

**NORTHLAND REGIONAL COUNCIL**  
**HEARING OF RESOURCE CONSENT APPLICATION BY**

**DOUGLAS CRAIG SCHMUCK AND INTERESTING PROJECTS LIMITED**

**MINUTE #2 OF THE HEARING COMMISSIONER**

**Introduction**

1. I have been appointed by the Northland Regional Council (**NRC**) as an Independent Commissioner to hear and decide the application lodged by Douglas Craig Schmuck and Interesting Projects Limited (**the Applicants**). The Application is referenced as APP.041365.01.01.
2. I previously issued Minute #1 which set out some preliminary matters in preparation for the hearing which is set down to commence on Monday 3 August 2020.
3. I have been provided with the reporting officer's report (**the Staff Report**) prepared pursuant to section 42A of the Resource Management Act 1991 (**RMA**) and the Applicants' briefs of evidence.
4. This Minute outlines some requests for further information.

**Further Information from the Reporting Officer**

5. I request further information from the reporting officer regarding correspondence/communications from various NRC staff. The Staff Report states:

Page 6 (unnumbered paragraph):

*In assessing the information, the NRC determined that no independent technical or peer review of the reports provided with the application were necessary. This decision was made on the basis that the effects associated with the proposed activities have already been subject to scrutiny through previous consenting processes. There are no areas of disagreement between NRC staff and the content of technical reports provided.*

Page 7 (unnumbered paragraph):

*A number of technical assessments are provided within the application and comments have been provided from NRC staff addressing particular matters where required.*

Paragraph 66:

*NRC staff have considered the provision of this barrier and the extent of any adverse or positive effects it may generate. NRC staff have indicated that, in keeping with policies that consider the appropriateness of hard protection structures, the use of hard protection structures to protect shellfish beds from dredging activities is considered to be the least preferred option. Softer protection measures including a shallow sloping batter is preferable with minimal modification to stable seabed levels.*

Paragraph 113:

*NRC staff have reviewed this information and confirmed that any effects on existing coastal processes will be minimal and therefore acceptable.*

Paragraph 142:

*The application records that ‘The nature of the proposed DOBY land-based activities are such that they are not sensitive to natural hazards.’ Based on the technical evidence provided with the application and advice from NRC staff, this is accepted and adopted for the purpose of this report.*

6. I request a copy of all internal correspondence/communications (e.g. emails, memorandums etc) which support each of the above statements – there does not appear to be any such documentation attached to the Staff Report in support of these statements. I note that some of above text makes reference to ‘previous consenting processes’, however this is a new hearing and a new application – I am not privy to all the previous documentation that may have been prepared by NRC staff on any previous application(s). I am also aware that the Applicants’ supporting reports for the current application are, in many cases, different (or updated) reports to those used in the previous application(s).
7. Further, paragraphs 119 to 122 of the Staff Report make reference to the NRC’s Harbourmaster’s advice to the reporting officer on navigational matters and moving of moorings, however no evidence of this correspondence appears to be attached to the Staff Report. I request a copy of all internal correspondence/communications (e.g. emails, memorandums etc) the Harbourmaster has provided to the reporting officer to support the statements made in paragraphs 119 to 122 of the Staff Report.
8. I request the above information be provided, via Ms Alissa Sluys of the NRC, no later than 1 pm on Wednesday 29 July 2020 and that this information be circulated to the parties and myself by the close of business that day. Ms Sluys’s contact details are provided at the end of this Minute.

### **NRC Legal Advice**

9. I request legal advice from the NRC’s legal counsel on two matters: 1) ‘the existing environment’; and 2) my ability to make a decision on activities which are also the subject of an appeal currently being considered by the Environment Court. I outline the background to these two matters below.

#### *The Existing Environment*

10. Paragraphs 42 to 46 of Mr Hood’s evidence discusses the ‘existing environment’ and deals with the matter of whether the existing environment includes the structures which are proposed to be replaced, noting their current consents have a 2036 expiry date. Mr Hood concludes that (his emphasis) “...*the only pragmatic approach is to consider the effects of the proposed structures as if the existing structures have been removed (to cover the period from 2036 to 2054), whilst remaining cognisant of the fact they are part of the existing environment until 2036.*” This approach differs to that presented in Section 5.1 of the Application which focusses on the difference between the proposed activities and the currently consented activities -that is, the Application considers the existing structures to be part of the ‘existing environment’ in terms of assessing the effects of the proposed activities. Paragraph 53 of the Staff Report states that the approach outlined in Section 5.1 of the Application is appropriate.
11. I also note that Mr Farrow, in paragraphs 19 to 23 of his Statement of Evidence, discusses the matter of whether the existing structures should be considered as part of the existing environment or whether the effects of the proposed activities should be measured against the environment without the existing structures – that is, an ‘unmodified state’.

12. I will be exploring this matter further with various witnesses at the hearing, however I request the NRC provide me with legal advice on any relevant case law on the matter. I understand there is case law that deals with the 'existing environment' as it relates to activities which have expiring consents for which new (replacement) consents are being sought; however those are generally where an application is made close to the expiry of the consent (in the order of 6-12 months) and, in such cases, the expiring consented activity is not generally considered as part of the 'existing environment' (but legacy effect can be considered). In this case the application for new (replacement) consents has been made a very long time ahead of its expiry (some 16 years) and I would like to know whether the approach taken in the Application is correct or whether Mr Hood's 'pragmatic approach' is the correct approach in this case. In the event there is no relevant case law to help answer the question, I request that the legal advice includes some guidance on the matter.
13. I expect that the Applicants' legal counsel will be addressing this matter in legal submissions. However, I also consider it appropriate that the NRC provide legal advice on this matter.

#### *Environment Court Proceedings*

14. On page 6 of the Staff Report the reporting officer states:

*Following close of public notification on 1 April 2020, the applicant's intentions regarding progression of the appeal of a previous council decision on discharges associated with the boatyard currently before the Courts was queried. This was on the basis that a High Court decision was issued on 20 March 2020 that set aside a previous decision of the Environment Court and remitted the matter back to that Court for further consideration. In response, the applicant provided a summary of matters the [sic] pertain to the history of litigation associated with the subject site and responded to a number of matters raised in the submissions. That document is attached as Appendix B to this report.*

*The applicant has since advised that, in the event the Environment Court issues a decision granting consent to the activities sought before any hearing on the current application concludes, they will no longer form part of the current application and will be withdrawn. Conversely, if the Court declines consent, the applicant may pursue the current application as presented and/or may appeal any decision of the Environment Court. A question that arises from this possibility is whether the Regional Council has the ability to make a decision on a suite of activities being sought where they have already been declined by both Commissioners and a Court. This is a question that has not been clearly addressed at the time of preparing this report.*

15. I understand it is the discharge permits (to air, water, and land) which are the subject of the appeal to the Environment Court and that the nature of the activities in front of me are the same as those being in front of the Court.
16. I request the NRC provide legal advice on whether there is anything which precludes me from making a decision on an application for activities which are also the subject of an appeal currently being considered by the Environment Court. If the answer is 'no' then I also ask that the legal advice outline the implications for the Applicant should the Environment Court's decision be different to mine, either in terms of the substantive decision but also in terms of potential differences in conditions of consent (should I and the Court decide to grant the Application).
17. I request that the NRC legal advice on the two matters discussed above be provided, via Ms Sluys, no later than 1 pm, Wednesday 29 July 2020 and that it be circulated to the parties and myself by the close of business that day.

## Witnesses that May be Excused from Attending the Hearing

18. The Applicants have asked whether I have any questions of Mr Johnson and/or Mr Farrow.
19. Having read Mr Johnson's Statement of Evidence, I have determined that I have only one question of him, which I am happy for him to answer in writing – this may be tabled at the hearing or, if possible, circulated prior to the hearing. Accordingly, there is no requirement for him to attend the hearing, unless he has rebuttal evidence in respect of any submitter's pre-circulated evidence.

### Background:

In paragraphs 15 to 17 of your Statement of Evidence you respond to matters raised in paragraph 65 of the Staff Report. Your responses deal with the matter of whether a subsurface erosion barrier is appropriate (needed), however you do not appear to have provided information on alternative methods that could be used to achieve the same purpose (despite what is stated in your paragraph 15).

### Question for Mr Johnson:

Please outline what alternative methods to the (hard) subsurface erosion barrier structure were considered and describe the advantages and disadvantages of such alternatives compared to the proposed solution?

20. I do have questions of Mr Farrow so ask that he attend the hearing. Having read his Statement of Evidence, particularly paragraphs 19 to 23 (discussed earlier in this Minute), I consider it would be helpful if Mr Farrow could prepare a series of photograph – from the various vantage points detailed in the Littoralis report contained as Appendix 2 of the Application – showing the subject site in an 'unmodified state' (per Mr Farrow's paragraphs 19 and 23) and a second photograph showing the equivalent view with the proposed structures (i.e. an 'artist's impression of the proposed structures superimposed on the photograph) . These images will help in understanding what the magnitude of adverse effects the proposed structures will have on natural character, landscape, and visual amenity – these being assessed by Mr Farrow (per his paragraph 23) as '*moderate-low (minor)*'. These new photographs do not need to be pre-circulated and I am happy for Mr Farrow to table and speak to them at the hearing.

## NRC Contact Details

21. If any party wishes to seek further clarification in relation to this Minute or the hearing process please contact Ms Sluys in the first instance, email: [alissas@nrc.govt.nz](mailto:alissas@nrc.govt.nz) or phone 0800 002 004.

**DATED** 26 July 2020



Dr Rob Lieffering  
Independent Hearing Commissioner