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ARCHAEOLOGICAL INVESTIGATION AND THE HISTORIC PLACES ACT 1993: A BRIEF GUIDE

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Under the Historic Places Act 1993 (HPA), it is not lawful for any person to modify a New Zealand archaeological site for any purpose unless an authority has been granted by the NZ Historic Places Trust to do so. This provision is set out in section 10 of the Act. Under section 10 (1) it is not lawful for any person to "destroy, damage, or modify" any part of a site, "knowing or having reasonable cause to suspect that it is an archaeological site". Section 10 (2) provides for the protection of archaeological sites from unlawful investigation:

Except as provided in section 15 or in section 18 of this Act, it shall not be lawful for any person to carry out any archaeological investigation that may destroy, damage, or modify any archaeological site.

This paper sets out those provisions of the HPA which relate to and authorise the investigation of archaeological sites. It is intended to assist archaeologists applying for authority to investigate archaeological sites, or undertaking investigations on behalf of the Trust. The paper will also address questions asked frequently over the lawful investigation of archaeological sites.

WHEN IS AN AUTHORITY REQUIRED?

As set out above, any modification of an archaeological site is unlawful except as provided in the HPA (sections 14, 15, and 18). In simple terms, therefore, an authority is required whenever an investigation may "destroy, damage, or modify any archaeological site". The interpretation of an "archaeological site" as given in section 2 of the HPA includes "any place" in New Zealand associated with human activity before the year 1900 that "is or may be able through investigation by archaeological methods to provide

evidence relating to the history of New Zealand".

Archaeological methods are not defined further under the HPA. Archaeologists would agree that such methods are centred in the careful spatial and stratigraphic interpretation, excavation and recovery (as appropriate) of cultural material in place (cf. section 2 definition of an archaeological site as a "place"). At some level, it is arguable that where a site has been so disturbed as to be removed from its original place, those disturbed site remains can not be investigated by strictly stratigraphic methods. Consequently, any such remains in secondary deposition may not constitute an archaeological site for the purposes of the HPA. Furthermore, an authority may not be required for controlled sub-surface excavation above or around a site where archaeological remains in place shall not be modified. This could include the subsurface investigation of an area of land to locate an archaeological site, or to gather information on the landscape and context in which a site exists, where however there is no intention to modify any site. In such cases, the archaeologist must take care to ensure that any archaeological remains in place are not affected knowingly. Such care should extend to the re-instatement of top soil above any site exposed in a test pit.

LAWFUL ARCHAEOLOGICAL INVESTIGATION

As indicated above, section 10 provides that an archaeological investigation "that may destroy, damage or modify any archaeological site" may take place lawfully under two sections of the HPA.

Section 18

Section 18 of the HPA is headed "investigation of archaeological sites". This section allows that for "any purpose consistent with this Act", the Trust may carry out an investigation of any archaeological site (section 18 (1) (a)). The Trust may also authorise "in writing" any person to carry out an archaeological investigation (section 18 (1) (a)). Section 18 allows that "any person may apply to the Trust for an authority under subsection (1) (b)" to carry out an archaeological investigation. This could include an investigation for assessment purposes or other resource management needs, or for research purposes.

In considering an application, the Trust is required to take into account:

- the purposes of the investigation,
- the competency of the person, and
- the adequacy of the institutional and professional resources available to that person (section 18 (2)).

Subsection (3) provides that no archaeological investigation shall be carried out "except with the consent of the land owner and occupier", and where appropriate, with the consent of "such iwi authority or other body" as the Maori Heritage Council "considers appropriate".

There is no prescribed form in which an application must be made. An application should include and identify the information and consents required under subsections 2 and 3. Any questions or concerns over such matters as the competence, adequacy of resources, or consent of an appropriate iwi authority or other body, may be discussed with the Trust before an application is lodged. Where a site of interest to Maori is concerned, sufficient time must be allowed for the Maori Heritage Council of the Trust to consider whether the consent of an appropriate Maori authority has been given for the investigation. In this regard, it should be noted that section 18 (3) differs from section 11 of the HPA where an application for authority to modify, damage or destroy a site requires "consultation with tangata whenua and any other person likely to be affected", rather than consent (section 11 (2) (d)). Under the HPA, therefore, iwi have an effective right of veto over any application for authority to modify a site for the purposes of an archaeological investigation only.

Where the Trust authorises an archaeological investigation under section 18, it may do so "subject to such conditions as it thinks fit to impose". An authority decision and any conditions imposed should recognise the purpose and principles of section 4 of the HPA. These guide any person exercising functions and powers under the HPA. The principles relevant to a section 18 investigation include taking account of "all relevant cultural values, knowledge and disciplines", safeguarding "the options of present and future generations", and ensuring that New Zealand's heritage is "fully researched, documented, and recorded, where culturally appropriate" (section 4(2)(b)). In specific terms, the Trust must ensure that all archaeological work authorised under section 18 "shall conform to accepted archaeological practice", and the land shall be returned as near as possible to its former state

(unless the owner agrees otherwise) (section 18 (4)). Archaeologists who are employees of the Trust acting under delegated authority are equally subject to the requirements for consent and archaeological work in any investigation (section 18 (1)).

It should be noted also that the Trust may exercise the powers specified in section 18 in relation to an application for authority to modify a site under section 11 or 12 (see section 14 (1) (c)). Consequently, a decision on a section 11 or 12 application may require a prior archaeological investigation for the purposes of assessment (consistent with section 18 of the HPA) before the authority can be exercised. This occurs most frequently where the archaeological site evidence concerned is largely buried, and therefore poorly understood.

Section 15

An archaeological investigation may be required under section 15 of the HPA as the condition of an authority (further to the Trust's powers under section 14 in relation to an authority application). In such a case, the Trust must be satisfied "on reasonable grounds" that an archaeological investigation is likely to provide "significant information as to the historical and cultural heritage of New Zealand" (section 15 (1)). If so satisfied, the Trust may "grant an authority to destroy, damage or modify a site or sites subject to a condition requiring that an archaeological investigation be carried out by or on behalf of the Trust" (section 15 (1)). Where such an investigation takes place, the authority may not be exercised by the holder until the Trust is advised in writing of the completion of the investigation by the time determined (see section 15 (2)).

As indicated above, the Trust may carry out the investigation required under section 15 (with the cost of the investigation to be paid to the Trust; section 15(3)), or may give consent for any person to do so on its behalf under section 17 of the HPA (see section 15 (4)). Where section 17 consent is given, the Trust must consider whether the person "has sufficient access to appropriate institutional and professional resources", or "is sufficiently skilled and competent", and in every other way capable of ensuring the work is carried out satisfactorily (section 17(2)). This has an obvious parallel to the Trust's consideration of an applicant's competence and access to resources under section 18.

FURTHER RELEVANT POWERS

Section 13 investigation

The HPA is clear that any archaeological investigation that may modify a site must be carried out under the provisions of sections 15 or 18. This applies to the Trust as much as to any other party. However, section 13 of the HPA also allows the Trust to undertake an investigation where there is "reasonable cause to believe that work that will destroy, damage or modify any archaeological site will proceed and where no authority application has been made under section 11 or section 12". In that case, the Trust may carry out an investigation "for the purpose of obtaining information on whether an archaeological site exists and whether an authority is necessary" (section (13)(b), with provision for the recovery of the cost of such an investigation (section (13)(b)). If this investigation involves the proposed modification of a site, then the provisions of section 18 also apply.

Section 21 rights of entry

Any employee or person authorised by the Trust may also exercise a right of entry under the HPA to carry out an investigation under section 13, or to obtain information "as to the significance of an archaeological site" to decide whether to impose a condition on an authority under section 15 (1) (section 21 (1) (a) and (b)).

THE FUTURE

The statutory management of cultural heritage in New Zealand is currently under review (as discussed elsewhere in this issue). The discussion document circulated by the Department of Conservation on the review sets out several options for the future of statutory site protection. In one option, the archaeological provisions of the HPA would be devolved entirely to the Resource Management Act 1991 (RMA) under the jurisdiction of local authorities. The HPA authority process for application to modify archaeological sites has obvious parallels to the RMA resource consent process. This would facilitate any devolution of section 11 and 12 application provisions, whether in whole or part. However, little discussion has taken place on precisely how the current provision for archaeological investigation under sections 15 or 18 might be devolved, or whether such a move is desirable. Issues to consider here include the requirement for appropriate

archaeological and cultural skills, knowledge, and assessment and monitoring processes for any authority providing consent for an archaeological investigation. In part, the future direction of these matters is now in the hands of those who will make submissions on the review.