultant's report that was unfavourable to establishing a memorial in Dove-Myer Robinson Park (the Boffa Miskell report).
6. I consider that the Council was wrong to recommend to the Local Board approval of the landowner approval application in September and December 2019 before all the conditions

set out in the Board's in-principle resolution had been fulfilled. But as approval was not granted at either of these meetings, there were no adverse consequences.

7. I do not consider that the Council acted unreasonably in recommending a grant of landowner approval by the Local Board at its November 2020 meeting.
8. I consider that the consultation process carried out by the Council in September/October 2019 was adequate. While I think that remarks of a Council officer at the time urging the Ministry to counteract views opposed to landowner approval in the Park were unwise, they were not a material factor.
9. I consider that the results of the consultation were reported accurately and adequately to the Local Board.
10. I consider that the Council was justified in granting a building consent exemption in respect of the memorial.
11. I have concluded that no recommendation is appropriate or necessary in this case.

Introduction

1. This complaint concerns the Government's decision to establish a National Erebus Memorial in Dove Myer Robinson Park/Taurarua in Parnell, Auckland and, more specifically, the associated approvals and consent granted by the Auckland Council (the Council) that permit that project to proceed. A complaint against the Ministry of Culture and Heritage/Manatu Taonga (the Ministry) over its role in the project has already been investigated (case number 557680 and final opinion of 24 March 2022).
2. In November 2017, the Government announced that a National Erebus Memorial would be erected in Auckland. The lead agency for the project was the Ministry. To help it identify a suitable site, the Ministry contacted the Council at an officials level in March 2018. Over the next few months the Ministry and the Council worked together identifying possible sites. By June 2018 these had been reduced to five (including Dove-Myer Robinson Park (the Park)) and a day was spent jointly visiting these sites.
3. In August 2018, the Ministry decided that its preference was for Dove-Myer Robinson Park and this was endorsed by the then Minister for Arts, Culture and Heritage in September. The Park is owned by the Council. In order to carry out the project the Ministry needed two major authorisations – a resource consent for the memorial itself and landowner approval to carry out the work in the Park (a third approval from the Council – tree asset approval – has been treated as part of the process of obtaining a resource consent). During the course of this investigation the complainants also raised the decision of the Council to grant a building consent at the pre-consenting stage. This has been included in the investigation that has been undertaken.
4. The Council assigned the application for a resource consent to an Independent Hearing Commissioner and this was granted on a non-notified basis in March 2020. The

application for landowner approval was considered by the Waitematā Local Board (the Local Board) under authority from the Council. The Local Board agreed to endorse landowner approval in November 2020 and on the basis of this, the Council conveyed approval the following month.

5. The complaint challenges the actions of Council staff in regard to the grant of the resource consent on a non-notified basis, the grant of a building consent at the pre-consenting stage, and the consultation carried out by Council officials on behalf of the Local Board before it gave its endorsement of landowner approval. It also alleges that the Council unduly favoured the Ministry thus leading to an unfair presentation of the results of the consultation to the Local Board when it came to consider the question of landowner approval.

Investigation of complaint

6. This complaint was made by Margaret Brough, Roger Burton, Dame Naida Glavish, Joanne Malcolm and Steve Phillips on 26 July 2021.
7. Initially, the complaint was addressed solely to the actions of the Ministry about the full process undertaken in regard to the project. Discussions were held with the complainants to clarify the nature of their complaint. As a result, it became apparent that elements of the complaint (in particular, the grant of a resource consent and the consultation undertaken prior to the grant of landowner approval) were matters that were the responsibility of the Council rather than the Ministry.
8. The complaint was notified to the Council on 4 October 2021. The Council responded to the notification on 15 October 2021. At this point it was decided to defer further investigation of the complaint against the Council until the investigation into the complaint against the Ministry was completed.
9. My opinion on the Ministry complaint was issued on 24 March 2022. Investigation of the complaint against the Council had resumed shortly before this. Meetings were held with the complainants and the Council. The complainants subsequently elaborated on their initial complaint (and introduced the question of the building consent referred to above). These more detailed allegations against the Council were put to it on 24 March 2022. The Council responded on 20 May 2022.
10. Initially my investigation did not include the Local Board's activities and focused on the actions of Council staff. However, as the investigation proceeded it became apparent that one aspect of the complaint was the responsibility of the Local Board. This was the targeted consultation undertaken in September and October 2019 (discussed from paragraph 101). While decisions of the full Local Board are outside my jurisdiction under the Ombudsmen Act (OA), I am not precluded from investigating other actions by a local board. Accordingly the Chair of the Local Board (as it was then constituted) was notified of my investigation on 31 August 2022. A response was provided on 28 September 2022.

(Wider issues in regard to the responsibilities of the Council and local boards are discussed in the Appendix.)

11. On 29 November 2022, I issued an opinion setting out my provisional views on the complaint. This was provided to the complainants and the Council and their comments were invited. I asked the Council to bring this opinion to the attention of the Local Board (though there were no adverse comments or recommendations addressed to it) and to a former Council employee (identified in this report as AB) about whom I had made critical comments. I asked the Council to convey to me any comments that they wished to make on the opinion.
12. The complainants responded with their comments on 21 December 2022 and the Council responded on 23 December 2022. With their comments the Council set out AB's own comments. The Local Board did not comment on the opinion. I have taken these comments into account in forming my final opinion on the complaint.

Ombudsman's jurisdiction

13. The departments and organisations whose decisions and other actions may be investigated by an Ombudsman under section 13(1) of the OA are set out in Schedule 1 of that Act. Under that Schedule, the Council, a unitary authority created by the Local Government (Auckland Council) Act 2009, and its local boards are made subject to investigation by an Ombudsman.
14. But, in investigating the actions of councils and local boards, an Ombudsman is precluded from questioning the decisions of a full council or board (section 13(1) of the OA). There are no relevant Council decisions involved in this complaint but there are a number of decisions taken by the Local Board that are relevant to matters raised by the complainants. These will be referred to and their effect discussed at appropriate parts of this provisional opinion, but no findings may be made in respect of them. Accordingly, this complaint is addressed to the actions or inactions of members of the staff of the Council, whether performed on behalf of the Council or the Local Board.
15. The Council is responsible for decision-making in relation to a local authority's regulatory responsibilities under the Resource Management Act 1991 (the RMA). Consequently, the Ministry's application for a resource consent in respect of building the memorial in the Park was made to the Council. But the Council decided to refer the application to an Independent Hearing Commissioner and there has been no challenge to this decision. Independent Hearing Commissioners have historically been regarded as falling outside the Ombudsmen's jurisdiction and that is the approach I have applied in this investigation. Consequently, I have not formed any opinion in respect of the actions or decisions of the Independent Hearing Commissioner.
16. Nevertheless, the role played by the Commissioner forms an essential part of the background to the complaint made against the Council regarding non-notification of the resource consent. It will therefore be mentioned or recorded as it is relevant to a

consideration of the decision not to notify the resource consent application. But care will be taken not to allow an indirect examination of the correctness of decisions taken by the Commissioner through an examination of the actions of the Council staff involved with him.

Non-notification of the resource consent

17. The erection of the memorial in the Park required the grant of a resource consent by the Council. The Ministry lodged an application for a consent on 16 September 2019. As recorded above, the Council referred the application for determination by an Independent Hearing Commissioner. It contributed to the Commissioner's consideration of the application by way of a report on 14 February 2020 prepared by one of its senior planners under section 42A of the RMA. This report recommended that the application proceed overall as a discretionary activity. The senior planner considered that the effects of the proposal, in RMA terms, would have no more than minor adverse effects on the environment and thus the threshold for notification was not reached. In addition, he concluded that no special circumstances existed that would require notification of the application. Consequently, he recommended to the Commissioner that the application not be subject to the RMA's notification or limited notification procedures.
18. These were recommendations. The final decision on notification rested with the Commissioner. In the event, the Commissioner concurred with the recommendations and dealt with the application on a non-notified basis. Resource consent was granted on 18 March 2020. The complainants consider that it was unreasonable of the Council not to recommend notification to the Commissioner. They do not specify the means by which they consider that that recommendation would have been conveyed to the Commissioner. I assume that if it had been made that it would have been by way of the senior planner's report.
19. In addition, the complainants consider that the Council ought to have insisted that the Ministry itself should have required notification of the application. The significance of this is that if the Ministry as the applicant had requested notification, notification would have been mandatory (section 95A(3)(a) of the RMA).
20. I deal with both of these complaints below.

Support by the Council for notification

21. On 3 December 2019, the Local Board unanimously agreed that it considered that the resource consent should be notified due to special circumstances. The circumstances that it identified were the Park's and its neighbourhood's regional, national and international interest with significant heritage and environmental importance and the high level of community interest demonstrated by the recent consultation carried out by the Local Board as part of the landowner approval process. This view was conveyed to

the Council's resource consent team a few days later. Presumably by this means it found its way into the report prepared for the Commissioner by the senior planner two months later.

22. As already remarked, the decision on notification was made by the Commissioner, not by Council staff. The Council in its response to me makes the point that the Ombudsman should not permit a collateral attack on a decision taken by an officer outside the Ombudsman's jurisdiction to be made in the guise of an investigation into advice he received from a Council staff member. It also makes the point that, the resource consent having been granted, the Council cannot recall or cancel it. Only a court of competent jurisdiction could do this.
23. I accept these submissions up to a point. But because only a court could invalidate the resource consent does not preclude an Ombudsman's investigation which is not primarily directed to legality (though an Ombudsman would not recommend a council to do something which it had no legal power to do). Nor do I consider that I can entirely ignore the senior planner's report. For example, if he had omitted to inform the Commissioner of the Local Board's position on notification this would have been a cardinal error that would call for comment by the Ombudsman. So while I intend to approach scrutiny of the senior planner's contribution in a cautious manner. I do not consider that I can or should entirely avoid examining it.
24. Having said that, I have to say that I am impressed by the careful and comprehensive way in which the senior planner worked through the issues and presented them to the Commissioner.
25. The report refers to the assessment by the technical experts engaged by the applicant to address the various aspects raised by the application (landscape, arboricultural, geotechnical, and so on). It then refers to the views of the various Council experts in these fields who had assessed the application. After this the senior planner forms his own view on these issues. He sets out fully the Local Board's support for notification and he returns to this when he expresses his view on whether special circumstances exist requiring notification. His conclusion on the latter was that the Local Board's support was not compelling in this case because its position was largely formed on the basis of opposition to the location of the memorial in the Park – a landowner approval issue – rather than the resource consent itself. However, in forming this view he did turn his mind to correspondence that sought notification specifically on resource consent grounds.
26. In its comments on my provisional opinion, the complainants raised the issue of whether the Council's failure to provide the Commissioner with the environmental report made by the Ministry's consultants, Boffa Miskell (discussed more fully below), was itself unreasonable. While I have concluded that the relevant officers of the Council engaged in appraising the landowner approval application had knowledge or constructive knowledge of that report, I am not able to say if this extended to those officers engaged with the resource consent application.

27. But I do not think that this matters. The Council's report on the latter distinguishes between factors relevant to the resource consent and factors relevant to landowner approval. The Boffa Miskell report, in my view, falls into the latter category. It is not at all clear that it would have been relevant to the notification decision made by the Commissioner. Consequently, I have not brought it into consideration in this context.
28. Working his way through the tests for notification or limited notification set out in the RMA, the Council's planner ultimately concluded that there were no grounds for notification. The process followed in forming this opinion seems to me comprehensive (though, of course, there may be disagreement with that opinion itself) and I do not consider that it can be impeached.
29. I therefore do not uphold the complaint that the Council should have recommended notification to the Commissioner. The senior planner's report on behalf of the Council seems to me to have adequately discharged the Council's obligations.

Requiring the Ministry to seek notification

30. The complainants consider that the Council should have required the Ministry to seek notification of the application.
31. I am not sure how the Council could have achieved this. Having received an application for a resource consent it was legally obliged to process this in the way prescribed by the RMA. It could not reject or refuse to consider the application unless the Ministry agreed to its notification.
32. Thus I interpret this complaint as suggesting that the Council was not forceful enough in attempting to persuade the Ministry of the desirability of notification. In fact, the Council did raise the question of notification with the Ministry shortly after the application was lodged, when a Council official liaising with the Ministry enquired whether it was intending to seek notification. The Ministry replied saying it was content to leave that question to the Council (as part of the process of the application though, not turning the notification decision over to the Council to make). It went on to say that, in its own assessment, notification was not required. The matter was left there.
33. The one substantive reason put forward for strong pressure to be exerted on the Ministry to seek notification is that this was said to be required by the Ministry's own Heritage Policy and that the Council should have insisted (or strongly pressed) the Ministry to comply with this. This requires consideration of the policy said to be applicable.

Heritage Policy 2004

34. The policy in question is the Policy for Government Departments' Management of Historic Heritage 2004 (the Heritage Policy).

35. This policy provides a framework for the management of historic heritage by Government departments. It sets out 19 policy statements: ranging from the identification of places of historic heritage value on land which they (departments) manage, to compliance with relevant statutory and regulatory requirements. Policy 15 on community participation states –

Government departments will invite public participation, where appropriate, in the management of historic heritage of special significance through various initiatives, such as:

...

(iii) voluntary notification of resource consent applications.

36. In October 2019, after the Ministry had lodged the resource consent application in respect of the National Erebus Memorial, solicitors acting for a complainant wrote to the Ministry asking it to seek voluntary notification of the application in accordance with the Heritage Policy. A copy of this letter was sent to the Council. The letter was not replied to by the Ministry until April 2020 (after the resource consent had been granted). The Ministry's view was that the policy did not apply in this instance. That view was accepted by me in my opinion on a complaint against the Ministry (case number: 557680 at paragraph 91).
37. In their submission on this complaint, the complainants take issue with that view of the policy, citing, amongst other things, the wide definition of 'Historic Heritage' in the glossary of the policy. They contend that it was unreasonable and a breach of natural justice for the Council to fail to require the Ministry to notify the consent application.
38. I do not accept the complainants' contention that the Heritage Policy applied.
39. The policy applies to places of historic heritage value on land that departments manage. Quite simply, in October 2019 when this issue arose, the Ministry was not managing any land in Dove-Myer Robinson Park as a site of historic heritage. In October 2019 (and even today) the memorial does not exist. It could not therefore constitute a site of historic heritage being managed by the Ministry. Indeed at that time the Ministry held no management or other rights at all in respect of Dove-Myer Robinson Park. The only entity with management rights in the park was the Council, the landowner. The policy, of course, does not apply to local authorities and in any case the Council was not seeking a resource consent.
40. Consequently, I am firmly of the view that the Heritage Policy did not and could not apply to the resource consent application that the Ministry lodged in 2019. The suggestion that it could is misconceived. This being the case there can be no substance to a claim that the Council should have required the Ministry to comply with the policy.

Conclusion on non-notification

41. I do not consider that the Council acted unreasonably in not recommending notification to the Commissioner or in failing to insist (or even forcefully trying to persuade) the Ministry to opt for voluntary notification itself. (I may add that even if, for the sake of argument, the Heritage Policy had applied, I do not see how responsibility for the Ministry's failure to comply with it could be shifted to or shared with the Council).

Predetermination and bias

42. The complainants allege that Council staff were complicit in a predetermination of the Local Board to grant '*in principle*' support for landowner approval at a meeting of 20 November 2018. They also allege that Council staff acted inappropriately to promote the grant of landowner approval when they should have maintained a professional distance between themselves and the Ministry as the promoter of the project. There are a number of strands to these allegations that I need to examine in reaching a view on them and I will revert to them later in this opinion.
43. But first, I acknowledge a point made to me by the Council that care must be taken not to circumvent the fact that decisions by the full Local Board are outside the Ombudsman's jurisdiction. Consequently, criticism of staff cannot be used as a means of questioning the decisions of the full Local Board. The sole emphasis must be on whether Council staff in their interactions with the Local Board and its members acted reasonably in the context of their professional responsibilities to it and to the Council.
44. In this regard, I think that it is appropriate to start with some general reflections on how officers might be expected to approach a project such as the National Erebus Memorial.
45. It seems to me that any local authority is likely to welcome and feel honoured at a suggestion that an important national memorial be established in its area. Of course, there will be questions as to funding and the precise siting to be settled that may subsequently be contentious. But, in principle, I see nothing untoward or inappropriate with staff being active in support of such an initiative. When the Ministry approached the Council early in 2018, there was an immediate effort made on the Council side to help the Ministry by identifying the regulatory and other hurdles it needed to surmount and in finding a suitable location. This general co-operative approach was endorsed by the Mayor of Auckland on 19 April 2018, following an approach from the Prime Minister, when he said that he supported Auckland as the site for the memorial and that Council staff would assist in this endeavour. At the same time a senior staff member ("AB") was identified as the Council co-ordinator and the conduit with Ministry staff engaged on the project.
46. I do not take the complainants as disagreeing with Council involvement of this nature. They have been clear that they support the erection of an Erebus memorial in Auckland. Their point of disagreement is with the nominated location – Dove-Myer Robinson Park.

In this regard (and it is not part of their complaint) it can be definitively stated that the identification of the Park in August 2018 was made solely by the Ministry. Council staff did not suggest it to the Ministry.

47. After these general reflections I turn to the specific complaints levelled at Council staff.

The Local Board's 'in-principle' support

48. At its meeting on 20 November 2018, the Local Board resolved –

That the Waitematā Local Board:

- a. supports locating the National Erebus Memorial at Dove-Myer Robinson Park at the proposed location identified in Attachment A to the agenda, subject to:
 - i. all necessary building and resource requirements being met;
 - ii. a rigorous design process which includes a review of the shortlisted designs by the Auckland Design Panel and, as a separate process, the Waitematā Local Board;
 - iii. the local board granting landowner approval for the installation of the winning design subject to Board approval of this design;
 - iv. the Ministry for Culture and Heritage providing funding to cover all costs relating to the installation and future maintenance of the structure and associate landscape features;
 - b. delegate to the Waitematā Local Board Chair and parks portfolio lead sign-off of the memorial design parameters;
 - c. receive the letter of support from the Ngāti Whātua Ōrākei Trust and notes that the Ministry for Culture and Heritage will lead mana whenua consultation on the location.
49. This is the 'in-principle' support for the establishment of the memorial in the Park. It is expressed in clause (a) of the resolution followed by a number of conditions or qualifications and a delegation relating to sign-off of the design. I will need to consider the effect of this resolution later. Here I am concerned with Council staffs' involvement in how it was developed.
50. The first reference that I have seen to the prospect of in-principle support being expressed by the Local Board is in an email of 5 September 2018 from the then Chair of the Local Board to the Council officer liaising with the Ministry, AB. The Chair had been briefed by the Ministry and expressed her own 'in-principle' support for the memorial being located '*in one of our parks*'. She does not specify Dove-Myer Robinson Park in the email but it seems likely that she is referring to that park. The Ministry had decided that its preference was for Dove-Myer Robinson Park in the previous month and

recommended it to its Minister. The Minister confirmed her support for this on 12 September 2018, though this was not publicly announced until 21 November 2018 the day following the Local Board's in-principle resolution.

51. It is likely that at the time these discussions were taking place the Local Board Chair and Council staff dealing with the Ministry knew of the Ministry's unannounced preference for Dove-Myer Robinson Park and it was in this context that the resolution was developed. On 7 September 2018, AB indicated in an email to the Ministry that, on the basis of the Chair's support, a proposal would be presented to the Local Board seeking in-principle support. This was done, but only after the proposal was discussed at a Local Board workshop, at which the Board insisted that mana whenua support be secured first. When this was forthcoming, a proposal was drafted for the Local Board meeting on 20 November 2018.
52. I do not see any evidence of predetermination or impropriety on the part of the Council officer involved in these steps. Nor do I see that he was under pressure from the Chair of the Local Board to progress the matter. In fact he, on 21 August 2018, had first suggested to the Ministry that it brief the Local Board Chair on the proposal so as to see if political support would be forthcoming before further work was done on the matter. This was a prudent step to take. I am satisfied that the Council staff member involved, AB, acted entirely properly in his interactions with the Local Board member concerned.
53. The complainants make the point that things were moving very fast at this point – most likely so that a Government announcement on progress could be made at a memorial event to be held on 28 November 2018, the 39th anniversary of the tragedy. I think that this was very likely so. They point to an internal Council email expressing concern at the pace of events and raising the question of whether there had been iwi consultation. It is clear that in regard to the latter there had not, and this became an issue when the matter was discussed at the Local Board workshop on 9 October 2018.
54. Following this workshop there was discussion between Council staff about how mana whenua consultation should be initiated and it was suggested internally that this could be through the 'Parks mana whenua forum' whose next meeting was scheduled for 31 October 2018. In an email to the Ministry of 11 October 2018, AB in passing this suggestion on to the Ministry said that the Council had a 'mana whenua forum' at which the project could be discussed, though Ngāti Whātua Orākei, the iwi in whose rohe the park lay often did not attend. Consequently, he suggested that the Ministry engage, in addition, with a one on one briefing with Ngāti Whātua Orākei. The complainants complain that the Council never followed up the suggestion of the Ministry presenting at the forum scheduled for 31 October 2018.
55. The first point that needs to be clarified is that the forum intended by the Council is the Parks mana whenua forum, not the Council's Mana Whenua Kaitiaki Forum. The email of 11 October 2018 suggesting this meeting is ambiguous and hitherto the complainants and I, and possibly the Ministry, have taken it to be referring to the latter forum. However, whichever forum was intended, the fact remains that the Ministry did not

attend and the Council did not insist that it do so. To this extent, the complainants' criticism still stands.

56. However, in my view there was nothing unreasonable in the Council not following-up on its own suggestion. It was always clear following the workshop that the responsibility for engaging with appropriate iwi to advance the landowner approval application lay with the Ministry, not the Council. While the Council was able to suggest means by which this might be achieved, it was for the Ministry to engage so as to be able to satisfy the Local Board that this aspect of its proposal had been resolved. In fact, the Ministry almost immediately following the workshop engaged directly with Ngāti Whātua Ōrākei and secured its support (see opinion on complaint 557680 at paragraph 36). This is acknowledged in clause (c) of the Local Board's resolution of 20 November 2018 quoted above. Whether the Ministry's attendance at the Parks forum would have been useful or not, the issue of mana whenua consultation that troubled the Local Board had been addressed. There was no need for the Council to insist on any further engagement in these circumstances.
57. The complainants are critical of what they see as failures on the part of the Ministry to engage with other iwi with an interest in the site. They criticise the Council for not ensuring that this occurred until the application for a resource consent was lodged almost nine months later. These complaints are principally directed to the Ministry and have been discussed by the Ombudsman in that context (see opinion on complaint 557680 at paragraphs 41-53). I see no reason to bring the Council into something that was clearly the responsibility of the sponsor of the project, the Ministry.

The Boffa Miskell report

58. In August 2018, the Ministry commissioned a firm of environmental consultants, Boffa Miskell, to report on the suitability of the site it was beginning to favour for the memorial, Dove-Myer Robinson Park.
59. In the event, the report was unfavourable to the Park, which even the Ministry conceded. A draft of the report was given to AB by the Ministry immediately after the survey and he responded by offering to look for other sites nearer to the airport (in Mangere and Hillsborough). But the Ministry was not interested in taking up his offer and shortly afterwards it confirmed its preference for Dove-Myer Robinson Park in the face of the Boffa Miskell report. The complainants maintain that a copy of this report should have been shared with the Local Board before it gave its in-principle support for landowner approval in the following November.
60. Solicitors acting for one of the complainants raised this with the Local Board in a letter of 21 November 2019. They said:

[The report] should have also been central to the Waitemātā Local Board's earlier decision to agree in principle to providing landowner approval. However, it was deprived of that opportunity because we understand neither

the Ministry, nor the Council, provided the Boffa Miskell report to the Waitematā Local Board.

61. The Council, in its response told me that the report given to AB was a draft report and it does not know if a final version was given to him. The actual authors of the staff report to the Local Board prior to its in-principle decision were not aware of the report and so did not annex it to their report. The first question that arises is thus whether the Council had the Boffa Miskell report in the first place and so was in a position to advise the Local Board of it.
62. In my view it is reasonable to assume that it did have the report or should have done so.
63. I accept that the version of the report tendered to AB may have been a draft, but it led him to make particularly pertinent comments on it to the Ministry. From that point, he knew that a relevant environmental report existed and I expect he could have obtained a final version from the Ministry if one was not sent to him on its own initiative. If the authors of the report to the Local Board did not know of the existence of the Boffa Miskell report that can only be because AB did not draw it to their attention. I accept that, in a large organisation such as the Council, staff in one area may not know of relevant information possessed by staff in a different area, but I do not accept that this excuses the Council in this instance. AB and the staff who drafted the report to the Local Board's November 2018 meeting were working on aspects of the same project. AB was known to be closely involved (as discussed above) in the initiative to seek in-principle support in the first place. It is inconceivable that the authors of the report to the Local Board did not interact closely with him in drafting their report. If the Boffa Miskell report was not drawn to the attention of the authors as part of this interaction this ought to have been done.
64. I consider that the Council knew of the report's existence when it reported in turn to the Local Board for its meeting in November 2018.
65. Then there is the question of the relevance of the Boffa Miskell report to the in-principle decision which the Local Board was to be asked to take.
66. The Council submitted that it was reasonable for AB to accept the Ministry's view on what was acceptable to Erebus families in determining its relevance to Council decision-making. It surmises that given the information supplied to the Council by the Ministry regarding the report, its draft status, and the nature of the decision before the Local Board, AB did not consider it to be particularly relevant at that point.
67. I do not agree that it was not relevant or that it was reasonable not to regard it as relevant. It was certainly considered relevant enough to annex to the report for the Local Board meeting of 3 December 2019 (when landowner approval was again on the Board's agenda). In this respect the Council says:

By this point in time the Council staff who prepared the report were aware of the Boffa Miskell report and it had featured in news articles. It was provided to the Local Board to provide context to those submissions from opponents of

the proposal, however, Council does not consider that the Boffa Miskell report was strictly relevant to the landowner approval decision.

68. In his comments on my provisional opinion, AB said that in his view the report was an input into the Ministry's internal decision-making process. It was not the practice of the Council to access reports prepared by or for developers. The Council in its comments emphasised that if the report was to be presented to the Local Board, this was the Ministry's responsibility and any criticism of a failure to share it with the Board should be directed to it, not to the Council. Both also emphasised that the report was wider than just addressing the suitability of Dove-Myer Robinson Park. It took the form of a wider consideration of possible locations for the memorial, most of which were outside the Waitemata Local Board's jurisdiction.
69. While I take the point that the reasonableness or otherwise of the Ministry not presenting the report to the Local Board could have been investigated, this matter was not raised by the complainants in that context and I do not intend to go back over it. It was raised in 2019 and as part of this complaint against the background of the decision to give in-principle support and the adequacy of the Council's advice to the Local Board on this proposal. In those circumstances I see nothing inconsistent with my earlier opinion on the Ministry's role, in proceeding to examine the Council's part in the Board's decision and, in particular, whether it ensured that the Board was fully informed so far as this was within the Council's control before it took a decision.
70. I accept that normally the Council would not access a report prepared by a developer. But this is not a case of the Council "accessing" a report. A draft of the report had been given to the Council by the Ministry. In the Council's hands it was official information and might have been the subject of a request for it by a member of the public. The draft was in its possession and it was relevant to the decision that the Local Board was called on to make (although it was wider in scope than this).
71. I observe that the Boffa Miskell report was known to the Council from August 2018, not just by December 2019. Its relevance to a decision to be taken by the Local Board should not be determined by whether it had featured in news articles, it should be determined by an objective judgment of whether it was relevant to the decision the Local Board had to take. While I agree that those sections of the report discussing other possible sites for the memorial were not relevant for the Local Board (a point made by the Council), the report's comments on the suitability of the Dove-Myer Robinson Park to house the memorial were highly relevant to its decision on whether to give landowner approval for the Park itself.
72. In my opinion the Council's failure to share the Boffa Miskell report with the Local Board before it took its in-principle decision on 20 November 2018 was unreasonable.

Council officers' support for landowner approval

73. As discussed above, Council staff were closely involved with the Ministry in 2018 in identifying possible sites for the memorial. This reflected a clear wish at a political level in Auckland to have the memorial established in that city. The actions of the Council staff in facilitating this are entirely understandable and appropriate. But essentially their role was to help the Ministry identify possible sites. The decision on which site to prefer lay with the Ministry and its Minister. As recorded above, this led to an exploration of whether the Local Board supported the Ministry's preferred site in-principle. Once this was established, in November 2018, the Ministry went about obtaining the necessary legal consents and approvals, with guidance from the Council as to how this was done.
74. This is unexceptional. But at this stage the Council was not an advocate for a particular site outcome, as opposed to being supportive in general of the memorial being in Auckland. The advocate and proposer of Dove-Myer Robinson Park as the site was the Ministry.
75. This changed in September 2019. In a report to the Local Board for its meeting on 17 September that year, the Council's Land Use Advisor, authorised by the General Manager Community Facilities, and the Local Board's Relationship Manager explicitly recommended approval of the Ministry's landowner approval application to construct the memorial in the Park. From that point, the Council was a supporter of landowner approval in the Park, not just a facilitator of the Ministry's application for this. In the event, the Local Board did not agree to this recommendation and resolved to consult the community on the issue. Following the consultation, the Council in a subsequent submission for the Local Board's 3 December 2019 meeting repeated its recommendation that the application be approved. The item relating to landowner approval was withdrawn from that meeting by the Ministry. Finally, for the Local Board's meeting on 17 November 2020, the Council again recommended landowner approval being given and, at that meeting, it was given by a vote of 4-3.
76. The various reports are amended to reflect developments between September 2019 and November 2020, but they all contain a similar recommendation concerning landowner approval for the Park, evincing Council support for this from September 2019 onwards.
77. It is necessary to clarify the context in which the Council staff's recommendations to the Local Board are being examined here. This is that Auckland Council is subject to investigation under the OA. This does not include decisions made by the full Council (section 13(1)). But it does include a recommendation made by one of its officers or employees (section 13(2)).
78. The Council makes the point that recommendations made by its officers as part of advice do not amount to the Council taking a '*substantive*' position. Only a Council resolution or a decision made by an officer with delegated authority (not applicable here) could do that. I accept this point. But I am investigating recommendations made in the Council's name by its officers. I find it unrealistic to decouple those recommendations from the

apparent position of the Council. I agree that they do not tie the Council to a commitment or position it could not repudiate. But they are expressions of support on the record by senior officers of the Council. Legally it may be that the Council had not adopted a substantive position on the siting of the memorial. But Local Board members and the public were, it seems to me, entitled to assume that from September 2019 onwards the Council did support the application by the Ministry for landowner approval to establish the memorial in the Park. I intend to proceed on this basis, though avoiding the use of the term ‘*substantive*’ in deference to the Council’s views.

79. In my meeting with the Council, I asked why it had adopted this position on landowner approval in September 2019 rather than leaving this to be argued by the sponsor of the project, the Ministry, and why it had not confined itself to expressing its views on the technical or professional aspects of the proposal.

Council’s response on its support

80. In its response, the Council told me that decisions by the governing body and local boards of Auckland Council are taken with the benefit of recommendations of Council staff. It claimed that this is a normal part of the decision-making process and provided elected members with quality advice from experienced staff. It also enabled members of the public viewing the agenda to understand in advance what the staff recommendations are. It pointed out (as had occurred at the 17 September 2019 Local Board meeting) that the governing board and local boards are not bound to adopt staff recommendations.
81. The Council then referred me to its Quality Advice Standards designed to help staff craft robust advice for decision-makers. These describe what good advice looks like in practice, referring to such standards as credible options and to the analysis as being made simple and concise. The Council also has a template for political reports that sets out how a report is to be constructed to align with the Quality Advice Standards and to present information in a way that helps elected and appointed members in their decision-making. The Council’s intranet sets out how recommendations are to be constructed, all with the aim of helping the decision-maker to understand what is being proposed and to make clear and unambiguous decisions in respect of this. It referred me to reviews by the New Zealand Institute of Economic Research favourably assessing the quality of the Council’s report writing in recent years.
82. On my suggestion that the Council officers might have confined themselves to expressing a professional view on the proposal’s compliance with policies or Council objectives, the Council said:

Having a recommended decision drafted also gives elected members a starting point if they wish to amend or tailor the resolution that they are voting on. If Council members’ agendas simply had a statement of a professional view that a proposal complies with policies then elected members would need to craft their decisions from scratch in the course of the

meeting and without the time available that staff have to carefully craft the recommended decisions.

83. Finally, the Council submitted that to confine staff to expressing a professional view that the proposal met the Park values and outcomes instead of providing a recommendation to grant landowner approval, could not be framed as a recommendation that complied with the Quality Advice Standards. These require decision-making reports to provide clear recommendations. Their absence would not give elected members the benefit of a recommendation from specialists in this area. I will address these points in turn.

My views on the Council's recommendation

84. In my view, the Council's response misses the essential point. This is whether it was necessary for the Council to take a position on a proposal that it was not making itself and, having done so, what the effect of this was on confidence in the Council's ability to make even-handed decisions on the project as it proceeded.
85. The Quality Advice Standards and the template for report writing are technical tools to ensure that staff preparing reports do not overlook matters that need to be covered in reports and that what is placed before elected members is clear and free from ambiguity. I do not depreciate the value of these as tools. But a decision still has to be made on what stance to adopt (or whether to adopt a stance at all). This is not a technical or process question, it is a policy question. What the answer to the latter is falls outside a template for report-writing. Nor does confining oneself to the technical or professional aspects of a proposal such as the Ministry's preclude a recommendation. If a technical objection was important enough this would obviously justify a negative recommendation.
86. I take the Council's point that including a recommendation can help a decision-maker to understand what is being proposed and to make a clear decision on it. But I observe that in this case just as precise a guidance could have been achieved by recommending to decline the application as much as to approve it. By choosing the latter, the Council was not just demonstrating what a clear recommendation amounted to – it was aligning itself with a particular outcome. There are other ways of presenting the matter too that could with greater neutrality be adopted. An obvious way would have been to present the Local Board with options – to approve/decline (indeed this is not an uncommon means of presenting matters to a decision-maker).
87. As for the Council's point that it is better for a recommendation to be drafted by officers with the time to do so rather than by members under the pressure of a meeting, this may be accepted in general too. But I note that this did not present an insuperable problem for the Local Board members at the 17 September 2019 meeting who came up with a radically different resolution to the one proposed to them by the officers.
88. I commend the Council for the work that it has obviously put into achieving high standards in its report-writing. I have no reason to doubt that the Quality Advice

Standards and the template that it has referred me to, help it to do this. But to suggest that a recommendation must be made in every case because the Quality Advice Standards require this, smacks of becoming a prisoner of one's tools. Ultimately, a judgment must be made by the report-writer as to what is required in the particular circumstances. There must be room for an intelligent decision to depart from a technical norm if this is called for in a particular case.

89. The question for me is whether it was justified in this case.

Justification for recommending approval

90. When Council officers first recommended landowner approval to the Local Board on 17 September 2019 it seemed unlikely that there would be any community consultation. The report acknowledged that this could occur but did not favour it. In the event, the Local Board decided that there should be targeted consultation carried out under the Council's direction. The complainants have questioned the neutrality of Council staff at various points of the process. The obvious difficulty with the Local Board's decision on consultation under the auspices of the Council was that the Council was now supervising consultation on a proposal it had just evinced support for. This is invidious, but not fatal. It is likely that local authorities have often held consultation on proposals which they have initiated or expressed support for. But it does demonstrate, the need for caution in giving one's support in the first place. I discuss the process followed by the Council in carrying out that consultation below (from paragraph 101). Here I confine myself to a consideration of whether there was any other factor which would either justify or disqualify the Council from adopting a position on the Park.
91. In this respect I revert to the in-principle approval resolved on by the Local Board on 20 November 2018. A consideration of the effect of that decision and its implications for Council officers is called for.
92. At this point it is necessary to advert to an argument advanced by the Council as to the effect of the resolution of 20 November 2018 (set out in paragraph 48). In the Council's view only clause (a)(ii) of the resolution (relating to the design process) created a condition precedent to the grant of landowner approval – that is, that only this subclause needed to be complied with before the Local Board could proceed to grant landowner approval. In the Council's view the words '*subject to*' at the outset of clause (a) did not create preconditions in the following subclauses that needed to be fulfilled before final landowner approval would be granted. Thus, it said, in relation to the resource consent that when an applicant wishes to undertake an activity on Council land two processes are involved – non-regulatory approval from a local board and regulatory approvals (resource and building consents from the Council). There is no set order in which these approvals need to be obtained and the Council generally recommends that an applicant gains landowner approval first, before incurring the greater expense of obtaining regulatory approvals from the Council. In the Council's view the Local Board's resolution

merely records the fact that landowner approval alone is insufficient and that regulatory approvals are also required before the full approvals process is perfected.

93. I do not know how appropriate it is to subject a local authority's resolution to an interpretatory analysis that might be applied to a statute. I would instinctively avoid applying such a standard. I accept that the order – non-regulatory followed by regulatory – may be the Council's preferred order, not least because this is likely to be in the applicant's financial interest. But I surmise that few applications receive the in-principle endorsement that this one did. This changes the context in which it falls to be considered. Whether or not the disadvantages identified by the Council in proceeding in this way were appreciated at the time, I see no reason to read down or qualify the reference to '*subject to*' as long as the Local Board's resolution still stood. (Though subject to what is discussed in para 97, it was presumably possible for the Board to have rescinded the resolution before it gave final approval. In fact, matters did unfold in the order contemplated by the resolution, with the regulatory approvals preceding the landowner approval.) The resolution may not have finally committed the Local Board to a particular outcome but as long as it subsisted it effectively set the terms of reference within which Council officers should have constructed their reports.
94. I do not intend to examine in detail the Council's arguments relating to the other subclauses (on design and funding). The Council refers to difficulties (even impossibilities) of treating the design subclause as a condition precedent and claims that the funding subclause had effectively already been satisfied. In the case of the design subclause any difficulty in applying it could have been clarified by the Local Board itself. Without going into the matter, it may be that the funding subclause had been satisfied. But indisputably the regulatory approvals (clause (a)(i)) had not been obtained and were not for another year or so.
95. I do not accept the Council's submission on the limited application of the resolution.
96. In considering its effect, the first point to make is that the resolution was a local board decision. It is therefore outside the jurisdictional ambit of an Ombudsman and I express no opinion on its merits. I take it as given. But my second reflection is that it must have some effect and influence on how the application for landowner approval was to be considered subsequently. It was not a mere expression of opinion with no ongoing significance, it represented a partial (but not full) disposition of the application before the Local Board. It was certainly not fully dispositive of the application and was not expressed to be. It enumerated a number of conditions which in my view (as already explained) its expression of support was subject to: building and resource consents, approval of the design process and of the final design, and a financial arrangement with the Ministry. Failure to satisfy any of these conditions would render the expressed support of the Local Board nugatory.
97. But even apart from these conditions, approval was not locked-in. The Local Board or a future Board could change its mind on support for landowner approval, although here it might find that it needed a good reason to do so – that after November 2018 there was a

presumption that approval would be forthcoming if the conditions were satisfied. There are two matters occurring post-November 2018 that might have prompted a change of mind. The first is the community consultation held in September 2019. That was not contemplated in November 2018 and if the Local Board had interpreted it as sufficiently negative it might legitimately have prompted a change of position. The other matter which comes to mind is the Boffa Miskell report. The Local Board had not seen it when it gave in-principle support, but it was disclosed to the Board when it reverted to the application in 2019 and 2020. It too might have caused a change in the Local Board's position. These were matters solely for the Board to consider.

98. As far as the staff were concerned, I think that they were entitled to work on the assumption that matters would take their course and that if the conditions were fulfilled approval would follow (though as a political decision this could not be guaranteed). Thus, when the Council officers reported to the Local Board in September and December 2019, they give prominence to the in-principle resolution of 20 November 2018. But in this regard the reports' focuses were very much on the design process and the consultation that had been carried out and aligning these with the Park's outcomes and values. The reports do not point out to the Local Board that one pre-condition of its in-principle decision, a resource consent (*'all necessary building and resource requirements'*) was still outstanding. Indeed, this factor caused the Ministry to withdraw its application for landowner approval from the Local Board's meeting on 3 December 2019.
99. For this reason, I consider it was premature for Council officers to recommend approval at the meetings of 17 September 2019 and 3 December 2019, since not all of the in-principle conditions had been satisfied – that is, no resource consent had been obtained. (Indeed nor had a building consent been granted but this would necessarily follow the resource consent.) It was wrong to have made these recommendations without at the very least discussing why it was justifiable to anticipate resource consent. But as the Local Board did not accept this recommendation at the September meeting and the item was withdrawn from the December meeting, these recommendations had no consequences. By the time the Local Board took its final decision on 17 November 2020 all the conditions had been satisfied. I consider that it was legitimate for the Council, taking its lead from the in-principle decision of 20 November 2018, to recommend approval at that meeting.
100. Consequently, while I think that the Council was wrong to adopt a supportive stance on the application for landowner approval in 2019, nothing came of that. I do not consider that the Council acted unreasonably, in recommending approval in November 2020.

The targeted consultation process

101. On 9 September 2019, lawyers acting for the complainants wrote to the Local Board drawing attention to provisions in the Local Government Act 2002 requiring consultation. They submitted that the Local Board was obliged to conduct statutory consultation on the proposal for landowner approval that was on the agenda for the Board's next

meeting. Whether influenced by that letter or not, the Local Board at its meeting on 17 September 2019:

requested the Land Advisory Team and the Local Board Engagement Advisor deliver a targeted consultation to seek the views and preferences of key stakeholders, park users and affected residents.

There was no explicit reference to the consultation being carried out under the Local Government Act or as a result of the approach from the lawyers (the Deputy Chair subsequently denied that the latter was a factor). Whether or not it was carried out under the statute I do not consider relevant to the matters I have to consider. In the event, the Council submitted to me that the consultation did comply with the requirements of the Act.

102. The targeted consultation was originally scheduled to run from 25 September to 8 October 2019. A decision on whether to grant landowner approval was vested in the Chair and Deputy Chair under the urgent decision provision since the local government elections were due and the outgoing Local Board was not scheduled to meet again. In the event, this plan was abandoned, the consultation was extended to 29 October 2019, and the decision left to the newly-elected Board.

103. The consultation process was managed by Council officers. It included:

- signs erected in the Park;
- an online item on the Council's website;
- posters in the Parnell Community Centre;
- a targeted mail drop to 2500 homes in and around Parnell;
- a drop-in event at the Park.

The material asked whether building the memorial in the Park would –

- impact your experience of visiting the Park;
- affect how often you would visit – more or less often;

and sought any other comments that submitters wished to make.

104. Although not part of the formal consultation, the Local Board also received a petition organised by some of the complainants containing 675 signatures, most but not all from local residents.

105. There were complaints about the consultation process made while it was proceeding. For example, the lawyers for the complainants wrote to the Local Board Chair on 26 October 2019 complaining that there was little information about the proposal in the mailed leaflet. The leaflet, they said, directed residents to the Council's website. This, it was said, was not helpful for those with poor IT knowledge and experience. A member of the Local Board was particularly vociferous in complaints to the Council Chief Executive about

claimed discrepancies between the design submitted for the resource consent and other deficiencies with the resource consent drawings (a consent not yet granted at that time) and the design submitted to the Local Board and the public.

106. The complainants suggest that the consultation was only interested in gathering the views of the local community, not the wider community, and certainly not the whole country. Only three days' notice was given of the drop-in event designed to share the plans with the public. They reiterate the criticisms of the drawings made by the Local Board member at the time. When consultation was extended, they say that the public was left unclear if submitters could submit again and, if they had changed their views, how this would be managed. They were also critical of the Council's liaison person with the Ministry, AB, privately urging the Ministry to take steps to add some balance to what he saw as an excessive focus on the impact on the lives of local residents. He suggested encouraging messaging from the Erebus families to counteract this.
107. In reply, the Council says that following receipt of the lawyers' letter additional steps were taken to clarify information. In particular, they point to the extension of the consultation period. On the criticism about the plans for the memorial, the Council says that these did incorporate the proposed footpath leading to the memorial and staff at the drop-in day were available to answer specific questions about the form and dimensions of the memorial. The marking of the memorial and the footpaths on the drop-in day was not the only form of information available. It concedes that the memorial height was not shown but claims this could not reasonably have been expected. The height was advertised on the Council's website. Other detail provided on the website included: information on the sound feature in the memorial, the extent of cut and fill works under the dripline of the notable Pohutukawa tree, a description of the new footpath, the lighting under the structure (from both a crime prevention and environmental design perspective), and a link to the latest drawings on the Ministry's website.
108. The timing of the open day was organised after the Local Board had requested the consultation and before the time-frame was extended. It was only one of a number of ways in which the Council provided relevant information. It says that the open day was well attended.
109. The Council points out that this was not a technical consultation process relying on minor details. It was targeted to exploring whether people wanted the memorial in Dove-Myer Robinson Park. While there were minor technical variations in the drawings, the scale of the memorial was always clear.
110. Finally, the Council submitted that, judged holistically the consultation complied with the Local Government Act. I can respond to that by saying that as I did not receive any complaint of non-compliance or illegality, I do not intend to go into that question.

My views on the targeted consultation

111. I accept the submission from the Council that this consultation was not intended to delve into detailed technical questions that only experts or those with a particular interest in such matters could contribute to. It was more high-level than that and pitched at finding out principally how the memorial would affect the enjoyment of ordinary visitors to the Park.
112. From this point of view I do not consider that a detailed examination of any alleged defects in the information provided is warranted. An overall impression of the scope of the consultation and whether it would give the Local Board the information it needed to make its landowner approval decision is more appropriate.
113. I have to say that from this point of view I consider that the consultation carried out was adequate. It certainly reveals no conduct that in OA terms could be said to be unreasonable. No consultation process could be expected to be perfect and this one was no exception, but I do not consider that overall it calls for criticism from me.
114. One outstanding issue, outlined above, is the involvement of the Council officer, AB, in urging the Ministry to take steps to counteract views being expressed during the consultation period. The Council emphasise that he was acting out of a desire, as he saw it, to ensure accurate messaging. He was the principal point of contact with the Ministry and was working with it to progress a common goal – a memorial in Auckland. The Council also point out that he was not involved in preparing any of the advice on the landowner approval or the resource and building consents.
115. By October 2019, AB had been working closely with the Ministry on the project for 18 months and I think that this may have led him to be rather more forthcoming in tactical advice to the Ministry than perhaps he on reflection should have been. Objectively, suggesting organising more participation in the consultation process seems to me a desirable thing, but I agree that Council officers should not become participants in a process in which in a sense they are *'holding the ring'*. AB did not play a part in the landowner approval report to the Local Board and I do not see that his intervention was serious enough to compromise the Council. It was perhaps unwise but I do not see it as having had material significance.

Mana whenua involvement with the targeted consultation

116. One issue I raised with the Council is the apparent lack of a specific strategy for involving mana whenua at this stage.
117. The Council in reply pointed out that the Local Board had requested that staff carry out a 'targeted' consultation. Its resolution establishing the consultation process asked the staff to note the matters raised at a public forum, the concerns raised by local residents

and community groups during the engagement undertaken by the Ministry and the steps taken by the design team to respond to those concerns. It requested the staff to deliver a consultation that sought the views and preferences of key stakeholders, park users and affected residents. There was no specific request for mana whenua involvement.

118. These aspects of the Local Board's resolution constitute the terms of reference for the targeted consultation carried out by the staff. As a full Board decision even if there was for the sake of argument a defect in them they are not subject to investigation by the Ombudsman.
119. The Council drew my attention to an Engagement Plan drawn up by Council staff at the commencement of the consultation process setting out the principles on which the Council engage with the community, describing the National Erebus Memorial project and the goals/objectives of the consultation process. One of the principles identified was to provide opportunities for Māori to contribute to the Council's (which, of course, includes local boards) decision-making processes. Ngāti Whatua Ōrākei is identified as a stakeholder with a high current level of knowledge of the project and from whom a high level of engagement could be expected.
120. In fact, extensive consultation with Ngāti Whatua Ōrākei had already taken place. This had been insisted on by the Local Board itself and had been carried out by the Ministry. The iwi's views were already well-known to the Board and I agree with the Council that there was no need to undertake further specific consultation designed to ascertain the views and preferences of this group.
121. The Council emphasises that this round of consultation (the matter had already been extensively debated before the Local Board and within the local community) was designed to allow the Local Board to hear from local residents and community groups which had not been consulted by the Ministry, the latter having conducted separate mana whenua consultation with all iwi (and not just Ngāti Whatua Ōrākei) having or claiming an interest in the proposed site of the memorial.
122. It points out that the targeted consultation did not exclude mana whenua (Ngāti Whatua Ōrākei and Ngāti Maru received email notification of the consultation) and that it was open to mana whenua to respond to the consultation. Indeed the officials' report to the Local Board specifically highlights responses from Māori.
123. The Chair of the Local Board in his response to this issue drew attention to the Board's Standing Orders allowing representatives of Māori organisations or their nominees to provide input to the Local Board on its monthly business meetings. He also referred to regular online hui that the Board held (at the time monthly) with mana whenua on matters within their rohe. In addition, Local Board members had considerable ongoing informal contact with mana whenua representatives at which matters, including the Erebus Memorial, were discussed.
124. The complainants consider that mana whenua consultation was inadequate in failing to take into account the 15 iwi and hapu that claim significant interest in Taurarua. It is not

clear to me that these criticisms are valid but in any case they relate to decisions taken by the Local Board. Here I am concerned with how Council staff carried out the consultation they had been mandated to conduct by the Board.

125. In my view the contacts with mana whenua that had existed at least since the initial application for landowner approval had been lodged a year before, lead to the conclusion that it was not unreasonable for staff to carry out the targeted consultation in the way that they did.

Reporting the results of the consultation

126. The decision on whether to grant landowner approval in light of the consultation that was undertaken, was one for the Local Board. It is not a matter that I can examine or comment on. But how the result of the consultation was reported to the Board by the Council, so as to contribute to its decision, is a matter that requires attention.
127. Of the 325 submissions received from local residents, 74 percent indicated that they would have a more negative experience of the Park, and 67 percent said they would visit it less often or were otherwise opposed to siting the memorial there. The major concerns expressed were the impact on surrounding trees, the size of the memorial and the impact on the ambience of the Park. The complainants consider that emphasis should have been placed on these results when reporting to the Local Board. Instead, they suggest that this overall negative result was diluted by the Council reporting results on a wider basis by including results from the city and across the country. On this basis only 57 percent felt they would have a more negative experience and 43 percent felt they would have a more positive or the same experience. On the question of visiting the Park, the results from this wider constituency were more evenly balanced than for the local community, 49 percent saying they would visit less often and 51 percent more often or not change at all.
128. The analyses in the reports prepared for the Local Board meetings of 3 December 2019 and 17 November 2020 drill down into more detail than this, but I do not feel I need to consider them to this degree of detail. The important point is that the reports present the figures accurately. It was then for the Local Board to judge whether to give more emphasis to local opinion or wider community opinion. This is not something for me to second-guess it on.
129. In my view the results of the consultation were presented accurately, indeed comprehensively, and there is no basis on which I can criticise it.

Building consent exemption

130. At a meeting with my representatives, the complainants raised an issue regarding the granting of a building consent exemption by the Council.

131. The complainants allege that this effectively allows the project manager, in consultation with its engineers and subcontractors, freedom to make significant changes to the memorial's structure and construction without the permission or oversight of Council staff. They are particularly concerned about changes that may affect the root structure of the Park's notable Pohutukawa, Te Hā. They assert that this is an unusual practice for a public structure and raises questions as to financial responsibility for structural failure and cliff collapse.

132. In response, the Council referred me to provisions of the Building Act 2004 that permit a council to grant exemption from obtaining a building consent where the local authority considers it likely that the completed building will comply with the Building Code. It makes the point that exemption is from obtaining a building consent, not from complying with the Building Code. The Ministry for Building, Innovation and Employment (MBIE) has issued guidance on issuing such exemptions. This might be for building work that varies from simple to complex. The guidance states:

At the other end of the scale, the building work could be for complex engineered projects where the construction will be designed and supervised by chartered professional engineers. Those might include ... major infrastructure projects such as motorway tunnels, electrical substations for rail networks or substantial wharf repairs. In these cases, the work is likely to comply, because skilled professionals are doing or supervising the work, and furthermore, Council's processing and inspecting procedures would add little to the overall process.

133. In considering the likelihood of compliance with the Building Code, MBIE suggests the following factors:

- any substantial previous demonstration of competence in carrying out similar work by the people who will carry out this work (for example, a history of previous building work in the council's district);
- the complexity of the building work relative to the competence of the people who will carry it out;
- any independent quality assurance systems or checks that will be applied in the course of the work.

134. The Council considered that the Ministry had engaged reputable engineers and contractors to deliver the project. It considered that the completed building work was likely to comply with the Building Code. It points out that exemptions are not unusual and that the Council has a process whereby applicants can apply online for an exemption. Finally, it says that liability for the structure is a legal issue that is not different to any other structure for which the Council is the regulatory authority.

135. I am satisfied that the Council has acted reasonably within its legal authority and took account of relevant factors and guidance before granting a building exemption. For this reason I do not uphold this complaint against the Council.

Recommendations

136. Whenever an Ombudsman finds that a decision, recommendation, act or omission was unreasonable or otherwise was objectionable, the Ombudsman may make appropriate recommendations (OA, section 22).
137. In this opinion I have found that in two respects the Council's officers acted unreasonably. These relate to the decision to recommend that the Local Board grant landowner approval and the failure to share the report of environmental consultants Boffa Miskell with the Local Board before it gave its in-principle support for the Ministry's application for landowner approval.
138. In respect of the first of these acts, there was no practical effect since the Local Board took no decision on the application at either of the board meetings concerned. I have concluded that the Council did not act unreasonably when staff recommended a grant of landowner approval to the meeting at which such approval was given.
139. The fact that there was no practical effect on a particular decision is not conclusive against making a recommendation; the unreasonable act may evince an objectionable policy or practice on behalf of the body that still needs to be addressed.
140. But I am satisfied that that is not the case here. I was impressed by the work that the Council has undertaken to ensure that its reports reach a very high standard. I do not feel that I need to make any recommendation in respect of this. The discussion in this report (paras 84-100) is sufficient I believe to alert the Council to the matters that require to be borne in mind when making policy recommendations. I am content to leave the matter there.
141. The complainants do not agree with this appraisal of the Council staff's recommendations. They consider that the expression of Council support had an important impact on the attitude of Local Board members to the application, converting a putative majority against giving approval into one that gave approval by the narrowest of margins in November 2020.
142. I consider these arguments as to the influence of the recommendations on Local Board members to be highly speculative. Indeed, the Local Board demonstrated its ability to depart from Council officers' views on more than one occasion while this matter was before it. I am unpersuaded that this argument has any force.
143. The failure to share the Boffa Miskell report with the Local Board before it gave its in-principle endorsement for landowner approval was more serious and arguably did have

practical consequences. The in-principle decision itself set out a course which the Local Board followed through-on over the next two years.

145. The most relevant statutory ground on which a recommendation falls to be considered is that set out in section 22(3)(c) of the OA – that the decision should be cancelled or varied. It is against this provision that I have considered whether to make a recommendation in this case.
146. In my provisional opinion I emphasised that the ‘decision’ referred to in section 22(3)(c) is the in-principle decision which the Local Board took on 20 November 2018. I concluded that the Council’s recommendation to the Board on 17 November 2020 that it grant landowner approval, when the Board had before it a copy of the Boffa Miskell report, was not unreasonable in OA terms. The latter Board’s decision two years later completely subsumed the earlier in-principle decision. Consequently, I saw no purpose being served by a recommendation addressing the in-principle decision.
147. The complainants strenuously objected to my provisional view that no recommendation was necessary under section 22 of the OA in respect of the report.
148. They drew attention to para 51 of my opinion on the complaint (557680) against the Ministry in which I referred to the importance of an open process being followed before a decision is made so that that decision is not locked-in prior to others with a different view having an opportunity to express it. In that case the ‘lock-in’ resulted from a view being formed internally in the Ministry before other options had been fully explored. The complainants drew an analogy from that situation to the failure of the Council to share its version of the Boffa Miskell report with the Local Board before the latter gave its in-principle support to landowner approval for the memorial.
149. I agree that this failure was important and that support might not have been forthcoming in November 2018 if the Local Board had known of the report. But I am not persuaded that anything would be gained by a recommendation in respect of it. Indeed it seems to me it would be futile to make such a recommendation. Undoubtedly, as the complainants maintain, the in-principle decision gave impetus to the proposal to site the memorial in Dove-Myer Robinson Park making it unfortunate that that decision was taken in ignorance of the report. But the fact remains that in November 2020 the Local Board granted landowner approval in full knowledge of the contents of the report. The in-principle approval given two years before it became part of the history of the project but was overtaken by the later decision.
150. This is not to excuse or minimise the Council’s error in November 2018. But these facts speak for themselves, they do not require to be reinforced by a recommendation that can have no meaning in respect of a decision that is now spent.
151. In these circumstances I have concluded that no point would be served by a recommendation that the decision of 20 November 2018 be cancelled or varied. It would have no effect on the grant of landowner approval finally given on 17 November 2020 when the Local Board was apprised of the more complete picture.

152. Consequently, I have decided that no recommendation is appropriate or necessary in respect of this matter.

Appendix: Notification of the complaint

1. The targeted consultation undertaken in September and October 2019 was requested by the Local Board and Council officers carried it out on behalf of the Board and reported the results to the Board. The decision to hold the consultation and the terms of reference incorporated into that decision were full Board decisions and could not be investigated by an Ombudsman. But the manner in which it was carried out (which the complainants had raised) was a Local Board responsibility that was subject to investigation.
2. As I had notified the complaint to the Council only and had had no contact with the Local Board this led to a consideration of whether the complaint had been adequately notified as required by the Ombudsmen Act. The matter was consequently raised with the Council and the Chair of the Local Board was written to giving full details of the complaint. This issue does not appear to have arisen before.
3. The Council in a very helpful response of 28 September 2022 pointed out that local boards are part of the Council's two-tier governance structure. They are part of, not separate or ancillary to, the Council. Their decisions in relation to the non-regulatory matters allocated to them are decisions of the Council. The Chief Executive and staff of the Council serve both the governing body of the Council and the local boards. In this regard, the Council drew attention to provisions of the Local Government (Auckland Council) Act 2009. In particular, section 7(1) of that Act provides that the Council has a two-tier governance structure comprising the governing body and local boards and that the Council's decision-making responsibilities are shared between each tier.
4. The Council agreed that I had jurisdiction to investigate the administrative actions of Council staff whether they were in relation to a responsibility of the governing body or a local board. The Council did not see that any issues arose with the notification of the investigation to the Council of 4 October 2021.
5. I am grateful for the elucidation given by the Council of the relationship between the governing body and its local boards and accept it as representing the correct position. The difficulty has arisen, I believe, from the fact that Auckland Council and its local boards are listed separately in Schedule 1 of the Ombudsmen Act, thus suggesting a legal distinction between them that, as the Council has explained, does not exist. I think that this separate listing should be reconsidered so as to more accurately reflect the correct legal position under the Local Government (Auckland Council) Act 2009.