Jan Wright,
Parliamentary Commissioner for the Environment,
P.O. Box 10-241,
Wellington 6143.

Mike Rashbrooke,
5A English Bay Road,
Opua 0200,
Bay Of Islands.

30-10-13 **1**

RE:Complaint against the Far North District Council (FNDC) and Northland Regional Council (NRC) in respect of their ongoing failures to protect an esplanade reserve and the local environment from the conduct and effects of unauthorised private commercial industrial activities on reserve.

Dear Commissioner,

I seek the assistance of your Office to remedy the above continuing situation on Walls Bay Reserve, Opua, My complaint, with documentation, alleges three **related** catagories of negligence:
[1] Failures to honour a formal acknowledgement made before the Environment Court;
[2] Failures to discharge statutory duties to uphold relevant law; and,
[3] Failures to adequately protect the environment.

Background:
A boat building operation was established with local Council permission on a private residential section at Walls Bay, Opua, from 1966. A deemed-consent (CU192) was granted in1976 to place and use an access slipway across the coastal strip/ 'Queen's Chain'subject to conditions expressly restricting boatyard activities to the private boatyard land and prohibiting them from being conducted on the public land.
Ref 1: Copy of CU192 (1971/1976)

There were no recorded issues concerning compliance with the access slipway conditions during the tenures of the first and second owners of the boatyard, respectively from 1966 to 1982, and 1982 to 1994.

In 1994 the new owner set about trying to expand the business onto the adjoining public land. His attempt to purchase the land did not meet with success, and a number of RMA resource consent applications to both Councils were subsequently lodged and then withdrawn. At his instigation, the public land designated 'unformed road' went through a formal road stopping process and became esplanade reserve in 1998.

He then applied for easements pursuant to the Reserves Act. These can be distinguished as 'status quo' easements to permit the existing access slipway across the (now) reserve on the same terms as CU192 (in the more secure form of an easement), and 'expansion' easements to allow the conduct of boatyard commercial industrial activities on Walls Bay reserve, particularly on the access slipway crossing reserve.

Following a Hearing, and further five month Committee process in 1999, the Council Committee's original recommendations only for status quo easements were extended to include expansion easements. These were forwarded the Department of Conservation for its statutory (oversight) consent.**The status quo easements were consented-to** by DoC in its Decision of **May 23, 2000**; the expansion easements were **declined**. The boatyard owner refused to allow the registration of the status quo/access easement on his property title.

In the interim, the boatyard owner, claiming "existing use rights", had began to conduct boatyard commercial industrial activities on the access slipway on reserve, and was subject to an application for an Enforcement Order by a private individual and an Abatement Notice from FNDC. The Enforcement Order was granted by the Environment Court in 1999. The Abatement Notice was appealed by the boatyard owner, and his appeal dismissed by the Environment Court. It ruled, **10 March 2000**, that the only existing boatyard use rights of the reserve were as stated in CU192 – for access purposes only.

In **April 2000** the boatyard owner made joint RMA resource consent applications to both Councils, which can also usefully be separated into 'status quo' or 'expansion' consents. Some expansion consents, were granted, **April 2001**. The boatyard owner appealed the decision seeking further RMA rights over the reserve; local submittors opposed (incl original boatyard owner) and DoC appealed, seeking fewer rights.

Following the appeals and Environment Court-conducted mediation between the parties during 2001, a Consent Memorandum was devised to record the basis for agreement among the parties to the issuance of a Consent Order (pursuant to the RMA) which included consent for some expansion of boatyard commercial industrial activities onto reserve. The part of the Consent Memorandum that is relevant to the first catagory of complaint **(Complaint [1])** is the first sentence of clause 6, where it states as follows:

"All parties acknowledge that before using the reserve in the manner consented to, the applicant must obtain the consents of the respective authorities and the Minister of Conservation under the Reserves Act 1977".

Ref 2 : Copy of Consent Memorandum, 21 December 2001.

This formal written acknowledgement is not merely a record of an agreement between the parties to the subsequent Consent Order, 31 January 2002; it is an acknowledgement of relevant law. It was signed by all parties, including the applicant boatyard owner, the FNDC, NRC and DoC. It was relied on by the Opua parties to that mediation process and Memorandum.

It must be noted that a first application for easements under the Reserves Act had been made in November 1998 **before** the application for resource consents under the RMA in April 2000. The DoC Decision, May 2000, had ruled the expansion easements incapable of being granted under the Reserves Act.

The Opua parties to the RMA mediation in 2001 relied on that prior statutory determination when, under financial pressure, they relented to accept certain terms of the RMA Consent Order. As they subsequently communicated in a letter to DoC, their reasonable expectation was that the "fresh application" for easements agreed-to among the parties to mediation would meet with the same outcome, and the RMA expansion consents would be unable to be lawfully given effect-to or exercised on or over the Walls Bay reserve.

This expectation has been met: Relevant easements pursuant to the Reserves Act were further sought in 2003, then applied-for in 2004, and again in 2005. 'Easements' to conduct boatyard commercial industrial activities on the access slipway on reserve have not been consented-to; **the right to conduct such activities on the access slipway on reserve has never been brought into existence.**

Ref 3: Document: 'History of easement applications, 2003 -2013.'

Notwithstanding the above, both Councils have, since late 2004, declined to act on evidence and complaints concerning **unauthorised boatyard activities being conducted on reserve**. Evidence of the activities and of formal complaints made to both Councils in 2004, 2009, 2010 and 2012 can be provided, along with evidence of the ongoing unauthorised boatyard activities on reserve.

With regard to **Complaint [1] and in respect of the NRC**, can your office investigate the matter and make comment as to whether the NRC can break it's agreement recorded on an Environment Court document, and does it's CEO have, and can they exercise, statutory powers to ignore or override the Reserves Act ?

During an unsuccessful attempt in **2012** by the boatyard owner to obtain a restraining order to stop someone recording/photographing these unauthorised activities for the purpose of referral to regulatory authorities, **he provided the Court** with a document signed by the FNDC Legal Services Manager.This was dated 10 November 2011, and had been sent to the boatyard owner at his request. The relevant part reads:

"(Note 3: on 21/2/05, former FNDC CEO Clive Manley ruled that that until the application for easements had finally been resolved, no enforcement action would be taken against Mr Schmuck under the Reserves Act in regard to boatyard-related activities on the reserve.)" **Ref 4:** FNDC document and letter, Nov 2011.

As can be observed, this content of the above document directly contradicts the content of the Consent Memorandum clause 6, and would appear to be evidence showing the-then FNDC CEO actively failing to honour his Council's written acknowledgement before the Environment Court. Separately from that, it purports to demonstrate that he took it on himself to assume statutory powers to override the Reserves Act.

With regard to **Complaint [1] and in respect of the FNDC,** can your office investigate the matter and make comment as to whether the-then FNDC CEO **did** make such a 'ruling', and if so, was he **entitled** to do so? Were he and/or FNDC in breach of any Acts, rules, laws or conventions in so doing? Then there is the same question as for the NRC: Can the FNDC break it's agreement recorded on an Environment Court document, and does it's CEO have, and can they exercise, statutory powers to override the Reserves Act ?

Extensive efforts to explore and resolve these matters with FNDC have not met with success:

Following a complaint to the Office of the Ombudsmen in 2006 concerning FNDC failing to take action on complaints, the same CEO (without mention of having made any '**ruling**') informed the Ombudsman that FNDC had obtained a legal opinion that they could exercise such discretion in the execution of their statutory duties. The Ombudsman informed the complainant that, as FNDC had obtained such legal opinion, his Office could play no further role.

A subsequent Local Government Meetings and Official Information Act request to FNDC for a copy of the referenced legal opinion obtained by Council met with the reply that it would not be released owing to"legal privilege". Further argument regarding the public interest failed to change the stance of Council.

When a **'ruling'** (without any other detail) was first referenced in a letter from the FNDC Legal Services Co-ordinator in 2010 (in response to formal complaints and inquiry regarding unauthorised boatyard activities on reserve) further official information requests were lodged, in 2010, for the legal opinion referenced by the previous CEO. It was felt that the legislative basis for such a **'ruling'** has major implications nationwide, and that it is very much in the public interest to be made aware of it, especially as the present FNDC CEO has adopted the same stance on the matter. After three months and several reminders without reply, this request was 'put on hold' pending other developments.

In 2012 a further information request was lodged seeking copies of any letters (from a certain date) sent by the previous or present FNDC CEO to the boatyard owner. The purpose was to establish whether the alleged **'ruling'** had been formalised and signed by any CEO on a document sent to the boatyard owner. Following reminders over the next three months, then referral to the Office of the Ombudsmen, this eventually elicited the response that the 'material requested could not be located'.

The only (obtainable) record (of any kind) of the alleged **'ruling'**, is as supplied by the FNDC Legal Services Manager to the boatyard owner, 10 November 2011, as already referred, and which remained unknown to other public parties until supplied by the boatyard owner to the District Court in 2012.

Complaint [2]

It is understood that both Councils have duties under the RMA Section 35 to monitor and enforce compliance with their respective Plans and RMA resource consent conditions.

In the case of the NRC, their replacement consent CON20060791410, **conditions 15 (a) to (d)** relating to **(13)** DISCHARGE TO GROUND, expressly require the use of drop sheets when any boatyard maintenance activities are being conducted on pervious boatyard surfaces. Most of the boatyard work area is pervious.

Of more concern, CON20060791410 condition **15 (e)** states as follows:

"Water blasting or washing of vessel hulls shall only take place over impervious yard surfaces (ie. the turntable) which are able to collect wastewater for processing via the wastewater treatment system."

Notwithstanding the above, NRC staff all the way up the organisation to the previous and present CEOs have taken the view that the express requirements of these NRC consent conditions for use of drop sheets is at the 'discretion' (sic) of monitoring staff (ie: not required), and, most critically, that the term "*yard surfaces*" **includes** the area of Walls Bay reserve where the slipway crosses it. This despite the condition noting **the only present impervious yard surface is the concrete turntable** located adjoining the boatyard boundary with reserve, slightly (lawfully) encroaching, with a collection sump in its middle.

NRC staff have referred ie to mean 'for example'(eg) rather than id est 'that is'. The 'big picture'concepts such as the lawful fact that the reserve is not any part of the boatyard; that the unauthorised conduct of these activities on reserve comprises offences pursuant to s94 of the Reserves Act; that NRC likely lacks the statutory authority to ignore or override the Reserves Act; that NRC was a signatory to the Consent Memorandum, and that the consent terms **anyway expressly confine the activity** to "*impervious yard surfaces*", has fallen on collectively deaf ears in formal written complaints during 2010 and again in 2012.

Further, CON20060791410 **condition 2** relating to **(10)** DISCHARGE OF TREATED WASHWATER TO THE COASTAL MARINE AREA, states as follows:

"The boat wash water containment system, and CTS treatment system shall be constructed and be fully operational in general accordance with the details provided in the application, by no later than 31 March 2009."

The system referred (as per "details provided in the application") was to be sited below the turntable at the top of the access slipway **on reserve** in the expectation (by the boatyard owner) of obtaining the requisite Reserves Act authorisation in the form of easements despite these having been declined in May 2000.

The construction of this system (as per "details provided in the application") **by a certain time** is a stated condition for the exercise of the discharge consent **(10).** This facility has not been constructed because Reserves Act authorisation has **not** been obtained. It follows that the stated RMA conditions for the exercise of the discharge consent have not been and cannot be met. This raises the question of whether consent CON20060791410 **(10)** can be regarded as valid. There has been no direct reply on this subject when it has been formally raised with NRC staff and Governance on several occasions, and no enforcement action.

Further, in response to complaint in 2010 regarding unlawful boatyard washdowns/waterblasting on the slipway on reserve, NRC monitoring staff issued an Abatement Notice to the boatyard **but then,** instead of following through to enforce compliance with the terms of its consents (as above), **insisted** the matter be 'resolved' by way of the boatyard owner placing plastic sheeting **on reserve** and continuing with his activities on reserve **without** Reserves Act authorisation having been obtained for the activities, or for the placement of the plastic sheeting, by either the boatyard owner or the NRC. These are offences pursuant to the Reserves Act s94, as has been raised without effect with NRC executive and governance.

It is understood, in connection with these matters, that the NRC has three catagories of duties:

(1) As a signatory to the Consent Memorandum – to honour it's acknowledgement before the Court; and,
(2) As a Regional Authority – to not commit or encourage/promote offences against the Reserves Act; and,
(3) As a regulatory authority pursuant to the RMA – to take enforcement action to bring about a cessation of non-compliance with NRC express consent conditions.

Complaint [2] alleges that NRC have failed to uphold and discharge all these duties.

In the case of the FNDC, their consent RC 2000812 dating from the RMA Consent Order, January 2002, has a Condition 13) which states as follows:

"During periods when that part of the slipway through the Esplanade Reserve area is being used for the washing down of boats, the Consent Holder shall erect screens or implement sinilar measures to effectively contain all contaminents within the washdown perimeter. Screening shall be arranged at the Consent Holder's expense and to be to the satisfaction of the District Council's Resource Consent Manager."

No screens have or screening has been employed during waterblasting activity on the slipway on reserve, which activity is anyway **not** authorised by Reserves Act easements. The waterspray clouds and columns drift across the reserve (as does paintspray & fumes) and FNDC has taken no RMA enforcement action.

It is understood, in connection with these matters, that the FNDC has three catagories of duties:

(1) As a signatory to the Consent Memorandum – to honour it's acknowledgement before the Court; and,
(2) As statutory landowner – to ensure that Reserves Act offences are not committed on it's reserve; and,
(3) As a regulatory authority pursuant to both the RMA **and** the Reserves Act – to take enforcement action to bring about a cessation of non-compliance with FNDC resource consent conditions and a cessation of offences pursuant to the Reserves Act, when such matters are brought to their attention.

Complaint [2] alleges that FNDC have failed to uphold and discharge all these duties.

Complaint [3] (Logically following from Complaints 1 and 2.)

The unauthorised boatyard commercial industrial activities on Walls Bay reserve complained-of include vessel washdowns, waterblasting, scraping, sanding, deposit of dust and marine biota and heavy chemicals used in anti-fouling paints, painting and spraypainting both topsides and antifouling applications.

The conduct of the abovementioned boatyard activities on Walls Bay reserve **without** the required Reserves Act authorisation; **without** the use of screens as required by the condition of the RMA Consent Order, **without** the construction and use of any **approved** contaminent containment system as required by NRC consent conditions, and for a period of **nine** years, can only have caused damage to the land of the reserve.

As discussed earlier, the boatyard owner has been required to place plastic sheeting between and beside the slipway rails from halfway up the reserve to the concrete turntable. This partly drains into a sump between the slipway rails downhill and about 10 metres above MHWS. The sump is not consented, does not collect or contain all water and debris resulting from the unauthorised activities, is subject (with the whole slipway area) to flushing during rain events, and comprises an offence or offences pursuant to Reserves Act s94.

RMA contaminent containment requirements were subject of a staged implemention process in the Far North from the time of purchase by the present boatyard owner in 1994. The previous owner had developed the yard to it's maximum capacity with the turntable and rail spurs, setting up hardstand areas on private boatyard land. One of four rail spurs goes up to the right between the boatshed and a bank, sloping gently downhill to the concrete turntable with the collection sump in the middle.

On the basis of a number of synergies – operational, environmental, financial, legal, simple and practical – this is the area on boatyard land where the two previous owners have stated **they** would site a contaminent containment area to conduct waterblasting etc activities to meet RMA requirements. It can be easily screened, and noise would be muffled to some extent by the activity being conducted between the shed and hill. This rail spur drains by gravity into the turntable collection sump for transfer to treatment systems that can also be located on boatyard land. DoC has raised the same or similar considerations and conclusions.

Considering that the NRC, in 'resolving' it's Abatement Notice (2010) by allowing/stipulating the plastic sheeting to be unlawfully placed on reserve as an 'acceptable' impervious layer from their statutory environmental perspective, they would surely accept this sheeting to be removed and lawfully placed for the same purpose on the rail spur discussed above. At least, that is what commonsense and relevant law would seem to suggest. It would be significantly easier and much cheaper than pouring a concrete layer to achieve the same outcome. **Why has any 'temporary' system been allowed to be sited on reserve instead of, obviously and lawfully, on the private boatyard land ?** This remains a significant issue.

These matters could have been sorted in 1996, but the present boatyard owner's repetitive and exhaustive attempts to gain private business use of public reserve have resulted in both Councils losing sight of their statutory duties, and, in many individual cases, losing sight of most of the relevant history, facts, issues and applicable law. They have allowed the present boatyard owner to virtually ignore the RMA requirements to establish a lawful contaminent containment system since 1994-5. They have taken **some** enforcement action in regard to RMA non-compliance issues, then given up on it altogethor since 2004. They are **virtually in collusion** with the boatyard owner with regard to his continuing to commit offences against the Reserves Act s94.

A particular issue of statutory process that stands out, and has been raised without effect with both Councils, are the **implications** of their mutual approach to ongoing easements applications and processes. They have treated an application for rights over reserve **as if the rights sought were 'existing use rights'**, waiting the outcome of statutory processes to determine whether or not they would be 'extinguished'. Under those circumstances, the exercise of the rights can be regarded as acceptable unless or until so extinguished. **However**, as has been raised exhaustively, the rights in question **have never been brought into existence** in the first place. **The effect** of the approach is that to apply for rights gives the applicant the right to exercise them until the process determining whether or not they will be brought into existence has finally been concluded. I trust you will agree that the precedent implications are profound and startling.

There has been some progress: As recorded in the **Ref 3** document: SOP 133, gazetted 16 October 2012, has lined-up the relevant clauses to be **withdrawn** at the second reading of the ROLD bill. A Reserve Management Plan was adopted by full Council in **February 2013**, which does **not** allow for boatyard industrial activities to be conducted on reserve. In March, the boatyard owner sought a declaration in the Environment Court, initially to challenge the Reserve Management Plan, but presently modified by his lawyers to be restricted to RMA matters without reference to the Reserves Act and the Consent Memorandum. DoC has usefully (finally) made it's Draft Determination of May 2007 a 'final' decision on **27 August 2013**. FNDC monitoring officers have subsequently taken evidential photographs and statements from witnesses regarding the continuing unauthorised boatyard industrial activities on reserve.

However, that remains the problem which has finally triggered this complaint to your Office: These activities are **continuing unabated**. Since the DoC decision being made 'final', August 27, 2013, the given basis by both Councils for not performing their statutory duties has lapsed or expired. Since this time there have been some 15 vessels waterblasted and painted etc on reserve, and that is just from casual observation as the reserve and access slipway are visually prominent from the Opua shop and wharf area. The further recent complaints to FNDC from three separate sources have still not resulted in the cessation of the breaches and offences.

It is appreciated that the present boatyard owner is an exceptionally determined, combative, litigous, and inappropriately self-assertive individual with substantial financial means. However, to the observation of many locals, the biggest contribution to the problem, and costs to ratepayers and taxpayers, has been the statutory failures by relevant staff of both Councils and their CEOs over a prolonged period of time.

Please advise if your Office can assist in some way, and if further documentation is sought on any matter raised in these complaints.

You may find Head Office departmental staff at LINZ, DoC, and Te Puni Kokiri have some familarity with the issues, and even some detailed knowledge of relevant facts, law and issues.The boatyard is unequivically supported on it's own land. The concern is for the reserve, the integrity of the Reserves Act, the integrity of the statutory conduct of the relevant territorial and regional authorities, and the integrity of the NZ regulatory systems as a whole.

In case you should like to gain an overview, I include with the referenced documentation a copy of a 37 page evidence-based history with some commentary covering the boatyard issues since its establishment from 1966 to 2010. This was compiled collaboratively by four people researching documents in 2010 in response to the ROLD matter. An update may be undertaken in the next six months.

Kind Regards,
Mike Rashbrooke.

Enclosed:

Ref 1. Copy of Deemed Consent CU192 (1971/1976).
Ref 2. Copy of Consent Memorandum, 21 December 2001.
Ref 3. Copy of Document 'History of boatyard easements applications 2003 – 2013.'
Ref 4. Copy of letter and document from FNDC to boatyard owner, 10 and 14 November, 2011.

Copy of Evidence Based History and Commentary of Opua Boatyard at Walls Bay, Bay of Islands October 1966 to June 2010 (37 pages)

Parliamentary Commissioner
for the Environment
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Mike Rashbrooke
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Dear Mike

I am replying to you on behalf of Dr Jan Wright, the Parliamentary Commissioner for the Environment.

Thank you for your recent letter dated 7th October 2016 and copies of recent letters to the Northland Regional Council concerning the operations of a boatyard at Walls Bay Reserve, Opua.

As you note in your letter the Office of the Ombudsman is the avenue for those wishing to query any decision, recommendation, act or omission of central and local government.

I understand from your letter and my inquiries that the issue is currently before the courts. As you may know the role of the Parliamentary Commissioner for the Environment is to assess and consider the overall system of laws, agencies and processes for managing the environment.

As a consequence, Dr Wright does not get involved in individual council decision-making processes, and cannot overturn decisions made by local agencies as this is outside her jurisdiction.

However, the wider issue of how local authorities monitor and enforce resource consent decisions is pertinent to the work of our office and we will feed your case into our ongoing thinking.

I hope this is of some help. I thank you once again for taking the time to inform us about your concerns, we value all community input about environmental matters.

Kind regards

Carl Walrond

Principal Advisor