

ALTERNATIVE SITES  
FOR CONTINGENCY TANK SYSTEM.  
EXISTING BUSH.

178° 16' 47.57

DRAIN LINE

BANK

45

ADDITIONAL WARD

TRAIL

ADDITIONAL EXIST  
HARDSTAND AREA  
TRAILER STORAGE ETC

EXISTING  
BOATSHED  
MEASURED AS. BUILT  
15.8.97 = 98.5 m<sup>2</sup>  
[ 12.5 x 6.3 ]  
[ + 7.5 x 1.8 ]

VISIBLE  
SURVEY  
PEG 2

5 ALLOCATED  
PARKING SPACES

— SPARE  
PARKING SPACES

~~Post 40~~

Field

WZKH

EXIST SLIPWAY  
& TURNABLE

BUND OR  
SILKEN

FIELD DRAW

~~115° 02'~~

VISIBLE SURVEY  
PEG

SITE PLAN  
1:250 APPROX

ROAD

NORTHLAND  
REGIONAL COUNCIL

- 9 MAY 2018

FILE No.  
N.R.C.

## INTRODUCTION

My name is Mike Rashbrooke. I have a Bachelors Degree in psychology, an Advanced Trade Certificate in carpentry, and a post graduate Diploma of Teaching in the specialized subject area of Design Technology .

As a kiwi I have both United Kingdom and NZ sailing qualifications.

I began sailing at age ten in 'P' class yachts, and represented my club and province in the national Tauranga and Tanner Cup competitions. I have approx. 5000 miles blue water sailing experience in the South Pacific and about 3000 miles coastal sailing experience in the English Channel, North Atlantic, Mediterranean, Aegean, North Pacific and New Zealand waters. I worked passage back to NZ from the USA on a container ship in 1982.

I worked in the boatyard in Walls Bay, Opuia, for periods in the early 1970s when it was primarily a boutique boat building enterprise in a shed, in balance with the residential character of the area. The second owner developed the turntable and boatyard hardstand outside, and the activity became primarily boat maintenance on this hardstand until March 2017. I worked for an operation, similar to the recent Walls Bay boatyard business, in Santa Barbara California, as a charter skipper out of Pireaus in Greece, and as a sailing instructor, also in California .

I have been Secretary and Chairman for the former Opuia and District Ratepayers Association Inc., and Secretary and Acting Treasurer for the Opuia Hall Society Inc. I remain a Committee member of Paihia and District Ratepayer's Association Inc., Opuia Coastal Preservation Inc. (OCP), and a member of the Opuia Cruising Club. I recently retired from my employment as a Registered Teacher at a Design Technology centre servicing 10 local schools in the Bay Of Islands area .

I own a small yacht, and a mooring in the Opuia basin.

I believe I am more familiar than most with the true history, relevant facts, consent details, property boundaries, and related issues concerning the reserve and boatyard in Walls Bay, Opuia.

My position is that I fully support the boutique boatyard operation on its own land. I always have and believe I always will. That being the case, I am just as strongly opposed to continuing attempts by the present owner to unnecessarily expand the private business onto public esplanade reserve or into the CMA.

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## History of boatyard easements applications 2003 – 2013.

**2003** - At the request/instruction of the boatyard owner, the-then CEO and the Legal Services Co-ordinator of FNDC pressured the-then Northern Conservator throughout 2003 to "reconsider" the Department's **previous** easements decision from the 1998 application. This was advocated to be done without public notification of the "fresh application" agreed-to by the parties to the mediation. It came to light through receipt of requested official information and was confirmed when the Northern Conservator was quoted in a magazine article in October saying he was about to make a "ruling" on an "application" for easements. Opua locals contacted the Offices of the Ombudsmen and Conservation Minister, with the result that the Northern Conservator **withdrew** from deciding the matter **without** the mandatory statutory requirement for public notification. Coincidentally, he resigned from his position on the day that he communicated this outcome to the FNDC staff, 31 October 2003.

**2004** - The FNDC Community and Environmental Services Committee, duly delegated under the Reserves Act, conducted a public Hearing of a fresh application by the boatyard owner for "easements to match the resource consents". In **September 2004**, they unanimously **approved** status quo easements and **declined** the expansion ones, with instructions to FNDC staff to **forward their recommendations to DoC for its statutory consent**. At the request/instruction of the boatyard owner, relevant FNDC staff refused to follow the instructions of Council governance. This was on the given basis that the boatyard owner "was not satisfied" with the recommendation and would decline to have the status quo easement registered on his property title - the same position he had earlier taken with regard to the May 2000 DoC decision. He also threatened judicial review proceedings in respect of process or processes followed.

FNDC obtained a legal opinion that the Committee's decision was final, and was safe from judicial review. However, after a second legal opinion cleared all matters except for a minor one giving cause for 'unease', **staff** invited the boatyard owner to make **another** application after local body elections, **without** having completed the 2004 statutory process by forwarding the Committee's Recommendations to DoC. **Staff** also took no enforcement action in response to complaint & evidence of boatyard activities on reserve.

**2005** - The District Council **accepted** another easements application from the boatyard owner, and, at his request/instruction supported by FNDC staff, agreed this would be heard by a Commissioner. FNDC **staff** also organised with the applicant that the Council would pay the Commissioner's fees, and, eventually, as *a fait accompli*, informed the elected Councillors of this 'arrangement' at a Council Meeting.

The Commissioner conducted a Hearing, **October-November 2005**. His Recommendations included both status quo and expansion easements. Council adopted his Report in March 2006, and staff immediately forwarded it to DoC. A number of serious issues of process were raised by Opua parties. DoC settled matters, November 2006, by, among other things, requiring FNDC to forward all original copies of submissions to and the Recommendations from **both** the 2004 and 2005 processes. The boatyard owner took considerable umbrage at this "interference" and unilaterally forwarded several boxes of documents such that the decision was further delayed by DoC staff being required to traverse the contents of these.

DoC issued a 'Draft Determination' in **May 2007**, which again **consented-to** the status quo/access easements and **declined** the expansion easements. The boatyard owner was invited to comment before the Draft Decision was made 'final'. Through his lawyer, he described the draft decision as "*nonsense*", threatened judicial review proceedings, and appealed directly to the Minister of Conservation.

Mr Carter conveyed his view that the issue was 'only' about boatyard slipway access across the reserve: the designation of the public land as reserve in 1998 had placed boatyard existing access rights in jeopardy, and the sought 'easements' (and ROLD clauses) were directed 'only' to remedy that situation, and to bring an end to the ongoing significant costs. He understood FNDC had broken agreements it had made with the boatyard owner, and implied that local submitters opposed to the expansion easements, whom he described as "pedantic", were trying to shut down the boatyard. **It can be noted however, that the proposed ROLD clauses went way beyond merely providing for (the existing and lawful) slipway access.** Mr Carter's comments were **inconsistent with the content** of the proposed ROLD clauses.

Two subsequent attempts proposed by Mr Carter, to 'remedy' the controversial matter by changing the clauses to make them ostensibly 'generic', failed to surmount the inconvenient fact that only one person in NZ has a slipway across this reserve. The Hon John Carter resigned as an MP in 2011 to take up the position of NZ High Commissioner to the Cook Islands.

**In the meantime**, DoC evidently still felt constrained from making it's Draft Determination 'final' while the matter was before Parliament, regardless of the controversial processes involved. FNDC staff in turn felt constrained from taking enforcement action under the Reserves Act "*until the application for easements had finally been resolved*" as per an alleged 'ruling' of their-then CEO in February 2005, a report of which only came to public light in 2012. The subsequent CEO, in 2010, invoked an alleged previous '**ruling**' (without other detail) as the basis for FNDC staff **continuing** to ignore breaches of FNDC resource consent conditions and offences against the Reserves Act.

Following representations in 2011-2012 from local hapu to Minister of Maori Affairs Pita Sharples, and from he to Prime Minister John Key, the Minister for LINZ, Maurice Williamson, eventually commissioned a Ministerial Inquiry into the proposed clauses in June 2012. Following an investigation of relevant boatyard history, facts and issues beyond the information provided in the presentations to Parliament by the applicant boatyard owner, he announced the gazetting of Supplementary Order Paper No 133 (SOP 133) on 16 October 2012. Part of this refers: "Delete *clauses 34A to 34C* (line 4 on page 14 to line 27 on page 15)." In the 'Explanatory note' it refers: "This SOP deletes those provisions."

The gazetting of SOP 133 did **not** prompt DoC to make it's decision 'final'. In the absence of a 'final' decision on the easements application, FNDC staff **still** declined to take enforcement action to bring about a cessation of unauthorised activities pursuant to the Reserves Act (and FNDC resource consent conditions) being committed/conducted on Walls Bay reserve by the boatyard operator.

The adoption by FNDC of a Walls Bay Reserve Management Plan in **February 2013**, which does **not** allow boatyard industrial activities on the reserve, has **not** resulted in a cessation of the subject activities; neither has a letter to FNDC, **dated 27 August 2013**, wherein DoC made its Draft Determination a '**Final**' Decision

In the meantime, in **June 2013**, Minister of Conservation Nick Smith announced that DoC has delegated the statutory powers to grant Reserves Act easements (& revocations etc) to local Councils **without** the statutory oversight of DoC. However, these powers are **not** retrospective, and such decisions are **still required to be in conformity/compliance with the Act**. Parliament has concurred with DoC, in the 'explanation' for the (now discarded) relevant proposed ROLD clauses, that the 'expansion' easements are not capable of being granted pursuant to the Reserves Act section 48. That is, they are unlawful.

The Hon John Carter was elected Mayor of the FNDC in local body elections in October 2013. Despite the long-awaited 'finalisation' of the fourth easements application matter, the subject unlawful boatyard activities on the slipway on/over Walls Bay reserve have **still** not ceased by the end of April 2014.

## AFFIDAVIT OF EDWARD T. LEEDS

I, Edward T. Leeds, Retired of Kerikeri, sincerely affirm:

1. I have read the affidavit of Douglas Craig Schmuck dated 22 June 2016.
2. Contrary to the statement in paragraph [30](d) of that affidavit, I am not now, and never was, a member of the plaintiff's society.
3. I purchased a private property at Walls Bay in Opua in May 1966 with the intention of establishing a boatbuilding yard on it.
4. In July 1968 the Bay of Islands County Council granted permission for short term use of a building then situated on the unformed road between my property and sea, subject to the construction of a workshop on my property and the appropriate relocation of the adjacent small slipway for which the Bay of Islands Harbour Board had granted construction permission.
5. In November 1971 the Bay of Islands County Council granted a planning (deemed resource) consent (C.U. 192) to erect a boat building workshop and office on my property subject to the condition that *"all activity be confined to that property with a minimum of inconvenience to the Public usage of the beach"* and that the slipway referenced in paragraph [4] above be moved to enable boats to be repaired on the property within a period of two years.
6. In 1976 the Bay of Islands County Council granted another planning (deemed resource) consent for a slipway to cross the unformed road to the boundary of my property subject to the condition that *"The applicant undertake to keep the unformed road free of all material, boats or machinery and that at no time will boat repairs or any other work take place on the unformed road."*
7. The boatyard henceforth operated under the conditions of the two deemed resource consents which were the relevant authorization for the boatyard

activity in the residential area and the operation of the slipway over unformed road at the time that I sold my property in October 1982.

8. Until the enactment of the Resource Management Act 1991, it was practice of established boatyards (including my own), and of individual boat owners to scrape, sand and anti-foul their boats at the edge of the sea between tides. Grids were made available by Harbour Boards for use by the public for that purpose.
9. Any departure from the requirements of the consents that may have occurred would have been of a minor, informal nature.
10. I never believed or represented that I had any right to carry out my business activities on public land, with the exception of the passage of boats from and to the sea. It was understood by me and, I believe, by the community (where my wife I resided from 1968 until 2006) that the unformed road which became esplanade reserve in 1998 was to be protected from encroachment, to be retained for the purposes of access to and along the sea and for recreation.
11. At the time of negotiating the purchase of the property which I planned to use for the boatyard I asked the vBay of Islands County Council about the possibility of purchasing a portion of the unformed road which separated that section from the sea. I was advised that it was not Council's policy to dispose of such land and I accepted this as being in the public interest.
12. It was my firm belief that when a portion of the unformed road was closed and became esplanade reserve in 1998 that it was given enduring protection as a public reserve in terms of S48 of the Reserves Act but with the provision that the boatyard would retain the right to move boats across the public reserve on the existing slipway.

13. I am aware that with the enactment of the RMA-91 it became the responsibility of boatyard operators to establish a containment area for contaminants. I believe that such an area (or containment system) could be accommodated on the boatyard property, ideally between the boatshed and the bank to the north.
14. I am also aware that the south-east rail spur on the boatyard property is located too closely to that property's boundary with the public land resulting in encroachment on the reserve for repair and maintenance work on boats. I believe that this spur can be conveniently and economically relocated by rotating it approximately five degrees clockwise where it joins the turntable, thus minimising boatyard activities on the reserve.

SWORN by EDWARD T LEEDS )

at this )

day of before me )

A Solicitor in the High Court of New Zealand

Permanen quon. Council  
Meeting of 17. 1. 68 for rebuilding  
of wall in connection to house on  
German reserve for use as boot & shoe  
workshop, subject to the building  
of a new workshop in the back  
land within a period to be  
negotiated when the land  
EPTI, is transferred to him.

3

L. C. Brown.

18. 1. 68.



Scale 50 links to an inch.

IN THE MATTER

of the Resource Management Act 1991, the  
Reserves Act 1977, and the Local Government Act  
1974

AND

IN THE MATTER

of an application to create easements over part of  
an area of Esplanade Reserve

BETWEEN

DOUGLAS SCHMUCK trading as Doug's Opua  
Boatyard

Applicant

AND

FAR NORTH DISTRICT COUNCIL as the  
Administering Authority

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SUBMISSIONS IN REPLY ON BEHALF OF APPLICANT

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TUMANAKO LAW  
Lawyers  
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KERIKERI

Phone: (09) 407-9700  
Fax: (09) 407-9702

Counsel Acting: Greg Davis

of the land, he does not seek the exclusive use of the land. In other words, the applicant does not wish to exclude all others from the use of that land. To do so would be tantamount to seeking an unrestricted conveyance of the land.

42. It is important to note, however, that while the applicant says he does not seek the exclusive use of the land, there will be some practical limitations on the use of area A and area B by members of the public. One must understand that area B in particular is an area that is immediately adjacent to the southern tramway. When a boat, or boats, are in a cradle, the cradle and the boats overhang the reserve. The applicant seeks a two-metre easement to enable him to work on the southern slipway without being seen to be "trespassing" on the reserve. In circumstances where there are no boats on the southern slipway, members of the public would be free to utilise that two-metre strip as they saw fit. However, in practical terms, when a boat is being worked on in that area, it would be unwise for them to picnic in that area for fear of contamination of their food and the like. It would simply not be practical for the public to do so. Furthermore, it would be unsafe for the public to do so.
43. Many of the old common law grants of easement were of limited application. The New Zealand law has been amended significantly by the passage of s.129 of the Property Law Act and Part IX Land Transfer Act 1952 which allows the creation of easements by deed.
44. In those circumstances, the nature of the easement will take effect according to its tenor and the rights of the dominant tenement are to be determined but with reference to the instrument creating the easement.
45. In this instance, the proposal to grant easements as it was notified did not suggest that the applicant was entitled to the **exclusive** occupation of the easement area. More particularly, the rights to use the walkway were specifically reserved from the grant of the easement. Moreover, the significant grassed area that makes up the majority of the esplanade reserve will not be covered by the easements needed to undertake the maintenance and repair of boats as part of the Boatyard activities.

TO: Northern Regional Council, Unit 10, Opua Marine Park, Opua 0200. 30-10-17

FROM: Mike Rashbrooke, 5A English Bay Road, Opua 0200. Ph 09 4026988.

**SUBMISSION RE:** Renewal of Discharge Consents CON 20060791410 (10-15) for Doug's Opua Boatyard.

I **oppose** this application for several good reasons and make the following observations:

### **1] Extension of time to make submissions.**

The consent authority (NRC) has apparently sent limited notification to Maori hapu who have **not** been directly involved with the resource consent and easement processes concerning Walls Bay esplanade reserve, nor with the relevant Waitangi Tribunal claims WAI 49, 2027 and 2424. The consent authority did **not** notify hapu which **have** been directly involved with these matters, processes and Treaty claims. Ngati Manu were only advised by another person on 29 October 2017, one day before the submission deadline.

The matters involved or connected with this application are complex and require more time to respond than has been provided to Ngati Manu. An extension of time for submissions should be extended by two weeks.

### **2] Full public notification of this application is appropriate and required.**

**Proposed change of use.** This application advises of the boatyard owner's intent to cease conducting boat repair and maintenance activities on the private boatyard land, and, instead, to conduct **all** boatyard activities on or over the adjoining public reserve.

**Proposed changes not of a minor nature.** The applicant has unilaterally removed all slipway spurs from the private land, with only about 4 metres of the boatyard turntable remaining on the boatyard site. This calls into question the viability of existing resource consents covering repair and maintenance activities on the boatyard site and the viability of easements granted in 2015 in reliance on the practical existence of a dominant and servient tenement. It entirely removes any lawful basis for the easement designated 'Area 'B'.

**This is a proposed change of activity.** That the boatyard owner advises of a '75% reduction' in boatyard work and emissions should not divert attention from the critical factor that the 'remaining 25%' of work and emissions are **now** intended to be conducted **only** on or over the land of Walls Bay Reserve.

**Previous applications publicly notified.** The boatyard RMA consent rights were subject of a public process from April 2000 involving a joint FNDC/NRC Hearing, a decision, appeals, Environment Court-conducted mediation between parties to the appeals and the promulgation of a Consent Order in January 2002. A **previous application for renewal** of the same existing NRC consents made in 2008 was **also** subject of public notification. NRC Commissioners Mark Farnsworth and Peter Jennings took good note of the content of public submissions concerning contaminant control and regulatory contexts, and strengthened certain express conditions of consent to reflect these. Similar adjustments may be deemed to be required following submissions to another public process concerning this application for **proposed changes of use and activity**.

**Lack of compliance** with certain express conditions of the existing resource consents (NRC and FNDC). This is evidenced and documented and is still raised in formal written complaints with both Councils without effect. There is no purpose to a consent process when the consent authorities do not carry out, and refuse to carry out, the statutory monitoring and enforcement duties which come with it. FNDC has stated in writing that it does not have the resources to do so; NRC sits on its hands while refusing to meet with complainants.

Mike Rashbrooke.

30 October 2017.



**"DOUG'S OPUA BOATYARD" – RIGHTS AND CONSENTS**

This is a list of rights and consents enabling "Doug's Opuia Boatyard" to use the Walls Bay local purpose (esplanade) reserve for boatyard-related purposes and activities. (The title reference for the reserve is NA121C/187.)

**A) Rights and consents under the RMA and the FNDC District Plan**

- 1) An existing use right authorising the presence of the slipway and its use for the conveyance of boats across the esplanade reserve. (Refer Environment Court judgment no. A 26/2000 dated 10 March 2000.)
- 2) An Environment Court consent order dated 31 January 2002 applicable to FNDC resource consent number RC 2000812 authorising various activities and structures on the esplanade reserve.

(Note 1: FNDC District Plan rule 12.7.6.1.1(ix) provides a setback exemption for "Doug's Opuia Boatyard's existing uses and/or resource consents" i.e. for items A1 and A2 listed above.)

(Note 2: the above rights and consents do not by themselves enable the boatyard proprietor, Mr Doug Schmuck, to utilise the reserve. He can implement the above rights and consents only if – and only to the extent that – the permission of the landowner has also been obtained. The "landowner" is the FNDC which holds the land in trust as the administering body for the reserve.)

**B) Consents from the FNDC as "landowner" for the esplanade reserve**

- 1) An informal consent from the former Bay of Islands County Council authorising the presence of the slipway and its use for the conveyance of boats across what was then (in 1976) unformed legal road but which subsequently became the esplanade reserve. (Refer extract from Law North letter dated 10/8/00.)
- 2) A letter from the FNDC's Chief Executive David Edmunds dated 1 April 2011 permitting specified works and activity on the esplanade reserve.

**C) Unconfirmed consents from the FNDC as "landowner" for the esplanade reserve**

An FNDC decision granting various easements over the esplanade reserve in favour of the boatyard. (Refer Council minutes dated 9 March 2006.)

(Note 1: these easements do not yet exist as the FNDC's decision was subject to the consent of the Minister of Conservation which has not yet been given.)

(Note 2: Mr Schmuck is understood to be seeking legislation authorising these easements.)

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

**Summary**

Although Mr Schmuck is still being allowed to use the reserve as per the former FNDC CEO's ruling mentioned in section C of the above list, the legal position at present – pending the final outcome of the application for easements – is that Mr Schmuck is only able to implement the rights and consents listed in section A of the list to the extent that they are permitted by the "landowner" consents shown in section B of the list.

*Def*  
13

## **PRIVATE GAINS FOR BOATYARD OWNER IF SOUGHT 'EASEMENTS' GRANTED.**

In his submissions to Parliament (Re: RR bill) in 2007, Mr Schmuck put the value of gaining the 'easements' he sought over Walls Bay reserve as : "1.5 to 1.6 million dollars". This would include:

**1) Convenience.** Would enable him to haul boats only 10 metres onto reserve to work on, instead of hauling them the 20 metres to the private boatyard property. This may save as much as an extra ten minutes, up or down, for each haulout. Not important in respect of boats up for days, weeks or months, but advantageous for quick jobs like hauling boats for waterblasting, repainting anti-fouling and re-launching the same day.

The usual main boatyard activities of longer-term repairs and maintenance on the hardstand areas on the boatyard private land have more recently been displaced by the convenience of unlawfully using the slipway on reserve for quick anti-fouling jobs, and charging the public for work on their boats conducted entirely on the slipway on the public land.

**2) Increase to existing boatyard business operational area** by about one fifth.

**3) Increase of boatyard asset value** or asking price for sale purposes.

**4) Opportunity to lawfully shift the boatyard industrial activities away from the private boatyard land** and onto public land to free-up the private land for other purposes. These purposes could include:

**a) A small private dwelling** adjoining existing boatshed on the existing Southern hardstand area; and/or

**b) A large private dwelling across the private section.** A small tin shed could be erected on the private land and called the 'boatyard office' for compliance purposes, and someone could then lawfully repair and maintain their own boat (and one or two others) on the slipway on reserve while living in the dwelling.

**5) Retention of private slipway across public reserve** in the event that the present (or a new) boatyard owner decided to effectively (but not 'legally') shut down the boatyard to have a dream retirement situation of private house, slipway, and jetty in the heart of Opua. The tin shed 'boatyard office' strategy (see 4)b), above) and one or two boats worked-on each year (on reserve) may meet minimal requirements to keep the situation classified as 'a boatyard business'.

Relevant existing consents and easements have always required **removal of the slipway and restoration of the public land** in the event that the boatyard business ceases to operate. Gaining rights to expand the boatyard commercial industrial activities onto reserve could assist to get around that requirement.

The attempt to obtain the private commercial use of the public land began within six months of the Schmuck family purchase of the boatyard in 1994, while it was still subject to the lease-back arrangement with the previous owners. Dwelling applications for the boatyard site were lodged then withdrawn in 1998 after the public land became reserve, likely in the expectation of obtaining the sought Reserves Act 'easements'. Two separate sewerage connections have recently been established for the site. Whether Mr Schmuck intends to retain the existing business or to live at the present boatyard site himself or to develop and sell variations on a 'luxury' situation to someone else is unclear.

**What matters** is the detriment to the public good by the exercise of both the extant and further optional rights available to the boatyard owner in the event that they can, on the basis of 'necessity for the yard operation' obtain (or presently retain) the sought 'easements' over Walls Bay reserve.

MR 2014

## **FNDC ELECTED COUNCILLORS 1 Page primer on the Boatyard, the Reserves Act and Costs.**

### **THE BOATYARD.**

The boatyard at Walls Bay in Opuia is fully supported conducting its activities on its private land and fully supported in using the slipway across public reserve to access the private site. This access-right was consented-to in 1971, and, after the land became reserve in 1998, subsequently consented through Reserves Act easements granted in 2000 and again in 2007. Previous owners have been content with the status quo.

However, the present boatyard owner wants more. He refuses to register the access easements because they don't grant rights to conduct private boatyard commercial industrial activities on public reserve. The rights required to lawfully expand the business onto reserve have been declined, including by a duly delegated Council Committee in 2004, some four times by formal statutory process. There is a reason for this: the boatyard doesn't need them to operate successfully and the Reserves Act does not allow these activities to be conducted on this reserve.

### **THE RESERVES ACT.**

The first thing to understand about the Act, is that there are different classifications of reserves, with different degrees of protection. What can be granted over one kind of reserve may not be allowed over another more highly protected one. Local purpose (esplanade) reserves are highly protected.

The Reserves Act allows for four categories of rights to be granted over reserves: A lease, a licence, an easement or a concession. There is no category of such rights called 'landowner consent' that can, on its own, authorise some private structure or activity on a reserve. RMA rights granted over a reserve cannot lawfully be exercised unless also authorised by a lease, licence, easement or concession under the Reserves Act. All of these rights require a formal publicly notified application process and hearing of submissions.

Each category of rights can be granted only for certain purposes, such as grazing, public facilities, access, supply of services etc. These purposes are listed in the Act. None of the purposes in the Act for which a lease, licence, easement or concession may be granted includes the subject private commercial industrial business activities that the boatyard owner has sought since his family purchased the boatyard in 1994.

### **COSTS**

FNDC staff and Councillors have been provided accurate information regarding the scope of the Reserves Act by highly qualified and experienced public submitters (an ex law Professor and a retired (Australian) Supreme Court Judge) **since 1998**. Councillors **ignored** that advice while considering an application in 1999 and their boatyard expansion easements recommendations to DoC were **declined** in 2000.

The boatyard owner obtained RMA consents for the activities on reserve in 2002, and FNDC staff attempted throughout 2003 to persuade the DoC Conservator to just 'grant' easements to 'match' without due process. This attempt was eventually terminated by DoC Head Office intervention, and the boatyard owner lodged the fresh application that had been agreed-to in the RMA mediation process leading to the Consent Order.

Councillors got it right in 2004, recommending only for the status quo access easements, but staff refused to forward their recommendations to DoC. Staff invited the boatyard owner to lodge yet **another** application, and, on his insistence, also organised for it to be heard by a commissioner and for those costs to be met by Council (ratepayers). The commissioner's 2005 recommendation to DoC in favour of boatyard expansion easements was again **declined** in 2007, with the decision **delayed** by the ROLD bill scandal until 'finalised' in August 2013. FNDC staff and Mr Carter as an MP have both contributed significantly to these costs by encouraging the boatyard owner, and by trying to ignore accurate advice regarding the Reserves Act provided in submissions since 1998.

Mike Rashbrooke. 22-10-14.



# Volume 706, Week 21 - Wednesday, 1 July 2015

Speech from Parliamentary Business Hansard debate. Published 1 July 2015

**EUGENIE SAGE (Green):** I thank the Minister for Land Information. It is always much appreciated when the actual Minister is in the chair and able to answer questions. Yes, this is a bill that has been around for a long time, but in my short call I would like to talk a bit about Supplementary Order Paper 296, which is in Mr Williamson's name. That Supplementary Order Paper is really important because it deletes provisions that the Primary Production Committee recommended be inserted. Those provisions would have allowed the Far North District Council to privatise the public esplanade reserve at Walls Bay in Ōpua. That would have allowed Mr Schmuck and his boatyard to take over much of the reserve for commercial boat building. It has certainly been a long-running saga, which the Hon Damien O'Connor spoke about in an earlier reading. It has been in and out of councils, the Department of Conservation, and the court, and it has been to the Ombudsman. That saga has been largely because Mr Schmuck has wanted not just the right to move boats up and down the slipway in the reserve but also the right to, effectively, monopolise it for his boatbuilding business by doing waterblasting, by repairing boats there, and by generally using the reserve as part of his business.

So the Green Party has stood alongside members of the community in seeking to protect the esplanade reserve and public access to it. These esplanade reserves are important as part of the concept of the Queen's Chain and ensuring that there is public access along rivers, lakes, and the coast. The Walls Bay Esplanade Reserve at Ōpua is an important part of the Bay of Islands walkway. There has been quite a lot of concern in the community at Mr Schmuck's efforts to privatise it. I think that in one of the local media stories I saw, one neighbour pointed out that it is very difficult for people to go picnicking in the reserve if there is the waterblasting of a boat occurring alongside. It makes the whole area quite unattractive for public use. We were really concerned by these clauses being inserted in the bill because, potentially, they were setting a precedent for other business operators to seek to take over public lands, and esplanade reserve, and use those for their businesses. Maiki Marks, in her advocacy, called it a "modern-day land grab".

So we are very pleased that the Supplementary Order Paper has been tabled and that it does delete these clauses from the bill. Certainly, the Department of Conservation was prepared to grant easements to allow boats to move across the slipway, but Mr Schmuck seems to have been quite litigious, and not been content with that, and wanted to challenge that at every opportunity. I think now we have the Mayor of the Far North District Council, the Hon John Carter, seeking to assist Mr Schmuck to get consents from the district council. I am not clear whether those have been granted, but it seems that it was his advocacy at the select committee that resulted in the clauses being included in the first place, so we are very pleased with the Supplementary Order Paper that removes them from the bill.



FAR NORTH  
DISTRICT COUNCIL



Our reference

All replies should be addressed to the District Secretary

23 October 1998

Doug Schmuck  
PO Opuia  
Bay of Islands

Dear Mr Schmuck

RE: APPLICATION FOR A DWELLING - RC 1990302

Thank you for your application for the above. I have assessed your application and will need the following information before I can complete its processing:

1. Your proposed house appears to occupy part of the space shown as carparking on the site plan submitted with the application by Great Escape Yacht Charters.

With all of the existing and proposed activities, the following car parking spaces are required to be provided on site:


- 2 spaces for the yacht charter business
- 3 spaces for the boatbuilding business (a condition of the 1971 planning consent)
- 1 space for the dwelling (as per the District Plan)

Can you show on a plan (drawn to scale) where you can provide the necessary six car parking spaces (including access and manoeuvring areas) on the site.

2. Could you show on the plan all of the existing and proposed buildings on the site.  
*pers. comm. D Schmuck - other boatshed went in 1980s. Only other structure is a cover on which of 1.2 x 2.4. No further requirement for plan.*
3. Could you provide the written approval of one further neighbour, Angela Marinkovic who owns the section next to Chris Sharp.

Further processing of your application is hereby suspended in accordance with section 92 of the Resource Management Act until such time as this information has been received.

Yours sincerely

  
Janet Stephenson  
Consultant Planner

# FAR NORTH DISTRICT COUNCIL



Our reference

RC 1990302

All replies should be addressed to the District Secretary

30 October 1998

Doug Schmuck  
C/- PO  
OPUA

Dear Doug

**RE: APPLICATION FOR A DWELLING**

I discussed, I carried out a site visit today and was shown around by Brian. I have some queries now having seen the site:

1. The two car parks on the south wall of the boat shed are not realistically possible given
  - (a) the presence of the winch and its roof which constricts the area available to 3m, and
  - (b) the sharp corner required to get around to turn into and out of this area

You will need to show that these two carparking spaces can be achieved, either by moving them to another location and/or doing works. Note that any works on the road reserve (eg lowering the access and putting in retaining) will need prior approval of a Council engineer.

Note that there are minimum requirements in the District Plan for the size of car parks and the amount of manoeuvring provided so that cars can turn on site and drive out forwards. I attach a copy of these.

2. The drawing shows carparks 1-3 parallel with the building, and on the plan I do not see how car 1 could back out without hitting the bank or the adjacent car. In practice this does not appear to be a problem - is this because the real parking is angled in relation to the building? You need to be able to show that cars 1-4 can back out of their spaces, turn on site and drive into the road forwards (see District Plan requirements). Make sure whatever solution you come up with for spaces 5 and 6 does not impinge on the turning area for spaces 1-4.
3. The northern side of the dwelling appears to be located over the small stream. Is this actually the case?



Appeals by Director-General of Conservation and by D C Schmuck  
on Applications for Boat Yard Activities at Opua.

Summary of Department of Conservation's Views  
For 4 September 2001 Mediation Meeting  
(without prejudice)

Parts of the proposal/decision that are agreed with

- a boat yard operating at the site
- boat passage over the esplanade reserve
- having a boat washdown system
- use of the jetty
- no cleaning of hulls at jetty

Parts of the proposal/decision that are not agreed with

- boat maintenance activities (including boat washdown) on the esplanade reserve
  - inconsistent with purpose of esplanade reserve
  - incompatible with use of esplanade reserve
  - adequate boat yard land for boat maintenance activities
  - original boat yard consent did not allow (then) road reserve to be used for boat maintenance
- proposed boat washdown system
  - biosecurity risk
  - not demonstrated that proposal is best practicable option
  - washdown area can be located on own property
  - discharge to sea unnecessary given small volume
  - three operating systems in Bay of Islands, two are zero discharge
- jetty extension for shed
  - unnecessary
  - adverse effects not avoided
- contaminant discharges allowed beyond exclusive occupancy area
  - no justification given for this
- wording of some conditions
  - need to provide clarity on sandblasting, waste disposal, and integration of management plans

Other important point

- easements not possible under Reserves Act for boat maintenance activities on esplanade reserve

# New rules for cleaning bottoms

Mike Rose marine editor

[mrr@dnz.co.nz](mailto:mrr@dnz.co.nz)

## Environment watchdog's reassessment tightens rules on antifouling paints

Although most boat owners will not have been aware of it, over the past three years the Government's Environmental Protection Agency (EPA) has reassessed all antifouling paints used in New Zealand.

The aim has been to ensure that both the environment and those applying the paints are properly protected, preferably without unduly compromising the effectiveness of the antifouling paints.

The good news for the owners of moored boats is that, while antifouling manufacturers, retailers and boat yards will be affected (some quite seriously) by the resulting new rules, there will be little effect for the owners of most moored pleasure boats.

One of those involved in the consultation process with the EPA was the managing director of New Zealand marine and commercial paint manufacturer Altex Coatings, Mike O'Sullivan.

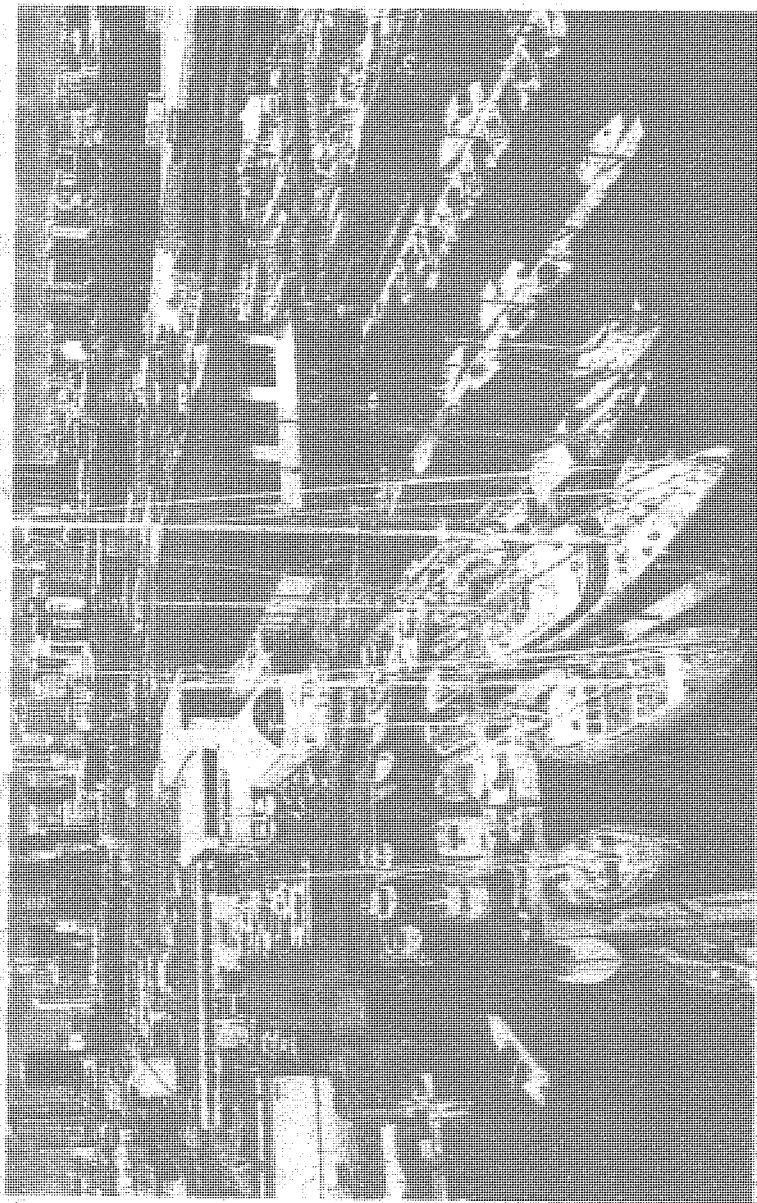
He says New Zealand is leading the way with its reassessment of antifouling paints and their application.

"We know that many other countries are looking closely at what is happening here," he says.

He believes the outcome of the review is a good one, despite the fact it will have a significant effect on his company.

"I think we will look back on this in a year and think it was a progressive and logical step forward in today's health and safety conscious world."

To conform to the new regula-



Changes to rules covering antifouling paint and its use will have little effect on moored boats, but will improve safety.

case of their Altex Yacht & Boat No 10 (a "semi-hard" antifouling), this will have to happen by 2015.

A minor change in formulation is required for its Altex Yacht & Boat No 5 antifouling, one of the country's most widely used pleasure boat antifouling paints.

O'Sullivan says this change will have no effect on the product's antifouling performance and does not need to be in place until 2023.

The company's other antifoulings: Pettit Vivid (a brightly coloured, low copper content antifouling paint able to be used on all substrates, including aluminium) and the water-based Pettit Hydrocoat, require no changes.

The new rules also require

and safety information on their labels.

Each can will also have to be accompanied by a safety data sheet, attached to the can or provided by the retailer. Both requirements take effect from January 1 next year.

Those applying antifouling (especially professionally) and those providing space for it to be applied will also be affected by the new regulations.

From July 1, 2015, anywhere antifouling is being scrubbed down, sanded or painted will need to be clearly designated as a controlled work area, within which all waste will have to be contained so it cannot enter the environment.

strict regulations.

All controlled work areas will also require detailed signs visible from 10m away, saying antifouling work is taking place, that everyone in the area must be wearing protective equipment, and giving the name and contact details of the person who established the controlled work area.

Those intending to spray apply antifouling will also have to install suitable screens around the boat to ensure that no antifouling paint is able to escape the controlled work area and affect any other person or boat or any waterway or part of the surrounding environment.

Everyone involved in the spray ap-

yards and hard stands (such as Orans Marine in Westhaven) already do all of this and so are unlikely to be too seriously affected. But some yacht club yards and smaller hardstand areas will have to work hard to ensure they meet the 2015 deadline.

Because most boat owners who apply their own antifouling do so using brushes and rollers, rather than spray painting, they will not be too badly affected by the changes.

They will, of course, no longer be able to use some of the more informal areas for applying antifouling, such as on careening grids, slipways or beaches. However, this will have little effect on most, especially in larger centres, as local and regional councils have long banned such practices anyway.

DIY-ers will also, mainly for their own health, no longer be allowed to dry sand antifouling, all sanding will need to be wet. In addition, Ron Brown, Altex's pleasure marine manager, recommends that they use a pole sander, to provide some distance between themselves and the dust and debris created by the sanding.

Brown says DIY-ers should also be aware of some key "do nots" when reapplying antifouling.

"These are not because it is against the law (although, in some cases, it is) but because it will adversely affect the performance of the paints."

He says people should not try to apply antifouling coatings between tides, should not add additives or excessively thin the antifouling, should not use too much or too little antifouling and should not relaunch their boat before the antifouling is completely dry.

"Provided one is sensible, follows the new rules and is happy to apply antifouling with brushes and rollers, the new regulations will have little effect on most boat owners," he says.

More information: EPA; (04)



mandatory collection of contaminated waste from maintenance activities will reduce the opportunity for off target effects on people, terrestrial, aquatic and taonga species.

- 8.24. With these additional measures in place for the use and management of remaining antifouling paint products, the Committee considers that the benefits to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites waahi tapu, valued flora and fauna and other taonga outweigh the risks.

## 9. International obligations

- 9.1. No international obligations were identified that may be impacted by this reassessment.

## 10. Commentary around additional controls

- 10.1. Where a substance poses non-negligible risks, controls should be imposed on the substance to help manage those risks. The staff's risk assessment has indicated that additional controls are required to mitigate the risks for all of the antifouling paints being considered. These controls will apply in addition to, or in place of, the default controls triggered by the hazard classifications. The controls for each substance can be found in Appendix E.
- 10.2. The additional controls were developed in consultation with stakeholders. The controls reflect conditions of use and user obligations that are required to help mitigate the risks that may arise through the lifecycle of the substance.
- 10.3. The additional controls are proposed in accordance with section 77A(4)(a) of the HSNO Act, on the basis that "the proposed control is more effective in terms of its effect on the management, application, and risks of the substance". The intent of each additional control and the wording is provided in Table 5.
- 10.4. The Committee considers that these additional controls will help to mitigate the risks that were not quantitatively modelled in the risk assessment, **such as the risks to bystanders and the risks to the environment from off-target deposition of antifouling paints during application or removal.** They will also help to ensure users are better aware of the controls and able to comply with them.
- 10.5. The Committee recommends to the EPA that in addition to Safety Data Sheets, the EPA work with the industry (manufacturers/suppliers and marinas/**hard-stand operators**) to develop a user-friendly summary fact sheet of the controls and make it freely available particularly to DIY operators.
- 10.6. Additionally, the time-limited approvals for those substances where the benefits only marginally outweigh the risks provides a risk management tool by eliminating the pathway to exposure by

removing the availability of a substance from New Zealand over time.

Table 5: Description of additional controls for the mitigation of risks arising from antifouling paints

Control Code	Intent of control	Control
R-1	<p><b>Personal protective equipment</b></p> <p>Control T5 (refers to Reg. 8 of the Hazardous Substances (Classes 6, 8, and 9 Controls) Regulations 2001) requires that people handling antifouling paints use protective clothing or equipment that prevents them from coming into contact with the substance, either via skin contact or through inhalation.</p> <p>This control will apply to any person (DIY or professional) applying or removing antifouling paints, including in locations that are not designated as workplaces.</p> <p>For clarity around situations where no workplace exposure standards exist for the relevant components of an antifouling paint, a variation is proposed to the default control T5 (use of PPE) that specifies when subclause (1)(b) applies.</p>	<p>Subclause (1) of Reg. 8 of the Hazardous Substances (Classes 6, 8, and 9 Controls) Regulations 2001 should be replaced by the following:</p> <ol style="list-style-type: none"> <li>Any person who handles the substance must use protective clothing or equipment that is designed, constructed, and operated to ensure that the person— <ol style="list-style-type: none"> <li>does not come into contact with or inhale, the substance; and</li> <li>is not exposed to a concentration of the substance that exceeds the workplace exposure standard (WES) for that substance, if a WES for that substance exists.</li> </ol> </li> </ol>
	<p><b>Controlled work area and signage</b></p> <p>To protect sensitive areas from exposure arising from spraydrift of the substance, the application of the substance by spray techniques is permitted provided that it is done in a controlled work area. The extent of the controlled area should be sufficient to ensure that off-target deposition of the substance is avoided. Additionally, this will also protect bystanders from involuntary exposure to antifouling paints during application.</p> <p>In order to inform people that spray painting activity is being undertaken, signage must be placed at the entrance of the controlled work area.</p>	<p><i>This control comes into effect on 1 July 2015.</i></p> <p><b>Controlled work area</b></p> <ol style="list-style-type: none"> <li>Any person applying the substance must ensure that application of the substance is carried out in a controlled work area.</li> <li>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.</li> <li>Any person applying the substance in a controlled work area must avoid off-target deposition of the substance. To avoid doubt, this requirement includes avoiding off-target deposition of the substance onto persons outside of, but within the immediate vicinity of, the controlled work area.</li> </ol> <p><b>Signage</b></p> <ol style="list-style-type: none"> <li>Any person applying the substance must ensure that signs are placed at every point of entrance into the controlled work area. Signs must be posted from the start of application, until the end</li> </ol>



of the application.

5. Signs erected in accordance with (4) must—
  - a. warn that an application is being carried out using a substance that is toxic to humans;
  - b. identify the person in charge of the application;
  - c. state that entry into the controlled work area is not permitted unless personal protective equipment (PPE) is worn by the person entering the controlled work area; and
  - d. comply with regulation 34 and regulation 35 of the Hazardous Substances (Identification) Regulations 2001 as if the distance referred to in regulation 35(3) is not less than 10 metres.
6. The conditions of (4) and (5) do not apply when the substance is applied using non-dispersive methods.

#### Collection of substances from maintenance activities

Boat maintenance activities remove the antifouling substance, biofouling waste and other contaminants from the hull of a boat. Used antifouling paints removed from the hull of boats during maintenance present a risk to the operator and to the terrestrial and aquatic environments. Collecting used antifouling paints generated from maintenance activities will reduce the risk of these substances entering the environment. It is intended that this control should apply to all antifouling paint waste so that it is a requirement to collect waste for any antifouling paint removed from a vessel's hull.

R-3

*This control comes into effect on 1 July 2015.*

1. Any person who removes any antifouling paint coating from the hull of a boat must ensure that waste containing antifouling paint residue is collected; and
2. All collected waste, as referred to in subclause (1) must be disposed of in accordance with the Hazardous Substances (Disposal) Regulations 2001.

#### Additional labelling requirements

In order to mitigate risks to both people and the environment, additional information must be provided on antifouling product labels. The product label is a key mechanism to ensure that information about the hazardous properties of the antifouling paint is made available to the end-user.

R-4

These controls will impose labelling requirements that are additional to the current

*This control comes into effect on 1 July 2015.*

**For formulated antifouling substances:**

1. Labels must include the following statements (or similar):
  - a. When applying this substance by spraying, you must sufficiently enclose the area to ensure that the substance is not deposited on off-target sites and has no adverse effects on bystanders

## Decision on the Application for reassessment of Antifouling Paints (APP201051)

standard of labelling required by Hazardous Substances (Identification) Regulations 2001.

Subclause (1)(a) relates to Control R-2.

Subclause (1)(b) relates to Control R-3.

b. You must ensure that waste generated from maintenance activities does not enter the environment

2. A person must not supply a hazardous substance to any other person unless the substance label shows the information required by (1).

#### Safety data sheets (SDS)

This control modification will require 16-header SDS to be provided for antifouling paints rather than the more generic "documentation" requirements. This will standardise the presentation and format of safety information accompanying the substance.

This control replaces the requirements of:

R-5

- regulations 37 to 50 of the Hazardous Substances (Identification) Regulations 2001;
- regulations 16 to 18 of the Hazardous Substances (Emergency Management) Regulations 2001; and
- regulation 13 of the Hazardous Substances (Disposal) Regulations 2001.

See Appendix E for the exact wording of this control.

10.7. The revised controls will come into effect after a transition period in order to allow for compliance with the revised controls to be arranged. These transitional periods are described below:

- R-1: Personal protective equipment control variation (immediate)
- R-2: Controlled work area and signage (2 years)
- R-3: Collection of substances from maintenance activities (2 years)
- R-4: Additional labelling requirements (2 years)
- R-5: Safety data sheets modification (6 months)