BEFORE THE NORTHLAND REGIONAL COUNCIL HEARINGS COMMISSIONER

IN THE MATTER	of an application under section 88 of the Resource Management Act 1991 (Act)
AND	an application by Doug's Opua Boatyard for resource consents relating to the redevelopment of the existing boatyard located at 1 Richardson Street, Opua, and a consequential application to vary the conditions of the Interesting Projects Ltd (Great Escape Yacht Charters) resource consent.

SUBMISSIONS OF COUNSEL FOR DOUG'S OPUA BOAT YARD ("DOBY") IN REPLY

Dated this 1st day of September 2020

Henderson Reeves Connell Rishworth Lawyers

Solicitor: Colleen Prendergast

96 Bank Street
PO Box 11
Whangarei 0140

P: +64 9 430 4350
F: +64 9 438 6420
E: colleenp@hendersonreeves.co.nz

Introduction

1. The above applications were heard before Cr Leiffering over three days commencing 3 August 2020.

2. These reply submissions deal with matters or issues raised by the Commissioner which were not, or not fully, resolved in the hearing, as well as responding to matters raised by the submitters in their presentations.

Basis for assessment

The existing environment

3. There are two parts to the application from DOBY before you. Broadly these seek:

    (a) Consent to dredging, construction of the wharf and associated structures, and activities in the CMA ("wharf/dredging application"); and

    (b) Consent to discharges to land, water, air and the CMA in order to mitigate the effects of activities authorised on the land and in the CMA ("discharge consents").

4. The basis for assessing the applications was addressed in my opening submissions and discussed during the hearing. It is clear that there remains a difference of opinion as to the definition of the "existing environment" in respect to each part of the application.

5. The Commissioner considers both parts of the application seek renewal/replacement type consents which, in reliance on *Port Gore Marine Farms v Marlborough District Council*[1] and *Ngati Rangi Trust v Manawatu-Whanganui Regional Council,*[2] he must assess on the basis that the existing environment does not include the structures and activities currently existing.

6. Conversely, DOBY's position is that the above cases are only marginally applicable to the discharge consents, and not at all applicable to the wharf/dredging application. To explain:

7. Both *Port Gore* and *Ngati Rangi* relate to water consents[3] that were about to expire and for which new[4] consents had been sought.

8. *Port Gore* concerned appeals against the decisions made by the Marlborough DC in respect of "renewal" applications for three marine farms operating under s 124 at the time of the hearing. The Environment Court held that, when assessing applications for new consents when the existing consents are due to expire, the

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1 [2012] NZEnvC 72

2 [2016] NZHC 2948

3 Coastal permits in *Port Gore*, and water takes in *Ngati Rangi*.

4 There is no such thing as a renewal or replacement consent in the RMA; applications are to be assessed as new consents.

environment must be imagined as if the [activities for which renewal is sought] were not actually in it.[5]

9. The High Court endorsed and followed that approach in *Ngati Rangi Trust v Manawatu-Whanganui Regional Council,* an appeal arising from an Environment Court decision on a water take application.

10. The High Court noted that consideration of the existing environment in the context of subdivision and land use consents was different to that of water take permits which were not permanent,[6] and said:[7]

> [65] …The learned authors of *Environmental and Resource Management Law*[8] note a principle has emerged in which it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions. The text says:
>
> > Accordingly, the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consents being renewed did not exist. …

11. It went on to say:[9]

> [66] … The context [of the subject consent] is different to the line of authorities on the existing environment that has evolved from the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Limited* where it was determined that the existing environment may include activities in which a decision-maker has no control over, such as granted resource consents that are likely to be implemented. (Footnotes omitted)

12. To summarise: *Port Gore* and *Ngati Rangi* are authority for the principle that:

> *When considering applications for water consents which are due to expire, the "existing environment" must be imagined to be without the effects of the activities for which renewal/consent is sought.*

13. Applying this principle to the DOBY applications:

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[5] *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72, at [140].
[6] *Ngati Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [60] – [63]
[7] *Ibid,* at [65].
[8] Derek Nolan *Environmental and Resource Management Law* (5th ed, Lexis Nexis Wellington 2015). Note that the quote cited can be found in Chapter 8 Water, at p 610.
[9] *Ngati Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [66]; see also *Sampson v Waikato Regional Council* EnvC A178/2002.

The wharf/dredging application

14. DOBY holds an existing coastal permit for the wharf, slipway and associated structures and facilities.[10] That permit is extant and does not expire until 30 March 2036. The Deemed Coastal Permit covering the jetty/wharf and slipway is of indefinite duration and also extant.

15. The application before the hearing is not seeking to "renew" that coastal permit some 16 years ahead of its expiry date. It is a completely new application for a coastal permit seeking a 35 year term, albeit for similar (but not the same) structures, facilities and activities in the CMA as are already lawfully established.

16. On that basis, the environment against which the wharf/dredging application is to be assessed is that applying to any new application, as described by the Court of Appeal in *Queenstown Lakes DC v Hawthorn Estate Ltd,*[11] not that as described in *Port Gore.*

17. The correct approach to the assessment of the wharf/dredging application is to consider the environment as set out in para 49(b) of my opening submissions, summarised below for ease of reference:

    (i) Until 2054 - the existing jetty/wharf and slipway form part of the existing environment and are the baseline from which the visual, landscape and natural character effects of the proposed coastal structures should be assessed; and

    (ii) From 2036 - the effects of the proposed structures must be assessed as if the GEYC and wharf pontoons were removed.

The discharge consents

18. The position with the discharge consents is not quite so straightforward. The discharge consents have expired and are being exercised pursuant to s 124 RMA. Applying *Port Gore*, assessment of the application must imagine the existing environment without the effects of the activities the discharges are required for.

19. However, while the discharge consents have a finite term which has expired, the activities to which those consents apply are not authorised by a water consent. The discharge consents relate to the Far North District Council ("FNDC") land use consent RC2000812 which provides for specific boatyard activities on parts of the esplanade reserve abutting the boatyard, as shown in the 2002 Consent Order.

20. A similar situation was addressed by the Environment Court in *Tainui Hapu v Waikato Regional Council.*[12] There the District Council had sought an upgrade of the existing sewage disposal plant together with "renewal" of the associated discharge consents. Tainui Hapu

[10] Referenced as AUT007914.01 – AUT007914.03 and AUT007914.05 – 09, previously referenced as CON20030791410 (01 – 03) and (05 – 09).
[11] *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299, at [84] (CA)
[12] *Tainui Hapu v Waikato RC* EnvC A63 - 2004

appealed the grant of consent to discharge treated sewage into the Raglan Harbour.

21. The Court noted that the sewage disposal plant was designated and could lawfully continue to operate. It noted previous Court decisions holding that identification of the existing environment and relevant effects are matters of fact to be assessed in each case and not overlaid by refinements or rules of law. In the circumstances of the case, it considered the environment as it existed with the activities and discharges continuing[13] and confirmed the Regional Council's decision.[14]

22. In my submission, *Tainui Hapu* is analogous to the current discharge consent applications before the hearing.

23. Here, the FNDC land use consent is of indefinite duration. The activities authorised by the consent can lawfully continue. None of the circumstances under the Act providing for a consent to be terminated apply. In particular, neither Council has raised any enforcement issues and nor is Mr Schmuck intending to stop exercising the consent. As a consequence, the environment as it exists includes the existing lawful land use activities and the legacy effects of the discharges, on the basis that they are granted and implemented consents over which the NRC has no control.

24. In the circumstances existing here, it is submitted that the *Port Gore* principle does not apply to the discharge consents. Consideration of the existing environment must include the existing lawful land use activities and the legacy effects of the discharges. The assessment of the application should focus on the actual and potential effects of the proposed discharges, and whether the evidence shows they are, or can be remedied or mitigated to be, minor or less than minor.

Matters to which regard must or may be had

25. During the hearing many of the submitters' presentations and some of the questions to the witnesses focussed on the 2018 NRC decision, and also on the 2019 Environment Court decision on the discharge consents. Many of the questions elicited responses from the submitters endorsing the conclusions reached by either or both decisions, but particularly in relation to the 2018 application.

26. It is settled law that the decision is to be made on the basis of the evidence before the decision maker. It is also accepted that a consent authority is required to have regard to the pre-hearing meeting report (if any) under s 99; and entitled, but not obliged, to have regard to any relevant information obtained under ss 88[15] and 92.[16]

27. Section 104(1)(c) provides that the consent authority may consider any other matter it considers relevant and reasonably necessary to determine the application before it. It is not clear to me how the

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[13] Ibid, at [104] – [110]
[14] Ibid, at [118]
[15] The application
[16] Request for further information

earlier (2018) decision (or the Court's 2019 decision) can be considered reasonably necessary to determine the current application before the hearing.

28. The hearing is to be determined on the basis of the evidence before it. A decision of the Council from another hearing may well be the (in that case disputed) result of the hearing it relates to, but cannot have any evidential value in relation to the matter being considered at the current hearing. The Council is not, and cannot be bound by its decision on another application; a decision on a resource consent has no precedent effect in the strict legal sense.[17]

29. Similarly, although the Court is required to have regard to the first instance decision, Environment Court hearings are conducted *de novo*. The Court is not bound by its own decisions, thus decisions for similar applications on the same site are of marginal relevance.[18]

Other Acts and Non-RMA documents

30. After the hearing, the Commissioner requested and was provided with a copy of the Reserve Management Plan for the reserve in question, perhaps because of comments made in Ms Marks' submission and accompanying appendices.

31. The consent authority may give regard to non-RMA documents, but unless those documents have been prepared in accordance with the First Schedule of the RMA, they can be given little weight.[19] Further, when granting consent to an application, s 104 RMA does not require the consent authority to consider the provisions of other Acts, except where the provisions of concern have been integrated into the relevant district or regional plans.[20]

32. The provisions of a Reserve Management Plan for instance, could be relevant under s 104(1)(c) when considering a proposed development of a reserve in circumstances where the Reserve Management Plan was recognised as a relevant method and the objectives and policies of the District Plan referred to the function and purposes of reserves.[21] But that is not the case here.

"Need" under the RMA

33. Questions during the hearing and some of the submitters' presentations raised issues as to whether there was any demand or need for the marina berths, in particular.

34. The case law is clear; the decision maker's task is to consider the potential effects on the environment, not the need or lack thereof for the facility. In *Gulf District Plan Association Inc v Auckland CC,*[22] the Environment Court followed *Fleetwing Farms Ltd v Marlborough*

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[17] *Progressive Enterprises Ltd v North Shore City Council* High Court Auckland, CIV-2008-485-2584, 25 February 2009, Venning J, at [4].
[18] *Ibid*
[19] *Campbell v Napier City Council* EnvC 067/05, at [57].
[20] *Darroch v Whangarei District Council* EnvC A018/93 (PT).
[21] *Howick Residents and Ratepayers Association Inc v Manukau City Council* EnvC A001/2009, at [40], [41]
[22] EnvC A101/2003, at [99] – [101].

District Council[23] where the Court of Appeal held that every case should be treated on its merits, and that it was not the role of the Court to identify the "best" proposal to achieve a given end.

35. However, where the Court has to consider the sustainable development of limited resources such as coastal land, it is likely to take demand (or lack of it) into account in weighing up matters and exercising its overall discretion.[24]

36. However, that is not the case with marina berths here. Demand for marina berths and moorings is strong. The PRP recognises Opua as an area of high demand for such facilities. It notes that "high density on-water boat storage (including … marinas) is likely to be the only way to provide additional on-water boat storage."[25]

Response to matters raised by the Commissioner

37. During the hearing further information was requested from the experts and Mr Schmuck as follows:

Stormwater 360 – First Flush Volume

38. Mr Papesch was requested to provide further information about the first flush system of the proprietary treatment system, and how the trade waste pumping system works. His explanation is **attached**, marked "**A**". In summary he advises:

    The first flush system is recommended best practice. The 10m^3 volume is the total of 0.7m^3 for waterblasting, 0.7m^3 for slipway cleaning, and 1.0m^3 for rainfall or additional waterblasting. A first flush rainfall depth 10mm is reasonable, and accords with the technical literature.

    The fox valve is designed to capture and divert the initial runoff, which is likely to contain any residual pollutants, to suitable treatment (here, to trade waste). It is activated by a demand driven valve when water blasting commences, and will not close until a per-programmed volume of water has been discharged to the sewer.

    Trade waste to the sewer requires a pump chamber and pump sized to meet the operational requirements. A standard E/one pump or similar and a pump chamber 0.75m^3 is adequate, subject to the pump chamber being alarmed.

    In the event of a power failure, and provided the stormwater treatment system is positioned as is currently before the Environment Court (at the toe of the slipway), stormwater will still discharge through the stormwater treatment system before discharging to the CMA. The likelihood of washwater discharging to the stormwater system is low in those circumstances.

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[23] [1997] 3 NZLR 257
[24] *White v Waitaki District Council* EnvC C066/06, at 32.
[25] Proposed Regional Plan, Policy D.5.19

Metals in sediments, and pipi relocation

39. Dr Wilson was requested to:

    (a) consider and formulate a condition to ensure metals in sediments do not increase or exceed existing levels, in recognition of the already increased levels in the environment; and

    (b) discuss the likely effect of relocation on the health of the pipi bed, including identification of the percentage requiring to be relocated.

40. Dr Wilson's proposed condition is set out below:[26]

> The median concentrations of total copper, lead, zinc, chromium, nickel, and cadmium from at least three samples in intertidal or subtidal sediment as measured at any point 10 metres from the facilities shall not exceed the median concentrations measured in previous years from the same locations. Once Sediment metal concentrations decrease below the coastal sediment quality standards, they shall not exceed the following:
>
> - 65 milligrams per kilogram of copper;
> - 50 milligrams per kilogram of lead;
> - 200 milligrams per kilogram of zinc;
> - 80 milligrams per kilogram of total chromium;
> - 21 milligrams per kilogram of total nickel; or
> - 1.5 milligrams per kilogram of total cadmium.

41. Dr Wilson notes that he has inserted the value for total nickel, which was missing in the s 42A report, from the Coastal Sediment Quality Standards presented in Table D.4.4 of the Northland Proposed Regional Plan. All of the above concentrations are consistent with these standards.

42. Dr Wilson is of the opinion that relocating pipi affected by the works proposed by the application will give them the opportunity to re-establish and survive in Walls Bay. He has drafted a Pipi Relocation Plan for consideration, noting that less than 5% will be affected. He considers the risk to the remaining 95% of the bed is considered to be low due to the small dredging footprint and short duration of the dredging operation.

43. A copy of the 4Sight Consultants letter and the draft Relocation Plan is **attached**, marked "**B**".

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[26] I note that this condition (34) is one of the conditions on which agreement was not reached. Mr Hood, in his Supplementary Statement, is recommending it be deleted on a number of grounds.

Air Quality – conditions re water blasting plume and odour from the paint and antifouling; EPA "controlled work area" definition

44. Mr Stacey was requested to develop conditions to mitigate the effects of the waterblasting plume on the walking track, and odour caused by the application of paint or antifouling. It was suggested that the conditions be aligned with wind speeds and direction in a similar manner to that for the sanding and grinding conditions.

45. Waterblasting: Advice received from Mr Stacey confirmed the opinion in his evidence; that if the following factors were included as conditions on the consent, the likelihood of someone getting wet on the walkway would be very low:

    - Deployable screen;
    - Requirement to only undertake this activity during appropriate wind conditions (wind speed greater than 0.5m/s blowing up the slipway through 45 to 170 degrees);
    - Getting the boats much further up the slipway; and
    - The operator being conscious of the angle and direction of the water blaster nozzle. Detailed training to be provided to the operators.

46. Odour and controlled work area: Mr Stacey refers to the Environmental Protection Authority *"Decision on the Application for reassessment of Antifouling Paints (APP201051)" Appendix E – Controls for Antifouling Paints."* The definition of "controlled work area" contained therein reads as:

    > *The **controlled work area**, as referred to in subclause (1) is a designated area in which antifouling paints are applied, using a method and located such that off-target deposition of the substance, including onto bystanders, is avoided by taking all practicable steps.*

47. In noting that there appeared to be no specific requirement in the EPA document to use screens, Mr Stacey says that arguably the deployment of screens is practicable, with these being erected along the reserve side of the slipway in a similar manner to the screen used at the bottom of the slipway. He considers that the screens could help reduce overspray drifting onto the reserve, particularly for some of the larger vessels which overhang the reserve. However the screens would be less helpful for the smaller vessels where they can be moved further up the slipway and within the confines of the boatyard.

48. Further, Mr Stacey considers the screens would only be effective for antifouling emissions if the paint was being applied using a spray gun. Spraying of antifouling represents about 50% of the boatyard's total application per year, about 35 hours. Assuming that larger vessels extending out over the reserve will account for approximately 50% of the applications, spray painting of the larger vessels would occur for approximately 18 hours per year. Given the small number of hours of spray painting per year, Mr Stacey questions the need for

the screens, particularly as they would be placed on parts of the reserve unlikely to be frequented by the public.

49. The conditions approved by Mr Stacey are:

> 79. Sanding and grinding operations shall only be conducted when the wind speed is between 0.5 m/s and 5 m/s (as an hourly average).
>
> 80. Water blasting or the application of antifouling and paint shall only be undertaken when the wind speed is greater than 0.5 m/s and when apparent wind on the slipway is from the northeast to the south southeast (wind is blowing up the slipway through an angle of 45 to 170 degrees).

50. A copy of Mr Stacey's emails together with a copy of the relevant pages of EPA Application APP201051 are **attached**, marked "**C**".

Sediment Erosion Barrier – soft protection options

51. Mr Johnson was requested to identify the alternatives considered (if any) to the erosion protection barrier, and in particular to comment on soft protection options such as the use of sandbags rather than rock.

52. Mr Johnson refers to his evidence of 29 July 2020 and advises that several other alternatives to the erosion barrier were considered – see para 6 (i) – (iii) – with the erosion barrier being considered the most suitable. Para 9 then considered a different type of erosion barrier and determined that a placed rock barrier was the most suitable.

53. As to soft protection measures, he advises:

> (a) Sandbags are not practical due to their poor durability, the nylon bags will perish when exposed to UV and saltwater in a short amount of time - and then they will need to be replaced.
>
> (b) A batter was not possible due to geotechnical conditions, and the proximity of the slipway and the shellfish bed.
>
> (c) In my opinion, a placed rock barrier is actually quite a "soft" protection measure, when you consider the advantages outlined in my paras 9 and 10 of my evidence.

54. A copy of Mr Johnson's email is **attached**, marked "**D**".

The Clark submissions: environmental effects and water depths

55. Mr Schmuck was requested to respond to the submission by Mr Clark, and in particular as to the water depths around the wharf and pontoons, as measured by Mr Clark.

56. Mr Schmuck responds:

> I have reviewed the Clark's submissions on the application APP.041365.0101as requested by the Commissioner at the end of the hearing on 5 August 2020 and state the following.
>
> (i) As to their combined submission, I can concur with their concerns about the general environmental matters they raised up the Waikere and Waikino inlets and indeed likely up the Kawakawa river estuary south of Opua. And I am certainly not in a position to reckon what would have been the historical implications as I have only lived and worked in Opua for 31 years.
>
> (ii) I can however rely on the evidence presented by way of the "Modelled Currents and Sediment Transport" studies included in my submissions by 4 Sight Consulting which slow clearly a completely different tidal effect at this site. This supported by 25 years of maintaining the end sections of the slipway and turning block by hand and observing little if any collective sediments in that time.
>
> (iii) As to Mr Clark's submission, without a definitive grid showing the locations of his soundings, I can only assume the measurements he has provided at my structures are along the batter or directly in the area dredged in 2002 that has subsequently filled with a slurry like substance; that would offer little or no resistance to a bamboo pole and likely less to a keel of any substantial displacement.
>
> (iv) The cohesive point between the two submissions is that at this site, there has been no maintenance dredging at all for 18 years and yet in that time, little if any general seabed sediment levels have changed.

57. A copy of Mr Schmuck's email is **attached**, marked "**E**".

Iwi consultation

58. Questions during the hearing and the s 42A report impliedly criticise Mr Schmuck for not consulting with tangata whenua prior to notification of the application.

59. It is acknowledged that it is best practice for both the Council and the applicant to do so. But s 36A of the Act makes it clear that there is no duty on either the applicant or the Council to do so.[27]

60. However, following Ngati Hine's presentation at the hearing, Mr Schmuck approached Mr Cooper with a view to instigating some discussion between the parties. Subsequent contact has been made and the matter progressed. I understand further progress will be made following the decision on his application. A copy of the email chain is **attached**, marked "**F**".

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[27] Watercare Services v Auckland Council [2011] NZEnvC 155

Deemed Coastal Permit

61. Mr Schmuck has considered the concerns raised in respect to the above. Following discussion with Mr Maxwell, he has agreed to surrender that part of the Deemed Coastal Permit ("DCM") relating to the wharf. The DCM for the slipway will not be surrendered.

62. A copy of Mr Schmuck's instructions to Mr Hood are **attached**, marked "**G**".

Response to matters raised by submitters

63. While obviously expressing views passionately held, many of the submissions and submitters focussed on matters not relevant to the application before the hearing, and not relevant to the effects of the proposed activities. The presentations also continued to reveal a number of long held misconceptions, misinterpretations and misunderstandings of the law and the rights given to DOBY/Mr Schmuck by the resource consents he holds.

64. It is not an efficient use of time in these submissions, to note every aspect of concern. Suffice to say, Mr Schmuck has held resource consent to undertake boat washdown, repairs and maintenance on part of the reserve since 31 January 2002. Inspection of the NRC records will show that DOBY (and Mr Schmuck) has taken advice and followed the processes required by the relevant Acts, has a good compliance record, and that allegations of collusion are just that – unsubstantiated allegations.

65. If thought necessary, consideration of the evidence filed on behalf of DOBY/Schmuck at the NRC hearing and the Environment Court appeal held on NRC files will also help to understand the reasons for the appeals in respect to both of those matters. Aspects of natural justice do not apply as Opua Coastal Preservation Inc ("OCP") and/or its individual members were involved with both matters.

66. Then, as in the past and now, no technical or expert evidence was filed by OCP; rather reliance is placed on the opinions of lay people, most of whom hold no qualifications or expertise in the areas within which they assert their opinions. The weight to be given to such evidence was recently discussed in *Meridian Energy Ltd.*[28] There the Court emphasised the fact that, while s 276 of the RMA allowed the Court wider scope to admit evidence than did the Evidence Act, that did not mean that "anything goes," and there was no reason why the rules relating to expert evidence should not apply.[29]

67. Dealing now with some of the more substantive misunderstandings or misconceptions raised in submissions:

Reserve Management Plan

68. Ms Marks, in paras 36 – 42 of her submission, and Mrs Kyriak, on page 20 of her submission, refer to the process which resulted in "significant changes" to the "recently adopted Walls Bay Esplanade

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[28] *Meridan Energy Ltd* [2013] NZEnvC 59

[29] Ibid, at [60] – [67]

Reserve Management Plan" without notification and thus with no community involvement. With respect, the submissions misunderstand the legislation, and the reasons for the amendments sought to the Management Plan. In essence, the Plan as adopted failed to take account of the implications of the resource consents held by Mr Schmuck. The amendments sought to correct that.

69. A Reserve Management Plan is a non-statutory document prepared under the Reserves Act 1977. Its purpose is to indicate the direction in which the Council, with input from the community, considers a particular reserve should or could be developed. It is a guide only with no legal clout. In particular, a reserve management plan cannot override any existing resource consents, or any consents granted in the future. The Reserves Act provides for minor amendments, such as those required to recognise resource consent activities, to be undertaken without notice[30].

70. Under s 104(1)(c) of the RMA, when considering a resource consent application, the consent authority may give regard to non-RMA documents. However, unless those documents have been prepared in accordance with the First Schedule of the RMA, they can be given little weight.[31] Further, when granting consent to an application, s 104 RMA does not require the consent authority to consider the provisions of other Acts, except where the provisions of concern have been integrated into the relevant district or regional plans.[32]

71. The provisions of a Reserve Management Plan for instance, could be relevant under s 104(1)(c) when considering a proposed development of a reserve in circumstances where the Reserve Management Plan was recognised as a relevant method and the objectives and policies of the District Plan referred to the function and purposes of reserves.[33] But that is not the case here.

72. For completeness, I note that s 41(16) of the Reserves Act 1977 provides that a Management Plan is not required for Local Purpose reserves. The decision to prepare a Management Plan for the Walls Bay Reserve arose out of the mediation of the appeals against Mr Schmuck's resource consent applications in 2001 which resulted in the 2002 Consent Order.

The Reserves Act – proviso to s23(2)(a), and Part 10 of the RMA

73. Both Mr Rashbrooke[34] and Mrs Kyriak[35] refer to s 23(2)(a) and its provisos and in particular to "the public's lawful right 'freely to pass and repass over the reserve on foot'". They make various claims - that the excavation (the canyon as Mr Rashbrooke calls it), the landscaping, the parapet walls, the waterblasting, the screens, and the working on stationary boats – will all seriously impede access over the reserve and thus be contrary to the s 23(2)(a) second proviso.

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[30] Reserves Act 1977, s 41(9)
[31] *Campbell v Napier City Council* EnvC 067/05, at [57]
[32] *Darroch v Whangarei District Council* EnvC A018/93 (PT)
[33] *Howick Residents and Ratepayers Association Inc v Manukau City Council* EnvC A001/2009, at [40], [41]
[34] See Rashbrooke "Submission Expansion" - Conceptual pp 3, 4, 8 for example
[35] See Kyriak submission pp16, 33, 34, 55, 60

74. Mr Rashbrooke claims that the movement of all "contaminating" activities to the boatyard is mandated specifically by the s 23(2)(a) provisos.[36] Mrs Kyriak claims a recent Supreme Court case shows that "a Council administering a reserve, is required to make its decision in accordance with s 23 of the Reserves Act 1977".[37]

75. Both Mrs Kyriak and Mr Rashbrooke also claim that the reserve was created by way of subdivision under Part 10 of the RMA when the stopped portion was separated from the remainder of the unformed road.[38]

76. However, with respect, Mrs Kyriak and Mr Rashbrooke have misread and misinterpreted s 23(2). Neither the second proviso to s 23 of the Reserves Act nor Part 10 of the RMA apply to the reserve. The reserve was not and has not been subdivided. The stopping of a road and issuing of title is a statutory process, not a subdivision.

77. Section 23 of the Reserves Act 1977 deals with Local Purpose reserves with s 23(1) requiring the provisions of the Act to have effect for the purpose of providing and retaining areas for the local purpose for which the reserve is classified. Section 23(2) requires:

> (2) [H]aving regard to the specific local purpose for which the reserve has been classified, every local purpose reserve shall be so administered and maintained under the appropriate provisions of this Act that –
>
> (a) where scenic, historic, archaeological, biological, or natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:
>
> Provided that …
>
> Provided also that nothing in this paragraph shall authorise the doing of anything with respect to any esplanade reserve created under section 167 of the Land Act 1948, or section 190(3) or Part 25 of the Municipal Corporations Act 1954 or Part 2 of the Counties Amendment Act 1961 and existing at the commencement of this Act, or any local purpose reserve for esplanade purposes created under the said Part 25 or Part 2 *or under Part 20 of the Local Government Amendment Act 1978* ***[****or under Part 10 of the Resource Management Act 1991****]*** after the commencement of this Act, that would impede the right of the public freely to pass and repass over the reserve on foot, unless the administering body determines that access should be prohibited or restricted to preserve the stability

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36 Rashbrooke Expanded Submission, p 4

37 Kyriak submission, p 34, citing *Rangitira Developments Limited v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2020] NZSC 66 In fact, the Supreme Court discussed the effect of the various Mining Acts on the primacy of coal mining rights in respect of a water conservation reserve with high biological and natural features, and concluded that there was nothing in s 60(2) of the Crown Minerals Act that limits the obligations of the Council under s 23(2)(a) and (b) of the Reserves Act.

38 Kyriak submission, p 34 footnote; Rashbrooke Submission Expansion – questionable legal advice, pp7,8

> of the land or the biological values of the reserve: (*emphasis added*)

78. The reserve was created by virtue of the stopping of an unformed road running along the foreshore. As is noted on the title for the land[39], the reserve is subject to s 345(3) of the Local Government Act 1974.

79. Section 345 of the Local Government Act 1974 deals with the disposal of land not required for road. Of relevance here, s 345(3) provides as follows:

> (3) Where any road or any part of a road along the mark of mean high water springs of the sea, … is stopped, there shall become vested in the Council as an esplanade reserve (as defined in section 2 (1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991 –
>
> (a) a strip of land forming part of the land that ceases to be road not less than 20 m wide along the mark of mean high water springs of the sea, … ; or
>
> (b) the full width of the land which ceases to be road –
>
> whichever is the lesser.

80. Section 2 of the Local Government Amendment Act 1978[40] inserted Parts 18 - 22 into the Local Government Act 1974. Part 20, being ss 270 – 314 of the Local Government Act 1974, related to subdivision and development of land. It was repealed by the coming into force of the Resource Management Act 1991.[41]

81. Section 345 is part of Part 21 of the Local Government Act 1974, not Part 20. The second proviso to s 23(2) quoted above simply does not apply.

82. Further, Part 10 of the RMA deals with subdivision and is not relevant here. The action taken by the Council was to follow the required process under the Local Government Act 1974 and stop the unformed road. It became esplanade reserve on the closure of the road by virtue of the operation of the statute.

The need for the marina berths

83. During the hearing Mrs Kyriak, in response to questions from the Commissioner, indicated that there was no demand for marina berths. That is not correct.

84. As noted in para 36 above, Opua is identified in Policy D.5.19 of the PRP as being an area of significant demand for on-boat water

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[39] Application, Appendix 8

[40] This was a short 4 section Act. Section 2 inserted parts 18-22 into the Local Government Act 1974. So it is obvious that the reference to part 20 of the 1978 Act is a reference to part 20 of the 1974 Act as inserted by the 1978 Act.

[41] See RMA 1991, Schedule 8

storage. The Bay of Islands Marina website shows there are only seven berths for sale, ranging in size from 12m to 50m.

Move boatyard activities to the boatyard

85. A number of submitters[42] consider that DOBY should be required to relocate its activities off the reserve and on to the boatyard site. They argue that the activities are not suitable for a reserve, and that they prevent the public from access to and enjoyment of the reserve.

86. This call comes from people who have never accepted Mr Schmuck's 2002 resource consents; who continue to argue that the only lawful boatyard activity is to move boats up and down the slipway. They have, in the past, also argued that the reserve is the last remaining esplanade reserve in Opua and should be available for the public to enjoy.

87. In fact, Mr Schmuck's consents have been found to be valid and in effect.[43] He has rights, both resource consents and easements, to undertake waterblasting and, in specified circumstances, repair and maintenance of boats in specified areas on the reserve. None of the issues providing for termination of the resource consents apply.

88. In reality, it has to be remembered that if it wasn't for Mr Schmuck's actions in initiating the closure of the road to provide for easements for boatyard activities, there would be no reserve there at all.

Conditions

89. Over the past week or 10 days, Mr Hood worked with Mr Hartstone and Mr Maxwell in an attempt to agree a set of conditions. They came close but didn't quite get there. There are three areas of disagreement – conditions 31, 34 and 51 – with a few minor amendments for clarity.

90. A copy of the conditions as agreed by NRC, with comments by Mr Hood, together with a supplementary statement from Mr Hood advising the detail of his concerns is **attached**, marked "**H**". I generally agree with and support those concerns.

91. In particular, I have grave concerns about the NRC iteration of condition 31, the condition volunteered by Mr Schmuck.

92. As it stands, condition 31 is not the condition that was offered. It is more in line with a condition seeking to impose a gloss on the words in s 122(5)(b) so that they read "except to the extent *the consent authority* considers reasonably necessary*"* as was held by the Court of Appeal in *Hume v Auckland Regional Council.*[44]

93. This is a working, not a public, wharf. As was shown in my opening submissions, case law clearly indicates that restriction on public access is appropriate in those circumstances. Reasonable public

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42 Rashbrooke, Dysart, Kyriak, OCP, Larcombe, Marks

43 *Schmuck v Far North District Council and Ors* [2014] NZEnvC 101, at [25] – [48]' The decision also discusses the status of the Consent memorandum, see [49] – [55]

44 CA262/01, Court of Appeal 17 July 2002, Tipping, McGrath, Glazebrook JJ

access with the consent of the consent holder in accordance with the circumstances existing on the wharf at the time is the appropriate measure for a condition on this consent for a small boutique boatyard. Take a look around at the (limited) access provided by much larger – and publicly owned - wharfs/marinas in the near vicinity.[45]

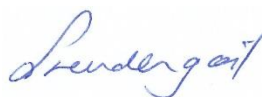
94. Mr Schmuck does not agree with, and pursuant to his rights under s 108AA, will not accept the condition as written.

95. He remains willing to accept the condition he volunteered with a minor amendment to the hours, as shown in the tracked changes to the draft conditions attached to this reply:

> 31. The consent holder shall have exclusive occupancy of the area of seabed within the boundary of the Occupation Area shown on Northland Regional Council plan number 4965 except that the consent holder shall allow reasonable public access to and through this area, and reasonable public access to and use of the dinghy ramp, wharf and pontoon structures as set out below:
>
> (a) Public access to the dinghy ramp to the south of the wharf, and beach landings to both sides of the wharf, to be available at all times;
>
> (b) Public access past the wharf sign board, security gate and charter boat berth area, may be restricted by the consent holders when working conditions require;
>
> (c) Public access through the security gate is to be permitted from 0700-1800, and 0700-2000 during NZ Daylight Savings time when the consent holders of the facility are on site and working conditions will allow, provided that fishing, collection of seafood and the bringing of any equipment onto the structures is prohibited.

96. Alternatively, he will accept the condition imposed on the current coastal permit, as reiterated in the s 42A report:

> 31 The Consent Holder shall have exclusive occupation rights within the 'Occupation Area' identified on the Northland Regional Council Plan Number 4953/1, except that the Consent Holder shall allow reasonable public access to and through this area and reasonable public access to and use of the wharf and pontoon structures.



C Prendergast
Counsel for the applicant
1 September 2020

[45] See the Reply for Interesting Projects Ltd