

**TO: THE HEARINGS COMMITTEE  
NORTHLAND REGIONAL COUNCIL**

SECOND SUBMISSION BY Angelika Kyriak - 7 Richardson Street, Opuā

ON AN APPLICATION BY DOUGLAS CRAIG SCHMUCK FOR DOUG'S OPUA BOATYARD

(Amended/ Combined Amalgamated submitted as per letter Doug's Opuā Boatyard to NRC 17 November 2017 accompanied with an Assessment of Environment Effects of same date.)

FOR:

1. CAPITAL AND MAINTENANCE DREDGING
2. REPLACEMENT OF A COMMERCIAL WHARF, PONTOON;
3. ~~PLACEMENT OF NEW PROTECTIVE FORESHORE EARTHWORKS;~~  
**(withdrawn)**
4. ~~BEACH REHABILITATION (withdrawn)~~  
IN CONJUNCTION WITH OCCUPATION PURSUANT TO SEC 178 OF THE HARBOURS ACT 1950
5. A NEW, MORE COMPREHENSIVE USE OF THE ALL TIDE MARINA STRUCTURES  
IN CONGRUITY WITH THE EXISTING RESOURCE CONSENTS  
AND
6. THE RENEWAL OF ASSOCIATED DISCHARGE CONSENTS THAT WILL EXPIRE ON OR BEFORE 30 MARCH 2036.

Statement in: *Assessment of Environmental Effects*, dated 17 November 2017 (on page 7)

*"The slipway is not part of this consent application as it legally stands alone pursuant to s 178 of the Harbours Act 1950. It therefore maintained (sic) and/or reconstructed as a Deemed Coastal Permit in perpetuity. Existing wharf structures have a similar legal status but are in effect being built with greater utilitarian purpose as a marina in conjunction with the old activities."*

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## 1. EXECUTIVE SUMMARY

This application is stated to be for the replacement of commercial wharf and pontoon.

The application is not stated to be for:

- replacement of a slipway
- a "jetty facility"
- the relocation of the existing wharf and pontoon;
- the innominate activity of a "marina";
- the innominate activity of exclusive occupation of any part of the coastal marine area;
- capital dredging.

The application is also for a new, more comprehensive use of the all tide **marina** structures in congruity with the existing resource consents. What are the all tide **marina** structures? Certainly not the existing structures which, perhaps by implication, are intended to be replaced with "marina structures."

Existing coastal permits were issued for the wharf and pontoon (and other minor associated structures) by Order of the Environment Court in 2002. Other existing consents are for the existing seawalls and dinghy ramp granted in 2013. The wharf to be replaced is a structure *not be used for permanent mooring of any vessel and. not be used for the cleaning down, or the preparation or painting of vessel hulls.* The pontoon to be replaced is a structure that shall only *be used for casual berthing of craft.*

The proposed replacement of a wharf and pontoon is treated in the s42A reports as the placement of a "jetty facility" a term not defined in the relevant Plans nor with a meaning that is self-evident. The Regional Coastal Plan defines jetty as "a projecting part of a wharf; a landing-pier; a timber pier of slight construction." The dictionary meaning of facility is "a place, especially including buildings, where a particular activity happens" , as, for example - a nuclear research facility, or military facility or a sports facility. A jetty and pontoon could be a refuelling facility; or a loading facility for example. I would suggest that the category "jetty facility" is in innominate activity and should not be "invented".

The present proposal represents a radical departure from the status of the wharf and the pontoon which is not apparent from the notification of the application.

There is no necessity for nor public benefit from this departure and no justification for it; it does not offer a more efficient use of water space for moorings or reduce water space needed for mooring; on the contrary, it will displace existing moorings. It does not intend to increase boat maintenance activity; merely to relocate it from the adjacent land.

I respectfully ask that any consent for the replacement of the existing structures are granted with the current conditions relating to their location, use and associated occupation of the seabed.

## 1) CHANGE IN CIRCUMSTANCES

On 20 July 2018 the Court of Appeal issued its Judgment in the matter of an appeal by Opua Coastal Preservation Incorporated related to the grant of easements by the Far North District Council (as delegated by the Minister of Conservation). As a result, the Minister's decision was quashed with respect to the following easements granted over the esplanade reserve at Wall's Bay in favour of the land at 1 Richardson Street, being the site of Doug's Opua Boatyard:<sup>1</sup>

- A. *An easement over [the areas marked X, Y and Z on the plan] to permit the following:*
  - 3. *The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.*
  - 4. *The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.*
  - 5. *The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.*
- B. *An easement 2 m wide over [the areas marked W and X on the plan] to permit the following:*

*Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.*

The Court observed (at paragraph [18]) that resource consents could not confer a legal right on Mr Schmuck to use or occupy the reserve for his business, or even to discharge the contaminants on the land of another.

I take exception to the statement by Counsel for the Applicant (10 August 2018) that *a decision under the Reserves Act cannot (and does not) affect rights held under the RMA* and reiterate that resource consents could not confer a legal right on Mr Schmuck to use or occupy the reserve for his business on 1 Richardson Street.

For example, a resource consent by the FNDC under the RMA permitting my neighbour to place a chicken coop on my land does not confer *rights* to my neighbour to do so but merely confirms that in doing so he does not breach the provisions of the RMA.

Unlike the FNDC, I am not bound by the Reserves Act with respect to the permission I might give my neighbour [but I might be prohibited by common law to grant him an easement]. The 2014 FNDC simple common law "landowner" permission to the Applicant to use the reserve for certain purposes was quashed by the High Court and the decision was of no effect; as administrator of the reserve, it cannot grant "landowner" permission.

Pursuant to the Court of Appeal, the "permissions" by the FNDC granted by way of easements were also quashed.

The Applicant has described his present (reduced) boatyard activity as follows:

*I have undertaken the decommissioning and removal of all private land slipway spurs and cradles save one ....cutting instantly 75% of the boatyard's capacity to work...*

*This in fact now controls and otherwise contains all activities of the main slipway to the...reserve; the concrete basin and structures of the turntable on the boatyard proper.*

(Ref. AEE 27 September 2017, pp. 1-2.).

In other words, the only boatyard activity on 1 Richardson Street is confined to : the concrete basin and structures of the turntable on the boatyard proper although the activities on that turntable have also been restricted as a consequence of the Judgment.

With respect to the present application, the Applicant notes that the proposal, *in effect, will become an integral structural part of the Boatyard's land use consent activities.* (Ref. AEE, 17 November 2017, page 7). Counsel for the Applicant, on the face of the Memorandum dated 10 August describes the currently application as being for *activities ancillary and associated with the boatyard on 1 Richardson Street, Opuā.*

I would respectfully submit that there is very little land use consent activity on 1 Richardson Street with which to integrate the present proposal; the activity in the coastal marine area is at risk of becoming a stand-alone mooring and marina facility without association with any land above mean high water springs.

The Court of Appeal noted:

*[57]...An easement that allows boats to be located on cradles sitting entirely on the reserve and to be repaired or maintained in that position supports the business, but not its operation on the dominant tenement. The business conducted on the reserve does not touch the dominant tenement, even though the connected financial transactions may find themselves reflected in any books of account held on that site. The necessary connection between the rights and the enjoyment of the dominant tenement is therefore missing, and what is conferred is merely a personal advantage to the owner of the boatyard*

An analogy might be drawn with the proposed activities on what is called the "jetty facility"; they do not support the operations of the private boatyard and are not integral with those operations.

With respect to discharges, the Court of Appeal determined that the following easement was valid.

*E. An easement [over the areas marked T, U, V, W, X, Y and Z on the plan] to*

*permit the following:*

- a. The discharge of contaminants to air, soil, and water in accordance with any relevant resource consent;*
- b. The emission of noise in accordance with any relevant resource consent.*

It did so with the following reasoning:

*[89] The Society argues that the right is too ill-defined to be the subject matter of an easement. We do not accept that to be so, as the necessary definition is provided by the reference in the easement to the relevant resource consent and the management plan developed thereunder. These provide the constraints that allow the servient owner to ensure the owner retains control and possession of the site notwithstanding the right to discharge contaminants. They control the level of noise, and the permissible contaminants to ensure that noise and contaminant discharge is consistent with continued public use of the reserve.*

I believe that the Court was unaware that discharge consents are not issued by the owner of the servient tenement, and that it is the NRC, not the FNDC which controls the level of noise and the permissible contaminants.

As to the consideration of the easements in relation to purposes of the Reserves Act, the decision of the Court is inconclusive. <sup>1</sup> and it is a stretch to conclude, on the basis of the decision, that the activities provided for by the easements are not contrary to the Reserves Act. The Court asked the addressed the question and determined as in paragraph 113.

*Do the challenged easements permit development for the purposes of the Reserves Act?*

*[113] We have decided not to address this ground of appeal because of the unsatisfactory way the appeal grounds shifted during the proceeding and even during hearing. We are not satisfied that we had available to us the argument and evidence necessary for proper consideration of the issues. Nor are we even satisfied that argument addressed the true issues raised by the facts of this case.*

With respect to coastal permits, the role of the Regional Council can be distinguished from that of the territorial authority because coastal permits can grant rights: a coastal permit for exclusive possession in association with a permit for a structure or activity.

Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area and every individual is assured the right to enter, stay in or on, and leave it; to pass and repass in, on, over, and across it; and to engage in recreational activities in or it subject to certain enactments including bylaws, regional plans, and district plans.

In that sense, the regional council, in exercising its powers under s 12(2) of the RMA-91, is placed in the challenging position of balancing the rights of every individual with the aspirations of an applicant for exclusive occupation.

A further issue arises with the proposed consent condition.

## 2) SCOPE OF THE APPLICATION

### a) The Slipway

Addendum to Planner's Report Para 63: *The evidence of Mrs Kyriak asserts that the slipway is not part of the current application...*

In response I note that the application as set out on the front page of this submission is the application made by the Applicant.

The exclusion of the slipway from the application is not my invention. The statement was made implicitly by the wording of the application which does not refer to the slipway, and expressly by the Applicant in his *Assessment of Environmental Effects, 17 November 2017 page 7*.

*"The slipway is not part of this consent application as it legally stands alone pursuant to s 178 of the Harbours Act 1950. It therefore maintained (sic) and/or reconstructed as a Deemed Coastal Permit in perpetuity. Existing wharf structures have a similar legal status but are in effect being built with greater utilitarian purpose as a marina in conjunction with the old activities."*

*Assessment of Environmental Effects, 17 November 2017 page 7*

I choose to take the Applicant at his word particularly as no information was provided concerning the nature of any slipway refurbishment and further because the Applicant gave notice that *the physical make-up of the slipway may change drastically* [on page 2 of the AEE dated 27 September 2017]..

I respectfully submit that it is this 17 November 2017 amalgamated application which is to be taken as the application under consideration; it is the one publicly notified within the prescribed period of 20 working days after being first lodged. <sup>ii</sup>: The earlier application of September and October were superseded.

At issue are the following proposed consents.

**AUT.039650.02.01** *Place use and occupy space in the coastal marine area with a refurbished slipway (including turning block and associated cabling).*

What is a refurbished slipway?

**AUT.039650.04.01** *Use a slipway and a jetty facility (inclusive of ~~three~~ work berth areas) for the purposes of vessel maintenance and chartering, and use two berths associated with the jetty facility pontoon as a marina.*

What is the proposed vessel maintenance activity on the slipway?

**AUT.039650.09.01** *Disturb the land the in the coastal marine area during demolition and removal of unwanted structures, jetty facility construction **and** slipway refurbishment ~~and~~ seawall construction.*

What refurbishment is proposed? The above proposed consents, or those portions referring to the slipway, may well be beyond the jurisdiction of Council.

**b) The Wharf and Pontoon: Scope of Activity**

The Applicant in his Statement Before the Hearing of Commissioners advised that the proposed "jetty facility" is intended to allow *five berths overall instead of the present eight allowed by the existing consent*. This was recognised initially in the proposed consent AUT.0309650.04.01 but that limitation was removed by the proposed omission of the word "three" in the proposed amended consent and associated condition as follows.

**AUT.0309650.04.01** *Use a slipway and a jetty facility (inclusive of ~~three~~ work berth areas) for the purpose of vessel maintenance and chartering and use two berths associated with the jetty facility pontoon as a marina.*

38. *The ~~three~~ working berths associated with the jetty and marina facility shall not be used as a marina.*

(The proposed consent refers to (a) a jetty facility; and (b) jetty facility pontoon and creates confusion which is compounded by the proposed condition, referring to a "jetty and marina facility".)

The concern is with the deletion of the words **three** and there seems to be no satisfactory explanation for that deletion particularly in view of the Applicant's express confirmation to the Committee that the proposal is for a jetty with five berths overall as publicly notified.

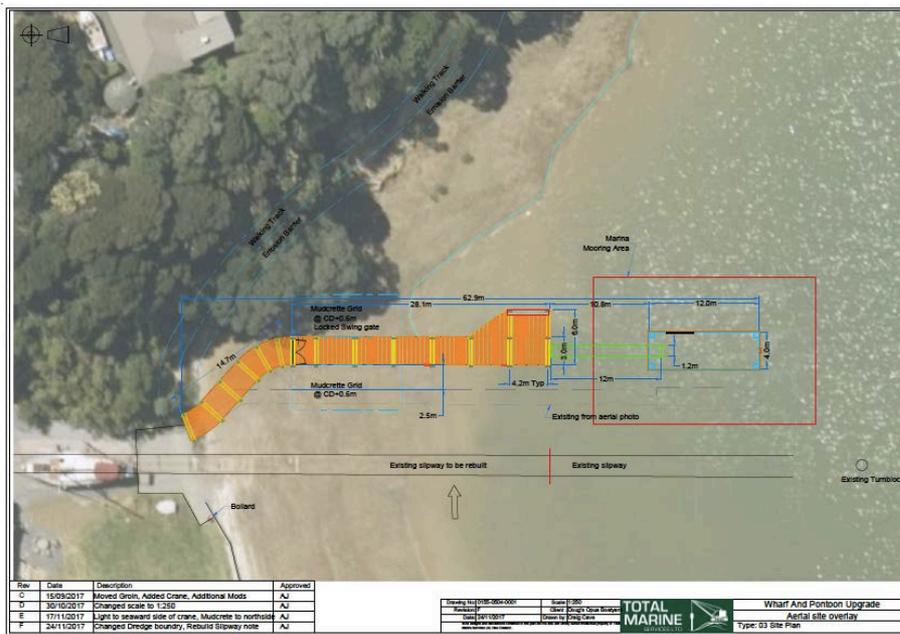
The public notification is follows: (emphasis provided)

1. *Use the slipway and jetty facility structures and **three work berth** areas for purposes of vessel maintenance and chartering and **two berths** associated with the jetty facility pontoon as a marina.*

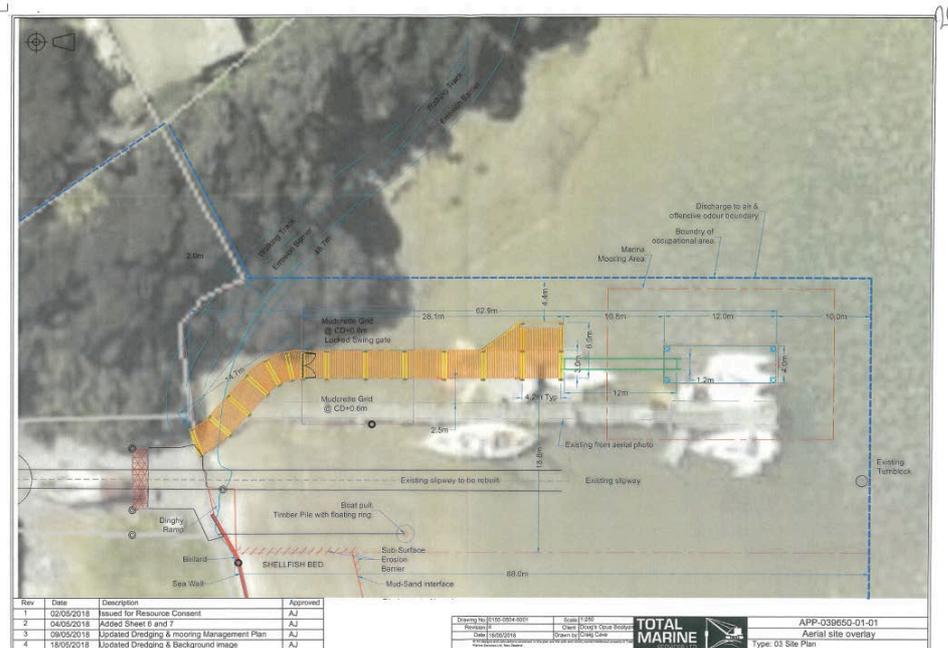
I respectfully submit that the word "three" be reinstated in the wording of any proposed consent for the use of the "jetty facility" and any associated condition to be in conformity with both the application and its public notification.

**c) Wharf and Pontoon: Relocation**

At the request of the Hearings Commissioners, a further plan was submitted in May. This shows the extent of the relocation of the wharf and pontoon which was not apparent from previous plans as made available with the public notification.



**Plan with public notification**



## ***Plan provided in May***

The Report prepared by Total Marine in support of the applicant notes as follows:

### **2     *Aesthetics***

*It was important that the design does not visually inhibit the view of the residents of Opua. And despite the existing structure already being there for years, for those residents that could see the structure it was important it does not compromise the natural flow of the coast line and spoil the view.*

Five measures are proposed to achieve the objective. The first measure is to position the jetty as close as possible to the northern side of the proposed site.... to restrict it from views of most residents to the North.

I do not understand the reference to a "proposed site." What is "the site"?



As for views of residents to the North, I (being one of them) am unaware that the views of those residents are obstructed by the location of the present jetty although the relocation will restrict its view from 1 Richardson Street

In his statement before the Hearings Commissioners, the Applicant notes (at paragraph 17):

*The proposed new jetty structure will be located at the extreme north side of the bay with no change to the location of the abutment. It is designed to fit in along the bush to be visually more amenable to the bush clad foreshore whilst at the same time utilising the width of the occupational footprint for approaches to the slipway and the new jetty in a more effective manner at all tides.*

The present jetty is already located on the extreme north side of the Bay. With the relocation, the footprint of the boatyard's presence in the coastal marine area is significantly extended northward and even without the seawalls the intrusion of the wharf and pontoon into the bush clad foreshore at one of its very special sites, is unwelcome.

Presently, on leaving the Bay by rounding the corner away from the existing jetty means that one enters a new and magic space. Its relocation and any permitted activity relating to it will intrude into the now peaceful setting and the natural aspect of the pohutukawa dipping their branches almost into the sea. This affects not only residents, but visitors and all users of the walkway.



With the relocation of the wharf and pontoon:

- The exclusive occupation area is unnecessarily increased.
- The area of proposed dredging is wider than it need be.
- There will be greater remoteness of the new wharf and pontoon in relation to the 1 Richardson Street with which this structure is ostensibly associated.
- Supervision of activities on the wharf and pontoon including the mudcrete grills (if consented to) from 1 Richardson Street will become more difficult.

I respectfully submit that the relocation of the wharf and pontoon is unnecessary and undesirable and that its replacement at the location shown on NRC Plan 3231b be confirmed and that consents (and related consents) with respect to the application be to the effect as set out below

**AUT.039650.01.01: AUT.039650.04.01** *Place use maintain and occupy space in the coastal marine area with a wharf (including fixed jetty, pontoon gangway, and piles, security gate lighting signage and hoarding) for the purpose of berthing, vessel maintenance and chartering.*

## **Suggested Conditions:**

*The location of the jetty shall be as shown on Northland Regional Council Plan No: 3231b [or like Plan] attached to this consent.*

*No more than three vessels may be berthed at the wharf at any one time.*

*The wharf shall not be used for permanent berthing of any vessel. For the purpose of this condition "permanent berthing" means the use of the wharf for longer than 12 hour in any seven day period or the use for other than repair and maintenance or survey work"*

*The wharf shall not be used for the cleaning down, or the preparation or painting of vessel hulls.*

*The pontoon shall only be used for casual berthing of craft.*

*Signage shall be erected on wharf gateway to advise the public of the availability of public access.*

*The area of exclusive occupation over which the Consent Holder may exercise control of access and use are limited to the Boundary of Occupation Area identified on Northland Regional Council Plan No: 3231b attached to this consent except that the Consent Holder shall allow reasonable access **to and through** this area and reasonable public **access to and use of** the jetty facility*

**Appropriate conditions related on off-street parking, toilet facilities, rubbish/recycling facilities.**

**Conditions as proposed (modified as suitable).**



### 3) RELEVANT REGIONAL PLAN: PROVISION FOR MARINAS

Addendum to the Planner's Report paragraph 48.

*...While it is acknowledged that the direction of the Proposed Plan provides a more current policy direction from the Council, the policies within this proposed document are afforded little weight at this time as issues associated with them are yet to be resolved.*

I am not aware of any issues concerning the policies related to marina development as set out in the proposed plan. It is noted in the Introduction to the Plan, (as per the S42A Recommendations of 1 July 2018), the Plan *contains very little optional consent such as issues, explanations, methods (other than rules) and assessment criteria*

The Planner's Report classifies the proposed marina as an innominate activity in the Proposed Regional Plan. In my view, the omission of such a consent category in the proposed plan is not an oversight and the category: *"Marina Development and Occupation"* should not be re-inserted now.

<p><b>APP.039650.04.01</b> Coastal Permit</p>	<p>Marina Development and Occupation</p>	<p>Use the slipway and jetty facility structures and three work berth areas for the purposes of vessel maintenance and chartering, and the two berths associated with the jetty facility pontoon as a marina.</p>	<ul style="list-style-type: none"> <li>▪ Discretionary activity in accordance with Rule 31.6.8(l) and 31.6.8(m) of the RCP.</li> <li>▪ <b>Innominate activity</b> within the PRP and is therefore deemed to be a discretionary activity in accordance with section 87B(1)(a) of the RMA.</li> </ul>
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It is proposed by the Applicant to construct and operate:

*a small private/ commercial marina for the specific use of the vessels moored and/or secured to it in contiguity with current operations associated with vessel maintenance, chartering and the normal conduct of occupation of vessels in a marina environment. (Ref. AEE, 30 October at p.6) as ...an evolutionary step in the development of the entire site...whilst providing a fit for purpose small marina and improved boat maintenance facility..*

(Ref. AEE, 30 October, at p.8)

In my view, it is current policy that is relevant. The Proposed Plan (as amended by the s42A Recommendations) sets out specific policy relating to adverse effects of activities in the coastal marine area on land based values [D2.9] including land based infrastructure such as toilets, car parks, and refuse facilities and this is applicable to the present consent application whether it includes a "marina" or not.

But with respect specifically to marinas it is policy D5.13, "managing the effects of marinas." should be most closely observed

Policy D5.13 specifies that marinas must provide for convenient facility for collection and disposal of refuse, sewage and sullage, recyclable material etc. They also must provide for shore based facilities, including parking, public toilets, boat racks, and public access. There seems to be nothing optional about this policy.

It is not enough for it be "understood" that parking and public toilets will (or may) be available on 1 Richardson Street. There is no evidence for such availability now or in the future, and no proposed condition requiring the provision of those facility.

It is not enough to rely on the existence of public toilets next to the ferry ramp, or parking availability in the area of the public hall or, in my view, on any of the facilities provided by another approved marina provider. Such an approach would encourage the development of marinas outside marina zones possibly within a radius of a kilometre or so of the Opuia Marina (and presumably other marinas) by developers piggy-backing on existing public facilities and/or private marina facilities which may not be designed, available or intended for such wider use.

Marinas must also take into account council plans (including reserve management plan) and limitations that apply to the adjoining land. In this case, the adjoining land is an esplanade reserve. The purpose of that reserve is to enable public recreational use of the esplanade reserve ...**and** adjacent sea.... (RMA-91, s 229).

Policy D.5.15 provides for recognition that it is the purpose of Marina Zones to provide for the development and operation of marinas. Opuia has such a zone and a marina only recently significantly expanded to meet demands well into the future.

Policy D.5.17 provides for the recognition of significant demand for on-water boat storage in Opuia and proposes that high-density on-water storage is likely to be the only way to provide additional on-water boat storage in Opuia. However, the present proposal does not provide any additional on-water boat storage and may well reduce the mooring space available.

On-going issues between the Applicant and members of the public with the use and enjoyment of the esplanade have been long-standing and even now are not necessarily resolved. It is likely that similar issues will develop with the establishment of a marina on the "site" in the coastal marine area and as the requirements by berth holders for privacy, security, etc. conflict with the use and enjoyment by the public of the water adjacent to the esplanade reserve as well as competition for parking availability on Richardson Street.

I respectfully submit that Walls Bay is not suitable for "Marina Development and Occupation", if such an innominate activity is to be adopted, and ask that the proposed consent APP.039650.04.01 not be granted.

**4) EXCLUSIVE OCCUPATION**

This is another innominate activity which, I respectfully submit, is not appropriate.

APP.039650.03.01 Coastal Permit	Occupation	Occupy space in the CMA associated with a jetty facility and slipway to the exclusion of others.	▪ Innominate activity within the RCP and PRP and is therefore deemed to be a discretionary activity in accordance with section 87B(1)(a) of the RMA.
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**AUT.039650.03.01** - Occupy space in the coastal marine area to the exclusion of others.

Consideration of the application and the proposed grant of consent relies on plans provided by the Applicant.

**Area and Conditions of Exclusive Occupation**

As noted in the first s42A Report for Ms Donaghy, the application proposed a:

*...new exclusive occupation area [which] will extend from MHWS to a distance 8.8 metres east of the current eastern boundary of the authorised occupation area, and additional 8 metres north of the existing northern boundary...[and the] southern boundary is also proposed to be extended an additional 3 metres south to include the area of the workboat mooring and dinghy pull.*

It was submitted by Counsel for the Applicant at the hearing:

***Location of Offensive Odour and Occupation Boundaries***

*As noted by Mr Schmuck in his statement, the offensive odour boundary and the occupational area boundary do not coincide. I queried the reasons for this with Mr Maxwell from the Council. His response indicated that it was an oversight, that there was no particular reason for it and that it seemed sensible for the seaward boundaries to be aligned to reduce confusion. Mr Johnson from Total Marine has produced plans to correct the error and is able to answer questions if required.*

This "oversight" is difficult to understand as the plans were provided by the Applicant. As for confusion arising from the fact that the respective boundaries do not coincide, I note that they do not coincide now and have not coincided since the grant of coastal permits in 2002 and there is no evidence of any confusion.

The Addendum to the Planner's Report recommends an area of exclusive occupation as shown on the attached Plan 4826/1. I note that this does not coincide with the odour boundaries and assume that the Plans produced "correct the error" of an oversight were not adopted.

The Addendum to the Planner's report at paragraph 78 suggests further that:

*...I recommend that the Applicant relook at the area of exclusive occupation and further clarify the extent of the extension to this area which is sought. An area of exclusive occupation should reflect the minimum area required to carry out the activity it supports. A reduction in this boundary area maybe appropriate.*

This puts the onus on the Applicant to consider a change of the plans showing the area of exclusive occupation; i.e., to change the application.

I suggest that it is the consent authority that should "relook" at the *area which is sought* having regard to the minimum area required to carry out those activities for which consent is granted.

Bearing in mind that "exclusive occupation", or a permit under s12(2), is in the nature of a lease or licence (*Hume v Auckland Regional Council*) and in a sense the alienation of public land affecting the rights of every individual in New Zealand, the areas given over to exclusive occupation should be the minimum required for effective operation of a coastal permit.

I make no submission on the proposed dredging because I am completely out of my depth in assessing the information provided but am grateful for the care with which it has been treated. However, it does appear to me that were the wharf and pontoon (and occupation area) not moved to the North, the area of dredging (insofar that capital dredging is necessary at all) could be further reduced.

As important also, are the conditions setting out the terms of or exceptions to the exclusive occupation consent.

At present (the 2002 consent) occupation of the seabed is dealt with by way of a condition relating to occupation of the seabed is as follows:

*This consent applies only to the area defined within the Boundary of Occupation Area shown on Northland Regional Council Plan No. 3231b attached*

*The Consent Holder shall have exclusive occupancy within the Boundary of Occupation Area shown on Northland Regional Council Plan No: 3231 except that*

*the Consent Holder shall allow reasonable access **to and through** this area and reasonable public **access to and use of** the wharf and pontoon structures*

I believe that no separate consent for the innominate activity is required as consent for exclusive occupation of a relevant part of the seabed can be incorporated with the consent to place, use and occupy space in the coastal marine area for the wharf and pontoon and respectfully request that the proposed consent not be granted.

With respect to proposed consents AUT.039650.05.01-- seawalls; AUT.039650.06.01 -- dinghy ramp; AUT.039650.07.01 -- stormwater culverts; AUT.039650.08.01 -- dinghy pull, I suggest that the use of the words "occupy space in the coastal marine area" with those facilities is inappropriate and unnecessary. The coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—. That the Applicant should have exclusive occupation of the airspace above those respective structures is anomalous and at its utmost absurdity, only the sky is the limit of the occupation area of the seawalls. A similar absurdity arises with respect to the stormwater culverts and the water and airspace above them. (Seawalls and the dinghy ramp are discussed below).

As an aside, it appears to me that a consents to "use" existing seawalls, and an existing dinghy ramp and existing stormwater culverts are quite unnecessary. What "use" can there be made of the seawalls? The structures have been placed and are a part of the land on which they are situated. The seawalls and culverts are part of infrastructure. The dinghy ramp, the greater part of which is fixed to the FNDC esplanade reserve is available for public use and presumably the present Applicant and/or his customers are entitled to use it.

I respectfully submit that the proposed consents set out below are not required and that the question of private ownership/possession of these facilities [and to the reclamation] be laid to rest.

- AUT.039650.05.01** ~~Place use~~ **Use** and occupy space in the coastal marine area with ~~a new seawall and~~ existing seawalls (inclusive of existing reclamation associated with ~~an existing~~ **the seawalls**).
- AUT.039650.06.01** Use and occupy space in the coastal marine area with a dinghy ramp.
- AUT.039650.07.01** Use and occupy space in the coastal marine area with stormwater culverts.

## JURISDICTION:

### 5) DINGHY RAMP AND LINE OF MEAN HIGH WATER SPRINGS

The location of the dinghy ramp vis à vis the coastal marine area is in question. The plans prepared by Total Marine are unclear about the location of the dinghy ramp, but the plans prepared by Thomson King surveyors (who prepared survey of the coastal marine boundary in 2010) show at least 90% to be located outside that area on public land. It was Thomson King.

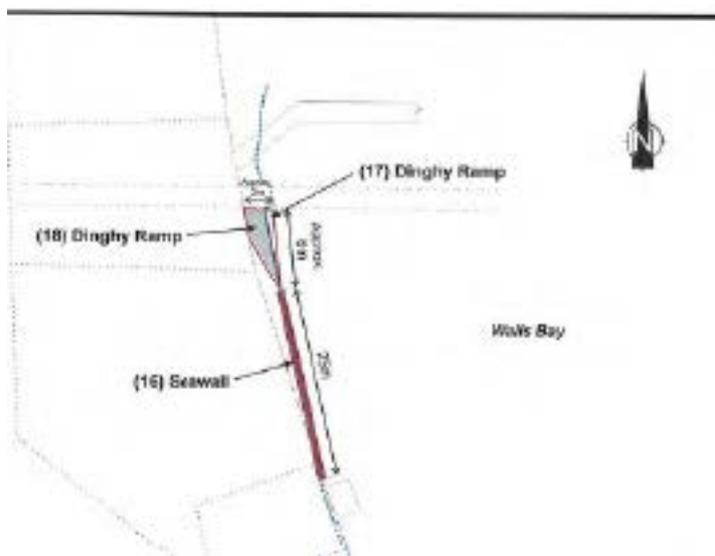
In 2013 NRC granted resource consents for the dinghy ramp and existing seawalls) as follows:

Coastal Permit: (17) to place, use and occupy space with a seawalls and a dinghy ramp extension; and

Land Use Consent: (18) to place and use those portions of the dinghy ramp located above Mean High Water Springs.

A copy of the Consent is found on page 117 of the First Planner's Report. I note that it does not include reclamation associated with the seawall.

The attached plan shows the respective areas. (Plan No. 4467A)



A condition of the consent was that: *These consents shall apply to only to the seawall and dinghy ramp identified on NRC Plan No. 4467A and also on the marked up Thompson Survey Limited Plan entitled "Proposed Walls Bay Site Management Plan" Surveyor Ref No 809a5, Rev date 03-04-12 (NRC Plan No 4467B)*



It is clear from both plans, that the dinghy ramp is located almost entirely above MHWS. While the present proposal is also for a coastal permit and land use consent for the dinghy ramp I do not believe that the location of the ramp (and respective NRC and FNDC consents) is adequately identified on the associated plans and this should be addressed.. I propose the following consent (if a consent for the dinghy ramp is required at all):

**AUT.039650.06.01 - Coastal Permit:**

To use a dinghy ramp extension.

*This consents shall apply to only to dinghy ramp identified on NRC Plan No. 4467A and also on the marked up Thompson Survey Limited Plan entitled "Proposed Walls Bay Site Management Plan" Surveyor Ref No 809a5, Rev date 03-04-12 (NRC Plan No 4467B)*

**AUT.039650.18.01- Land Use Consent**

To use those portions of the dinghy ramp located above Mean High Water Springs.

*This consents shall apply to only to the dinghy ramp identified on NRC Plan No. 4467A and also on the marked up Thompson Survey Limited Plan entitled "Proposed Walls Bay Site Management Plan" Surveyor Ref No 809a5, Rev date 03-04-12 (NRC Plan No 4467B)*

## 6) JURISDICTION: Seawalls

Proposed Consent AUT.03950.05.01 *is to use and occupy space in the coastal marine area with existing seawalls (inclusive of existing reclamation associated with the seawalls.)*

It is my understanding that reclamations cease to be coastal marine area and become the land of the Crown pursuant to Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011 and note that the current 2013 consent for the seawalls (attached herewith) does not include the reclamation associated with them.

In paragraph 81 of the Addendum to the Planner's Report, it is acknowledged that a small portion of the seawall is in fact landward of MHWS. She notes that: *Subsequently these existing structures require land use consent, which can be captured by the regional council as a "hard protection structure" pursuant to PRP Rule C.1.1.17. This Rule captures both s9 and s12 matters within the RMA and is captured within my s42A report.*

I respectfully submit that RMA-91 section 9 matters are within the jurisdiction of the District Council. The Transfer of Powers between the Far North District Council and the Northland Regional Council is limited to land use consents for (a) construction of earthworks for earth dams; and (b) private jetties and boat ramps that straddle cma. I note that the 2013 consent for the dinghy ramp and seawall did not include a land use consent for the seawalls presumably in recognition of the lack of jurisdiction.

A copy of the Transfer Document provided to me by the Manager of Legal Services of the FNDC is attached.

I do not know on what basis jurisdiction is now assumed to grant land use consent in the absence of such transfer of power as indicated in the Transfer Deed.

Having reference to the consent granted for the seawalls in 2013, I see no reason why that consent would not be the basis for a "replacement" consent, given the clarity of plans accompanying it. A possible consent (if one is appropriate or required):

**AUT.039650.05.01** To use existing seawalls located in the coastal marine area

*This consents shall apply to only to seawall identified on NRC Plan No. 4467A and also on the marked up Thompson Survey Limited Plan entitled "Proposed Walls Bay Site Management Plan" Surveyor Ref No 809a5, Rev date 03-04-12 (NRC Plan No 4467B)*

As for consent with respect to the portions of the seawall situated above MHWS, the Applicant at present has a consent from the Far North District Council and if a replacement consent is required, an application to that territorial authority would seem appropriate.

## APPENDIX

### EXCERPTS FROM COURT OF APPEAL DECISION

#### Excerpts from CA119/2017 [2018] NZCA 262

BETWEEN	OPUA COASTAL PRESERVATION INCORPORATED Appellant
AND	FAR NORTH DISTRICT COUNCIL First Respondent MINISTER OF CONSERVATION Second Respondent D C SCHMUCK Third Respondent

#### JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The Minister's decision of 5 June 2015 to consent to the easements is quashed, save in respect of easements A3 and E.**

[17] In 2000, the Environment Court dismissed Mr Schmuck's appeal against an abatement notice issued by the Council, finding that the boatyard activities on the reserve were not protected by existing use rights under the RMA, and that resource consent authorising the activity was needed.<sup>5</sup> Mr Schmuck then focused on the requirement to obtain resource consents for his business activities on the public reserve.

[18] In January 2002, the Environment Court granted resource consents which allowed Mr Schmuck to place structures on the reserve and to use the reserve for various boatyard activities, including the maintenance, repair and washing down of boats on the slipway. These were granted by consent. But resource consents could not confer a legal right on Mr Schmuck to use or occupy the reserve for his business, or even to discharge the contaminants on the land of another, and so Mr Schmuck persisted with his attempts to obtain the easements he sought.

[44] At its meeting on 5 June 2015, the Council consented to the grant of easements, acting as the Minister's delegate. The easements as consented to were registered in July 2015. We set out the terms of the easements in full below taken from the easement which was ultimately registered. The alpha-numeric numbering in the registered easement differs from that used in earlier drafts of the easement. To assist with comprehension, it is the numbering system employed in the registered easement we use throughout this judgment:

*These proceedings*

[45] The Society issued the present proceedings challenging two decisions. The first, a decision of Council in 2014 to grant “permission” to Mr Schmuck to carry out the private commercial boatyard activities on the esplanade allowed for in the resource consent. We have not described the 2014 decision in the narrative set out above, as the issue is not appealed. The second, the decision to consent to the grant of easements over the reserve for carrying out the boatyard activities made in June 2015, which is the focus of this appeal.

[46] The proceedings were heard in the High Court before Fogarty J. The Judge said that in making the 2014 decision, the Council had purported to exercise a right of ownership, the grant of permitting use of the land, when it did not have that right. To the extent the Council’s decision ever had any effect, it was therefore quashed. There is no challenge to that finding on this appeal.

[80] The right to wash down a boat on the reserve before it is moved to the dominant tenement might also be the subject of a valid grant of easement. That is because allowing this activity is incidental to the repair and maintenance of on the dominant tenement. But the easement conferred in A4 is broader than that. It also allows the washing down of boats on the reserve and returning them to the water as part of something like a boat valet service. Washing down of boats is, as the easement reflects, a distinct part of the business and easement A4 is drawn broadly enough to allow this part of the business to be conducted entirely on the reserve. We do not consider the easement, as drawn, is adequately focused upon support of the dominant tenement

[83] Our conclusions on easements A3, 4 and 5 are therefore as follows:

- (a) Easement A3 for the construction of a wash-down area and contaminant system is valid on its own terms. The issue arises with its use.
- (b) Easement A4 for the washing down of boats is invalid as it allows the operation of a standalone boat wash service on the reserve.
- (c) Easement A5 for the erection of screens is invalid as the grant is too uncertain.

[93] The rights to enter onto the reserve to work on boats beyond washing them down (easements A6 and C) are too broad and ill-defined, giving rise to issues of joint occupation over the servient tenement. As we have noted, it is possible that some of the easements could be redrawn more narrowly to constitute the valid grant of an easement. But the issues on this appeal are to be determined in accordance with the easements as currently registered.

[122] The Minister's decision of 5 June 2015 to consent to the easements is quashed, save in respect of easements A3 and E.

## DISCUSSION ON "OCCUPATION" OF THE COASTAL MARINE AREA

### EXCLUSIVE OCCUPATION

Addendum to Planner's Report Para 75:

*The evidence of Mrs Kyriak dispute the use and meaning of the word 'occupy' in regards to the proposed coastal permits. To clarify the requirement of this word, I refer to section 12(2)(a) of the RMA whereby a structure within the CMA must hold a valid resource consent to 'occupy' any part of the common marine and coastal area....to further clarify, this does not give exclusivity to the area of occupation.*

That is not my understanding.

12 (2)(a) *No person may, unless expressly allowed by ...a resource consent,— (a) occupy any part of the common marine and coastal area; ....*

It is the person, not the structure, that is granted occupation rights described in the Hume case (*Hume v Auckland Regional Council*, CA262/01 June, 17 July 2002) as being similar to a lease or a licence.

12(1)(b) *No person may, in the coastal marine area,— (b)... erect any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or*

The person is granted the right to erect a structure and in the absence of a consent under s12(2) the public is not excluded from the structure or the area of the coastal marine area occupied by it.

The presently proposed permits relating to the application by Doug's Opuia Boatyard use the word to: *place use and occupy space in the CMA for the respective structures and are expressly permits under both s 12(1)(b) and 12(2)(a) in term of Rule C.1.1.16 of the Proposed Regional Plan. Those coastal permits are proposed to be granted without any condition [s108(h)] limiting the extent of occupation.*

I refer to Declaration by Treadwell upheld by the Court of Appeal in *Hume v Auckland Regional Council*, CA262/01 June, 17 July 2002

*Except to the extent that it expressly provides otherwise, a coastal permit that authorises the consent holder to occupy part of the coastal marine area with a structure, namely a jetty, gives to the consent holder an exclusive right to occupy the space being part of the coastal marine area occupied by the physical structure (ie piles, decking etc) but does not authorise the consent holder to exclude members of the public with or without transport from using the unoccupied space under, beside*

or above the **jetty** including the surface of the **jetty** and other parts of the structure that is within the coastal marine area for the purpose of providing public access to, from, and along the foreshore of the coastal marine area.

But the material fact in connection with that declaration is the condition to which the above referenced permit was subject, stating that:

*the rights, powers and privileges conferred by it extended and applied only “to the placement of the approved structure on and over the foreshore and/or seabed pursuant to ss 12(1)(b)(c)”.*

The coastal permit granted to the Humes was not a permit pursuant to s 12(2) **nor did the construction and use of the jetty require such a permit.**

The Court reasoned at paragraph [22]:

*[22] There are thus two ways in which any form of coastal permit may give rights of exclusion of others from use and occupancy.*

*The first is when the permit expressly provides for such rights of exclusion; they will then take effect according to their tenor.*

*The second is when exclusion of others or a degree of exclusion is reasonably necessary to achieve the purpose of the permit. This is akin to saying that rights of exclusion **may be implied to an appropriate extent when the purpose of the permit makes such implication reasonably necessary.** The ability to make an implication of this kind is logically necessary to allow the coastal permit system to operate effectively. Parliament cannot have intended such operation to depend solely on express conditions of a permit. If there were no such conditions and no power of implication, some permits might then be unable to operate according to their purpose.*

*[27] The activity of construction of a **jetty** must **by necessary implication** exclude others to the necessary extent. The activity of occupying and using the **jetty** does not do so, except to a very limited spatial and temporal extent. It is the occupation dimension which is relevant in this case and in any event, as noted earlier, the Humes cannot gain the advantage of avoiding the clear implication of s 108(2)(h) by not having a s 12(2) permit and relying on the dubious argument, based on implication, that they have one by dint of their s 12(1) permit. We therefore accept Mr Asher's submission that as the permit does not expressly provide otherwise and as there is no reasonable implication to the contrary, the Courts below rightly held that the public were entitled to use the Humes' **jetty** for access purposes. We note, however, that public use must not be such that it unreasonably impedes the Humes' use of the **jetty** to gain access to their property*

The presently proposed permits relating to Doug's Opua Boatyard use the word to: *place use and occupy space in the CMA for the* respective structures and are **expressly permits under both s 12(1)(b) and 12(2)(a)** in term of Rule C.1.1.16 of the Proposed Regional Plan which covers the following RMA activities..

- Erection, reconstruction....of structures (s12(1)(b))
- Occupation of space in the common marine and coastal area (s12(2)(a))

There are no proposed conditions pursuant to s 108(2)(h)(i) detailing the extent of the exclusion of other persons

Standing on their own, these proposed permits can be read as granting exclusive occupation rights in the part of the coastal marine area.

The proposed coastal permit APP.039650.03.01 presumes to deal with the extent of the exclusion of other persons.

That proposed coastal permit is to " - *occupy space in the coastal marine area to the exclusion of others*". It is an innominate activity in terms of the proposed regional plan; presumably the draftspersons of that proposed plan did not envisage a separate "invented" coastal permit for such a blanket right of occupation of space in the coastal marine area. This proposed permit is subject to conditions.

In the present structure of the proposed consents:

coastal permits are issued pursuant to both sections 12(1) and 12(2) in relation to specific structures granting unconditional exclusive rights of occupation of the seabed; and

a separate coastal permit is issued under s12(2) for conditional exclusive rights of occupation of the seabed.

This situation is likely to lead to misinterpretation and possibly to dispute and I submit that consents for relevant structures be granted pursuant to s 12(1) and 12(2) with appropriate conditions setting out the extent of exclusive occupation and that a separate consent for exclusive occupation of the seabed is not required or desirable..

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[110] <sup>1</sup> The Act requires Council to give notice of its intention to grant an easement and it is the Council, not the Minister, that is required to consider any objections under s 48(2). We therefore agree with Fogarty J that the same full consideration of objections is not mandatory for the Minister. However we disagree with the Judge that the Minister's consent role is limited to acting as a check on the Council. There is nothing in the statutory scheme that suggests the Minister's discretion is so constrained. To the contrary, it suggests that the Minister remains free to take a different view to Council as to whether an easement should be granted having regard to issues of jurisdiction (as the Minister earlier did in this very matter) and as to the purposes of the Act.

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[111] We think it a necessary implication of the overall statutory scheme and s 48 in particular that, in exercising the s 48(1) discretion, the Minister must have regard to the legal constraints upon the rights that can be conferred under the Act and the purposes of the Act. These are, we consider, mandatory considerations for the Minister.

*Do the challenged easements permit development for the purposes of the Reserves Act?*

[112] It is at this point we feel we must comment upon the way in which this proceeding has developed in the High Court and before this Court. The nature of the issues pursued by the Society has shifted a number of times. Some matters have been conceded which in our view might have usefully been explored (such as the delegation to the Council) while others have been conceded only to be reopened, such as whether the approach Fogarty J took to the role of the Minister was correct. The Judge's description of the Minister's role was agreed to be correct in the statement of issues, but opened up again in argument, inevitably we think.

*Do the challenged easements permit development for the purposes of the Reserves Act?*

[113] We have decided not to address this ground of appeal because of the unsatisfactory way the appeal grounds shifted during the proceeding and even during hearing. We are not satisfied that we had available to us the argument and evidence necessary for proper consideration of the issues. Nor are we even satisfied that argument addressed the true issues raised by the facts of this case.

<sup>ii</sup> 95Time limit for public notification or limited notification

The time limit is,—

**(a)** in the case of a fast-track application, 10 working days after the day the application is first lodged; and  
**(b)** in the case of any other application, 20 working days after the day the application is first lodged.