

NORTHLAND REGIONAL COUNCIL

**Report and Decision of independent Hearing Commissioners
Sharon McGarry and Dr Rob Lieffering
Hearing held at the Mangawhai Club, Mangawhai
on 21 – 23 September 2020**

Independent Hearing Commissioners Sharon McGarry and Dr Rob Lieffering were delegated functions and powers under section 34A of the Resource Management Act 1991 (**RMA** or ‘the Act’) by the Northland Regional Council (**NRC**) to hear and determine the application for resource consent to construct a wharf facility, which was lodged by the Mangawhai Historic Wharf Trust on 5 July 2018 and referenced as NRC application number APP.040213.01.01.

HEARING REPRESENTATIONS AND APPEARANCES

Applicant:

Mr A. Green, Counsel, Brookfields Lawyers
Mr C. Leach, Chairman of the Mangawhai Historic Wharf Trust
Mr R. Faris, Trustee of the Mangawhai Historic Wharf Trust
Dr P. McDermott, retired development and planning consultant
Dr J. Craig, Ecologist
Ms K. McLaughlin-Brown, Landscape Architect and Planner, Evolve Planning and Landscape Architecture
Mr V. Chandra, Principal Planner, Dream Planning Limited

Submitters:

New Zealand Fairy Tern Charitable Trust

- Ms S. Ploughman
- Mr I. Southey

Mr D. Goodwin
Mangawhai Tavern Properties and Mangawhai Tavern Trading Co.

- Mr J. Walters

Mr J. Pearson
Ms D. Stone
Mangawhai Heads Holiday Park Ltd

- Mr R. Gunson

Royal Forest and Bird Protection Society of New Zealand Inc.

- Mr N. Beveridge

Ms M. Scott
Mr J. Cayford
Director-General of Conservation

- Ms S. Bradley and Ms L. Sutherland, joint Counsel
- Dr A. Beauchamp, Ecologist, Department of Conservation
- Mr T. Makan, Technical Officer, Department of Conservation (via internet)
- Ms L. Kirk, Planner, Department of Conservation

Mr A. Hamilton and Ms N. Everett
Mr A. McConchie
Mr J. Price

Written statement tabled:

Mr R. and Mrs L. Whale

Section 42A Reporting Officer:

Ms K. McGuire, Consents Officer, NRC

- Ms K. Hansen, Biodiversity Advisor, NRC

BACKGROUND AND PROCEDURAL MATTERS

1. This is the report and decision of independent Hearing Commissioners Sharon McGarry (Chair) and Dr Rob Lieffering. We were appointed by the Northland Regional Council (**NRC**) to hear and determine an application by the Mangawhai Historic Wharf Trust (**MHWT** or ‘the Applicant’) for various resource consents associated with the construction and use of a wharf structure and pontoon, and to occupy the coastal marine area (**CMA**) at the end of Moir Street, Mangawhai.
2. The application was lodged on 5 July 2018 and further information was requested by the NRC under section 92 of the RMA on 3 August 2018. The Applicant provided the further information on 25 January 2019 and, after being advised that the application would be publicly notified, requested the application be placed on hold to undertake fundraising.
3. The application was updated with amended application documentation on 7 April 2019 and was publicly notified on 25 May 2020.
4. The application seeks to ‘reconstruct’ a historic wharf at the end of Moir Street, Mangawhai which was removed in the 1950s. The proposed wharf facility would comprise a piled timber wharf structure (90 metres (**m**) long) with a two-sided building located at the head of the wharf (10.9 m x 12 m) for shelter and display boards. It was originally proposed to construct a gangway which would extend from the head of the wharf to a floating concrete pontoon which would be secured by four piles. However, the application was amended in the Applicant’s written Right of Reply to remove the proposed gangway and floating pontoon.
5. The application includes disturbance of the foreshore with the use of heavy machinery on the CMA during construction. It is proposed that any earthworks not included as part of this application and any land disturbance will be undertaken in accordance with the permitted activity rules in the NRC’s Regional Water and Soil Plan for Northland (**RWSP**).
6. The hearing of the application commenced at 9.30 am on Monday 21 September 2020. Evidence was heard over the course of three days and the hearing was adjourned at 3.00 pm on Wednesday 23 September 2020 to enable the provision of further information, further expert conferencing, and for the Applicant to provide a written Right of Reply.
7. The NRC provided a report prepared under section 42A of the RMA (‘Staff Report’) which was circulated to the parties¹ prior to the hearing. The Staff Report recommended that application be refused.
8. The Applicant’s evidence was also pre-circulated prior to the hearing². The application documentation, submissions, Staff Report, and pre-circulated evidence were pre-read by us, and we directed that this material be ‘taken as read’ during the hearing³.
9. We issued Minute 1 on 10 August 2020 outlining the hearing process and timeframe for the pre-circulation of evidence.
10. We issued Minute 2 on 14 September 2020 directing pre-hearing expert witness conferencing on ecology and planning to assist in identifying area of agreement and disagreement.

¹ In accordance with section 103B of the RMA.

² In accordance with section 103B of the RMA.

³ As provided for by section 41C(1)(b) of the RMA.

11. We undertook various site visits before, over the course of the hearing, and following the hearing during low and high tide conditions, including the application site and immediate environs, and sites around the upper and lower Mangawhai Harbour⁴.
12. Following the adjournment of the hearing, we issued Minute 3 on 28 September 2020 outlining the provision of further information, further expert planning conferencing, and setting a timeframe for the provision of the Applicant's written Right of Reply.
13. The Applicant provided its written Right of Reply on 27 October 2020.
14. We formally closed the hearing on 30 October 2020 having determined we had sufficient information to make our decision.
15. We would like to thank Ms Alissa Sluys, the NRC's Hearing Consents and Hearing Administrator, for the assistance that she provided to all parties throughout the hearing process. We also wish to thank those parties who attended the hearings and presented evidence.

Extension of Statutory Timeframes to Notify Application and to Hold and Complete Hearing of the Application

16. Section 95 of the RMA requires the NRC to notify an application within 20 working days of its receipt, and section 103A(2) of the RMA requires that a hearing of the application is completed no later than 75 working days of the close of submissions. Section 37 of the RMA enables the consent authority to extend statutory time limits, subject to the requirements set out in section 37A of the Act.
17. NRC staff have advised us the Covid-19 response and subsequent Alert Level 4 lockdown and progressive periods at Alert Levels 3 and 2 have had a significant impact on the ability for the NRC to notify the application and prepare for, and hold, this hearing within the statutory timeframes prescribed by the RMA. We were advised the period between lodgement of the application and notification of the application was exceeded by 30 working days. We understand the NRC has previously used the provisions of section 37 of the RMA to extend the statutory time limits associated with the notification of the application and that the Applicant had been advised of this time extension.
18. NRC staff have advised us the period between the close of submissions to the commencement of the hearing was 63 working days and the hearing period was 29 working days (i.e. 21 September 2020 to the formal closing on 30 October 2020). The combined period from the close of submissions to the completion of the hearing was therefore 92 working days, which exceeds the 75 working days specified in section 103A(2) of the RMA by 17 working days.
19. Due to the special circumstances affecting the ability of the NRC to hold a hearing (being the Covid-19 Alert restrictions) and the complexity of the application (requiring additional time for us to request and receive further information following the end of the formal part of the hearing) we consider it appropriate in this case to extend the statutory time limits specified in section 103A(2) of the RMA by 17 working days. This extension is made pursuant to section 37A(4) of the RMA.

⁴ The application site and surrounds were referred to by the different parties variously as 'Mangawhai Estuary', 'the estuary', 'Mangawhai Harbour', and/or 'the harbour'. In this decision we use these terms interchangeably. We also note that the harbour/estuary is further divided into the 'lower', 'middle', and 'upper' sections, with the application site being within the 'middle' section.

20. In making this decision to extend timeframes under section 37A(4) of the RMA, we confirm that we have taken into account the matters specified in section 37A(1)(a-c) of the RMA - that is, we consider the extension of time will not prejudice the interests of any of the parties; we have taken into account the interests of the community in achieving adequate assessment of the effects of a proposal; and, we have taken into account our duty to avoid unreasonable delay in making our decision.

THE APPLICATION

21. The Staff Report detailed background information to the application and described the proposed activities. We do not repeat that information here.
22. In the Applicant’s Right of Reply the application was amended to remove the gangway and floating pontoon, which would prevent use of the wharf for recreational boats. In summary, the Reply proposed the following additional restrictive measures:
- (a) Limiting the construction period to 1 April to 31 July;
 - (b) No tying up of boats at the wharf;
 - (c) Provision of a \$50,000 fund for maintenance costs;
 - (d) No use of the Moir Street road reserve during construction;
 - (e) An alcohol and a dog ban on the wharf;
 - (f) Monitoring of usage of the wharf using an electronic counter on the wharf and the Mangawhai Tavern’s CCTV system; and
 - (g) No commercial use of the wharf.
23. A consent term of 30 years was sought.

REGIONAL PLAN RULES AFFECTED

24. The Staff Report stated the proposed activities are classified under the operative Regional Coastal Plan for Northland (**RCP**) and the Proposed Regional Plan for Northland – Appeal Version 2020 (**PRP**) as follows:

Consent Type	For	Detail	Classification
APP.039149.03.01 Coastal Permit	<ul style="list-style-type: none"> ▪ Structures – Wharf Facility 	<ul style="list-style-type: none"> ▪ Place, use and occupy space in the coastal marine area with the wharf facility. 	<ul style="list-style-type: none"> ▪ Non-complying activity in accordance with Rule 31.3.4(m) and Rule 31.3.4(t) of the RCP. ▪ Discretionary activity in accordance with Rule C.1.1.21 of the PRP.
APP.039149.04.01 Coastal Permit	<ul style="list-style-type: none"> ▪ Disturb Foreshore 	<ul style="list-style-type: none"> ▪ Disturb the foreshore in the coastal marine area during construction. 	<ul style="list-style-type: none"> ▪ Discretionary activity in accordance with Rule C.1.1.21 of the PRP.

SITE DESCRIPTION

25. The Staff Report described application site and the surrounds of coastal environment at the end of Moir Street, Mangawhai. For the purpose of our assessment, we adopt the description as outlined in the Staff Report (pgs. 6-8).⁵
26. In summary, we note the following:
 - (a) The CMA of the Mangawhai Harbour estuary affected is classified as ‘Marine 1 (Protection) Management Area’ (**M1MA**) under the operative RCP; and as a ‘General Marine Zone’ under the PRP;
 - (b) The wharf footprint contains the remnants of the historic wharf and two historic groyne structures, which are registered by the heritage New Zealand Pouhere Taonga as an archaeological site (R08/22);
 - (c) The two historic groyne structures border the channel near the wharf site;
 - (d) The application site and a small adjacent area is classified in the Regional Policy Statement for Northland (**RPS**) and the PRP as having high natural character;
 - (e) The CMA affected is identified in the PRP as a ‘significant bird area’ and a ‘significant marine mammal and seabird area’; and
 - (f) The Mangawhai sandspit (2.2 kilometres from the application site) is identified in the RPS as an Outstanding Natural Feature (**ONF**) and Outstanding Natural Landscape (**ONL**) and as an ONF in the PRP. The application site itself is not the subject of any ONF or ONL.

NOTIFICATION AND SUBMISSIONS

27. The application was publicly notified on 25 May 2020, following a reduction to Alert Level 2 under New Zealand’s COVID-19 Alert system.
28. A total of 227 submissions were received within the submission period, with four late submissions accepted by the NRC after being granted a section 37 RMA waiver and one late submission rejected by the NRC.
29. At the commencement of the hearing we were advised that one submission in opposition lodged by Mr Southey had been withdrawn and one submission in support by Dr McDermott had been withdrawn, to enable them to give independent expert evidence.
30. Accounting for these withdrawals, a total of 225 submission were received, with 30 submissions in opposition to the application; and 195 submissions in support. Thirty-five submitters indicated they wished to be heard.
31. The Staff Report stated that the key reasons for the submissions in support of the application included the following:
 - (a) Increased amenity and recreation;
 - (b) The proposed wharf will provide a link to Mangawhai’s history;
 - (c) Improved access to the CMA in the upper harbour; and
 - (d) Potential benefits to the local economy and businesses due to an increase in tourism in the area.

⁵ In accordance with section 113 of the RMA.

32. The Staff Report stated the key issues raised by submissions in opposition to the application included the following:
- (a) Adverse effects of the construction and use of the wharf facility on bird and marine life, particularly on the New Zealand fairy tern/tara iti (**NZFT** or ‘fairy tern’);
 - (b) Adverse effects of the use of the wharf on land-based facilities such as traffic, parking, and public toilet facilities; and
 - (c) Adverse effects of the presence of the wharf on visual amenity and natural character.
33. We were provided with, and have read, copies of all of the submissions received and consider the issues raised were accurately summarised in the Staff Report, as detailed above.

SUMMARY OF EVIDENCE

Applicant’s Case

34. The revised notified application set out the background to the establishment of the MHWT and its focus to re-establish a functional wharf in its original location on behalf of the community. The documentation included the following:
- (a) Historic photographs of the demolished wharf, design plans, timelines for the project, and funding;
 - (b) Details on community consultation undertaken (Appendix 1);
 - (c) Construction and operation details (Appendix 2);
 - (d) A planning assessment by Mr Jackson Worsfold, Dream Planning (Appendix 3);
 - (e) A cultural impact assessment by Environs Holding Ltd (Appendix 4);
 - (f) An archaeological assessment by Dr Moira Jackson (Appendix 5);
 - (g) Correspondence with Heritage New Zealand Pouhere Taonga (Appendix 6);
 - (h) A landscape and visual assessment by Ms Kylie McLaughlin-Brown, Dream Planning (Appendix 7);
 - (i) A preliminary environmental impact assessment by La Brontë Coastal Consultants Ltd (Appendix 8);
 - (j) An intertidal and seabed survey by Biosearches (Appendix 9);
 - (k) An overview of environmental effects by Dr John Craig (Appendix 10);
 - (l) A copy of the ‘Mangawhai Historical Wharf Charitable Trust Deed’ (Appendix 11); and
 - (m) A map of potentially affected persons and written approval from five parties (Appendix 13).
35. Further information requested by the NRC under section 92 of the RMA was provided on 25 January 2019.
36. **Mr Andrew Green**, Counsel for the MHWT, conducted the Applicant’s case by presenting legal submissions and calling six witnesses. In summary, he made the following key points:
- (a) The application turns on the potential effects on the threatened NZFT and Policy 11 of the New Zealand Coastal Policy Statement (**NZCPS**) directs that adverse effects are to be avoided, but that this is not synonymous with prohibited;

- (b) Based on the ‘facts’, adverse effects from the construction and operation of the wharf on the NZFT population will be avoided;
 - (c) The Reporting Officer’s recommendation and conclusion in the Staff Report are unfounded and appear to be based on her misunderstanding of the NZCPS and the majority decision of the Supreme Court in *King Salmon*⁶;
 - (d) Through the ‘correct application’ of *King Salmon* the application passes both ‘gateway tests’ of section 104D of the RMA for non-complying activities on the basis the adverse effects will be ‘transitory and no more than minor’;
 - (e) The Applicant accepts that it has the evidential burden, however, it is not required to prove beyond reasonable doubt adverse effects will be avoided;
 - (f) There is a history of the NZFT’s ability to adapt to change and they have habituated to significant human population growth over recent years in Mangawhai; and
 - (g) The adverse effects of the wharf are insignificant in the context of the ongoing substantial changes to the Mangawhai Harbour.
37. Appended to Mr Green’s legal submissions were copies of NZCPS Policy 11, RPS Objective 3.4 and Policy 4.4.1, PRP Policy D.2.16, and RCP Objectives 25.3.1 and 25.3.2 (Appendix 1); and a synopsis of case law referred to (Appendix 2). At our request, he provided us with an electronic casebook of all the cases referenced. He also tabled a document by Subsurface Ltd Archaeological Services (dated 19/09/2020) describing and photographing the intertidal remains of the historic wharf, which he requested be included with the application documentation.
38. **Mr Colin Leach**, Chairman of the MHWT, provided a brief of evidence and presented a written summary statement outlining the background to the formation of the Trust, its purpose and funding for the re-establishment of a functional wharf. He highlighted the benefits of the wharf and the changes to the historic wharf design to make it ‘fit for purpose’ for accessing the water in all tides. He considered the wharf would build community spirit and provide for recreational and educational opportunities.
39. **Mr Roy Faris**, a Trustee for MHWT, provided a brief of evidence and presented a written summary statement addressing site investigations, replication of the wharf structure, construction methodology, and materials.
40. **Dr Philip McDermott**, a retired development planning consultant, provided a brief of evidence and presented a written summary statement addressing the wider issue of the survival of the NZFT and the events and circumstances that threaten their survival, in order to place the possible threat of the wharf in context. He considered the NZFT population has been more or less stable since the 1990s, with year to year fluctuations and ‘small but significant gain over the past decade, rather than a decline’. Attached to his evidence was a ‘working paper’ authored by him titled ‘The Survival of the New Zealand Fairy Tern at Mangawhai’ (dated August 2020).
41. **Dr John Craig**, an ecologist, provided a brief of evidence and presented a written summary statement addressing the information and evidence put forward by submitters and considered it was ‘inappropriate and inconclusive’, due to analysis by individual variable. He stated there was no evidence to show that mangrove removal had had a negative effect on NZFT breeding. He considered submitters had ignored the NZFT’s ability to habituate to disturbance from recreational activities. He concluded the effects of the construction and operation of the wharf would be ‘less than minor and transitory’.

⁶ *Environmental Defence Society Inc. v New Zealand King Salmon Company Ltd* [2014] NZSC 38

42. **Ms Kylie McLaughlin-Brown**, a Planner and Landscape Architect at Evolve Planning and Landscape Architecture, provided a brief of evidence and presented a written summary statement assessing landscape, natural character, and visual and amenity effects (including potential noise and lighting effects). She concluded the wharf would result in a ‘moderate to low (minor)’ visual change once the wharf became part of the landscape like it historically was; ‘moderate to low adverse effect (minor effect)’ on the perceived naturalness and natural character within the harbour; and a positive amenity and recreational attribute for the wider community. Appended to her evidence were copies of her Natural Character Assessment, the Historic Wharf Rebuild Visual Representation Plan Set, and viewpoint photos from the esplanade reserve adjacent to Mr Goodwin’s property (a submitter in opposition who lives at 3 Moir Street, Mangawhai).
43. **Mr Vishal Chandra**, a consulting Principal Planner at Dream Planning Limited, provided a brief of evidence addressing the relevant statutory provisions and issues raised in submissions and the Staff Report. He concluded the proposal would have significant positive effects on recreation, social, and education outcomes for the community and visitors. He considered the wharf was generally consistent with the relevant provisions of the NZCPS, RPS, RCP, and PRP given the NZFT will habituate and any effects that may occur would be ‘temporary and transitory’. He concluded the application passed both section 104D RMA ‘gateway tests’ for non-complying activities and therefore the consents sought can be granted subject to conditions.

Submitters

44. **The New Zealand Fairy Tern Charitable Trust (NZFTCT)** was represented at the hearing by Ms Susan Ploughman who spoke in opposition to the application and called Mr Southey as an expert witness. She highlighted the risk to the NZFT from increased human disturbance and considered their capacity to tolerate further increased direct and indirect habitat disturbance was limited. She provided a copy of a New Zealand Geographic article titled ‘*Fallen from Grace*’.
45. **Mr Ian Southey**, an amateur ornithologist with 40 years of experience and a strong interest in the NZFT, provided a written statement of evidence outlining historic and ongoing research relating to the bird. He addressed the bird’s population status, impacts of mangrove removal on the birds, food sources, feeding territories, human disturbance issues, boat wakes, impacts near the proposed site, and the Applicant’s expert evidence. He concluded there was no evidence that adverse impacts on the NZFT would be avoided and that there was a risk of unknown impacts. Appended to his evidence (his Appendix 1) was a paper authored by himself titled ‘*Fairy terns near the proposed wharf site on Mangawhai Harbour – feeding behaviour and potential human disturbance*’.
46. **Mr David Goodwin**, who lives at 3 Moir Street, spoke in opposition to the application on the basis of adverse effects on his views of the estuary, lack of parking facilities, the visual impact of the building at the end of the wharf and lighting, and adverse effects on the fairy terns. He considered the proposed wharf would devalue his property by increasing the number of people and boats. He considered the existing boat activity (particularly jet skis) caused disturbance and erosion, and that this needed to be addressed to avoid existing adverse effects. He was concerned about adverse amenity effects from parking, litter, noise, drinking, and night-time activity on the wharf.

⁷ Issue 162 Mar – Apr 2020

47. **Mr John Walters**, represented Mangawhai Tavern Properties Ltd and Mangawhai Tavern Trading Ltd at the hearing in support of the application. He considered the proposed wharf would be a great focus and asset for the community. He did not consider the proposed wharf activity would add to the existing stresses experienced by the NZFT. He noted the area was well used by walkers and kayakers, and sporadically by jet skiers, with boat ramp use restricted to around high tide.
48. **Mr John Pearson**, a resident and ratepayer in Mangawhai and Chair of the Mangawhai Harbour Restoration Society, presented a written statement in support of the application. He highlighted the community's strong connection with the harbour and use of the historic wharf for trade and transport. He considered the rapidly growing community needed recreational facilities and access to the estuary. He acknowledged recreational activities needed to be managed, including boat speed restrictions, and dog control. He considered existing recreational use (dog walking, kayaking, gathering shellfish, fishing, and swimming at the application site would not change. He noted the foreshore was not a wildlife sanctuary and should not be treated as one. He considered the wharf would re-establish the village's connection with the estuary and allow for better management of recreational activities.
49. **Ms Deborah Stone**, a Mangawhai resident and member of the NZFTCT, presented a written statement in opposition to the application. She emphasised the vulnerability of the fairy tern and noted her recent involvement in observing their fishing activities along the edges of the channel where the old wharf groynes still exist. She was particularly concerned about the floating pontoon, which was not part of the historic wharf, and the increase in recreational boat use. She considered the proposed wharf was not functionally necessary and would impact the sand flats at low tide. She called the application a 'tinihanga – a deception' as it would not be suitable for boat access without further changes and dredging, except for a very short time at high tide. In response to questions, she said that even without the floating pontoon and associated recreational use, she remained concerned about the disturbance of foraging birds at low tide and questioned the functional need for a wharf as a promenade.
50. **Mr Richard Gunson**, owner of the Mangawhai Heads Holiday Park and a Trustee of the MHWT, presented a written statement in support of the application. He emphasised the historic value the proposed wharf would bring to the community on its own and combined with other historic features. He noted his business hosted over 14,000 people per year in its holiday park on the lower harbour waterfront, adjacent to the fairy terns' foraging area, and yet they are still observed in the area. He hoped to significantly increase the numbers staying in the holiday park each year. He noted over 35 businesses were in support and are aware of the fairy tern and the work undertaken for its survival. He considered the proposed wharf could be used without adversely affecting the fairy tern and could help educate people to support them. He said that Mangawhai had a dog control problem which needed to be addressed regardless of the application.
51. **The New Zealand Royal Forest and Bird Society (Forest & Bird)** was represented at the hearing by Mr Nick Beveridge. He stated that Forest & Bird opposed the application on the basis of inadequate information, effects on the NZFT, and the lack of appropriate conditions. In response to questions, he considered that even if recreational use was restricted to high tide there would still be an unacceptable risk for the NZFT and considerable uncertainty. He noted that even 'transitory and minor effects' can result in cumulative effects that are significant.

52. **Ms Melanie Scott**, a member of the NZFTCT and a Department of Conservation (**DoC**) volunteer, presented a written summary statement in opposition to the application. She highlighted New Zealand’s international obligations under the United Nation’s Convention on Biological Diversity and the world’s imminent mass extinctions if we don’t protect our unique species. She noted the now extremely restricted geographical habitat of the fairy terns and the impacts from humans and predators. She highlighted studies showing the high abundance of fish for breeding fairy terns and the importance of shallow water. She noted the strong territorial nature of the males and the limits to their ability to adapt to disturbance, particularly when teaching their young to fly and fish. She noted her experience with human behaviour along the coastal strip around the application site and the increasing human and dog disturbance to nesting birds. In response to questions, she considered that existing recreational activity on the foreshore was already disturbing the fairy terns and should be limited.
53. **Mr Alister Hamilton and Ms Nicola Everett**, residents of Mangawhai, presented a written statement in support of the application. They considered resurrection of the historic wharf would be once again be part of the soul of the town and enable connection to the water. They noted there was deficient infrastructure and public amenities in the area. They considered the funding and enthusiasm showed the community support for the proposal. They thought a wharf would fit well with a coastal walkway and add amenities for visitors to Mangawhai.
54. **Mr Aaron McConchie**, a resident of Mangawhai, presented a written statement, diagrams, and photographs in opposition to the application. He noted the historic wharf was necessary before suitable land access was available, but it was not a necessity now and had shortcomings from an amenity and environmental perspective. He highlighted the four ‘must haves’ identified through community consultation (display board, toilet, changing facilities, and storage) did not need to be on a wharf and three were not proposed. He considered the presence of the wharf would create ongoing pressure for dredging at some time in the future. He noted the original cost estimates had doubled in two years and would continue to increase. He considered the floating pontoon was not suitable for launching or retrieving small boats and was not fit for purpose. He considered that without accommodating recreational activities and by prohibiting commercial activities the wharf would only be used for standing on and used for substandard fishing. He raised concerns about parking, ongoing community funding, health and safety issues, accessibility, and the need to consider alternatives. He considered increased human activity on the fairy tern feeding area had not been mitigated and considered this could be avoided by not building structures in their foraging area. In response to questions, he stated removal of the floating pontoon would reduce the impact, but removing it would also remove most of the amenity value and intended purpose.
55. **Mrs Jennifer Price**, a resident of Mangawhai and Treasurer of the NZFTCT, presented a written statement in opposition to the application. She was not opposed to the restoration of wharves in general, but was concerned by the loss of the open stretch of water in front of the Mangawhai Tavern for teaching people to sail, visual effects of the wharf, detrimental effects on the fairy tern, and the provision of ongoing funds for maintenance. She did not understand the purpose of the wharf given the tidal limitations.
56. **The Director-General of Conservation** was represented at the hearing by Ms Shona Bradley and Ms Lisa Sutherland, acting as Counsel. Ms Bradley and Ms Sutherland presented a synopsis of submissions and called three witnesses – Dr Beauchamp, Mr Makan, and Ms Kirk. The legal submissions addressed increased human activity in the area of the wharf, the potential for cumulative effects through disturbance to foraging, and the increased risk of extinction of the NZFT. They submitted the Applicant had failed to prove its case that adverse effects on the NZFT would be avoided and that the burden of proof was on them. They stated that due to the potentially significant impact on NZFT, it was necessary to take a precautionary approach and decline the application. They submitted the application passed neither gateway of section

- 104D of the RMA for non-complying activities and must therefore be declined on this basis. They submitted that the Applicant had failed to provide enough information to determine the application and should be declined under section 104(6) of the RMA. The submissions cited numerous cases from the High Court and Environment Court throughout the submissions and helpfully provided us with a folder of decisions and a copy of the NZCPS.
57. **Dr Anthony Beauchamp**, a zoologist employed by DoC as a Technical Advisor Threats, provided a written statement of evidence addressing the importance of the harbour to the NZFT, the existing population, the importance of the harbour to foraging, development with the harbour, and the Applicant's evidence. He concluded that the proposed wharf would undoubtedly increase human activity in the middle section of the harbour at critical times when the NZFT are foraging to feed their young, and they are fledging their chicks and teaching them to fish. He considered that added disturbance at these times could lead to the extinction of the fairy tern. He considered the proposed wharf would encourage recreation in the middle section of the harbour, where recreational activity is currently relatively low. He was most concerned with existing disturbance activity by people waking unleashed dogs at low tide. He was concerned any increase in disturbance causing NZFT to relocate and noted that there are few suitable options for relocation, which would increase the probability the population will fail.
58. **Mr Troy Makan**, an ecologist employed by DoC as a Technical Advisor Systems Improvement, appeared via internet video and provided a written statement of evidence outlining the 'Nationally critical' threat classification status of the NZFT, the small population, and the significant investment and management work being undertaken to recover the species. He considered the proposed wharf would increase access and activity in an area critical to the fairy tern, which would increase the risk of extinction. He noted DoC had been doing work since 1987, in conjunction with community conservation efforts, with approximately \$160,000 spent annually for on ground management over the last two years and an increase to \$180,000 this year. He outlined the establishment of a Tara Iti Recovery Group to provide technical and strategic advice for their recovery. He also noted the DoC run research programme funded through a partnership with The Shorebirds Trust, which has provided approximately \$250,000 since 2017, with this money funding recovery planning support, genetic research, shell patch research, and predator control. In response to questions, he acknowledged it was difficult to manage adverse effects in the wider harbour habitat than at the breeding areas. He considered limiting human activity in foraging areas would be difficult.
59. **Ms Linda Kirk**, an RMA Planner for DoC, provided a written statement of evidence addressing the relevant provisions of the statutory documents, sections 104 and 104D of the RMA, the need to consider consequential and cumulative effects, and Part 2 of the RMA. She emphasised the importance of the harbour to New Zealand's rarest bird and the protective direction of the planning framework in the RCP in relation to Marine 1 (Protection) Management Areas. She considered the provisions of the operative RCP should be given more weight than the provisions of the PRP given the provisions relating to the coastal marine area would need to be approved by the Minister of Conservation before it would become operative. She noted that, in this case, the provisions of the PRP would need to give effect to the provisions of the NZCPS and the requirement to avoid adverse effects on threatened species and their habitats. She concluded the application should be declined under section 104(6) of the RMA due to inadequate information and that, in the event this not the case, must be declined under section 104D of the RMA, as neither gateway test for non-complying activities is passed.
60. **Mr Reg and Mrs Lynette Whale** provided a written statement in opposition to the application, which was tabled at the hearing. They raised concern for an already compromised fairy tern feeding area and questioned the need for a wharf structure.

Section 42A Staff Report

61. The NRC’s reporting officer, **Ms Katie McGuire**, spoke to her section 42A RMA Staff Report and addressed the matters raised throughout the hearing process. Ms McGuire stated that she relied on the evidence of Ms Hansen given her direct experience and knowledge of the NZFT. She confirmed that she remained of the view the application should be refused because of adverse effects on the NZFT, both direct and cumulative; and the requirements of the NZCPS that these must be avoided given the bird is classified as a ‘nationally critical’ threatened species. She provided a copy of a legal opinion from Mr Mike Doesburg of Wynn Williams regarding the relative weighting of the RCP and PRP (dated 18 September 2020).
62. **Ms Katrina Hansen**, Biodiversity Advisor for NRC, provided a technical review of the potential effects on the NZFT. She concluded the potential effects of construction of the wharf would be no more than minor with conditions to avoid and mitigate adverse effects on the NZFT. She concluded that the potential impacts from the operation and use of the wharf from increased recreational activity in the upper harbour would adversely impact the ability of the birds to feed and to breed successfully. She provided a copy of a published paper regarding the conservation status of the NZFT⁸

Joint Witness Statements

63. Following our Minute 2 directions to undertake expert conferencing, we received two joint witness statements (**JWS**) prior to the commencement of the hearing relating to potential effects on birds and planning matters. The JWS recorded areas of agreement and disagreement. A second JWS from the expert planners was received in response to our Minute 3, following the adjournment of the hearing.

Applicant’s Right of Reply

64. The Applicant provided a written Right of Reply on 27 October 2020. The Reply stated that the pontoon and gangway structures were removed from the application, thereby removing access to and from the water by boats and changing the use to ‘passive activities – walking, observation and interpretation’. In summary, the Applicant submitted that the concerns raised for the NZFT were ‘unsubstantiated fears’ which were not based on evidence. We were urged to consider the opposing expert evidence in light of the Court’s discussion on the language used in expert evidence in *SKP Inc. and Orr v Auckland Council* [2018] EnvC 081 (paragraphs 99-128) and consider the weight given to the evidence in light of the similarities to this case. The Applicant maintained the proposed wharf would be ‘a point of interest’ and ‘a major amenity for the local community and potentially an asset in the educational toolbox for the management of endangered shorebirds’. The Applicant requested that an interim decision be made granting the consent and setting a timetable for finalising conditions.
65. Appended to the Reply was an email from Mr John Walters (dated 6 October 2020) confirming agreement in principle to use of the Mangawhai Tavern’s CCTV system for security, and a letter (dated 6 October 2020) from Peter Wethey, Chairman of the Kaipara District Council’s Awards & Grants Committee, outlining the ‘Mangawhai Endowment Lands Account Policy’ and the funds available and the process and criteria for awarding grants.

⁸ S.M Ferreira, K.M. Hansen, G.R. Parrish, R.J Pierce, G.A Pulham and S. Taylor (2005) ‘Conservation of the endangered New Zealand fairy tern’ Biological Conservation 125 (2005).

ASSESSMENT

66. In assessing the application before us, we have considered the application documentation and further information, the Staff Report, submissions, and all evidence provided throughout the hearing process, including further information received after the adjournment.
67. We are required to consider the evidence, expert and lay, and reach a view on potential adverse effects and determine how best to deal with them within the requirements of the RMA and within the context of the relevant planning documents. We record that the findings we have made and the decision we have arrived at are based on the evidence before us and our consideration of that material within the context of the statutory framework.
68. We have reviewed and summarised all the evidence provided above to ensure there is an accurate record of the hearing process.

Status of the Activities

69. The starting point for our assessment of the application is to determine the activity class status of the proposed activities under the RCP and PRP. There was agreement that the activities should be ‘bundled’ and assessed as non-complying activities.
70. We accept the proposed activities should be considered as **non-complying activities** under sections 104 and 104D of the RMA.

Sections 104 and 104D

71. Section 104(1) of the RMA states that, when considering an application for resource consent and any submissions received, we must, subject to Part 2 of the Act (which contains the Act’s purpose and principles), have regard to-
 - (a) *Any actual and potential effects on the environment of allowing the activity;*
 - (ab) *Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;*
 - (b) *Any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or a proposed regional policy statement, a plan or proposed plan; and*
 - (c) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*
72. In terms of our responsibility for giving consideration to the application, we are required to have regard to the matters listed in sections 104 and 104D of the RMA.
73. Section 104(2) of the RMA states that, when forming an opinion for the purposes of section 104(1)(a), we may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. This is referred to as consideration of the ‘permitted baseline’.
74. There was agreement that there is no relevant permitted baseline of adverse effects. We agree, and record that we have not applied any permitted baseline.
75. There was agreement that any recreational use of the foreshore associated with the proposed wharf, and not recreational use of the wharf itself, would trigger RCP Rule 31.3.2. There was also agreement that recreational use of the wharf structure itself would not trigger RCP Rule 31.3.2 because it would not be on the foreshore.

76. Mr Chandra considered that recreational use of the harbour was permitted provided it met the performance terms, standards and conditions, and did not involve the installation of structures. He stated the movement of water resulting from vessel movement, noise from motorised vessels and people, and the visual presence of users on the water can be considered as part of the permitted baseline.
77. We accept that the existing environment includes permitted activities such as the recreational use of the coastal marine area and foreshore, any existing lawful structures, and applicable regulations and bylaws under other statutes. We have made our assessment on the basis that existing recreational activity on the foreshore area around the application site and harbour is undertaken in compliance with the existing rules and that enforcement of these is occurring, including boat speeds and navigational requirements, and dog control. We also assume the existing levels and types of passive recreational use of the foreshore around the middle and upper parts of the harbour are undertaken without disturbance of roosting, feeding or breeding of the NZFT or any indigenous or migratory bird species, in accordance with RCP Rule 31.3.2. However, we record that we heard evidence to suggest that this is not always the case around the application site.
78. Section 104(3)(a)(ii) of the RMA states that when considering the applications, we must not have regard to any effect on a person who has given written approvals to the application. We note the written approvals to rebuild the wharf (as notified) from Mr Richard Smith, Mr David Milne and Ms Margot Edwards, Mr John Waitri, Ms Louise Findlater and Ms P Griffiths.
79. We agree with Ms Bradley and Ms Kirk that our first consideration under section 104 of the RMA is whether we have adequate information to make a decision under section 104(6) of the RMA.
80. Section 104(6) allows a decision maker to decline an application if they determine they have inadequate information to determine the application. We find we have adequate information to determine the application. While more information could, and probably should, have been provided by the Applicant, we find we have sufficient information to determine whether there is likely to be adverse effects on the NZFT and their habitat. Accordingly, we do not consider it necessary or appropriate to refuse the application under section 104(6) of the RMA.
81. In making our assessment under section 104D(1) of the RMA, we can only grant consent for a non-complying activity, if either of the following 'gateway tests' is passed:
- (a) *The adverse effects of the activity on the environment will be minor; **or***
 - (b) *The application is for an activity that will not be contrary to the objectives and policies of –*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) *the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity; or*
 - (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
82. We consider sections 104 and 104D of the RMA below.

SECTION 104(1)(a) – ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT

83. The Staff Report assessed the following potential adverse environmental effects of the application:

- (a) Effects on water quality;
 - (b) Habitat/Ecological effects;
 - (c) Effects on benthic habitat and ecology;
 - (d) Effects on coastal birds;
 - (e) Effects on natural character, landscape and visual amenity;
 - (f) Effects on archaeological/historic sites;
 - (g) Cultural effects;
 - (h) Effects on public access and recreation;
 - (i) Effects on Navigation;
 - (j) Structural security/coastal hazards;
 - (k) Noise effects; and
 - (l) Land-based facilities.
84. We adopt the conclusions reached the Staff Report that the actual and potential adverse effects on water quality, benthic habitat and ecology, archaeological and historic values, and cultural values will be minor with the imposition of conditions.
85. We adopt the Staff Report’s conclusion that any adverse effects on navigation can be addressed by conditions requiring appropriate navigational lighting. We agree that lighting and noise effects associated with the operation of the wharf can be addressed by imposing appropriate standards. We have considered the further comments received from the Harbourmaster in relation to increased motorised boating in the middle and upper harbour. We accept that these navigational safety concerns are avoided with the amendment to the application to remove the gangway and floating pontoon.
86. We adopt conclusions in the Staff Report that any adverse effects on land-based facilities are likely to be minor given the locality, existing levels of use and events currently held in the immediate area, and existing facilities.
87. We find that, given the amendment to the application, there will be no change to the existing public access to and along the coastal marine area. We acknowledge that the public can currently walk to and along the foreshore and can access the foreshore from the existing boat ramp.
88. We find that the wharf will have positive effects on amenity by providing a point of interest and a connection with the past through the provision of signboards showing the historic wharf. We also acknowledge that the proposed would have positive economic effects on some local businesses.
89. We agree that any adverse effects on public access to and along the CMA will be minor during the construction of the wharf, but that this will be temporary.
90. In relation to effects on birds, we note that the JWS (dated 20 September 2020) records agreement between the bird experts regarding potentially affected threatened species in and around Mangawhai Harbour, the conservation status of each species, and construction impacts. There was agreement that any adverse effects associated with construction of the wharf (on the identified bird species) would be ‘limited’ and that adverse effects on the NZFT could be avoided by undertaking the works outside of the NZFT breeding season and with the imposition of conditions.

91. There was agreement that impacts from the use of the wharf primarily relate to the NZFT and disturbance impacts on their habitat around the application site. On the basis of the evidence, we agree and focus our assessment of the effects of the use of the proposed wharf on the NZFT.
92. On the basis of the evidence before us, we have focused our assessment on:
- (a) Effects of the use of the proposed wharf on the NZFT and their habitat; and
 - (b) Natural character, amenity, and landscape effects.

Effects on the New Zealand Fairy Tern

93. The environmental effects assessment by La Brontë Coastal Consultants Ltd⁹ (dated 16 March 2018) concluded that the effects of the proposal would be ‘no more than minor’ given the site is over three kilometres from the sandspit breeding area, the footprint of the structure is ‘insignificant’ in relation to the wider harbour habitat, and the existing uses of the area, including the Tavern and boat ramp.
94. The Bioreserches report¹⁰ (dated 22 January 2019) stated that observations made during a survey of the site confirmed the low tide channel in the vicinity of the end of the wharf is part of the feeding habitat of the NZFT and is ‘significant’ given the species conservation status. The report concluded –

‘The effect of additional vessels using the low tide channel on the feeding activity of the fairy tern is unknown and is a significant deficiency in the information available. While it is understood, at present, most of the vessel movements occur north of Moir Point, where a relatively high intensity of fairy tern feeding occurs, there are no data that would provide assurance that no adverse effect, either direct or cumulative would result. In our view that issue would require direct observation and data collection’. (pg. 11)

95. The ‘Overview of Environmental Effects of the proposed Mangawhai Wharf Restoration’¹¹ by Dr Craig (dated March 2020) concluded that any negative effects on birds of the constructed wharf would be ‘less than minor’.
96. Mr Green’s opening submissions for the Applicant stated –

‘Dr Craig’s evidence discusses the ability of birds, including NZFT, to habituate. He concludes that both the construction and operation effects of the wharf will be less than minor. This is not a situation where the loss of one bird will lead to the annihilation of the species. It is well past time the mythology and unscientific conjecture surrounding the NZFT is addressed’. (paragraph 19, page 4)

97. Mr Green considered Mr Southey’s population estimates and conclusions lacked rigour and that recent fluctuations in population numbers were not a cause for alarm. He stated –

‘...the only conclusion that can be drawn from this data is that the population has survived and grown in the face of considerable if not spectacular expansion of the sorts of activities and events that are asserted to be a threat to the NZFT’. (paragraph 27, page 6).

98. Mr Green submitted there was no evidence produced as to how the effects of disturbance might manifest themselves and that these were insignificant compared to other changes in the estuary, including urban growth, mangrove removal, and increased recreational use.

⁹ Appendix 8 of the application.

¹⁰ Appendix 9 of the application.

¹¹ Appendix 10 of the application.

99. Dr Craig’s evidence for the Applicant stated that the considerable information put forward by submitters did not support the claims and arguments made, including reduced foraging from use of the wharf, and cumulative effects on top of the negative effects of mangrove removal. He considered the NZFT in the vicinity of the wharf would habituate to the presence of people and that there are many examples where threatened and at risk native birds will ‘readily accommodate structures’. He gave examples where birds accept and adopt structures, and where the presence of people did not affect breeding. He considered the information provided by Mr Southey did not support his conclusion that mangrove removal had negatively affected the NZFT population and that many factors are influencing their breeding success. He noted the evidence provided by Mr Southey indicated foraging areas or feeding territories can change, which suggests the NZFT can therefore habituate to use of the wharf structure. He noted that some of the foraging areas in the lower harbour were subject to considerable disturbance and yet NZFT ‘persist’ in these areas. He considered the effects of boats had been ‘overplayed’ and that any effect would be ‘transitory’, meaning the bird would move but that this would not affect its ability to get food.
100. Dr Craig’s evidence highlighted the importance of communities and government agencies to actively manage the habitat of ‘conservation dependent’ threatened species such as the NZFT and New Zealand dotterels at Mangawhai. He stated that developments which may fund protective measures offer an option to reverse the current losses, whereas doing nothing supports ongoing degradation. He considered the assumption that ‘people are the problem’ limits strategies for conserving species and that opportunities for people to interact with local biodiversity can be part of the solution in managing people’s behaviour.
101. Dr McDermott’s evidence highlighted the other significant threats facing the NZFT including predation, weather events, and long-term habitat changes. He concluded that direct disruption by human activity is less significant. He suggested the data do not support the hypothesis that substantial growth in settlement and related human activity are major threats to the NZFT’s survival. He considered the NZFT demonstrated their adaptability in their foraging use of the harbour, with the number of ‘territories’ increasing between 2009 and 2018. He considered mangrove removal may have increased accessibility for foraging. He noted that despite significant increases in recreational use in the harbour, the NZFT has adapted and has continued to reproduce. He suggested the NZFT may have reached or exceeded the natural carrying capacity of the Mangawhai habitat; and that long-term threats from climate change and in-breeding were key issues for their survival. He considered there was no evidence that rapid growth of settlement and associated human disturbance threatens the survival of the NZFT by impacting on its ability to forage.
102. Mr Southey’s evidence for the NZFTCT noted that the fairy terns are probably the most threatened endemic bird and the rarest species in New Zealand, with only 36 individuals known to be alive in August 2019. He highlighted that only nine breeding pairs had laid eggs last breeding season and that six of these breeding pairs fed in the Mangawhai Harbour and bred on the sand spit. He noted that any apparent stability of population numbers in recent years (2009-2019) was actually a balance between periods of loss and recovery, and that low reproductive success over this period was sustained. He highlighted that active management by DoC and community groups had significantly improved over this time and had resulted in increased numbers of fledged chicks in some seasons, but that storm events in some seasons had caused chick deaths. He noted fewer eggs were laid after mangrove removal in 2015 and that when eggs were lost, they were not replaced as had been observed in previous years. He said this indicated a drop in reproductive success, which was very concerning. He noted that the changes in the first clutch size were statistically significant (Table 1 of his evidence) and indicated the productivity of the breeding birds at Mangawhai was lower than at other sites. He considered this was likely to be related to foraging conditions and food availability after the mangrove removal. He noted a comparison of average annual mortality for the population

before and after mangrove removal suggested the population was in decline, but that this difference was reduced due to successful predator control.

103. Mr Southey stated that fishing in shallow waters within the harbour, near the water's edge, made the NZFT vulnerable to human disturbance. He highlighted their use of sand banks for roosting, courtship, and mating activity. He noted identified territories are actively defended and that displacement of males could result in mortality from injuries as they compete/fight with other males in attempts to find food in adjacent territories. He said human disturbance is 'the elephant in the fairy tern management room' and that the birds already need to find their way around people, which can impose a large energetic cost and degrade their habitat. He considered the NZFT were relatively comfortable around people, but that the density of people was the problem and could potentially lock them out of significant areas of habitat for long periods of time at critical times (such as over December-January when chicks are being feed). He noted the birds can accommodate human disturbance in several ways (such as increased habituation, limiting activity to when people aren't around, and moving their activity elsewhere), but that these strategies were already routinely used to accommodate existing levels of human disturbance and that the scope for further tolerance was limited. He considered observations suggested the 'bounds of tolerance' were already exceeded at times and that further work was required to understand the relationship between the birds and the existing levels of human disturbance.
104. Mr Southey noted that the male fairy tern that controlled 'territory 2' (Figure 7 of his evidence), which includes the application site and the delta area in the middle of the harbour, was one of the most successful productive breeding males. He stated that in the five breeding seasons since 2015, this male had helped rear three chicks to independence. He noted that this represented 20 percent of the production from the harbour over this period and that only one other male had exceeded this level of production. He stated that the delta where the two channels converge is a common spot for roosting, and courtship and mating, and noted this is only 150 m from the application site.
105. Mr Southey's paper relating to the feeding behaviour and potential human disturbance (his Appendix 1) concluded that the area around the proposed wharf is used for feeding, roosting, courtship, and mating. Field observations undertaken showed the area was not heavily fished in lighter winds (15 percent of the fishing activity), but was important in strong south west winds (27 percent of the fishing activity); and that although the territory was utilised over the entire tidal cycle, birds were present for prolonged periods three hours before low tide and intermittently until 2.5 hours after low tide.
106. In response to questions regarding the potential avoidance or mitigation of human disturbance on fairy tern foraging by potentially removing the floating pontoon and/or limiting recreational use at low tide, Mr Southey acknowledged that this reduces his concerns. However, he said that, given the intention of the wharf was to attract more people to the area, he remained of the view that more people would still access the tidal flats and increase human disturbance at low tide because of the proposed wharf.
107. Ms Bradley's and Ms Sutherland's submissions for the Director-General of Conservation stated that the concerns for the NZFT had been largely dismissed by the Applicant and that the evidence presented was essentially a 'desktop' analysis. They noted the conclusions reached are 'implausible' given they rely on the fairy terns' ability to habituate to 'minor and transitory effects' and that there are bigger threats to the concentrate on. They argued the only probative evidence, by way of direct observations and research, had been provided by DoC and the NZFTCT, and that this suggests the current level of human activity on the harbour is disturbing foraging, without the proposed wharf. The submissions drew similarities with

*Davidson*¹², where the Environment Court found a proposed marine farm would change the New Zealand king shag's habitat, with a low probability (very unlikely but possible) risk of extinction the species. They noted that that marine farm application had been declined on the basis of inadequate information (under section 104(6) of the RMA) regarding the combined and cumulative effects of other marine farms and stressors in the environment. They submitted that similarly, in this case, the proposed wharf would add cumulatively to the environmental stressors adversely effecting NZFT. They made reference to the High Court's *Davidson*¹³ decision which confirmed that the majority of the Environment Court had properly exercised its discretion to take cumulative effects into account under section 104(1)(c) of the RMA; and that even a minor effect could result in cumulative effects that are significant.

108. Dr Beauchamp, for the Director-General of Conservation, highlighted the importance of the harbour to the survival of the NZFT and its small population and extremely limited number of laying pairs (six at Mangawhai in the 2019/2020 breeding season). He considered that any additional disturbance at critical times could lead to extinction given factors impacting the lives of individuals birds can affect the species survival. He considered any reduction in the breeding number of birds could increase the probability of extinction. He noted disturbed birds can only relocate within their own foraging territory. He considered that frequent or constant human presence was 'very likely' to displace pairs and potentially impact the number of eggs laid and/or the number of young fledged. He stated that during low tide the middle harbour and lagoons on the sandspit were the core areas of foraging, with 34 percent of dives occurring in the middle harbour. He noted that reproductive success depended on the proximity of these productive foraging areas to the sandspit. He outlined the existing impacts from human disturbance, particularly from unleashed dogs at low tide near the channel margins and the challenges already faced without increased disturbance. He noted increasing human disturbance over the last 20 years had resulted in few remaining natural areas (except the sandspit refuge) and increased dog disturbance. He considered that even with people restricted to the proposed wharf itself, there would be an increase in human disturbance near the low water channels margins, particularly over December and January which is a critical period for breeding success. He considered that providing information on the birds on the wharf would not avoid disturbance or offset adverse effects. He emphasised the need for a precautionary approach given the potentially significant consequences for the NZFT's survival.
109. In response to questions regarding the potential avoidance and mitigation of human disturbance effects on fairy tern foraging by removing the floating pontoon, Dr Beauchamp said it was difficult to see how additional recreational activity would not be associated with just the wharf. He considered the main concern was that there would still be an increase in walkers in the CMA as a result of the wharf being there.
110. Ms Hansen, for the NRC, highlighted the importance of the middle harbour for feeding and roosting of several pairs of NZFT. She noted the middle harbour channel had been shown to have the highest number of small fish. She noted that any adverse effect on even one pair's foraging area was an effect on approximately 10% of the breeding population. She agreed with Mr Southey that there had likely been impacts on the breeding success of the fairy tern arising from the mangrove removal within the upper harbour and that further loss of foraging ability would likely have more than minor impacts. She considered a precautionary approach was warranted given the need for further research to understand factors affecting their breeding success and efforts made since 2005 to halt their decline and protect the remaining population. She considered Mr Southey and Dr Beauchamp had approached their assessment scientifically, but acknowledged a detailed analysis of the available data would be useful. She remained of the view that an increase in human activity in the middle harbour associated with

¹² *RJ Davidson v Marlborough District Council* [2016] NZEnvC 81

¹³ *RJ Davidson v Marlborough District Council* [2017] HC 52

use of the proposed wharf would contribute to gradual decline to a tipping point where the fairy tern would become extinct and that the tipping point is uncertain. She considered all stressors in the fairy terns habitat needed to be addressed including predator control, storm event protection measures, and protection of food supplies. Overall, she concluded the increased recreational activity in the middle harbour (particularly at low tide) posed a moderate risk, with a high potential impact on the survival of the NZFT.

111. In response to questions regarding the potential avoidance or mitigation of human disturbance on fairy tern foraging by potentially removing the floating pontoon and/or limiting recreational use at low tide, Ms Hansen remained concerned that the wharf itself would be a focal point for additional human activity. She said that with more people in the area there would be more activity on the foreshore and more people with unleashed dogs, despite signage and enforcement of the bylaw.
112. In Reply, Mr Green submitted there was no evidence that the quality of foraging, feeding or reproductive capacity of the NZFT had been affected by the presence of people and their dogs (and horses); and that the increase in human activity in recent years is not reflected in any loss to the NZFT.

Findings

113. Determining ‘actual’ effects on the environment is relatively easy because it concerns existing factual circumstances that can be proved on the balance of probabilities. However, we must also take into account ‘potential’ effects, including future effects on the environment. We acknowledge the assessment of risk of future effects can be difficult. In this case, the potential adverse effects are uncertain, but they may result in, or contribute to, a significant impact or loss to a ‘nationally critical’ threatened species.
114. In relation to future risk, we have considered the future risk on the evidence that was available to us and we have taken into account a significant relevant factor, namely the potential for the NZFT to be driven to extinction by the cumulative effects of disturbance of foraging and roosting areas associated with the proposal, and the accumulative effects of other stressors that exist around these areas as well as the nesting sites. We use the term ‘accumulative’ in the same sense the Environment Court did in *Davidson*, where it used the term for the potential effects of stressors other than the activity for which consent is sought – the Environment Court found that, where such accumulative effects are relevant, then they may be taken into account under section 104(1)(c) of the RMA, a point made to us by Ms Bradley. Although we find it likely to be a low probability risk of a more than minor effect, the potential consequence from an ongoing minor effect is extinction of the NZFT. This is undoubtedly a catastrophic adverse effect which could be exacerbated by the proposal; and we therefore find that the cumulative and accumulative adverse effects could be extremely serious and irreversible.
115. The evidence shows wider Mangawhai Harbour is extremely important for the NZFT and that the application site in an important feeding, roosting, courtship, and mating area. The proposed wharf is located within the territory of one of the most successful breeding pairs and extends 90 m across the foreshore area close to the low water channel which is regularly utilised by the birds for fishing. We consider that use of the wharf, in this location, particularly during the breeding season, will undoubtedly increase the risk to at least one breeding pair of NZFT (and potentially up to three breeding pairs) and acknowledge that each pair represents 10 percent of the current breeding individuals.

116. We do not agree with Mr Green that it is ‘mythology’ that the loss of one individual would contribute to the risk of extinction of the species. We accept the evidence that the survival of the species is highly dependent on ensuring every fertile breeding pair can feed themselves and their offspring from foraging within range of the sandspit, in both the estuary and the open sea. We have no doubt that use of the proposed wharf structure will increase human activity over the foreshore and near to the low water channel where individual birds are regularly observed feeding and roosting. In our view, this increase in activity will not *avoid* adverse effects on the NZFT or its habitat. While we accept people can currently access the foreshore and low water channel at low tide, we find that the wharf would increase the current level of human disturbance in the vicinity of the wharf.
117. We acknowledge that the evidence presented was based on the application as notified and not as amended at in the Applicant’s Reply. However, we consider we tested the scenario whereby there was no pontoon in our questioning of the various experts and submitters in exploring opportunities to avoid and/or mitigate adverse effects. We note that Ms Hansen, Mr Southey, and Dr Beauchamp were all of the view that even if recreational activity was restricted to the wharf itself, there would still be additional disturbance to the NZFT utilising the tidal areas and low water channel in the vicinity of the wharf. All experts, except Dr Craig, considered that this increase in disturbance at low tide, particularly during the breeding season when human activity is highest, would add to the stressors present in the existing environment.
118. The Applicant’s case relies on the ability of the NZFT to adapt and habituate to increased human activity. We agree with the majority of the experts that the fairy terns are already utilising these strategies and that there is a limit to their capacity to tolerate further ongoing disturbance and that these incur an energetic cost on the NZFT and their reproductive success. While there are examples where birds appear to habituate to structures, we note that the proposed wharf will bring people significantly closer to important foraging, roosting, and courtship/mating areas around the margins of the low water channels and the delta area. We find this would undoubtedly increase human disturbance in an area which is currently difficult to access at low tide.
119. We find that the fact that the NZFT still ‘persist’ at Mangawhai, including in areas where there is significant recreational activity (i.e. the lower harbour) is directly related to the significant efforts and funds that have been invested by DoC, the NZFTCT, and the community to actively manage and offset the various stressors faced in their natural habitat. We consider this application would certainly contribute to these existing stressors. The Applicant has not proposed any measures to provide for protection of the NZFT and their habitat, either by way of funding or direct actions. We do not accept that education (such as signage) and partnership with the community regarding ongoing protection of the NZFT needs a wharf structure.

Effects on Natural Character, Amenity, and Landscape

120. Ms McLaughlin-Brown assessed the effects of the proposal on natural character and visual amenity.
121. Ms McLaughlin-Brown noted that the entire Mangawhai Harbour CMA is identified as having ‘High Natural Character Values’ under the RPS and the PRP. She considered the Northland Mapping Project, which was used to determine natural character statuses throughout the region, had failed to take into account some relevant site-specific matters such as man-made structures. In her opinion, the subject site would likely demonstrate less than ‘High’ natural character values based on changes that have taken place since 2014. She concluded that the proposal would have an overall moderate-low adverse effect (minor effect) on the perceived naturalness and natural character within the harbour.

122. Ms McLaughlin-Brown presented evidence on the potential effects of the proposal on amenity values, namely noise, light, and visual amenity. Her evidence regarding noise related to motorised craft that would use the facility, however we note that the amended application would now not permit vessels to tie up to the wharf.
123. Lighting is proposed at the end of the wharf by way of solar lighting for navigation and safety purposes. Ms McLaughlin-Brown stated that, whilst the wharf would increase the light spill within the CMA, there is already an element of light spill and glare within the surrounding environment, namely from the Mangawhai Tavern. She considered the additional navigation and safety lighting would result in a minor effect.
124. Mr Goodwin stated the wharf would result in significant visual effects, as he overlooks the area where the wharf is proposed to be built. The Landscape and Visual Assessment report (Appendix 7 of the application), which was prepared by Ms McLaughlin-Brown report did not specifically address visual effects from Mr Goodwin's property. The report did include Vantage Points 3 and 4 (sheets 9 and 10), being the Esplanade Reserve in front of Mr Goodwin's property and the end of Moir Street, respectively. From these vantage points the visual effects were assessed to be 'moderate' (more than minor) initially, diminishing to moderate-low (minor) once the structure becomes part of the landscape it was historically.
125. In her Statement of Evidence, Ms McLaughlin-Brown discussed Mr Goodwin's submission, but noted that she had not been able to assess the potential visual effects from his property without gaining access to the property. Instead, she included photographs (Attachment 3 to her evidence) from the reserve in front of his property, however, these photographs did not include visual simulations of the proposed wharf. She noted that the majority of the wharf would be visible from this location, but that this would not affect any of the landscape characteristics which form the landscape values of the site. Ms McLaughlin-Brown stated that, whilst the wharf would create a change in the view, that change would not necessarily result in adverse effects.
126. In response to questions, Mr Goodwin confirmed he would allow Ms McLaughlin-Brown coming onto his property to take photographs from his deck area. We requested that Ms McLaughlin-Brown produce some further photo montages showing the view from Mr Goodwin's property at low and high tide. We were provided with those montages after the adjournment, which showed the proposed wharf without the pontoon and gangway. However, there was no supporting written commentary or assessment provided by Ms McLaughlin-Brown as to whether her opinion on visual effects had changed or were the same to prior to the visit.
127. The Staff Report noted there were no ONF or ONL identified in the relevant planning documents in the vicinity of the application site. The Staff Report referred to the Ms McLaughlin-Brown's Landscape and Visual Assessment report (Appendix 7 of the application), which concluded the adverse effects of the introduction of the wharf on landscape and seascape values were moderate to low (minor). Ms McGuire agreed with this assessment.

Findings

128. We find the proposed wharf will result in moderate to high adverse visual effects on Mr Goodwin – that is, these effects would be 'more than minor' in RMA terminology. His property and dwelling directly overlooks the area where the wharf is proposed to be built, which is an area currently devoid of significant man-made structures (except the minor remnants of the old wharf and some navigational safety floats marking the groynes). While we agree with Ms McLaughlin-Brown that the visual effects would decrease over time, we do not agree that they would diminish to a 'moderate-low (minor)' degree.

129. We are surprised that Ms McLaughlin-Brown did not approach Mr Goodwin, either as part of preparing her initial Landscape and Visual Assessment Report or following receipt of submissions, so that she could assess visual effects from his property given it overlooks the site. While she did do this after the adjournment (at our request), no commentary was provided by her on the magnitude of effects from his property. Whilst the new photo montages she provided were useful, we would have benefited in her providing her professional assessment of what the adverse visual effects on Mr Goodwin would be. In the absence of that information, all we can assume is that Ms McLaughlin-Brown considers the effects on Mr Goodwin to be the same as she reported for Vantage Points 3 and 4 – that is, 'moderate' initially, diminishing to 'moderate-low (minor)' once the structure becomes part of the landscape it was historically part of.
130. We find the adverse effects on natural character and landscape values will be, at worst, minor. That is, we agree with both Ms McLaughlin-Brown and Ms McGuire as to the magnitude of such effects.

SECTION 104(1)(ab) – ENVIRONMENTAL OFFSETS AND COMPENSATION

131. Section 104(1)(ab) of the RMA requires us to have regard to any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity.
132. No offsets or compensation measures were proposed by the Applicant.

SECTION 104(1)(b) OF THE RMA – RELEVANT PLANNING PROVISIONS

133. There was agreement that the relevant planning documents under section 104(1)(b) of the RMA were the NZCPS, the RPS, the RCP, and the PRP. In making our assessment, we have had regard to all of the relevant objectives and policies of these planning documents. We have focused our assessment on key matters in contention in relation to each statutory document, and our assessment of potential and actual environmental effects.
134. The second JWS recorded agreement between Ms McGuire and Mr Chandra that the provisions of the PRP should be given more weight than the RCP given decisions have been released. Ms Kirk disagreed and considered provisions of the RCP should be afforded more weight than the RCP as the coastal marine area provisions would need to be signed off by the Minister of Conservation. However, there was agreement that the higher order documents (NZCPS and RPS) should be given more weight than either the RCP or PRP if there is any conflict between the provisions of the planning documents
135. The legal opinion of Mr Doesburg referred to the relevant principles identified by the High Court in *Keystone Ridge Ltd v Auckland City Council*¹⁴. He noted that the RCP predated the NZCPS and the RPS, whereas the PRP had been prepared to give effect to these documents. He therefore concluded the PRP should be afforded more weight than the RCP in the event of any conflict.

¹⁴ HC Auckland AP24/01, 3 April 2001

136. We agree with Ms McGuire, Mr Chandra, and Mr Doesburg’s legal opinion that the provisions of the PRP should be afforded more weight than those of the RCP. We find the RCP should be given less weight than the PRP because the RCP pre-dates the current NZCPS and RPS, and its provisions do not give proper effect to these documents (as required by section 67(3) of the RMA). The fact that the ‘coastal plan’ provisions of the PRP have not yet been signed off by the Minister of Conservation (a point made by Ms Kirk) is, in our view, of less importance than the fact that these provisions appear to give effect to both the NZCPS and the RPS more so than the provisions of the RCP.
137. The second JWS from the planners included a comprehensive table outlining the objectives and policies of the different planning documents relevant to this application - the table included each planner’s assessment for both the ‘with pontoon’ and ‘without pontoon’ scenarios. Helpfully, the table identified which provisions the planners agreed were ‘key’.
138. The table attached to the second JWS of the planners also identified whether each of them considered the proposal to be ‘consistent with’, ‘inconsistent with’, or ‘contrary to’ each of the relevant and key provisions. There were clear differences of opinion between the planners in this respect and we do not repeat all their positions in this decision. The JWS also stated each planners’ ‘overall’ position. Ms McGuire considered the proposal was, overall, *inconsistent with* the RCP, the PRP, the RPS, and the NZCPS. Ms Kirk considered the proposal was, overall, *contrary to* the RCP, the PRP, the RPS, and the NZCPS. Mr Chandra considered the proposal (without the pontoon) was, overall, *consistent with* the RCP, the PRP, the RPS, and the NZCPS.

New Zealand Coastal Policy Statement

139. In terms of the NZCPS, the planners agreed the key provisions are Objectives 1, 4, and 6; and Policies 1, 3, 6, 11, and 18.
140. We have found that the proposal has the potential to have adverse effects, including cumulative and accumulative effects, on the critically endangered NZFT and its habitat. We therefore find it will not protect indigenous biodiversity in the coastal environment, which is the specific intent of Policy 11 of the NZCPS – in particular the proposal will not ‘avoid’ adverse effects on the NZFT, being a threatened indigenous species, nor its habitat. We consider that the granting of consent is not be supported by the clearly directive nature of Policy 11(a) of the NZCPS, whereas refusing consent would, based on the evidence, assist in achieving the intent of Policy 11.
141. One issue concerning Policy 11 of the NZCPS that we need to determine is how we weigh the present lack of knowledge of the cumulative and accumulative effects that exist in our consideration of the proposed wharf and its uses that is the subject of this application. We have found the additional disturbance effects associated with the proposal is somewhat uncertain but the evidence shows these disturbance effects will certainly add to the existing disturbance that would occur from human activities within foraging areas of the mid-harbour area. These activities will certainly create a disturbance risk for NZFT, whether in foraging or roosting – the actual risks are uncertain, but they are risks nonetheless. The threatened status of NZFT means that even a very small increase in risk is material to our consideration. The proposal would add to the collection of human activities that occur in the Mangawhai Harbour that pose a poorly understood, but potentially significant, cumulative threat to NZFT.

142. All the experts were agreed on the significant vulnerability and risks facing the NZFT as a species, with the Mangawhai area being a critically important area for survival of the species. We are required to assess the risk, based on the evidence, of the proposal on the foraging, roosting, and breeding of the NZFT. We have concluded that the risks caused by probable disturbance activities associated with the proposal are, by themselves, relatively small but they nevertheless create a risk. Section 3 of the RMA defines 'effect' widely to include 'any potential effect of low probability which has a high potential impact'. Under section 104(1)(a) of the RMA, a consent authority must have regard to any actual and potential effects on the environment of allowing the activity and all effects must be considered. Given the seriousness of the consequences to the NZFT species if even one bird suffered adverse effects, we consider it entirely appropriate to protect this endangered species with a risk (albeit small) of extinction of the species – we consider a small risk of extinction of an endangered species requires more rigorous protection of the NZFT.
143. The point of Policy 11(a) of the NZCPS is that if a species is threatened then it is automatically susceptible to various stressors and any adverse effects on its habitat should be avoided. Applying that policy, we consider that this is a strong factor against granting consent. More information and analysis are required beyond what we have been presented with here to address accumulative effects in a comprehensive manner. The burden of proof is on the applicant to put forward information that will satisfy a decision-maker that the risk of cumulative and accumulative effects is acceptable – that has not occurred in this case.
144. While we do not have absolute certainty on these effects, we are satisfied that there will be adverse effects and that they could potentially be significant. We certainly have sufficient information to conclude that adverse effects on NZFT and their habitat will not be avoided.
145. Policy 3 of the NZCPS directs that a precautionary approach be adopted where environmental effects are both 'uncertain, unknown, or little understood' and 'potentially significantly adverse'. We find that is the case for this proposal and, accordingly, consider a precautionary approach is warranted.
146. We have predicted that the adverse effect of the change to NZFT habitat as a result of the proposal will be minor given the extent of potential habitat in the Mangawhai Harbour. However, we have also predicted that the cumulative and accumulative adverse effects could be serious - that prediction being that, potentially, the NZFT could be driven to extinction by the cumulative disturbance effects and accumulative effects of other stressors. Whilst that is a low probability event, the potential consequence could be extinction which is clearly a 'significantly adverse' effect, which would be exacerbated by the proposal.
147. We consider the precautionary approach confirms we should exercise our discretion under section 104(1)(c) of the RMA to take accumulative effects into account.
148. Several policies of the relevant statutory planning documents seek to 'avoid' adverse effects on threatened and endangered species and/or their habitats, including Policy 11(a) of the NZCPS. We heard differing evidence regarding what 'avoid' means, particularly in the context of Policy 11 of NZCPS. Both Ms Kirk and Ms McGuire considered, in the context of this application, 'avoid' to mean *no* level of permissible adverse effect, whereas Mr Chandra considered the term to allow 'transitory and minor effects'. We note that Dr Craig made use of the terms 'transitory and less than minor' as did Mr Green in his opening legal submissions.

149. The differences in opinion appear to stem from various cases which have been heard in the Courts, with ‘minor or transitory adverse effects’ having been language used in part of the Supreme Court’s decision on *King Salmon*. However, as noted by Ms Bradley, the “minor and transitory” qualifiers that the Supreme Court applied in *King Salmon* related to Policies 13 and 15 of the NZCPS, which deal with effects on natural character and natural features and landscapes, respectively. In her opinion, the “minor and transitory” qualifiers do not apply to Policy 11 of the NZCPS for very good reason as even a minor or transitory effect could tip the balance for a threatened species. Ms Bradley discussed three cases which the Courts had considered what ‘avoid’ means in the context of Policy 11(a) of the NZCPS, namely *Davidson*, *Clearwater Mussels*, and *Pierau* – all three included consideration of potential adverse effects on birds that were listed as ‘threatened’ under the New Zealand Threat Classification System lists (as is the case for the current application). In all three cases the Courts found that ‘avoid’, in the context of Policy 11(a) of the NZCPS, means ‘not allow’ or ‘prevent the occurrence of’ – being the absolute avoidance approach recorded in paragraph [96] of the Supreme Court’s decision on *King Salmon*.
150. We agree with Ms Kirk and Ms McGuire that Policy 11(a) of the NZCPS directs that adverse effects must be avoided on certain threatened and endangered species and their habitats. While the last-minute amendments to the application will undoubtedly significantly reduce the potential for adverse disturbance effects on the NZFT, we find, based on the evidence of Dr Beauchamp and Mr Southey that the amended proposal will still result potential for adverse effects on the foraging and feeding of the NZFT and that these effects cannot be avoided. The proposed structure will encourage increased human activity over the foreshore and near the water channel where fairy terns are regularly observed feeding.
151. In relation to activities occurring in the coastal environment, Policy 6(2)(c) and (d) require us to recognise that there are activities that have a functional need to be located in the CMA and to provide for these activities in appropriate places; and to recognise that activities that do not have a functional need for location in the CMA generally should not be located there. We acknowledge that a wharf structure is generally required to be located in the CMA if its function is for the movement of people and/or cargo from the land to the sea, or to enable access and recreational use of the CMA. However, with the amendments made to the application through removal of the pontoon and associated gangway, this is now not the purpose of the proposed structure. The purpose and function of the proposed wharf is now to provide for passive activities such as walking, observation, and interpretation, and we find that such activities do not ‘need’ to be located in the CMA. Based on the evidence, we consider that the walkway (the wharf itself), shelter, observation area, and signage would be better (and could be) located outside the CMA and, as such, it does not functionally need to be located in the CMA.

Regional Policy Statement for Northland

152. In terms of the RPS, the planners agreed the key provisions are Objectives 3.4 and 3.15; and Policies 4.4.1, 4.7.1, and 4.8.1.
153. Granting the consents would not achieve Objective 3.4 of the RPS which seeks to safeguard Northland’s ecological integrity. Objective 3.4 is supported by Policy 4.4.1 of the RPS which seeks to maintain and protect significant ecological areas and habitats by, *inter alia*, avoiding adverse effects on indigenous taxa that are listed as Threatened in the New Zealand Threat Classification System lists. Policy 4.4.1 of the RPS outlines a tiered protection structure with Policy 4.4.1(1) providing the highest level of protection to ecosystems, habitats, and species (biological values) most at risk of irreversible loss, with the appropriate management response being to avoid adverse effects in the coastal environment and to ensure there are no more than minor effects elsewhere. Policy 4.4.1 of the RPS essentially reflects Policy 11 of the NZCPS.

Proposed Regional Plan for Northland

154. In terms of the PRP, the planners agreed the key provisions are Objectives F.1.3 and F.1.7; and Policies D.2.16 and D.2.18.
155. Granting the consents would not achieve Objective F.1.3 of the PRP which, like Objective 3.4 of the RPS, seeks to safeguard Northland’s ecological integrity. Objective F.1.3 is supported by Policy D.2.16 of the PRP which seeks to manage adverse effects on indigenous biodiversity by avoiding adverse effects on indigenous taxa that are listed as being Threatened in the New Zealand Threat Classification lists. The relevant parts of Policy D.2.16 of the PRP reflect Policy 11 of the NZCPS.

Regional Coastal Plan for Northland

156. In terms of the RCP, the planners agreed the key provisions are Objectives 9.3.2, 10.3.1, 16.3, 17.3, 25.3.1, and 25.3.2; and Policies 9.2.4.1, 9.2.4.3, 10.4.1, 10.4.2, 16.4.1, 16.4.2, 17.4.3, 17.4.4, 25.4.1, 25.4.3, and 25.4.4.
157. Granting the consents would not achieve Objective 9.2.3 of the RCP which seeks to protect significant habitats or indigenous fauna within Northland’s CMA. Objective 9.2.3 is supported by several policies, including Policy 9.2.4.3 which directs that where significant actual and potential adverse effects on significant habitats of indigenous fauna are identified (as part of processing coastal permit applications) then particular consideration must be given to either declining consent or requiring a condition to require mitigation and/or remedial measures to be instituted.
158. As discussed earlier in this decision, we find that the provisions of the RCP should be given less weight than either the PRP – that is, the directive nature of the protective provisions of PRP are, in our view, to be given more weight than the less directive nature of the RCP provisions in this regard. Our position is further supported by the fact that the NZCPS and the RPS contain equally directive policies in this regard.

Overall Assessment – Planning Provisions

159. Overall, we find that the proposal is not supported by the directive protective provisions of the NZCPS, the RPS, the PRP, and to a lesser extent the RCP, whereas a decision to refuse the consents would, in many respects, assist in achieving those objectives and be consistent with those policies.
160. We are conscious that there are also a number of enabling provisions in these planning documents which appear to create a ‘tension’ with the protective policies – that is, the provisions pull in different directions. For example, Objectives 4 and 6; and Policies 6 and 18 of the NZCPS are clearly enabling provisions of the NZCPS and support the proposal. However, these enabling provisions use weaker language, such as “recognise” and “provide for”, compared to the directive language used in the protective provisions, which use the word ‘avoid’. Accordingly, we consider the provisions that use the directive language to take precedence (or ‘trump’) the enabling provisions in this case.

SECTION 104(1)(c) – OTHER RELEVANT MATTERS

161. Section 104(1)(c) requires us to have regard to any other matters that are relevant and reasonably necessary to determine the application.
162. The planners considered the Te Uri o Hau Kaitiakitanga o te Taio (Iwi Management Plan for Te Uri o Hau) to be a relevant ‘other matter’ under section 104(1)(c) of the RMA.

163. The planners agreed the key provisions of the Te Uri o Hau Kaitiakitanga o te Taio (Iwi Management Plan for Te Uri o Hau) are Objectives 36.1, 36.2, and 36.3. No policies were identified as being key in this Plan. Both Ms McGuire and Mr Chandra considered the proposal was consistent with its relevant provisions, but Ms Kirk considered the proposal was contrary to those provisions.
164. Mr Chandra noted the draft Kaipara Sub-regional Spatial Plan 2020 and the draft Mangawhai Spatial Plan 2020 maybe relevant in part in setting the wider context and priorities for the locality as a fast-growing settlement and urban centre,
165. We have had regard to these three plans in making our decision.
166. The other matter which we consider appropriate to consider under section 104(1)(c) of the RMA in this case are the ‘accumulative’ effects on the NZFT. We discuss its relevance in other sections of this decision and do not repeat that here.

SECTION 104D

167. Section 104D of the RMA presents two ‘gateway’ tests, one of which must be passed before a resource consent can be granted for a non-complying activity. The first gateway test is whether the adverse effects are minor and the second gateway test is whether the activity is contrary to the relevant objectives and policies of the relevant regional plan(s). In considering the first gateway test it is only the ‘adverse’ effects which are to be considered, not any positive effects that the proposal may generate. In considering the second gateway test, it is the relevant objectives and policies of the relevant regional plan(s) which are considered. This gateway test does not concern itself with objectives and policies of higher order planning documents such as the NZCPS or the RPS – these are to be considered under section 104 of the RMA if it can be shown that one of the section 104D RMA gateway tests is passed.
168. In respect of the first section 104D RMA gateway test, we find the effects to be more than minor and therefore this test is not passed. Our finding on this relates to the ‘cumulative’ and ‘accumulative’ adverse effects associated with the proposal. Cumulative effects under s104(1)(a) relate to the additive effect of the proposal over the existing disturbance effects in and around the subject site. While the existing disturbance in and around the subject site is generally low over much of the year, there are periods of the year when disturbance effects are moderate-high (but significantly less than the lower part of the harbour). These ‘background’ disturbance activities and their associated effects on the NZFT are predicted to increase into the future as Mangawhai and Mangawhai Heads grows and the cumulative effects of the proposed activity must be considered in the context of that increasing background disturbance trend – that is, the likelihood of the proposed activity adding to the increasing background disturbance is ‘certain’ as it is intended to be a focal point for coastal activities in the mid-harbour area. Assessing the magnitude of these additive effects is difficult to predict due to various uncertainties and lack of scientific information, but the consequences could be significant (more than minor).
169. There are also other stressors on the NZFT that can also influence its breeding success and the survival (maintenance) of the species. These additional stressors include those: 1) at the nesting sites, namely through natural events (such as winds and tides), predation, and human disturbance; and 2) within the foraging areas, namely natural events (such as weather events) and anthropogenic effects such as land uses in the catchment which can generate sediment/nutrients which get flushed into the harbour. Whilst the proposed activity would not result in, or contribute direct to, any of these types of effects, it will certainly add to the overall stresses experienced by the NZFT – we refer to these types of additive effects as ‘accumulative’ effects (to differentiate them from the strict ‘cumulative’ effects defined in the RMA) – we are able to consider these accumulative effects under section 104(1)(c) as an ‘other

matter’. The term ‘accumulative effect’ was coined by the Environment Court in *Davidson*, a case with similarities to the current application in that it related to, *inter alia*, potential effects on the New Zealand king shag which is a threatened bird species.

170. In respect of the second section 104D RMA gateway test, prior to the second expert conferencing both Ms Kirk and Ms McGuire considered the proposal is contrary to the objectives and policies of the RCP and PRP (noting that the objectives and policies of the RPS and NZCPS are not relevant under this test). Mr Chandra considered it is not contrary to the objectives and policies of the RCP and PRP. However, the second JWS prepared by the planners stated that Ms McGuire had changed her position and now considered the proposal was inconsistent with the ‘overall’ provisions of the RCP and PRP, although she was still of the view it was contrary to the ‘key’ provisions. Ms Kirk was still of the view that the proposal was, overall, contrary to the RCP and PRP provisions and Mr Chandra considered it was consistent with these plans.
171. The RCP and the PRP cover a wide variety of issues and include both enabling and protection provisions. That is, each of these plans is trying to be a plan for all people. Whilst the proposal is clearly contrary to some provisions and inconsistent with others (noting that ‘inconsistent’ is not the same as ‘contrary’, the latter meaning repugnant to), it is also supported but other provisions. Case law has established that when considering the second section 104D RMA test, the question that needs to be answered is ‘is the application contrary to the overall objectives and policies that are applicable to the proposal?’ If an application is contrary to just one or two objectives or policies, even if they are ‘key’ provisions, does not mean that the application necessarily fails the second section 104D RMA gateway test. In this case, we find that the proposal is contrary to the directive protective provisions, but is also supported by a number of enabling provisions in both the RCP and PRP. Accordingly, it cannot be said that the proposal is contrary to the overall objectives and policies of the RCP and PRP. We therefore find that the application passes the second section 104D RMA gateway test, albeit by a narrow margin.

PART 2

172. The matters specified in section 104(1) of the RMA that we must have regard to are ‘subject to Part 2’ of the RMA. These words, and how they apply to the consideration of resource consent applications, has been the subject of a number of cases heard in the Environment Court, High Court, and more recently the Court of Appeal’s decision on *Davidson*.
173. The Court of Appeal’s decision on *Davidson*¹⁵ provides the latest, and most authoritative, position on this matter. In summary, the *Davidson* decision directs that where the NZCPS is relevant to an application and it is clear from the relevant NZCPS policies whether consent should be granted or refused, then there is no need for a decision maker to refer back to Part 2 RMA matters as it would not add anything to the required evaluative exercise – that is, separate recourse to Part 2 RMA matters is not required as those matters are already reflected in the NZCPS objectives and policies. As the Court of Appeal stated at para [71]:

“Putting it another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to King Salmon and expose the consent authority to being overturned on appeal”.

¹⁵ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316

174. The *Davidson* decision also provides guidance on whether Part 2 RMA matters need to be considered where the NZCPS provisions do not provide clear guidance on whether consent should be granted or refused, and situations for applications where the NZCPS is not relevant. In both situations the decision maker needs to determine whether the relevant plan has been ‘competently prepared’ under the RMA – that is, whether it contains a coherent set of policies designed to achieve clear environmental outcomes. If the relevant plan meets these criteria then there is no need to consider Part 2 RMA matters, and if the relevant plan does not meet these criteria then the decision maker should consider RMA Part 2 matters and determine whether they provide assistance in making a decision on the application.
175. We heard no evidence to suggest the relevant provisions are invalid, incomplete or present uncertainty in making any decision. At worst, the validity of the RCP may be in question given its promulgation under a previous version of the NZCPS. However, this has no significance in terms of the manner in which the application has been assessed, given that the PRP assumes significant weight as part of the assessment.
176. Given the directions issued by the Court of Appeal in the *Davidson* decision, we do not consider reference to RMA Part 2 matters would add anything to the evaluative exercise we have undertaken under section 104 of the RMA.

CONCLUSION AND OVERALL DETERMINATION

177. We have focused our assessment of the application on the actual and potential adverse effects of the proposed activities and the outcomes sought by the statutory planning framework.
178. We have had regard to the evidence before us and all the submissions made. We note that it is not the number of submissions in support or opposition that drives our decision, but rather the issues and concerns raised and the ability to avoid, remedy, and/or mitigate adverse environmental effects that is our focus. We note that the community consultation undertaken showed particular community support for a recreational facility for boats and for dredging the channel for better all-tide access. We consider that these activities would have potentially significant adverse effects on the NZFT by increasing boat activity in the middle of the harbour. While we acknowledge these activities are not proposed, we consider the proposed wharf structure itself would increase human activity within an area of the harbour that is significant to one of the most successful breeding NZFT males/pair.
179. While we acknowledge the amendment to application goes some way to addressing disturbance effects on the NZFT, it will certainly still encourage additional human activity and bring such activity significantly closer to an area of the harbour that is important to fairy tern foraging and reproductive success. The evidence shows the existing level of recreational use in the middle of the harbour at low tide is low, but that at times this is likely to be reducing feeding time and increasing the energy spent to feed chicks. The timing of any likely peak use of the wharf will be over the Christmas and New Year holiday period, which coincides with the most sensitive time for successful fairy tern breeding, making it very difficult to avoid or mitigate additional human disturbance in the area.
180. The evidence suggests there is an ongoing need to actively protect the tidal areas on the edges of shallow channels of the harbour that are within the feeding range of the sandspit breeding area; and to ensure existing activities comply with the relevant rules, regulations, and bylaws to mitigate and avoid existing (and future) adverse disturbance effects. This is critical in light of the ongoing population growth and development in the Mangawhai and Mangawhai Heads area. We consider that ‘persistence’ and survival of the NZFT population, despite existing levels of human activity, is not a justification for increasing human activity associated with structures in areas where there are currently low levels of activity. The fact that increased human activity in the harbour will happen into the future regardless of this application means

that provision of any new infrastructure must be carefully considered to ensure adverse effects on the fairy tern’s wider foraging habitat are avoided.

181. Overall, we are not satisfied that the proposed activities can be carried out without increasing disturbance of the NZFT and further degradation of the habitat of the NZFT. We find the directive protection provisions of the NZCPS, RPS, PRP, and RCP in relation to the protection of threatened species and their habitats clearly do not support the granting of the application. While this is the primary basis for refusing the application, we find the proposed wharf will have more than minor adverse visual effects on Mr Goodwin and that given the proposed function of the wharf, it does not need to be located in the CMA. Accordingly, we do not consider the proposal promotes the sustainable management of natural and physical resources – that is, it does not meet the purpose of the RMA.

DECISION

182. For the above reasons, it is our decision on behalf of the **NORTHLAND REGIONAL COUNCIL**, pursuant to sections 104B, to **REFUSE** resource consent application APP.040213.01.01 by the Mangawhai Historic Wharf Trust.

Dated this 18th day of November 2020



Sharon McGarry
Independent Hearing Commissioner (Chair)



Rob Lieffering
Independent Hearing Commissioner