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**BEFORE THE HEARING COMMISSIONERS FOR NORTHLAND REGIONAL
COUNCIL**

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of applications by Doug's Opuia Boatyard for
discharge consents and coastal permits for
activities ancillary to and associated with the
boatyard on 1 Richardson Street, Opuia

**SUBMISSIONS OF COUNSEL FOR THE APPLICANT
TO THE RECONVENED HEARING**

Introduction

1. The hearing for the above applications commenced on 17 May 2018. During the hearing, Mr Schmuck advised he was prepared to withdraw some aspects and amend other parts of his applications in order to address the apparent matters of concern to the Commissioners and submitters.
2. The hearing was adjourned (part heard) on 18 May 2018 in order to allow Mr Schmuck to provide further information as a result of the proposed amendments. On 28 May 2018, counsel confirmed amendment of the applications as follows:
 - (i) proposed beach rehabilitation – withdrawn;
 - (ii) proposed seawall - withdrawn;
 - (iii) area of proposed dredging reduced by 52% and the volume to be excavated reduced by 42%;
3. At the same time counsel advised that Mr Schmuck had engaged professional consultants to provide expert advice on the applications, and sought extension of the time by which the further information was to be filed.
4. Subsequently the applications were suspended to allow time for the expert assessment to be undertaken and evidence provided.
5. A request that suspension of the application cease was made on 11 July 2018, and took effect from 12 July 2018. On the same day expert ecological, air quality and engineering evidence¹ was filed in support of the

¹ From 4Sight Consultants Ltd, AECOM Ltd, and Total Marine Services Ltd respectively

amended applications. Plans omitted in error from the engineering evidence earlier filed together with further copies of the engineering and air quality reports consequentially amended to correctly reference the plans filed, were provided to the Council on 16 July 2018.

6. For completeness, I confirm that the plans submitted on 16 July 2018 correctly show only the one mudcrete grid; that on the southern side of the slipway. The northern side grid has been withdrawn in a further attempt to reduce any potential adverse effects.

The s 42A Addendum report

7. For ease of reference and in the interests of brevity, my submissions today generally focus on the s 42A report and the expert evidence, with comment on statements made by the submitters only where necessary or relevant to the point being made.
8. Submissions in reply to the submitters points are proposed at the conclusion of their evidence, in accordance with usual practice.

Expert evidence

9. It is agreed that Ms Donaghy correctly summarises the major conclusions from the applicant's evidence, and the issues identified by the Council's peer review of the engineering and ecological reports. As a consequence, my submissions do not repeat those matters but generally identify areas of agreement and those areas where differences of opinion require further consideration.
10. For completeness, I note that with the exception of those matters identified and addressed below, the applicant generally accepts the conditions as recommended by the reporting planner.

Mudcrete Grid

11. At the hearing the submitters made much of the applicants purported long term consistent noncompliance with the discharge conditions of consent. This, together with the most recent sampling results has caused Ms Donaghy to change her opinion on the mudcrete grid. Notwithstanding that the Council has become more accepting of such structures in recent times as a way of assisting vessel owners to comply, she no longer supports the parts of the applications seeking consent for a mudcrete grid or discharge of washdown water to the CMA as "the Applicants operations are uncertain and potentially significantly adverse."
12. This is not only disappointing and shortsighted, but doesn't appear to be in accordance with the Council's policies, good sustainable management practice or established case law.
13. The Commissioners are referred to paras 26 -28 of my submissions to the hearing on 17 May 2018, and in particular to the following:

28 However, even if there was an issue as to compliance (which there isn't), that is not a valid reason to decline to grant

consent. As long ago as 1967, the Court of Appeal held, in *Barry and Auckland CC* that a Council is entitled to accept that an applicant will comply with the conditions of his consent. And, in *NZ Suncern Construction Ltd v Auckland CC*, the High Court held that the appellant's prior conduct could not be used to override any of the more explicit statutory criteria required to be considered.

14. Mr Johnson, in paras 8 and 9 of his response to s 42A report suggests the reason the fight against fan worm and other invasive species is unsuccessful is due to the lack of access to affordable haul out facilities. In his opinion a washdown grid is the most cost effective way to clean and inspect a hull and will have a positive effect on biosecurity control in the Bay of Islands. As a result he believes there is a definite need for such a grid on this site.
15. Mr Schmuck obviously agrees. He is prepared to accept the conditions recommended should the Commissioners disagree with Ms Donaghy, and has instructed Mr Johnson to prepare plans to comply with those requirements.

Dredging – the subsea erosion barrier

16. Ms Donaghy refers to the discussions in the Total Marine Services report ("Total Marine") on beach morphodynamics, aesthetics and the proposed dredging methodology, the analysis of the location and design considerations and the construction methodology, including the proposed subsea erosion barrier. She notes that Mr Maxwell for the Council acknowledges the batter slopes proposed are typical of similar scaled projects in the Bay of Islands, but expresses concern as to the need for the subsea erosion barrier. A similar concern was expressed by Mr Griffiths for the Council.
17. From his email attached as Appendix 3, Mr Maxwell considers that a clear need for the erosion barrier or its efficacy for its intended purpose has not been demonstrated. Despite apparently acknowledging the proposed batters as typical, he considers a gentle batter more appropriate, minimising the modification of the stable bed levels and the introduction of an additional structure on to the stable beach profile. He notes that the beach is currently in equilibrium and indicates concern the scouring action of the barrier will result in further modification of the natural cycling of sediments within the bay.
18. Mr Griffiths (Appendix 2) questions the need for the barrier given that the beach platform appears to be relatively hard packed and stable, with no visible signs of erosion. In his opinion, the installation of the barrier is likely to cause more disturbance to the beach and intertidal shellfish bed during construction, with possible long term unintended consequences.
19. Mr Griffiths recommends a closed season for dredging to protect the shellfish at the most vulnerable time of their life cycle. I can advise that the applicant accepts such a condition.
20. Ms Donaghy notes that the proposal for the subsea erosion barrier was introduced post notification and after the completion of the s 42A report for

the hearing. In her opinion, it is an additional structure requiring resource consent which has not been assessed against the provisions of the relevant planning documents. As a consequence, she believes it cannot be considered as part of the current applications.

The applicant's response

21. Mr Johnson from Total Marine responds:²

The sub surface erosion barrier was proposed as a mitigating effect of the dredging on the shellfish bed. The primary purpose of the sub-surface erosion barrier is to stabilise the edge of the shellfish bed to prevent the batter extruding on the surface area of the shellfish bed.

22. Figures 1 and 2 of the Total Marine report illustrate the effect of the proposed barrier. In Figure 1, the barrier supports the edge of the shellfish bed over the batter, leaving the shellfish bed largely undisturbed by the dredging. In Mr Johnson's opinion this is less invasive than the batter extending into and disturbing the shellfish bed (Figure 2). In his opinion, the barrier will act as a groyne which will assist in maintaining both the shellfish bed and the beach while preventing material build up on the ramp (para 4).
23. Mr Johnson acknowledges Mr Maxwell's concern as to the potential long term effects. He concedes that while the construction of the subsea erosion barrier is intended to have positive hydrodynamic effects on the beach and the environment, significant natural or unnatural changes to the currents or morpho dynamics may have unintended consequences. Notwithstanding, given the scale of the structure, in his opinion the benefits of the proposed barrier outweigh the minor risks.
24. Neither Mr Brown nor Mr Poynter from 4Sight Consultants see the potential ecological effects of the proposed barrier to be of concern. Both consider the installation of the proposed barrier will have no more than minor ecological effects.
25. Mr Brown notes that the construction of the barrier in the intertidal zone at the northern end of the beach is designed to prevent potential erosion caused by changes to the intertidal and subtidal shore topography and bathymetry caused by the dredging. Mr Poynter considers that the batter slope needed to achieve the required depth of water close to the shore with the minimum disturbance to the beach and shellfish is an engineering question.
26. The dredging proposed by the applicant is sought to enable deeper water closer inshore to facilitate access to the marina and working areas of the wharf, including the slipway. The intention is to achieve this with the minimum possible effect on the shellfish bed and the beach. I understand a shallow batter tapers the dredge around the middle of the beach and shellfish bed; a steeper batter shortens the dredge taper and reduces the effect on the beach and shellfish bed.

² Total Marine Services "Doug's Opuā Boatyard – Review of s 42A Report and expert evidence" 15 August 2018, para 3

27. Given the apparent minimum ecological effects, installation of the proposed subsea barrier is, I venture to suggest, an engineering question. Mr Johnson is a qualified coastal engineer.

The legal issue

28. As to the legal question troubling Ms Donaghy – the barrier is proposed in mitigation of the potential effects of the proposed dredging on the shellfish bed, discovered around the same time as the s 42A report was being prepared, and the beach. No change was, at that time, proposed to the substantive issue, being the dredging itself.
29. Plans showing what was proposed were circulated prior to the hearing. Amendments to the applications were made at the hearing, all designed to reduce or further mitigate the effects of what was proposed.
30. The hearing was adjourned. Expert evidence, including assessment of the proposed subsea barrier, has been submitted, circulated and assessed by Council experts.
31. In my opinion, there is no prejudice to consideration of the barrier as a mitigating effect is appropriate and if so decided, can be approved.

Dredging – sedimentation

32. The applicant notes that Mr Maxwell's opinion, following his consideration of the MetOcean Solutions Ltd- Opuia Marina Development Stage 2 Development Modelling report, is that once suspended sediment from the proposed dredging activity reaches the Veronica Channel it is "highly likely that strong tidal flows will quickly entrain and disperse the suspended sediments."

Dredging - contaminants in sediments

33. In para 19 of her report, Ms Donaghy summarises the conclusions reached by 4Sight Consultants and notes general agreement between the ecologists Mr Griffiths for the Council and Mr Brown³ for the applicant.
34. Mr Griffiths expresses concern as to the levels of heavy metals found by 4Sight in the sediment samples, which in his opinion were at levels likely to impact on marine organisms and ecological communities. He does not accept Mr Brown's conclusion, that the contamination is likely to be from historical activities, and considers that the recent compliance monitoring of stormwater discharges indicates that the boatyard is continuing to contribute to the high levels of metals in Walls Bay.

The applicants response

35. Interestingly, while 4Sight found high concentrations of copper, zinc and lead at the slipway site, analysis of the flesh of pipis collected from the bed adjacent the boatyard found no evidence of accumulation of heavy metal contamination.⁴ Also, samples of subtidal sediments near the base of the

³ As advised when the expert responses were filed, Mr Brown is no longer employed by 4Sight. Mr Poynter, who oversaw Mr Brown's work, is now the ecological expert.

⁴ 4Sight Consulting "Ecological Assessment – Doug's Opuia Boatyard" July 2018, at 5.2.2

slipway and at more distant points in the proposed dredge area did not exhibit heavy metal concentrations. Given that elevated levels of arsenic and mercury were consistent across all sites, Mr Brown opined that the levels were more likely to be related to catchment geology rather than boatyard activities.

36. Mr Griffiths expressed a concern, acknowledging it to be outside his area of expertise, as to the need for care when selecting a disposal site for the dredged material. Mr Brown expressed no such concern, just requiring disposal at an authorised site on land. He recommends use of a silt curtain around the dredging plant to contain sediment during the dredging operation and concludes that the potential for dispersal and resuspension of contaminants will be no more than minor.
37. The applicant has accepted the use of a silt curtain around the dredging plant as a condition on the dredging consent.
38. Mr Poynter refers to recommended condition 35 on page 28 of the s 42A report and notes the thresholds are already likely to be exceeded. While improved controls over runoff from the boatyard and other sources is likely to result in a progressive reduction over time, the recommended levels are likely to be exceeded for some time. He suggests an Advice Note acknowledging the present levels, but indicating clearly that future monitoring would seek to show an improving trend.
39. The applicant agrees with and accepts that suggestion. It is a sensible compromise to avoid immediate “noncompliance” but at the same time ensure efforts are progressed to achieve improved performance.

Air Quality

40. Although the Tonkin and Taylor (“T+T”) peer review of the AECOM air quality report is attached to her report, the time frames had not allowed Ms Donaghy to summarise and compare the conclusions reached with those of the applicants expert. Instead, Ms Donaghy notes the conclusions of the AECOM report, and makes recommendations from her assessment of the matters addressed by Mr Stacey, albeit with the rider that these may change after review of the T+T report.
41. Mr Stacey’s response to the s 42A and T+T reports sets out the areas where T+T and he reach similar conclusions. In summary:
 - (i) there is no potential for nuisance from dust or contaminants entrained in water droplets at the nearest house (T&T Report, para 3.5).
 - (ii) localised odours (5 – 10m from the activity) only are likely from the application of solvent-based surface coatings using a roller or brush (T&T Report, para 4.3).
 - (iii) mitigation measures to control air discharges, include:
 - a. sanding and grinding to be conducted only when the wind speed is between 0.5 m/s and 5 m/s, using 1-hour average wind speeds triggers (T&T Report, para 5.1)

- b. spray application of anti-fouling paint to be undertaken only when the wind speed is between 0.5 m/s and 5 m/s and when the wind direction is from between 45° and 170°. (T&T Report, para 5.1)
 - c. vacuum attachments to be used on all grinding and sanding equipment, when working on surfaces painted with antifouling. (T&T Report, para 5.1)
 - (iv) If the compliance boundary is moved closer to the boat yard, screens could be used to mitigate the effects of spray drift, but would only reduce visible mist to a varying degree and would not completely mitigate the issue. The screens could also have visual effects (T&T para 5.1).
 - (v) Water blasting is unlikely to pose any health risk as long as the water meets New Zealand drinking water standards (T&T para 3.5).
42. After consideration of matters raised by T+T, Mr Stacey goes on to:
- (i) Disagree with the use of tarpaulins or sheeting to enclose dust generating activities.
 - (ii) Agree with a 15m exclusion zone around spray painting activities with paints containing diisocyanates.
 - (iii) Agree with the use of vacuum attachments on all grinding and sanding equipment; and
 - (iv) Agree as a prudent measure, that temporary signage placed to the north and south of the slipway be used to create an exclusion zone in the reserve whenever boatyard activities are being undertaken.
43. Mr Stacey recommends changes to proposed conditions 68 and 74 to clarify the point of compliance as the “Discharge to air and offensive odour boundary”; and to condition 74 to make it consistent with the rules of the operative and proposed regional plans to allow discharge beyond the property boundary provided it is not offensive and objectionable.

Spray drift

44. In terms of spray drift, it seems Ms Donaghy has accepted the submissions from Mr Rashbrooke and Ms Marks that water spray in general may be offensive, regardless of whether or not it contains contaminants. She therefore recommends that temporary screens around water blasting areas are erected at all times when blasting is occurring to mitigate the effects of spray drift.
45. As above, neither T+T nor Mr Stacey agree, in part because the screens would not be effective and in part because they themselves could be an amenity issue.
46. Mr Stacey notes that the mist from the water blasting is, in essence, similar to that experienced when walking past ornamental water fountains or the automatic watering of public gardens or golf courses, none of which have

screens to protect those walking past. He does however suggest an alternative should it be concluded that screens are required.

47. In that circumstance, he would recommend a screen approximately 2 m high by 7.5 m wide, supported by two posts located either side of the slipway, be located just beyond the boundary between Area A and the walking track, as shown in Figure 1 of his report. The screens could be constructed of a windbreak-type material of a colour complementary to the surrounding environment, and be drawn across prior to water blasting and drawn back immediately afterwards.

Anemometer

48. Ms Donaghy refers to and acknowledges the applicant's installation of an anemometer at the site, as recommended by the Commissioners at the hearing. She notes that it is important that the general public can access the anemometer to check and record compliance if need be.
49. I am advised that the anemometer is located at the boundary of the reserve with the boatyard about a metre inside Area A on the slipway, and that it is clearly visible from the reserve. I have concerns however with the planners comment that the general public be able to monitor and record compliance.
50. Administration of its regional plan and monitoring, issues of compliance and enforcement of resource consents is a function and power of the local authority, in this case the NRC, not the general public. Enforcement officers are required to be authorised by the Council before they can undertake inspection and monitoring duties.
51. The applicant has, but does not have to, locate the anemometer in a position visible for all comers to see. It is important to note also that the slipway and associated areas are, in effect, a work space. When a boat is being worked on, there are clearly health and safety issues, and Mr Schmuck is entitled to restrict access over that part of the reserve, not only by his resource consent but also as a result of his responsibilities and duties under the Health and Safety at Work Act.

Conclusion

52. The applications before you today are reduced in scope from that originally proposed. The expert evidence provided by the applicant is to a large extent supported by the Council's experts.
53. I would like tomorrow to complete my submissions in relation to compliance and the points made by the submitters.



Colleen Prendergast
Counsel for the Applicant
16 August 2018