

Man O' War Station Ltd v Auckland Council
(formerly Auckland Regional Council)

Environment Court Auckland
19 December 2014

ENV-2009-AKL-176;
ENV-2009-AKL-187;
[2014] NZEnvC 260

Principal Environment Judge LJ Newhook, Environment Commissioner
RM Dunlop and Environment Commissioner K Prime

Resource consent — Adverse effects — Minor or transitory adverse effects — Whether any individual effect was significant — “On balance” — “Largely avoided” — “Essentially avoided” — Resource Management Act 1991, ss 3, 58 and 104.

In September 2013 the Environment Court issued an Interim Decision relating to a revised proposal for a consent to construct a dwelling. In the Interim Decision the Court found that the revised proposal had “largely avoided” or “essentially avoided” any adverse effects. The Court determined that the proposal would meet the purpose of the Resource Management Act 1991 if a number of minor amendments were made and conditions met.

The parties consulted and made changes to the consent conditions to address the Environment Court’s concerns. The changes were presented to the Court in October 2013. Between November 2013 and April 2014 the Supreme Court considered the appeal in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195. In that case the Supreme Court found that it would be improbable if any activity that has a “minor or transitory adverse effect” needed to be prohibited to preserve the natural character of the coastal environment.

In light of the Supreme Court’s decision the Environment Court re-considered the evidence behind its findings in the Interim Decision.

Held: (granting the resource consent)

(1) A finding that something has “largely avoided” or “essentially avoided” any adverse effects can have two connotations. It could refer to a collection of effects, none of which is more than minor in any respect, or a collection of adverse effects, some of which are minor, but some of which might individually rank as something greater. The evidence here was that “on balance” the proposal would preserve the existing natural

character. This wording appears to have been chosen out of a conservative analysis in the witness's approach. There were no individual elements which could be described as significant, among a collection of elements generally no more than minor. All potentially adverse effects were assessed as either low or negligible (see [19], [20], [21], [22]).

Other cases mentioned in judgment

Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

Man O' War Station Ltd & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) [2013] NZEnvC 233.

Man O' War Station Ltd v Auckland City Council [2010] NZEnvC 248.

Man O' War Station Ltd v Auckland Regional Council HC AK CIV-2010-404-5288, 11 May 2011.

Man O' War Station Ltd v Auckland Council (formerly Auckland Regional Council) [2012] NZEnvC 84.

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).

Wairoa River Canal Partnership v Auckland Regional Council [2010] NZEnvC 309, (2010) 16 ELRNZ 152.

Resource consent

The Environment Court reconsidered factual findings which it made in an Interim Decision in light of findings made by the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

MJE Williams for the Man O' War Station Ltd.

JA Burns for the Auckland Council.

PRINCIPAL ENVIRONMENT JUDGE NEWHOOK, ENVIRONMENT COMMISSIONER DUNLOP AND ENVIRONMENT COMMISSIONER PRIME.

Introduction

[1] On 30 September 2013 this Court issued an "Interim Decision of Environment Court Indicating Consent to Construction of a Small Dwelling after Reference Back from the High Court Concerning a Larger Proposal".¹ This decision was issued after a long and complex history which included an original decision,² High Court appeal,³ an interlocutory decision regarding the extent of matters remitted to this Court and the effect of the substantial changes to the proposal sought since that decision

1 *Man O' War Station Ltd & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council)* [2013] NZEnvC 233.

2 *Man O' War Station Ltd v Auckland City Council* [2010] NZEnvC 248.

3 *Man O' War Station Ltd v Auckland Regional Council* HC AK CIV-2010-404-5288, 11 May 2011, Venning J.

was issued,⁴ and then the rehearing itself; which produced the interim decision. In that decision this Court described the task before it as:⁵

... an exercise of reconsidering the two matters referred back to us by the High Court, and weighing them with the few remaining relevant factors from the first hearing. Notably, the proposal has been altered very significantly (substantially reduced in terms of its effects on the environment and the way in which it must be assessed having regard to relevant statutory instruments)

...

[2] In considering the revised proposal in light of the High Court decision and the changes made to it since the original decision was made, we determined the following:⁶

[The] proposal would meet the purpose of the Act when the following relatively minor matters are tidied up to the satisfaction of the Court:

- a. ... Attachment 1: Appendix 2 requires amendment to include the outdoor utility storage area described ... Further, we consider that it would be desirable for there to be a condition that recreational equipment, domestic appurtenances, and possibly some types of vehicles when not in active use, be stored in the area to avoid or mitigate adverse cumulative visual effects.
- b. ... Attachment 5: Condition (1), the Application Materials/Plans second bullet, cites a landscape and visual assessment prepared by Ms Gilbert ... more particularly, Appendix 1 “Landscaping Plan” and Appendix 2 “Restoration, Implementation, Maintenance and Management Plan”. The landscape and visual assessment is Attachment 1: Appendix 4, but does not appear to contain an Appendix 1 (and there is no reference to one in the Contents list). Appendix 2 at p 104 and following does not appear to contain plans illustrating the extent of re-vegetation planting described in Section 2. These should be supplied and found acceptable by us, and referred to in conditions.
- c. Attachment 5: Condition (1) – Application Materials/Plans 11th bullet, cites the Westergaard Gill revised plans at Attachment: Appendix 2. The condition appears to omit elevation drawing A-CD-12 8/8/12 in Appendix 2 from the 11th bullet and to omit the listed bridge section drawing from Appendix 2.
- d. Appendix 5: Condition (1) – Application Materials/Plans 12th bullet, cites a GWE drawing dated 24.10.12 which postdates the GWE Wastewater Assessment in Attachment 1: Appendix 8. The latter has a drawing GWE-OI dated 3/9/12 at p270 that shows a proposed primary disposal area. Is the reference to Condition 1 accurate? Might the 12th bullet be better juxtaposed with the seventh bullet on the same subject?
- e. Attachment 5: Condition (19)(ii) – Desirably there should be quantified metrics for the transparency and reflectivity of the glass. The metrics referred to are “visible light transmission” and “visible

4 *Man O' War Station Ltd v Auckland Council (formerly Auckland Regional Council)* [2012] NZEnvC 84.

5 *Man O' War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council)*, above n 1, at [53].

6 *Man O' War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council)*, above n 1, at [61].

- light reflection” respectively. Low transmission and reflectivity ratings should be aimed for.
- f. Mr Clough, at para 31 of his evidence-in-chief commented on proposed consent conditions about protection of an area of intact midden, to be secured by temporary fencing for the whole of the beachfront area shown in his Attachment 1: Figure 3 at p439. We do not consider that any of the archaeology conditions 9, 10, and 16-18, have this effect unless achieved indirectly through the Archaeological Investigation and Monitoring Plan (February 2013) and related NZHPT Authority required by Condition 9 (and now obtained). Clarification if needed. Proposed Condition 10 appears to require protection of a markedly smaller area during construction (refer Attachment 1: Appendix 6: Figure 8, which is a photograph with extent of site not delineated – p 166).
 - g. “NZCPS Policy 11(a)(i) might be potentially relevant to the possible presence of dotterels. A condition would appear desirable, rather than the simple Advice Note 7, noting that Condition 3 appears to apply only to the pre-development phase. Signs to alert visitors to the bach as they arrive at the beach, and members of the public landing on shore from boats, would appear to be desirable.”

[3] The parties then consulted and made changes to the conditions to address the Court’s concerns. These changes were presented to the Court, along with a joint memorandum in support, on 10 October 2013. From the wording at para 26 of that joint memorandum it was unclear as to whether or not these were intended to be absolute, but a subsequent memorandum dated 27 March 2014 confirmed that the draft conditions submitted last October represented the parties’ final positions. A “clean” version of the conditions submitted by the parties last October is attached hereto and marked as Annex A.

[4] Meanwhile, between November 2013 and April 2014, the Supreme Court undertook the hearing of an important appeal from a decision of the High Court in the notable “*King Salmon*” litigation originally heard by a Board of Inquiry. Of relevance in the present case, the Supreme Court decision⁷ considered whether the long-standing “overall broad judgment” approach⁸ was to prevail, or whether certain provisions of the 2010 NZ Coastal Policy Statement evidenced the presence of environmental bottom lines, and whether said provisions were considered to provide a veto. Of interest, our Interim Decision after Reference Back was discussed by the Supreme Court, along with numbers of other decisions of the Environment Court and higher Courts.

[5] While the Supreme Court discussed various passages of our Interim Decision in a manner from which it is possible to infer approval, there were no express findings one way or the other. We regret the time that it has taken to produce this decision, but we wished to deliberate carefully about two features of the present situation in particular, first as to whether the findings of the Supreme Court relating to the approach to be

7 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

8 Recorded as having derived from the often-cited High Court decision in *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

taken by decision-makers to proposed changes to Policy Statements and Plans, apply as well to resource consent activity under s 104 of the RMA; second some phrases in landscape evidence on the reference back, noted with approval by us in our Interim Decision, needed to be re-considered in light of the Supreme Court decision.

[6] In light of the Supreme Court decision, a question that we had required the parties to address prior to issuing our Interim Decision, would appear to remain pertinent. That is:

Whether as a matter of law, the NZCPS can take a harder line than the Act? Put another way, should the seemingly strong words in Policy 15(a) be qualified by way of an interpretive approach that reflects s 6(b) RMA.

[7] We had concluded that the provisions of the NZCPS could be interpreted as taking a more stringent approach. In the context of a Plan Change, we infer approval for our approach in the Supreme Court's decision, with elements of Policies 13 and 15 being held to amount to something in the nature of a "bottom line". We note that in our Interim Decision we did, however, qualify our conclusion with a proviso "as long as it is ultimately to achieve the purpose of the Act and is consistent with ss 56–58A". It would appear,⁹ with some exceptions, the Supreme Court essentially found that the NZCPS is to be considered necessarily as being in accordance with Part 2.

[8] Another aspect of our Interim Decision to be considered by the Supreme Court was our finding that no one provision of the NZCPS can be read as imposing a "veto". The Supreme Court appeared to accept our finding that there are tensions within Policies of the NZCPS in the sense of them pulling in different directions, but appears to have read down the extent of conflict, at least in the circumstances of the decision before it. In particular, it said:¹⁰

But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences and wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

And further:¹¹

Only if the conflict remains after analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

And again:¹²

A danger of the "overall judgment" approach is that decision makers may conclude too readily that there is a conflict between particular policies and

9 From [85] and [88] of the Supreme Court decision.

10 At [129].

11 At [130].

12 At [131].

prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them ...

[9] We turn now to consider the meaning of the word “avoid”. Once again, we note that the Supreme Court specifically referred to our finding in the Interim Decision that the word “avoid” does not mean to “prohibit”, possibly by inference, with approval. It discussed as well findings of another division of the Environment Court in *Wairoa River Canal Partnership v Auckland Regional Council*.¹³ The Supreme Court said:¹⁴

Our concern is with the interpretation of “avoid” as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that “avoid” has its ordinary meaning of “not allow” or “prevent the occurrence of”. In the sequence “avoiding, remedying, or mitigating any adverse effects of activities on the environment” in s 5(2)(c) for example, it is difficult to see that “avoid” could sensibly bear any other meaning. Similarly, in relation to Policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words “avoid,” “remedy,” and “mitigate.” This interpretation is consistent with Objective 2 of the NZCPS which is, in part, “to preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities.”

[10] The Supreme Court then compared and contrasted the consequences of two alternative approaches to ensuring “prevent[ion of] occurrence” depending on whether an overall judgement approach is taken, or one involving environmental bottom lines.

[11] After extensive discussion it held¹⁵ that while a policy in the NZCPS cannot be a “rule” as defined in the RMA, it might nevertheless have the effect of such in ordinary speech. The discussion proceeded with a heavy emphasis on provisions of the RMA about plan making, particularly s 58. At the conclusion of its detailed discussion, the Supreme Court found comprehensively against the “overall judgement” approach.

[12] The Supreme Court then noted that in the *NZ Rail* case previously cited, the High Court had expressed the view that Part 2 of the RMA should not be subjected to “strict rules and principles of statutory interpretation which aim to extract a precise and unique meaning from the words used”, stressing instead a “deliberate openness about the language, its meanings and its connotations which ... is intended to allow the application of policy in a broad and general way”. The Supreme Court held in contrast that the 2010 NZCPS had undergone a thoroughgoing process of development and that its language did not have the same openness as the language of Part 2.¹⁶

13 *Wairoa River Canal Partnership v Auckland Regional Council* [2010] NZEnvC 309, (2010) 16 ELRNZ 152.

14 At [96].

15 At [116].

16 It is not apparent to us whether it was argued before the Supreme Court that the NZCPS should be considered as having been promulgated in light of the long-standing “overall broad judgement” approach originally ordained in *NZ Rail*, but it is not necessary for us to consider the point further as we are bound by the findings of the Supreme Court.

[13] It was apparently argued by counsel there in support of the “overall broad judgment approach”, that to deny such would be to make the reach of Policies 13(1)(a) and 15(a) “over-broad”. The argument was that, because the wide definition of “effect” in s 3 of the RMA would carryover to the NZCPS, any activity with an adverse effect, no matter how minor or transitory, would have to be subject to complete avoidance. Taking account of the precise wording of Policies 13(1)(a) and (15)(a), the Supreme Court never the less held:¹⁷

It is improbable that it would be necessary to prohibit any activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or development may enhance the natural character of an area.

[14] We consider that the passage just quoted is of importance. It has caused us to reconsider certain findings in our Interim Decision, and the evidence on which they were based, to ascertain whether we should resile from the findings.

[15] Having conducted that exercise, we have decided that we need not embark on a careful inquiry as to whether the decision of the Supreme Court applies in consideration of applications under s 104, first because an answer in the present case is presented in another way, and second because it does not seem appropriate to attempt to answer such legal question where argument has been brief at best, and the decision is being made “on the papers”.

[16] The following are our reasons.

[17] The re-examination of findings in our Interim Decision has been to see whether they might fit within the evidently narrow compass of “minor or transitory adverse effects”.

[18] We were concerned about our findings that the revised proposal had “largely avoided” adverse effects,¹⁸ or “essentially avoided” them.¹⁹

[19] A fairly significant cause of delay in issuing this Final Decision has been that in revisiting those findings, we needed to trawl through the evidence of the appellant’s planning witness Ms BM Gilbert and its planning witness Ms WS Baverstock, to see whether our findings could meet the test. This is because “largely avoided,” or “essentially avoided,” could on the one hand connote a collection of effects none of which are more than minor in any respect, or on the other a collection of adverse effects, some of which are minor but some of which might individually rank as something greater.

[20] The phraseology in question had been taken from various paragraphs in the evidence of Ms Gilbert concerning the new reduced proposal. In addition, she drew our attention to a summary in an earlier report in which she opined that:

On balance, the proposal will preserve the existing natural character values of Owhiti Bay and not generate adverse effects with respect to natural character. [Emphasis supplied by us.]

17 At [145].

18 See [55] of the Interim Decision.

19 See [57] and [58] of the Interim Decision.

Once again we were concerned to know whether there were any individual elements that could be described as significant, among a collection of elements generally no more than minor.

[21] The answer to these questions was ultimately found by a careful re-reading of Ms Gilbert's report referred to, exhibited as an attachment to Ms Baverstock's evidence. This was an extraordinarily long and complex document. Having noted Ms Gilbert's methodology, in particular her rankings for visual effects and landscape values, we have re-read and analysed her assessment of each of these. By doing this we have ultimately been able to satisfy ourselves that there are no "outliers" among the collection of potentially adverse effects which are all assessed variously to either be low or negligible, where "low" is recorded as being where a proposed development is unlikely to comprise an adverse effect, and "negligible" is a situation where the proposed development is barely discernible and will not comprise an adverse effect.

[22] We have therefore ultimately been able to satisfy ourselves that the phrases "on balance," "largely avoided," and "essentially avoided," have been employed by Ms Gilbert out of a conservative approach to her analysis. We have therefore been able to satisfy ourselves that any adverse effects, whether individually or collectively, will satisfy the wording cited from para 145 of the Supreme Court decision. It therefore becomes unnecessary for us to rule whether the key findings in the Supreme Court decision are as applicable to the RMA consenting regime as they are to plan making. If they are so applicable, they are met.

[23] We can proceed in this decision to confirm the granting of consent on conditions, and will turn now to discuss the detail of that.

Amendments to Plans & Conditions

[24] We now consider each of the matters raised in para 61 of the Interim Decision and the changes made to the conditions in turn.

Outdoor Utility Storage Area

[25] The Court required that a plan showing the Outdoor Utility Storage Area be included in the conditions, as well as a condition "that recreational equipment, domestic appurtenances, and possibly some types of vehicles when not in active use, be stored in the area to avoid or mitigate adverse cumulative visual effects".²⁰

[26] An additional plan has been drafted (A-CD-06, dated 7/14/2013) which shows the Outdoor Utility Storage Area and retaining wall at the rear of the bach. This is now referred to in the list of plans at Condition 1. A copy of that plan is attached hereto and marked as Annex B.

[27] A further condition 34 has been also been added which specifies the use of this area:

[34] The consent holder shall ensure that recreational equipment, domestic appurtenances (such as portable outdoor furniture) and any vehicles (for example quad bikes) used to access the dwelling, shall be stored in the

20 *Man O' War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council)*, above n 1, at [61](a).

“outdoor utility storage area”, as shown on plan A-CD-06 – Site Layout (dated 7-14-2013) when not in active use.

Landscaping Plan & Restoration, Implementation, Maintenance and Management Plan

[28] In reference to the Landscaping Plan, the Interim Decision stated that “[t]he landscape and visual assessment ... does not appear to contain an Appendix 1 (and there is no reference to one in the contents list)”.²¹ Regarding the Restoration, Maintenance and Management Plan, the Interim Decision states that it “does not appear to contain plans illustrating the extent of re-vegetation planting described in Section 2”.²²

[29] Although it was not referred to separately on the contents list, the Landscape Plan was included in the Expert Witness Evidence bundle at p 103. For clarity is it attached hereto as Annex C. That plan shows the extent of the re-vegetation area described in the Landscape and Visual Effects Assessment as “active re-vegetation of the steep eroding escarpment enclosing the bay to the south”.²³ The Plan and Assessment are both referred to in the second bullet point of condition 1.

Omission of elevation drawing A-CD-12 and the listed bridge section drawing

[30] While these two plans were attached to the submissions of counsel for Man O'War Station Ltd at the rehearing, an earlier version was included in the bundle of evidence, but not included in the the list of plans at the 12th bullet point of condition 1 of the draft Resource Consent conditions presented at the hearing.

[31] The parties have agreed to amend the list at the 12th bullet point to include the following:

- (a) A-CD-12A – Elevations (7-14-2013)²⁴
- (b) A-CD-13 – (24-10-12)²⁵

[32] The drawing A-CD-12 referred to in the Expert Evidence Witness bundle and the Interim Decision has been superseded by A-CD-12A now referred to in the conditions and attached hereto as Annex D1. The only material difference between these two plans is that the latter includes details of specific timber stains. Plan A-CD-13, the bridge section, is attached hereto as Annex D2.

Drawing dated 24.10.12 postdates the GWE Wastewater Assessment

[33] In the interim decision the Court drew the parties' attention to the fact that the plan referred to in the then 12th bullet point of condition 1 postdated the Wastewater Assessment. This was thought to be an error. The Court also suggested that this reference might be better included as part of the then seventh (now eighth) bullet point, which refers

21 Above, at [61](b).

22 Above.

23 Statement of Evidence of Wendy Sharee Baverstock on Behalf of Man O'War Station Ltd (28 March 2013) attachment I, appendix 4, p 104.

24 Attached hereto as D1.

25 Attached hereto as D2.

to “Onsite Wastewater Disposal Site Evaluation Investigation Owhiti Bay Batch, Waiheke Island”.

[34] The parties have explained that the plan postdates the report because it was produced following a request by the Council for further information regarding the revised proposal, so the October date is correct. The parties have agreed to delete the then 12th bullet and to include reference to the October “Proposed Wastewater Disposal Area, Treatment Plant Location and Water Supply Details” in what is now the eighth bullet point.

Quantified metrics for the transparency and reflectivity of the glass

[35] In the Interim Decision we directed parties to include specific metrics regarding building material transparency and reflectivity and specified that “[l]ow transmission and reflectivity ratings should be aimed for”.²⁶

[36] The parties have pointed out that the intention would be to aim for low reflectivity and high transmittance as the two metrics are the converse of one another. The parties have amended condition 19 to include metrics not only for glass as set out in the Interim Decision, but also to include maximum LRV values for roofing and joinery materials. As referred to above, plan A-CD-12A includes reference to specific timber stains and reference to it has also been included in condition 19.

Protection of intact midden by temporary fencing

[37] In the Interim Decision we did not agree with Mr Clough as to the effect of the conditions proposed regarding matters of archaeology, and directed the parties to clarify certain matters.²⁷

[38] The parties have now presented a revised condition 10 which refers to Mr Clough’s plan. It now expressly requires protection of the full extent of the area shown in his “Archaeological Monitoring Plan for Planting and Re-vegetation & Temporary Fencing (Figure 1 a)”. For ease of reference that plan is attached hereto and marked as E. The parties have also included reference to Owhiti Bay: Archaeological Investigation and Monitoring Plan in what is now the sixth bullet point of condition 1.

NZCPS Policy 11(a)(i) might be potentially relevant to the possible presence of dotterels. A condition would appear desirable, rather than the simple Advice Note 7

[39] It was suggested in the interim decision that dotterels might be present in the area, and given the increased traffic through the area because of the bach, signage alerting users and visitors to the fact should be included in the conditions.

[40] Amendments have been made to condition 32 regarding signage and a 35th condition has been included also to address this issue. These amendments address the recommendations made by Dr Keesing in his evidence.

26 *Man O’ War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council)*, above n 1, at [61]e.

27 Above, at [61]f.

[41] The amended conditions satisfy all concerns raised in the Interim Decision and the Resource Consent is therefore granted in the terms set out in Annex A, and by reference to the plans annexed as B, C, D1, D2, and E.

[42] The parties' memorandum of 10 October does not address the issue of costs, possibly because it does not arise in the context of the quite convoluted history of the proceeding and the ultimately negotiated solution. Nevertheless, out of caution, the Court directs that any application for costs is to be filed with the Court within 20 working days of the date of this decision. Any response is to be filed within 15 working days following that and any final reply filed within 10 working days thereafter.

[43] The appeal is otherwise dismissed.

Orders

- (A) The resource consent is granted, subject to the conditions attached to this decision and marked "A", together with the plans attached as B, C, D1, D2, and E.
- (B) The appeal is otherwise dismissed.
- (C) Any application for costs is to be filed with the Court within 20 working days of the date of this decision. Any response is to be filed within 15 working days following that and any final reply filed within 10 working days thereafter.

List of Annexures

- A. "Clean" version of the conditions.
- B. Plan A-CD-06 (dated 7/14/2013), showing outdoor utility storage area.
- C. Boffa Miskell Landscaping Plan (dated 10/9/2012) showing Revegetation Planting.
- D1. A-CD-12A-Elevations (7/14/2013)
- D2. A-CD-13-(24/10/12)
- E. Archaeological Monitoring Plan for Planting and re-vegetation & Temporary Fencing

Annexure A

**CONDITIONS ON RESOURCE CONSENT APPLICATION A 725
MAN O'WAR BAY ROAD, OWHITI BAY, WAIHEKE ISLAND**

Pursuant to section 108 of the Resource Management Act 1991, this consent is subject to the following conditions:

Staging of Conditions

- (A) *Stage 1 Conditions: Pre-development* – Conditions required to be met prior to works commencing on site;
- (B) *Stage 2 Conditions: Development in progress* – Conditions required to be met throughout the period of works on the site;
- (C) *Stage 3 Conditions: Post-development* – Conditions required to be met following site works and including conditions that relate to the implementation and operation of the activity for which consent has been granted;
- (D) *Other* – Conditions that relate to the development in its entirety.

Application Material/Plans

- (1) The proposed activity shall be carried out in accordance with the plans and all information submitted as part of the application, subject to modifications required by the conditions set out below, being:
 - Assessment of Effects entitled “Revised Application for Land Use Consent for A Residential Dwelling at Owhiti Bay, Waiheke Island, 725 Man O’ War Bay Road” prepared by Isle Land Ltd and dated September 2012;
 - Report entitled “Owhiti Bay Man-O-War Farm, Waiheke Island, Landscape and Visual Assessment” prepared by Bridget Gilbert and dated September 2012 and accompanying appendices referenced as—
 - Appendix 1: Landscaping Plan (dated 10 September 2012); and
 - Appendix 2: Appendix 2: Restoration, Implementation, Maintenance and Management Plan.
 - Report entitled “Proposed Owhiti Bay Bach, Waiheke Island – Additional Geotechnical, Stormwater and Flooding Comments” prepared by URS Limited dated 7 September 2012;¹
 - Report entitled “Owhiti West Stormwater & Flooding Assessment” prepared by URS Limited dated 7 September 2012;
 - Report entitled “Owhiti Bay: Revised Residential Development – Spencer Property: Archaeological Assessment”, prepared by Clough & Associates Limited and dated September 2012;
 - Report entitled “Owhiti Bay: Archaeological Investigation and Monitoring Plan”, prepared by Clough & Associates Limited and dated February 2013;

¹ Please note: this report should be read in conjunction with the Geotechnical report referenced as “Geotechnical Appraisal Proposed Man O War Retreat, Owhiti Bay, Waiheke Island – Revision 2” dated 4 October 2007.

- Ecological Report entitled “Proposed New Dwelling/Holiday Bach at Owhiti Bay” prepared by Boffa Miskell dated 7 September 2012;
- Report entitled “On Site Wastewater Disposal Site Evaluation Investigation Owhiti Bay Bach, Waiheke Island” prepared by GWE Consulting Ltd dated September 2012 and plan referenced as “Proposed Wastewater Disposal Area, Treatment Plant Location and Water Supply Details” referenced as GWE-01 dated 24-10-2012;
- Report entitled “Coastal Hazard Review Proposed Development, Owhiti Bay” prepared by Riley Consultants Ltd dated 7 September 2012
- Report entitled “An Arboricultural Implication Report on the Proposed Construction of a Beach House at Man O' War Farm, Owhiti Bay, Waiheke Island” prepared by The Specimen Tree Company Ltd dated September 2012;
- Sediment Control Plan prepared by Isle Land Ltd referenced as “Sediment Control Plan, 725 Man O' War Bay Road, Owhiti Bay, Waiheke Island” dated September 2012;
- Plans prepared by Westergaard Gill Architecture Ltd referenced as “001 Owhiti beach house” sheet references as follows:
 - A-CD-01 Location Plan (dated 24-8-2012)
 - A-CD-02 – Site and Roof Plan (dated 8-8-2012)
 - A-CD-03– Earthworks Plan (dated 15-8-2012)
 - A-CD-05 – Level 0 Plan (dated 8-8-2012)
 - A-CD-06 – Site Layout (dated 7-14-2013)
 - A-CD-10 – Cross Sections (dated 8-8-2012)
 - A-CD-11 – Long Section (dated 8-8-2012)
 - A-CD-12A – Elevations (dated 7-14-2013)
 - A-CD-13 – Bridge Section (dated 24-10-12)

STAGE 1 CONDITIONS: PRE-DEVELOPMENT

Construction Management

- (2) Prior to the commencement of any works on site (apart from the construction and completion of the stock proof fence required by condition 7), the consent holder shall submit a Construction Management Plan (CMP) which shall be to the satisfaction and approval of the Council's Compliance Monitoring Officer. The Construction Management Plan shall include specific details relating to avoiding, remedying or mitigating adverse effects on the environment of the management of earthworks, vegetation protection and management, construction and management of all works associated with this development as follows including, but not limited to:
- (i) The site address to which the consent relates.
 - (ii) Details of the site manager, including their contact details (phone, email address, postal address); A cell phone number for after hours emergencies shall also be supplied.

- (iii) Any means, such as a restriction on the size and method of construction vehicles and machinery accessing the site, required to ensure that no damage occurs to adjoining dune systems and adjacent vegetation throughout the construction period
- (iv) Identification of archaeological sites, including the methodology for the protection and the discovery of any site/features during construction, which shall be in accordance with the New Zealand Historic Places Trust's consent to modify the site under the New Zealand Historic Places act 1993.
- (v) Location and methods of vehicle and construction machinery access throughout the complete construction period, including all site works.
- (vi) Location of vehicle parking for site workers and sub-contractors to be provided on site.
- (vii) Location of workers' conveniences (e.g. portaloos).
- (viii) Proposed hours of work on the site (NB hours shall correspond with any other condition in this consent relating to working hours);
- (ix) Measures to be adopted to maintain the site in a tidy condition in terms of disposal/storage of rubbish, storage and unloading of building materials and similar construction activities
- (x) Procedures for controlling sediment runoff, dust and the removal of soil, debris and construction materials.
- (xi) Construction management techniques in accordance with the recommendations contained in the ecological report referenced in condition 1.

The above details shall be shown on a site plan and supporting documentation as appropriate. The approved Construction Management Plan shall be implemented and maintained throughout the entire construction period to the satisfaction of the Council's Compliance Monitoring Officer.

Pre-Work Dotterel Survey

- (3) The consent holder shall undertake a pre-work survey of all the Owhiti Bay dune system, and surrounding areas to determine the presence of any breeding Dotterels. If any nesting areas are found during this survey, the appropriate protection measures are to be implemented under the guidance of the consent holder's ecologist to the satisfaction and approval of Council's Compliance Monitoring Officer before any construction work can be undertaken. The results of the survey shall be made available to the Council.

Tree Protection

- (4) A suitably experienced, Council-approved arborist ("nominated arborist") shall be employed, at the consent holder's expense, to

monitor, supervise and direct all works within the drip line or in the vicinity of protected trees, for the duration of the works related to this consent.

- (5) Protective fencing consisting of—
- 1.5 metre high steel waratahs;
 - orange mesh; and
 - three strands of tensioned fencing wire shall be erected outside and around the dripline of the protected Pohutukawa trees situated in proximity to the proposed dwelling in accordance with the recommendations of the appointed arborist as outlined in the report referenced in condition 1. The consent holder is responsible for maintaining the condition of the temporary protective fencing and the condition, repair and location of the temporary protective fencing should be regularly inspected as part of the routine tree-monitoring programme.
- (6) The area within the protective fencing and dripline of all protected trees shall be considered total exclusion zones as follows:
- (a) No storage of diesel, cement, building materials, site huts, spoil etc within the delineated area.
 - (b) No washing of equipment or machinery shall occur. Special attention shall be paid to concrete and petrol/diesel operated machinery to avoid contaminating the soil within the dripline of any protected tree.
 - (c) No spillages of substances likely to be injurious to tree health within seepage distance of the delineated area.
 - (d) No access into or works within the delineated area without the prior approval of the appointed arborist.
 - (e) No alteration to the dimensions of the delineated area without prior consultation and agreement from the appointed arborist.
 - (f) No machinery or vehicles (~~unless they can be kept within the bounds of an existing sealed impermeable surface i.e. carriageway, footpath~~).

Stock Proof Fence

- (7) The consent holder shall complete, to the satisfaction and approval of the Council's Compliance Monitoring Officer, all of the stock proof fence enclosing Owhiti Bay as shown on the Owhiti Bay Landscape and Visual Assessment *Appendix 1 Landscape Plan* by Boffa Miskell (dated 10 September 2012, Revision 0) before any works can be undertaken related to this consent. The fence shall be maintained as a stock proof fence at all times.²

² Please note: the plan referenced is appended to the report entitled "Owhiti Bay Man-O-War Farm, Waiheke Island, Landscape and Visual Assessment" prepared by Bridget Gilbert and dated September 2012.

Pre-Construction Meeting

- (8) A minimum of 7 days prior to the commencement of any works on site including earthworks and/or construction works (apart from the requirements set out in this condition), the consent holder or its agent responsible for the development shall arrange an on-site meeting with the Council's Compliance Monitoring Officer with all the contractors responsible for undertaking works to ensure that all parties involved are aware of what is required of them during the construction process. The following requirements will need to be checked and signed off by the Compliance Officer prior to the commencement of construction and/or site works are undertaken:
- Tree and archaeological protective fencing has been erected in the correct position (refer to conditions 4, 5 and 6);
 - The completion of the stock proof fence (refer to condition 7);
 - Sediment control measures are in place (refer to condition 2);
 - Pre-construction requirements identified in the approved CMP required by Condition 2 are implemented;
 - Results of the pre-work dotterel survey is documented along with any protection measures put in place as required by Condition 3; and
 - Conditions 9 and 10 have been met.

Archaeological

- (9) The consent holder shall have the appropriate approvals from the New Zealand Historic Places Trust required under the Historic Places Act 1993 for the modifications of archaeological sites before any works related to this consent, apart from requirements set out in conditions 4, 5, 6 and 7 can be undertaken. A copy of this approval shall be provided to the Council's Compliance Monitoring Officer prior or at the pre-construction meeting.
- (10) The consent holder shall install temporary protective fencing as shown on the plan referenced as "Archaeological Monitoring Plan for Planting and Re-Vegetation & Temporary Fencing (Figure 1a)" sourced from the *Owhiti Bay: Archaeological Investigation and Monitoring Plan*, prepared by Clough & Associates Limited and dated February 2013 referred to in condition 1. The area shown shall be marked off during construction and in no way disturbed by machinery or any construction activity throughout the whole construction period.

Monitoring and access

- (11) The consent holder shall pay the Council a consent compliance monitoring charge, plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the conditions attached to this consent (This charge is to cover the cost of inspecting the site, carrying out tests, reviewing conditions, updating files, etc, all being work to ensure compliance with the resource consent).

The compliance monitoring charge shall be paid as part of the resource consent fee and the consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice.

- (12) The servants or agents of the Auckland Council shall be permitted to have access to the relevant parts of the property at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements and/or take samples and view the records of any measurements that the consent holder is obliged to record under this consent.

STAGE 2 CONDITIONS: DEVELOPMENT IN PROGRESS

Geotechnical/Stormwater

- (13) The development shall be undertaken in accordance with the recommendations of the geotechnical/stormwater and flood reports prepared by URS New Zealand Limited dated September 2012, noted in Condition 1.³ A qualified registered engineer shall be engaged to monitor the construction works and at the conclusion of the works, a completion report shall be submitted by this engineer for the satisfaction and approval of the Council's Compliance Monitoring Officer.

Earthworks

- (14) The consent holder shall implement suitable sediment control measures during all earthworks to ensure that all stormwater runoff from the site is managed and controlled to ensure that no silt, sediment or water containing silt or sediment is discharged to Owahi Bay or watercourses and in accordance with standards and controls described in Auckland Regional Council's Technical Publication 90 (TP90) and the plan prepared by Isle Land Ltd dated September 2012 and referenced as "Sediment Control Plan – 725 Man O' War Bay Road, Owahi Bay, Waiheke Island". The sediment control measures shall be to the satisfaction and approval of the Council's Compliance Monitoring Officer.
- (15) To prevent contamination of natural watercourses or Owahi Bay with water containing soil sediment, there shall be no stock piling of excavated material on the site. Any surplus excavated material (except where this is to be reused on the site) shall be removed from the site and placed in a legally permitted disposal site. Any excavated material to be held temporarily on site is to be contained within a bunded area or enclosed by an approved sediment control fence until utilised on site. Any exposed areas are to be protected from surface water erosion by either top

3 Please note: the report referenced should be read in conjunction with the Geotechnical report referenced as "Geotechnical Appraisal Proposed Man O' War Retreat, Owahi Bay, Waiheke Island – Revision 2" dated 4 October 2007.

soiling or grass seeding or covered by erosion control cloth material as described in Auckland Regional Council Technical Publication 90 (TP90).

- (16) All earthworks undertaken on site shall be supervised by an archaeologist appointed by the consent holder. The archaeologist shall provide to the Council's Compliance Monitoring Officer a report at the completion of earthworks which outlines any findings during the earthworks.
- (17) If any archaeological or cultural heritage sites, including artefacts or human remains, are exposed during site works the following procedures shall apply:
- a. Immediately that it becomes apparent that an archaeological or traditional site has been exposed, all site works shall cease;
 - b. The site supervisor shall immediately secure the area in a way that ensures that any artefacts or remains are untouched;
 - c. The project archaeologist shall notify tangata whenua, the New Zealand Historic Places Trust, the Heritage Team of the Auckland City Council, and in the case of human remains the Police, that an archaeological or traditional site has been exposed so soon as possible so that appropriate action can be taken. This includes such persons being given reasonable time as determined by the Council to record and recover archaeological features discovered before work may recommence on the site.
- (18) In addition to condition 17 the consent holder must ensure any works are monitored by a suitably qualified archaeologist and should any archaeological evidence be uncovered all works shall cease and the archaeology be recorded in accordance with standard archaeological best practice.

The consent holder shall also invite a representative of Ngati Paoa to attend such works for monitoring and supervision purposes. The archaeologist shall prepare report on the supervised works which details what if any archaeological remains are identified during earthworks, with the report to be submitted to the Council's Compliance Monitoring Officer – Hauraki Gulf Islands within one (1) month of the completion of earthworks.

Colours and Materials

- (19) The development shall be finished in the colours and materials as described on the plans prepared by Westergaard Gill Architecture Ltd and specifically sheet A-CD-1 as follows:

- i. Roofing: Dark grey/black membrane roofing, maximum LRV 20%
- ii. Glass: Clear and non reflective.
Double Glazing: Reflectance 16% Transmittance 73% OR

		Single Glazing: Reflectance 11 % Transmittance 82%
iii.	Joinery:	Gun metal grey, maximum LRV 40%
iv.	Cladding:	Dark finished timber – refer Westergaard Gill Architecture Ltd A-CD-12A – Elevations (dated 7-14-2013)
v	Bridge:	Natural timber

Any change to the colours outlined above shall be complementary to the natural surrounding environment. Such change shall be to the satisfaction and approval of the Team Leader, Planning – Hauraki Gulf Islands.

Tree Protection

- (20) The consent holder shall ensure that all contractors, sub-contractors and work site supervisory staff who are carrying out any works within the root zones of any protected trees(s)/vegetation covered by this consent are advised of the conditions of consent and act in accordance with the conditions.
- (21) A copy of the Conditions of Consent shall be available at all times on the work site.
- (22) The nominated arborist shall document the inspections during construction, to monitor compliance with the conditions of the consent and to evaluate general tree health. A copy of the monitoring report following each visit shall be retained on site by the Project Manager, while a further copy is to be retained by the nominated arborist.
- (23) All excavations associated with the development and access way, that are within the root zones of any retained protected tree(s) or vegetation shall, where within the root zones of retained protected trees(s)/vegetation, be dug by hand, using hand tools only (i.e. hand held spade) to a minimum depth of 500 mm below ground level.
All excavation works within the root zones of protected vegetation shall be undertaken under the supervision and direction of the Appointed Arborist.
- (24) No washing of equipment, vehicles, concrete trucks, tools or materials shall occur in any areas where the surface is permeable (eg grassed areas) or where the run-off is directed towards permeable areas.

At no time is any soil or fill to be deposited within the drip line of any protected tree or group of trees, or the dune system sounding this the site.

- (25) No vehicles, machinery, equipment or materials shall be operated, manoeuvred, temporarily parked or stored within the dripline of any protected trees or on the dune system.

Landscaping and Weed Control

- (26) Landscaping on site shall be undertaken on the site in accordance with the landscape plan prepared by Bridget Gilbert

Landscape Architect referenced as “Appendix 1 Landscape Plan” dated 10 September 2012. The landscaping shall be implemented in accordance with the recommendations contained in “Appendix 2: Restoration, Implementation, Maintenance and Management Plan” dated September 2012.

The planting shall be undertaken within the planting season (autumn – spring) immediately following the closing in of the dwelling.

The landscaping shall be maintained by the consent holder for a minimum period of five (5) years to the satisfaction of the Council’s Compliance Officer. After five (5) years a suitably qualified arborist shall confirm to the Council in writing the plantings have been established in a manner that at least 80% can be expected to survive on the basis of a 10 year average annual weather cycle. Should dieback have occurred, replacement planting is to be undertaken in accordance with the landscaping plan to the satisfaction of the Planning Team Leader – Hauraki Gulf Island.

- (27) In order to allow the successful establishment of the planting on site along with the maintenance of the adjoining dune system, the consent holder shall undertake a thorough weed eradication programme to remove all noxious pest plants listed in the “ARC National Surveillance Plant Pest” contained within the “Regional Pest Strategy Management Strategy 2007–2012” from the site, a compliance report prepared by the Appointed Arborist shall be supplied to the Council within 10 working days following the removal of the identified weed species. Weed management options are referenced in “Appendix 2: Restoration, Implementation, Maintenance and Management Plan” dated September 2012. This report shall also detail the scope of the ongoing weed eradication programme that is to be undertaken by the consent holder.
- (28) Pursuant to section 108(1)(b) and 108A of the Resource Management Act 1991, compliance with Condition (26) (landscaping) shall be secured by way of a bond to the value of \$50,000. The bond shall be prepared at the consent holder’s expense and to the satisfaction of the Council’s solicitor and shall include the following terms (without limiting any other terms which may be included):
1. Performance of the bond shall be guaranteed by a guarantor acceptable to the Council. A recognised bank trading in New Zealand shall be deemed as an acceptable guarantor. A guarantor of a bond may be substituted with a cash bond.
 2. The bond shall be released when the vegetation plan (required by condition 26) has been implemented in full and has been established in a manner that at least 80% of the plantings can be expected, in the opinion of a suitably qualified independent specialist appointed by agreement between the parties at the

cost of the consent holder, to survive on the basis of a 10 year average annual weather cycle.

Footbridge

- (29) The proposed bridge shall be constructed of natural timber. The structure shall be no greater than 2.2 metres wide and have a maximum height of 999mm above the low water level of the stream over which it passes (or as otherwise required to avoid the need for any balustrade under the Building Act 2004).

Registered Surveyors Certificate

- (30) A Licensed Cadastral Surveyor shall certify to Council in writing *prior* to work progressing beyond the foundation stage and roof framing stage that the dwelling is set out as specified on the approval plans.

In addition, a Licensed Cadastral Surveyor shall certify to Council in writing prior to work progressing beyond the foundation stage and roof framing stage that the dwelling is set out as specified on the approved plans.

No work shall proceed beyond this stage until receipt of such certification, to the satisfaction of Council's Compliance Officer.

OTHER:

Grazing

- (31) No grazing of land shall occur within the area seaward of the stock proof fenceline referred to in Conditions 7 and 26. The fence shall be maintained as a stock proof fence at all times.

Signage

- (32) The consent holder shall install discreet signage advising the public of the sensitive dune environment particularly with regard to archaeological features situated within the dune systems of Owhiti Bay and the likely presence of dotterels. The final wording detail, size and position of signs, and number of signs shall be determined in consultation with the Council's Compliance Monitoring Officer.

Review Condition

- (33) Pursuant to s 128 of the Resource Management Act 1991, the Council may serve notice on the consent holder of its intention to review conditions 7 and 26 of this consent at bi-annual intervals for 5 years following the commencement of this consent.

The purpose of the review is to deal with any adverse effects on the surrounding area which may become apparent to the Council resulting from the protective measures taken in respect of the landscape and ecological features of the site. The review will

encompass conditions relating to these matters and other appropriate conditions in order to avoid, remedy or mitigate any significant adverse effects, and may include the provision by the consent holder of an updated Implementation, Maintenance and Management Plan to the Planning Team Leader – Hauraki Gulf Islands.

The consent holder shall meet all costs associated with the review of the conditions, including any required independent testing or reporting.

Outdoor Utility Storage

- (34) The consent holder shall ensure that recreational equipment, domestic appurtenances (such as portable outdoor furniture) and any vehicles (for example quad bikes) used to access the dwelling, shall be stored in the “outdoor utility storage area”, as shown on on plan A-CD-06 – Site Layout (dated 7-14-2013) when not in active use.

Ecological Protection

- (35) The consent holder shall ensure that the recommendations contained in the Ecological assessment prepared by Boffa Miskell Ltd, dated 7 September 2012 are adhered to. Specifically including:
- The need to protect the dotterel breeding grounds from dogs; and
 - Planting in and around the dwelling being restricted to that which is recommended in the landscape plan referenced in condition 1. This is to reduce the potential threat of weed infestations from “garden weeds”.

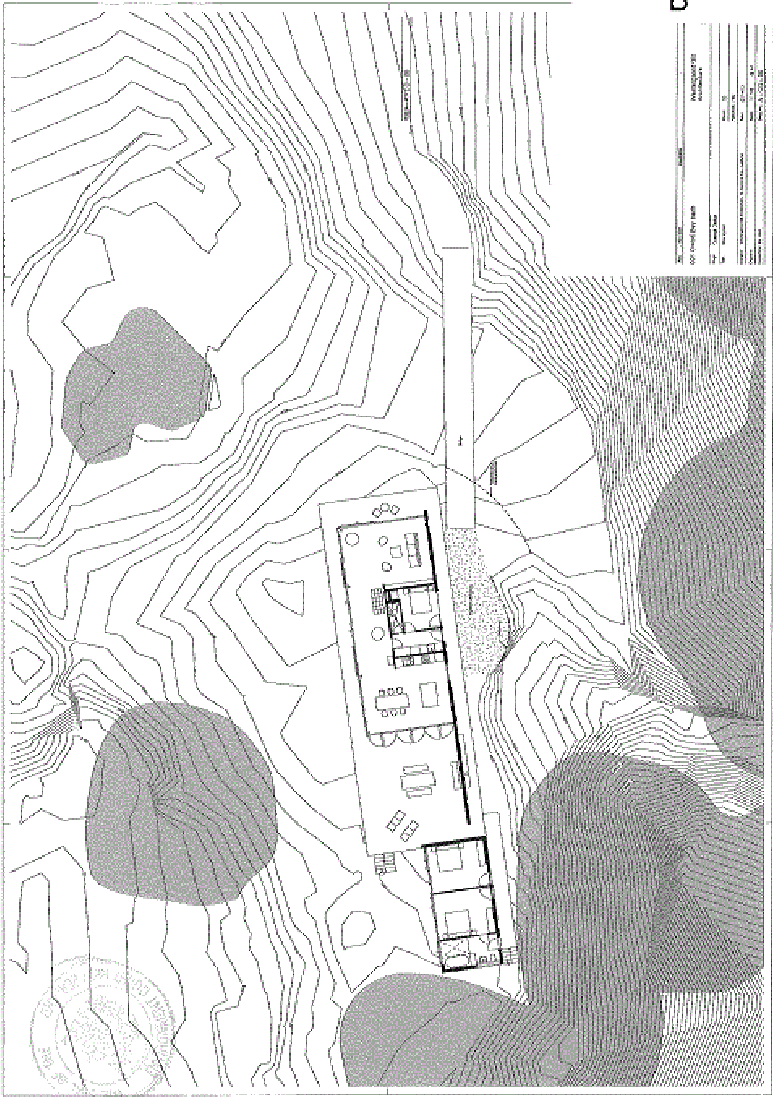
ADVICE NOTES

- (1) The consent holder needs to obtain all other necessary consents and permits, including those under the Building Act 2004, and comply with all relevant Council Bylaws. If a building permit application is already lodged with the Council or a building permit has already been obtained you are advised that unless otherwise stated, the use to which the permit relates shall not commence until conditions of this resource consent have been met. If this consent and its conditions alter or affect a previously approved building permit for the same project you are advised that a new building permit may need to be applied for.
- (2) Pursuant to Section 125 of the Resource Management Act 1991, this resource consent will expire 5 years after the date of commencement of this consent unless, before the consent lapses;
- a. the consent is given effect to; or
 - b. an application is made to the consent authority to extend the period of the consent, and the consent authority decides to grant an extension after taking into account the statutory

considerations, set out in s 125(1)(b) of the Resource Management Act 1991.

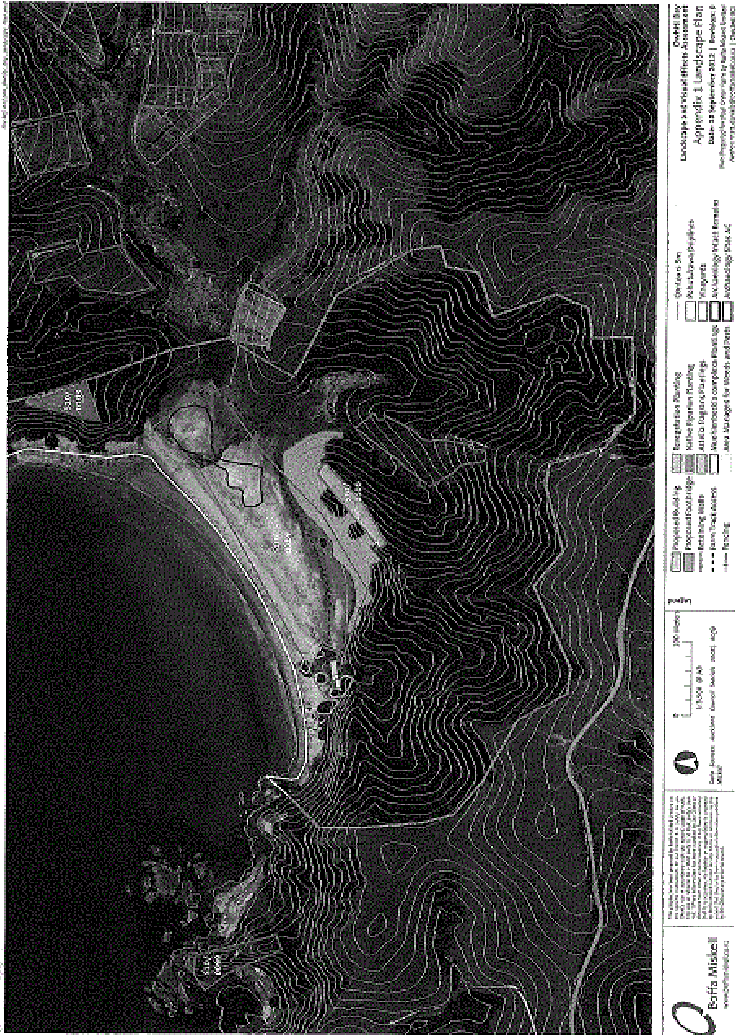
- (3) The consent holder is requested to notify the Council, in writing, of its intention to begin works, a minimum of seven days prior to commencement. Such notification should be sent to the Compliance Monitoring Officer and include the following details:
 - name and telephone number of the project manager and site owner
 - site address to which the consent relates
 - activity to which the consent relates
 - expected duration of works.
- (4) If you disagree with any of the above conditions or with any additional charges relating to the processing of the application, you have a right of objection pursuant to Section 357 of the Resource Management Act 1991, which shall be made in writing to the Council within 15 working days of notification of the decision. As soon as practicable the Council will consider the objection at a hearing.
- (5) If this consent and its conditions alter or affect a previously approved building consent for the same project you are advised that a new building consent may need to be applied for.
- (6) Appropriate building consent approval shall be obtained for all the drainage works required for the wastewater treatment and disposal system, including treatment plant facilities and for the storm water drain facilities, prior to work commencing on site.

Annexure B

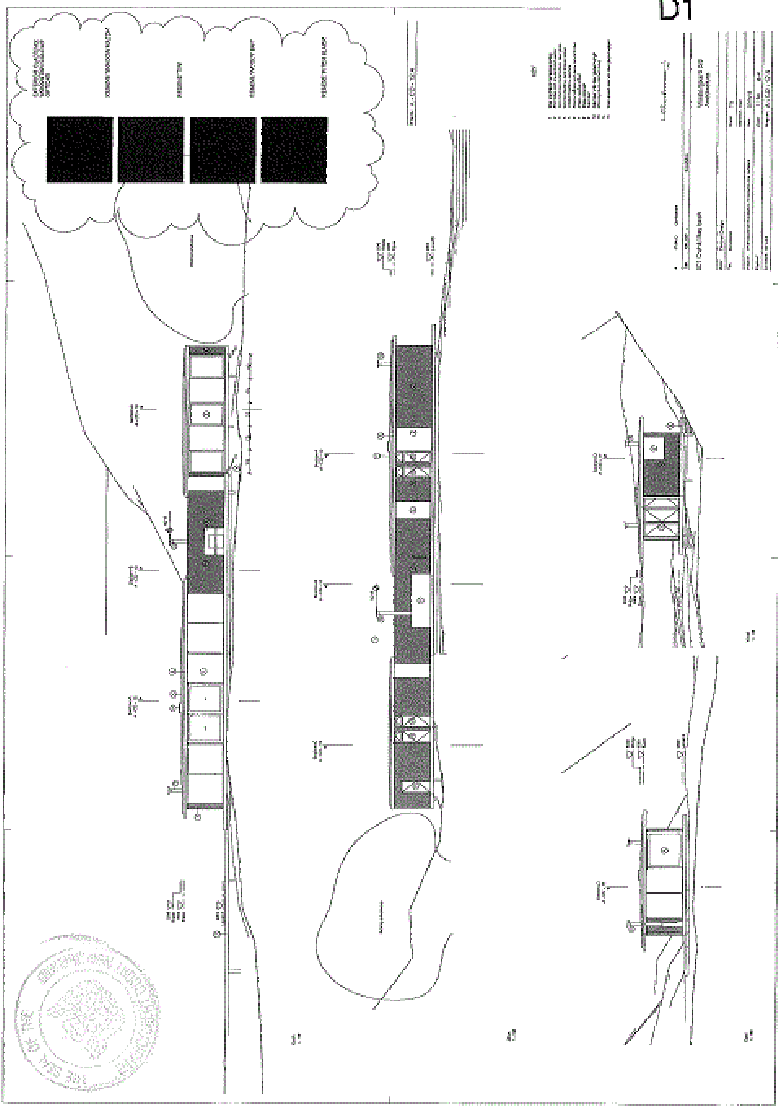


Annexure C

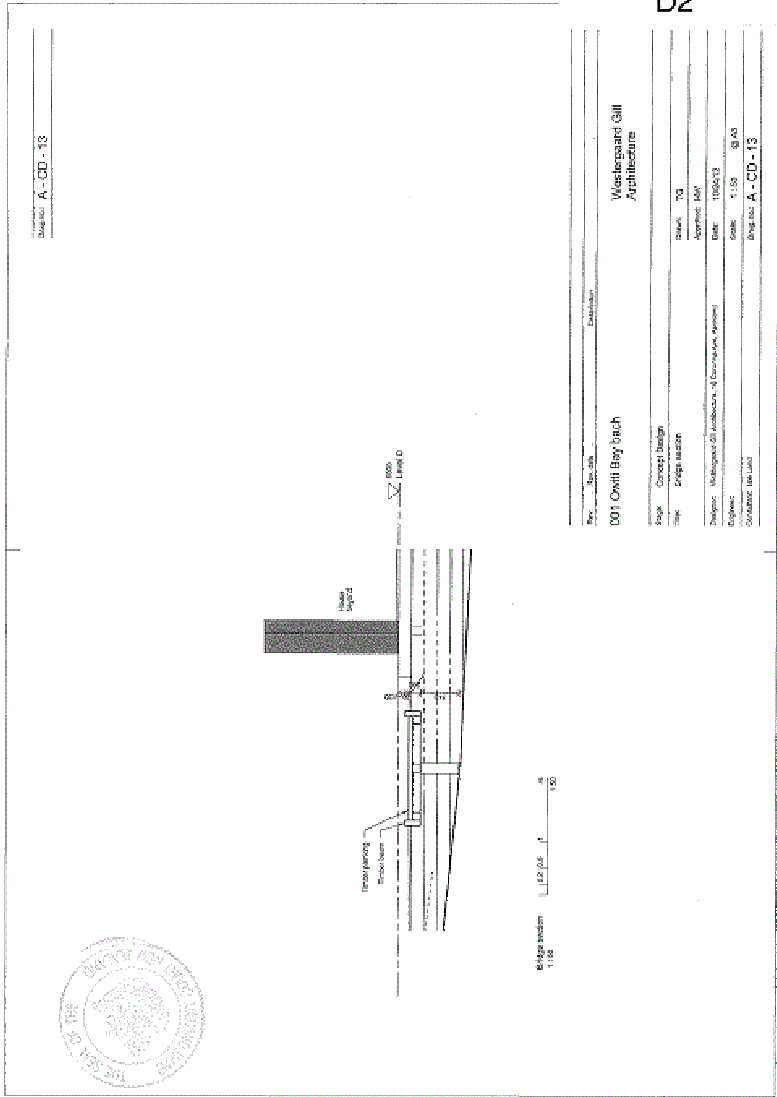
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Annexure D1



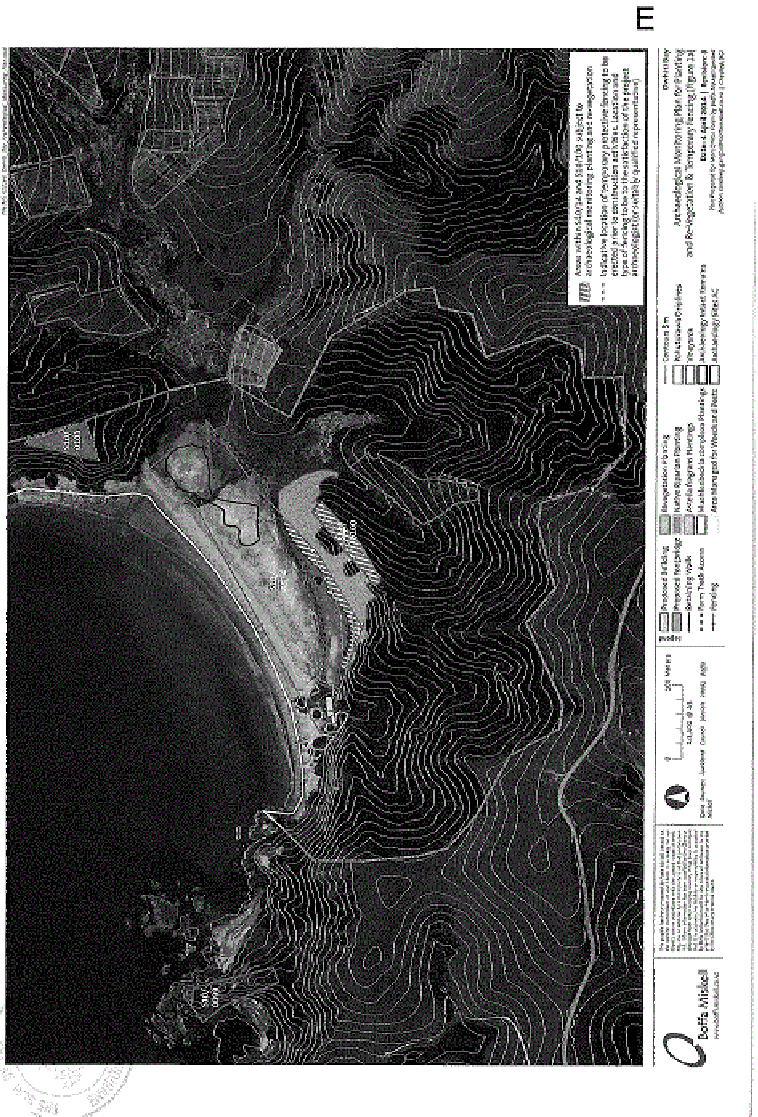
Annexure D2



D2

Project Name	001 O'Neill Bay beach
Client	Waihekepaard Gill Architecture
Scale	Concept Design
Date	Design Solution
Designer	Waihekepaard Gill Architecture, Auckland
Engineer	1:100
Contractor	1:100
Drawn by	1:100
Checked by	1:100
Approved by	1:100
Date	10/05/18
Scale	1:100
Drawn by	A + CD - 13

Annexure E



Reported by: Kerry Puddle, Barrister and Solicitor