

**BEFORE THE ENVIRONMENT COURT**

**Decision No. [2017] NZEnvC 090**

IN THE MATTER of the Resource Management Act 1991  
AND of an appeal pursuant to s 120 of the Act  
BETWEEN A PIERAU  
(ENV-2016-AKL-000174)  
Appellant  
AND AUCKLAND COUNCIL  
Respondent

Court: Principal Environment Judge L J Newhook  
Environment Commissioner D J Bunting  
Deputy Environment Commissioner R Bartlett

Hearing: at Auckland 29, 30, 31 March 2017

Appearances: B Carruthers & J Riddell for the Appellants  
D Hartley & B Ford for Auckland Council  
D Allan for L Gravatt and others under s274  
H Atkins and R Ashton for Ngati Manuhiri Settlement Trust and  
Others under s 274  
M Harris for himself under s274  
L Baker for The Greatest Show on Earth Limited under s274

Date of Decision: 23 June 2017

Date of Issue: 23 June 2017

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**INTERIM DECISION OF THE ENVIRONMENT COURT**

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- 1. Consent indicated as being available for the proposed "small events" subject to further refinement of conditions.**
- 2. Consent refused for the proposed large and medium festivals.**
- 3. Costs reserved.**



## REASONS

### General introduction

[1] Mr Pierau's proposal is to hold music festivals and other events on 3 different scales at a site near Te Arai Point on the north-eastern coast of the Auckland Council area. The application sought consent for five 3000-person events (the "large festivals"), two 500-person events (the "medium festivals") and twenty 200-person events (the "small events") over a total of 160 festival days per year until 2031. The site is on a broad valley floor, surrounded by rolling hilly topography subdivided on 3 sides into numbers of lifestyle blocks, and on the fourth side by the lands of the Ngati Manuhiri Settlement Trust and related parties. These properties overlook the festival site and its surrounds in varying degrees. The residents of several of the blocks opposed the application based on potential adverse effects including noise, traffic, visual intrusion and harm to local ecology.

[2] The application was refused by Auckland Council hearing commissioners and was appealed to this Court.

[3] The proposal, modified since consent was refused by the council, was described in evidence by the appellant's planning witness Ms B Macnicol and by Mr L Baker on behalf The Greatest Show on Earth, a party in support under s274. Ms Macnicol's statement offered a little more detail than our summary above, and commented on the comprehensive conditions of consent put forward in support, while Mr Baker's evidence was offered with great enthusiasm based on festivals held on the site in recent years.

[4] The proposal is agreed to be discretionary under the Auckland Unitary Plan.

[5] The surrounds include 3 freshwater dune lakes on the valley floor near the festival site, Lake Tomarata, Spectacle Lake and Slipper Lake, collectively known as the Tomarata dune lakes. Spectacle Lake, the largest, is adjacent to the proposed festival site. The vegetated margin of this lake is approximately 600 m from the festival area, approximately 130m from the camping area to be used for medium-sized events and approximately 70 m from the camping area proposed to be used during larger festival events. The lake is not presently accessible by road. Lake Tomarata is approximately 500 m south east of the festival site and is accessible by road. Slipper Lake is approximately 2 km to the north of the festival site and is accessible by road.



[6] The dune lake margins and wetlands support populations of several bird species that are classified as “threatened” under the New Zealand Threat Classification System<sup>1</sup>, with two species classified as Nationally Critical and Nationally Endangered, the two highest threat categories in New Zealand. The wetland margin habitat itself contains several plant species that are regionally rare and uncommon.

### **The issues**

[7] A broad statement of the issues in the case is as follows:

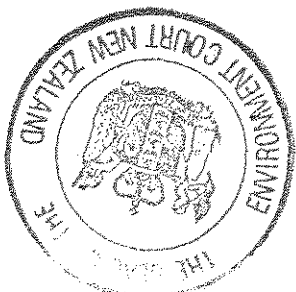
- What are the landscape, amenity and natural character values of the locality?
- What constitutes the relevant existing environment?
- Is the application of the permitted baseline concept appropriate here?
- What effects might the festivals and events have on amenity values of the residents in terms of noise, traffic, and general amenity, particularly visual?
- What is the ecological importance of the dune lakes environment?
- What might be the effects of the proposed festivals and events on ecology and biodiversity?
- What risk might there be to the threatened species if the Festivals and events proceed?
- Is a precautionary approach appropriate?
- Reverse sensitivity issues alleged as between the land of the Ngati Manuhiri parties and the site.
- Principles of the Treaty of Waitangi Te Tiriti o Waitangi.
- Planning framework, especially NZCPS and the relevant district plan provisions.

### **The proposal modified as to numbers and sizes of events**

[8] It is appropriate to record that the appellant responded positively, late in the

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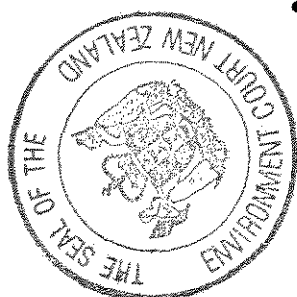
<sup>1</sup> Miskelly et al, 2008, referred to in the evidence in chief of the council’s avifauna witness Dr TG Lovegrove, para 4.9



hearing, to the cases brought by the other parties. In particular reductions in the numbers and sizes of proposed events were presented in revised draft conditions of consent in closing submissions on his behalf. Of some note, large festivals (500-3000 ticket holders) were no longer proposed to be held in the months September to November which is most of the period during which male Australasian bitterns "boom" and breeding occurs.

[9] The following events timetable (described here in summarized form) was proposed in the revised draft conditions:

- Two large festivals (500-3000 tickets) per calendar year held over 4 days (plus 7 days set-up and pack-down per Festival) - or a total of 8 festival days (22 days in total including the set up and pack down.) These large Festivals would be timed to occur on either Auckland Anniversary Day weekend or Waitangi Day weekend, and on one other weekend in the period from 27 December to 4 January, or at Easter weekend.
- Four medium festivals (up to 500 tickets) per calendar year held over 4 days (plus 7 days set up and pack down per festival) - or a total of 16 festival days (44 days in total including the set-up and pack-down). These medium festival weekends would be timed to occur at the Winter Solstice in June, in either one of the first two weekends in December or on two separate weekends between December and August.
- Twenty small events (200 guests/tickets) per calendar year each up to 2 consecutive days timed to occur at any time of year (plus 5 days set-up and pack-down per event), 5 of which could be music festivals.
- A limit on the total number of festivals and events in any calendar year to no more than 20.
- Within the 20 festival/event restriction in any calendar year, there could be two large festivals, four medium festivals and up to 14 small events.
- In summary there could be festivals or small events occurring on 52 days in any calendar year (plus 112 days set up and pack down) to give a combined total of 164 days of festival/event related activity on the site, of which 66 days could be the subject of large or medium events.



### **The planning framework: two general issues**

[10] We set here a high level analysis and findings about the current planning framework relevant for decision-making in this case. We do so at this early part of the decision because the results of the analysis have some influence on the treatment of other topics, notably some of the potential effects on the environment. (Detailed analysis of relevant planning instruments follows in a later section of this decision).

#### ***Determining activity status where plan replaced***

[11] When the application was lodged with the council, the principal planning instrument was the Operative Auckland Council District Plan (Rodney Section) ("Rodney District Plan"). Under that plan, the proposal was required to be considered as a non-complying activity under Rule 7.9.3.

[12] Since that time the Proposed Auckland Unitary Plan decisions version, has been released, becoming operative in part (indeed, substantial part), on 15 November 2016 ("PAUP:OiP").

[13] It was agreed amongst the parties that the objectives, policies and rules in the PAUP:OiP relevant to the proposal, are not subject to appeal. We agree, and find also that the Rodney District Plan is to all intents and purposes replaced, leaving the PAUP:OiP to be applied instead.

[14] A particular consequence of this is that the proposal is no longer required to be considered as a non-complying activity, but instead is a discretionary activity under General rule C1.7, "activities not provided for" in the PAUP:OiP. All planning witnesses acknowledged this in their respective statements of evidence in chief.

[15] We have had to consider the relationship between:

- (a) Section 88A RMA, which provides that the activity status of an application is frozen at the time the consent application is made, on the one hand; and
- (b) Section 86F RMA (replacing s 19), which provides that a rule in a proposed plan must be treated as operative, and any previous rule as inoperative, if the time for making submissions or lodging appeals on the rule has expired and there have been no submissions/appeals in opposition or those submissions/appeals have been determined,



withdrawn or dismissed.

[16] Counsel for the appellant drew our attention to some slightly inconsistent decisions of the Environment Court on this legal matrix. Some decisions<sup>2</sup> have held that activity status crystallises as at the time an application is lodged and is not altered by the development of a new plan. On the other hand, there have been decisions<sup>3</sup> where the interpretation preferred has been that s 88A is impliedly subject to [what is now] s86F.

[17] We favour the findings of the Court in the *Campbell* decision.<sup>4</sup>

So far as concerns the apparent tension between s 88A and s 19 (both post 2003 Amendment), we hold that s 88A(1A) is entirely subject to s 19 in the sense that the former proceeds upon an assumption that any rules setting the status of an activity have not yet been overtaken by new rules attaining operative effect and replacing them. Here, that situation has come about, and the transitional rule establishing non-complying activity for the proposal has been overtaken by the proposed plan rule becoming of operative effect and according restricted discretionary status.

[18] Our reasoning is as follows. In *Waiheke Marinas Limited*<sup>5</sup> the Environment Court presided over by the presiding Judge in the present case, described the role of s 88A as a “shield”, in circumstances where the applicant for consent sought to introduce new elements into the activities applied for, after the planning instruments had changed through the introduction of new provisions. In the present case we accept the submission of the appellant that in circumstances such as here, to preclude an appellant from relying on a more enabling activity status reached after a fully notified planning process, would transform the function of s 88A from a shield to a “straitjacket”.

[19] We also accept the argument of the appellant that it would not make sense for an application to continue to be assessed as say, a non-complying activity, when the whole planning framework has moved on and been replaced by a new operative plan that provides for the activity in a somewhat more enabling manner. There cannot be any sensible point in an application being hamstrung by the activity status found in a superseded plan that has become inoperative and having no ongoing relevance to the

<sup>2</sup> For instance *Appleby v Southland Regional Council* C81/2007; *Calder Stewart Industries Limited v Christchurch City Council* C17/2006.

<sup>3</sup> Such as *Canterbury Regional Council v Christchurch City Council* (2001) 7 ELRNZ 113; *Campbell v Napier City Council* W67/2005; *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2012] NZEnvC 38.

<sup>4</sup> At paragraph [17].

<sup>5</sup> [2015] NZEnvC 218 at [24].



assessment of the application. We add that we can see no basis upon which Parliament could have intended that an applicant be put to the cost of bringing an entirely new, but identical, application, simply to overcome such hurdle. Such a pointless and expensive “workaround” should hardly be needed to serve the purpose of the Act.

***Relevance of objectives and policies of adjoining zones***

[20] Submissions on behalf of the Te Arai South parties, drawing on evidence of Mr P Hall their planning witness, and on behalf of Gravatt and other s274 parties were to the effect that because consent is sought for a discretionary activity, there is no bar to giving weight to “effects on objectives and policies of zones in the receiving environment”.<sup>6</sup>

[21] In reply, counsel for the appellant submitted that as a matter of law there can be no such “effect”. It has been held that “effects” on planning instruments are not effects on the environment.<sup>7</sup> It was conceded on behalf of the appellant that such matters could possibly be raised under s 104(1)(c) “other matters”, to do with precedent or plan integrity, but it was submitted that no party had raised such an argument. We agree.

[22] There is no express requirement found in the Special Purpose – Quarry Zone or the PAUP:OiP more generally, to have regard to objectives and policies of surrounding zones when assessing an application such as the present. In similar vein it was raised in a question from the Court to Ms B Macnicol, planning witness for the appellant, and in later questioning of Ms H Thompson, planning witness called by the Council, that the objectives and policies of the Special Purpose – Quarry Zone do not refer to the maintaining or enhancing of amenity values.

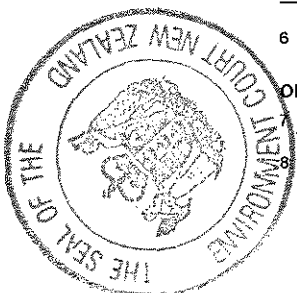
[23] It was submitted on behalf of the appellant<sup>8</sup> that the correct approach is to:

- (a) Consider the objectives and policies of the receiving environment to gain an understanding of the effects of interest concerning the proposal – in this case effects on rural character and amenity;
- (b) Those effects should then be considered under s 104(1)(a);

<sup>6</sup> Submissions on behalf of Te Arai parties at paragraphs [21] – [23]; EIC Hall, paras 115-137; submissions on behalf of s 274 parties paragraph [50].

<sup>7</sup> See for example *Bell v Rodney District Council* A227/2002.

<sup>8</sup> Paragraph 2.3 of submissions in reply.



(c) However for the assessment under s 104(1)(b), it is only the provisions that are relevant to the site itself which are to be considered, namely the zone provisions, and any higher level provisions of relevance, but not including provisions applying to adjacent land.

We agree with this approach, and note that it is consistent with the findings of the Supreme Court in the decision known as "*Discount Brands*"<sup>9</sup>.

[24] We consider that this approach gives proper acknowledgement to the structure of s 104 RMA, particularly its three quite distinct parts in subsection (1).

### **Planning Provisions: s104(1)(b) RMA**

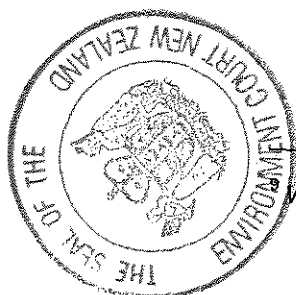
#### ***Statutory Planning Documents***

[25] In this section of our decision we evaluate the proposal against the relevant statutory planning documents.

[26] In doing so, we restate our earlier finding, that for the assessment under s104(1)(b) RMA, it is only the provisions that are relevant to the site itself that are to be considered, namely those of the Special Purpose-Quarry zone and any higher level provisions of relevance, but not provisions applying to adjacent land. The objectives and policies of this zone do not refer to maintaining or enhancing amenity values.

[27] We accept the list of the statutory planning documents provided in the evidence in chief of the council's planning witness Ms H Thomson as being comprehensive in relation to our evaluation. We list these documents here in their order of hierarchy, although for ease of presentation we have undertaken our evaluation in the reverse order:

- the New Zealand Coastal Policy Statement 2010 (NZCPS)
- the National Policy Statement – Freshwater Management (NPS(FM))
- the Hauraki Gulf Marine Park Act 2000 (HGMPA)





- the Auckland Unitary Plan (Operative in Part) - Chapter B - Regional Policy Statement (RPS)
- the Auckland Unitary Plan (Operative in Part) – relevant district plan provisions

### ***The Coastal Environment***

[28] Before undertaking our evaluation, we first discuss the Pierau site and its surrounds in relation to the coastal environment.

[29] Policy 1 (1) of the NZCPS states that the extent and characteristics of the coastal environment vary from region to region and locality to locality, and the issues that arise may have different effects in different localities.

[30] The PAUP:OiP<sup>10</sup> describes the coastal environment as including the coastal marine area, islands within the coastal marine area and the area landward of the line of mean high water springs determined by the natural and physical elements, features and processes associated with the coast, including vegetation, landscape, landforms, coastal processes and other matters included in Policy 1(2) of the NZCPS.

[31] There was general agreement among the parties and relevant witnesses that the Pierau site and the Tomarata dune lake ecosystem are located within the coastal environment.

[32] We agree and have undertaken our evaluation on that basis.

### ***Auckland Unitary Plan (Operative in Part) – Chapter B – Regional Policy Statement (RPS)***

[33] The RPS is contained in Chapter B of the PAUP:OiP.

[34] Ms Thomson, and the appellant's planning witness Ms Macnicol (in her rebuttal), identified the following provisions in the RPS which in their opinion have relevance to this proposal:

- B2 – Urban Growth
- B6 – Mana Whenua;

<sup>10</sup> Chapter B8.6. Explanation and principal reasons for adoption



- B7 – Natural Resources
- B8 – Coastal Environment
- B9 – Rural Environment

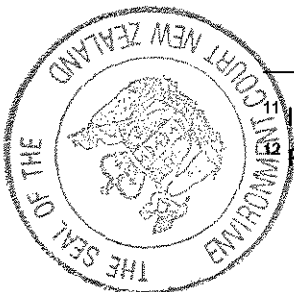
[35] Starting with Chapter B2, Ms Thomson noted that this policy seeks a compact urban form with relevant provisions relating to the integrated planning of land use, infrastructure and development...maintaining the quality of the environment and maintaining opportunities for rural production. She opined that the proposed activity is unrelated to a rural use of the site and is not located in an existing urban area. Policy B2.8.2.1 also refers to social facilities being located in appropriate locations. Her expectation was that small and medium sized events should be located close to their local communities or in locations with easy access to city, metropolitan and town centres. In her opinion the location of the Pierau site would not be consistent with this policy.

[36] Ms Macnicol<sup>11</sup> disagreed with Ms Thomson's conclusions on this, saying that while in her opinion the proposed events are not rural, rural locations are popular for such events because of the opportunity for different types of event experiences, pointing to the provision in the Plan for temporary activities.

[37] In our view there is validity in part of each of these opinions, but the vagueness in the term "appropriate locations" may to a degree be resolved by the quite significant time limitations placed on the holding of temporary events by the relevant rule. We therefore somewhat favour the opinion of Ms Thomson.

[38] Ms Thomson considered also that Chapter B6 has relevance as the adjoining site to the east forms part of the redress under a Treaty settlement for Ngati Manuhiri. She opined that it is important that effects from activities on the Pierau site do not adversely constrain Ngati Manuhiri from being able to reasonably develop their land.

[39] We are satisfied that the potential for the proposal to generate reverse sensitivity effects on the land of the Ngati Manuhiri parties has been adequately addressed through the covenant provided for in condition 26B of the draft conditions as recommended by Ms Macnicol in her rebuttal<sup>12</sup>.



<sup>11</sup>In para 2.14 of her rebuttal.

<sup>12</sup>Para 2.21

[40] Objective B7.2.1(1) requires the protection of areas of significant indigenous biodiversity values in terrestrial, freshwater and coastal marine areas from the adverse effects of subdivision use and development while Objective B7.2.1(2) requires that indigenous biodiversity is maintained through protection, restoration and enhancement in areas where ecological values are degraded or where development is occurring.

[41] These provisions are similar to the higher order provisions in Policy 11 of NZCPS, although requiring "recognition" of the biodiversity as opposed to "protection" in the RPS. We will evaluate these provisions when we come to the NZCPS, favouring its stricter requirements.

[42] Of particular significance in Chapter B8 is policy B8.3.2(5) which requires the adoption of a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown or little understood, but could be significantly adverse. This policy is in line with policy 3 of the NZCPS, which we will also come to.

[43] The disagreement between Ms Thomson and Ms Macnicol focused on whether conditions of consent could be prepared so as to protect the indigenous biodiversity. That dispute will be resolved in the context of our analysis of the relevant expert opinions in evidence before us.

[44] Ms Thomson was of the opinion that the proposal is contrary to a number of the objectives of RPS Chapter B9-Rural Environment, because the dominant land use for the site is for rural production and the proposed activities are inconsistent with this use.

[45] Although quarries are generally found in rural areas, her opinion goes a little too far having regard to the provisions of the Special Purpose-Quarry zone, because even though farming, forestry and conservation planting are non-quarry-related permitted activities in the zone, the dominant purpose is for quarrying.

*Auckland Unitary Plan (Operative in Part) – relevant district plan provisions/ Special Purpose Quarry Zone*



[46] The objectives and policies for the Special Purpose-Quarry zone include provisions for the management of noise, vibration, dust and illumination to protect

existing adjacent activities sensitive to unreasonable levels of these effects.

[47] Our evaluation of these effects and the conditions proposed for their mitigation are addressed in separate sections of this decision.

[48] Ms Macnicol pointed out that because there is no activity description or status for “other activities not provided for [in the Special Purpose-Quarry zone]”, or any type of activity that could include the proposed activities, the activity status must be determined under PAUP:OiC General Rule C1.7 “Activities not provided for”<sup>13</sup>. She concluded that the proposal should be assessed as a discretionary activity.

[49] There was no disagreement that this was the appropriate activity status, and we have found accordingly.

*National Policy Statement – Freshwater Management (NPS(FM))*

[50] Because of the proximity of the Tomarata dune lakes to the festival site, Ms Thomson evaluated the effects of the proposed activities against the provisions of the NPS (FM). In her opinion it is unlikely that the activities would have any notable effect on water quality<sup>14</sup> and she concluded that the proposal would not conflict with any of the relevant objectives and policies of the NPS. She reached this conclusion having considered the locations of the individual activity areas, the management of potential sediment discharges, and the conditions requiring managed portable bathroom facilities to be provided.

[51] There was no disagreement on this, and we find accordingly.

*Hauraki Gulf Marine Park Act 2000 (HGMPA)*

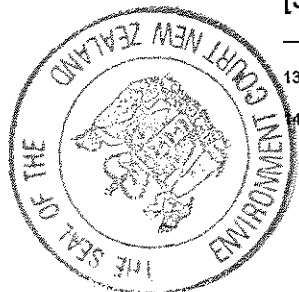
[52] Ms Thomson noted that while the site is in the catchment of the HGMPA, it is set back from the coast and that no festival or event activities are proposed to be held in the coastal marine area. From this she concluded that the proposal would be unlikely to conflict with the purpose for the HGMPA. Again, no one disagreed with this assessment and nor do we.

*New Zealand Coastal Policy Statement 2010 (NZCPS)*

[53] NZCPS Policy 3 requires that there be a precautionary approach towards

<sup>13</sup> Macnicol EIC at [4.5]

<sup>14</sup> Thompson EIC at [102] [103]



proposed activities whose effects on the coastal environment are uncertain, unknown or little understood, but potentially significantly adverse<sup>15</sup>.

[54] Policy 11 requires the protection of biological diversity in the coastal environment<sup>16</sup>. This is to be achieved by avoiding effects of activities on indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists, and indigenous ecosystems and vegetation types that are threatened or rare.

[55] Our analysis, discussion and findings about these matters are to be found in the parts of this decision dealing with the precautionary approach and the requirement to avoid "effects" of this kind.

#### **Is "Permitted Baseline" Relevant? : s104(2)**

[56] Under s 104(2) RMA, the Court has discretion as to whether to apply a permitted baseline approach. The subsection provides:

- (2) When forming an opinion for the purposes of subsection 1(a), a consent authority 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.

[57] Guidance may be taken from a decision *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council*<sup>17</sup>, where the Environment Court offered some questions to operate as guidelines for deciding whether to apply a permitted baseline approach, as follows:

- Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effects can conceivably be drawn?
- Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?



<sup>15</sup> We noted earlier the equivalent provision in the AUP (OiP) xxx

<sup>16</sup> We noted earlier the equivalent provision in the AUP (OiP) xxx

<sup>17</sup> [2006] NZRMA 559.

- If the parties consider that the application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared to the adverse effect, and if not, where do the merits lie over the area of disagreement?
- Is the evidence regarding the proposal, and regarding the hypothetical (non-fanciful) development under a relevant permitted activity sufficient to allow for an adequate comparison of effect?<sup>18</sup>

[58] Counsel for the appellant submitted that the concept would be useful in this instance, given the scale of temporary activities enabled by the PAUP:OiP, and the fact that the site is zoned Special Purpose – Quarry zone.

[59] We accept counsel's submissions that this does not mean that the effects of the proposed events can be no greater than the effects of permitted activities, and that the concept is simply a tool for assessing the effects by comparison to what could occur as of right. Where we part company with the submissions, is in the suggestion that "*there is no reason not to*". That begs the question of whether to exercise the discretion, and if so how.

[60] In her evidence in chief, Ms Macnicol focused on the concept of "existing environment"<sup>19</sup>, as opposed to "permitted baseline". In her rebuttal evidence, she responded to evidence on behalf of other parties about application of the permitted baseline concept. She acknowledged that it is discretionary in its implementation, but considered that there were several aspects relevant here, and expressed the opinion that the proposed events, subject to finalised conditions of consent, would be preferable to "events occurring in this location on this ad hoc basis utilising the permitted activity rules".<sup>20</sup>

[61] Referring to the rules in Chapter E40 of the PAUP:OiP, Ms Macnicol said<sup>21</sup> that temporary events/festivals are enabled on private land for up to 6 days per annum (up to two lots of three day events) outside the main centres, with no limit on the number of people attending; that there are limitations on noise and lighting, and that Rule E40.6.2 provides that there can be no more than 500 vehicle movements per day on adjacent

<sup>18</sup> See paragraph [21] of that decision.

<sup>19</sup> See page 14 of her EIC.

<sup>20</sup> Ms Macnicol, Rebuttal, para 3.3.

<sup>21</sup> EIC, para 3.4.



roads. She gave her opinion that such activities would not be fanciful<sup>22</sup>, because such events had occurred in the past. She carefully acknowledged<sup>23</sup> that pack-in and pack-out could be difficult to achieve within the three day limit, but that otherwise such events could occur under the temporary activity standards.

[62] Under cross-examination by Mr Allan, she again acknowledged<sup>24</sup> the 500 vehicle per day movement control, but referred (as she had in her evidence in chief) to the possibility of people taking buses. She acknowledged under questioning that people wanting to sleep in a car would of course have to arrive in it, and that bringing in camping equipment would see people wanting to use their car rather than a bus. She acknowledged that there are no regular public transport services in the vicinity.

[63] Ms Thomson and Mr Hall did not accept that the temporary activities provided for in Chapter E40 should be considered as part of a permitted baseline assessment.<sup>25</sup> They noted that the proposed conditions of consent allowed for 2 to 3 days for packing-in for large events, and 3 to 4 days to pack them down; noted that for the recent Shipwrecked Festival fully concluded within 3 days, pack-in and pack-out had to be undertaken during the night; and the event was for only 460 ticketholders.

[64] Concerns about time sensibly to be required for packing-in and packing-out seemed to be confirmed by the evidence of Ms Josephine Thomas and Mr Logan Baker of the Greatest Show on Earth Limited, a s 274 party. They were the organizers of the Shipwrecked Festival this year (and appeared in support of the appellant as applicant). They said<sup>26</sup> that they experienced "a few hiccups" with the running of the Shipwrecked Festival, notably that it was particularly unreasonable to work within the 3 consecutive days including pack-in and pack-out, commencing and finishing at midnight on relevant days; that in hindsight it was unsafe and risky in many ways; also that they were not able to complete their set-up as planned. They said that most festivals allow at least 14 days for pack-in 7 for pack-out. They expressed concern that there was insufficient time for testing of equipment or to identify hazards and rectify them before patrons arrive on site; that working through the night meant that staff were exhausted by the time the event commenced, leading to poor decision making which can lead to accidents.

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<sup>22</sup> EIC, para 3.5.

<sup>23</sup> EIC, para 3.6.

<sup>24</sup> Transcript p. 99.

<sup>25</sup> Ms Thomson EIC, paras 43-51 and Mr Hall EIC, paras 39-41.s

<sup>26</sup> EIC, para 4.



[65] We agree with the opposition parties that it would be fanciful to have regard to the permitted temporary activities as a permitted baseline, having regard to the quite extreme difficulties in packing-in and packing-out within 3 days, even for an event involving many fewer than 3,000 people, and particularly having regard to the want of safety. We also think that Ms Macnicol's concession about vehicle movements and her ultimate concession that large numbers of people arriving by bus might not be entirely realistic were proper.

[66] Finally, we consider that little of relevance would be gained by attempting to compare 6 days of permitted activities with the considerably larger number of event days, let alone pack-in and pack-out days, proposed by the appellant, even at the reduced level suggested in the final draft conditions of consent lodged with his counsel's reply.

[67] We note as well the evidence from Ms Thomson which we find was correct, about the very limited permitted activity opportunities besides events which could occur in the Special Purpose – Quarry zone.<sup>27</sup> Ms Macnicol confirmed this feature under cross-examination.<sup>28</sup>

[68] We decline to apply a permitted baseline in this case.

#### **Effects on the environment: s104(1)(a) RMA**

##### ***The "Existing and Future Environment"***

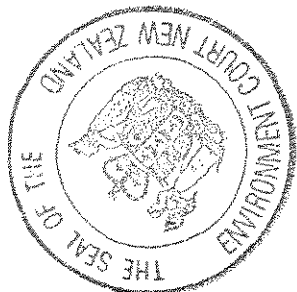
[69] Section 104(1)(a) RMA requires a consent authority to have regard to have any actual and potential effects on the environment. It has become established that the "receiving environment" means the existing environment, including beyond the subject site, and can include the future environment. The leading case is the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorne Estate Limited*<sup>29</sup>, where it was held that it was permissible and indeed often necessary, to consider the future environment rather than just the existing environment. The future environment

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<sup>27</sup> Ms Thomson EIC, para 50.

<sup>28</sup> Transcript, pages 89, 100-101.

<sup>29</sup> Decision CA 45/05 at para [84].





will include activities that are anticipated in the locality. That feature has been explained in the decision of the Environment Court *Burgess v Selwyn District Council*<sup>30</sup>, where it was held that the consent authority should not consider a future environment that might be artificial, but instead the activities, whether permitted or consented, must be likely to happen. We agree with that explanation.

[70] There was extensive evidence in this case not only from planners, but also from landscape witnesses and residents in the locality, and to a lesser extent from acoustic and transport witnesses. We do not intend to set it out here other than in a very much summarized form, because relevant aspects of it have been discussed elsewhere in this rather long decision and we wish to avoid undue repetition.

[71] We accept that counsel for the appellant<sup>31</sup> offered a reasonable if very much summarized description as follows:

- (a) The existing environment, which includes rural residential buildings, pastoral farming, forestry, the dune lakes and reserve land (including the habitat they provide for threatened species), the Mangawhai Harbour, visitor chalets, and sand mining; and
- (b) The likely future environment, both in terms of:
  - (i) Activities in the surrounding environment that are consented but unimplemented (namely the sand mine on the adjacent site); and
  - (ii) Activities permitted under the PAUP:OiP (namely the possible residential development of the Te Arai South precinct in the Ngati Manuhiri Treaty settlement area).

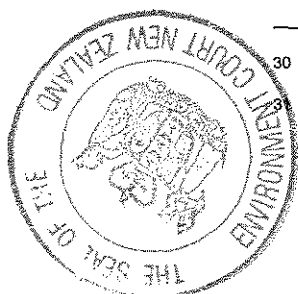
[72] As confirmed by our inspection of the site and locality, the evidence is that the environment presents today as a mixture of rural, rural residential, sand mining, forestry, minor visitor accommodation, and the attractive dune lakes. It is acknowledged that in the future there can be more of the same, that there is likely to be harvesting of forestry, some residential, rural residential development, and potentially a quite large sand mine on the Ngati Manuhiri land.

[73] Elsewhere in this decision we describe the landscape as relatively serene based

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<sup>30</sup> [2014] NZEnvC 11 at para [79].

<sup>31</sup> Opening submissions paragraphs 3.4-3.5.



on the evidence of the various witnesses just described, albeit with existing and potential visual and acoustic effects from the activities just described, and some traffic and transportation effects passing through and around it.

[74] We make detailed findings about the various kinds of effects elsewhere in this decision, but draw matters together somewhat at this point to make a general finding against the backdrop of the existing and likely future environment, that the effects of the proposed events would be quite strikingly different to all other existing and likely future activities. This must particularly be so during the night time in both visual and acoustic terms as described in the relevant parts of this decision. Also, the evidence collectively does not demonstrate the presence or likely future presence of adverse effects on the ecology, particularly the rare and endangered bird species, of anything like the potential effects from the proposal applying a precautionary approach in that respect. The effects from the proposal would in our judgment be strikingly different, indeed discordant (especially at night) from those activities in the present and likely future environment.

[75] Under s104(1)(a) RMA we must, subject to Part 2 of the Act, have regard to any actual and potential effects on the environment of allowing the activity applied for. As foreshadowed above, the principal effects about which we heard evidence and must resolve are traffic, noise, ecological, and visual.

### **Traffic**

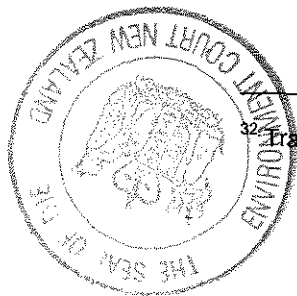
[76] Expert evidence on traffic was provided by Mr P Brown (for the appellant), Mr A Gratton (for Auckland Council) and Mr D Hughes (for Ngati Manuhiri Settlement Trust).

[77] At the time of the exchange of their primary evidence, concerns were raised by Mr Gratton and Mr Hughes that Mr Brown had not undertaken an assessment of traffic effects. Mr Brown responded to these concerns by preparing a report summarising his high level “rough order” assessment of these effects. This included details of the methodology he had used, vehicle turning diagrams for key intersections and supporting calculations.<sup>32</sup>

[78] Mr Gratton and Mr Hughes accepted the findings of Mr Brown’s report, which

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<sup>32</sup> Traffic Experts’ Joint Witness Statement at [3] and [4]



they said resolved their earlier concerns on this.<sup>33</sup>

[79] Subsequently, in their joint witness statement of 21 March 2017, the experts confirmed that there were no outstanding points of difference between them.

***The draft traffic conditions***

[80] In their joint witness statement, the experts recommended a number of amendments to the conditions on traffic which were current at the time of their conference. Key amongst these were that:

- Under Condition 44, prior to and after the 3,000 ticket events, road surface condition inspections be undertaken, with the consent holder being required to rectify any surface damage created in the time between the two inspections. At the conference the experts agreed that this condition should be amended to require that the person undertaking the inspections be approved by the Council; also that the requirement should apply to 500-ticket events as well as 3,000-ticket events (later renamed as medium and large Festivals).
- In Condition 46, the experts agreed to add two further objectives to the proposed Traffic Management Plan, one to ensure that queuing at the State Highway 1/ Waybe Valley Road intersection was managed safely if found to be required and the other for more than a single access point to be provided into the site for 3,000-ticket events (large festivals) if this was found to be necessary.

[81] The appellant's reply submissions confirmed that these amendments had been included in the draft attached to those submissions.<sup>34</sup>

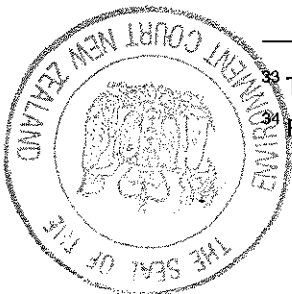
***Residents' concerns***

[82] We noted only one traffic-related matter raised in the residents' submissions, being from Ms M Fishlock who expressed concern about vehicles attending Festivals raising dust on unsealed sections of the access roads.

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<sup>33</sup> Traffic Experts' Joint Witness Statement at [5]

<sup>34</sup> Reply Submissions on Behalf of Mr Pierau dated 7 April 2015 at 3.11



[83] As to this, we note that proposed condition 40 requires all necessary actions to be undertaken to prevent dust nuisance to neighbouring properties and public roads, with the proposed measures to be fully detailed in the Site Management Plan. The Advice Note to this condition requires that active consideration be given to watering and/or the application of dust suppressants to roads, access tracks and manoeuvring areas during dry periods.

[84] We presume that the reference to a Site Management Plan in condition 40 should in fact be to the Events Management Plan which is to be prepared under condition 12. If so, this correction would need to be made and as well a subheading would need to be added to condition 12 to include the condition 40 requirements for dust management.

### ***Findings on traffic***

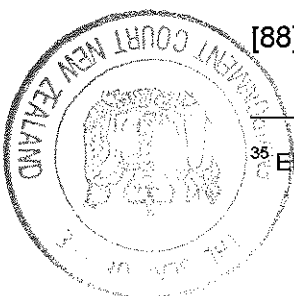
[85] With the traffic engineers' agreed amendments having been incorporated into the latest draft condition set; on the basis that the edits we have identified are included in the conditions; and on the basis that these conditions are fully implemented (including the requirement for a traffic management plan to be prepared for each medium and large festival), our finding is that the effects of traffic generated by any individual festival or event on the Pierau site would be no more than minor.

### **Landscape, Visual Amenity, and Natural Character Effects**

[86] Evidence in chief was given by Ms B M Gilbert, a consultant engaged by the Council, Mr J R Hudson, a consultant engaged by the s 274 parties Gravatt and others, and in rebuttal on behalf of the appellant by Mr B T Coombs, similarly qualified in landscape architecture.

[87] We were a little bemused about lack of evidence in chief on these matters from the appellant, particularly noting Ms Mcnicol's advice in her evidence in chief about the key issues identified by consultation amongst the appellant, Council and some of the s274 parties.<sup>35</sup> Nevertheless, our task was to focus on all relevant evidence brought to us, and therefore to consider the information and opinions brought by Mr Coombs with as much care as with the evidence of the other witnesses.

[88] Relevant also to our consideration of these issues was information brought to us



<sup>35</sup> EIC para 5.4.

in the evidence of local residents who gave evidence, including particularly Mr M Harris, Mr L Gravatt, Ms Fishlock, and Ms L Bell. Parts of the evidence of planners Ms Macnicol, Ms Thomson, and Mr Hall also bore upon the issues. We have considered all evidence closely, because alongside the issues concerning rare and threatened bird species, issues of landscape, visual amenity and natural character attained considerable importance in the case.

***What is the nature of the locality and site in terms of landscape, visual amenity and natural character values?***

[89] Perhaps in part because evidence on these issues on behalf of the appellant emerged only in a general way in the evidence in chief of Ms Macnicol and later the rebuttal evidence of Mr Coombs, the evidence in chief of Ms Gilbert (supported by Mr Hudson) was thought by us to be the most thorough. In particular, the evidence of Mr Coombs was not based on a detailed first principles analysis, but instead was confined to commenting on aspects of the evidence of Ms Gilbert, Mr Hudson, and the local residents.

[90] Ms Gilbert approached **visual amenity values** first, and rated them at the moderate to higher end of the spectrum on account of them containing highly attractive views from roads and dwellings, over the dune lakes and the valley, to the distant ocean where there are islands and coastal landforms; also on account on the relatively low-key character of built development combined with a fairly traditional “working” rural landscape character.<sup>36</sup>

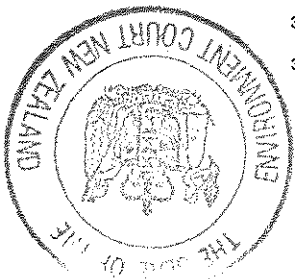
[91] Turning to the **landscape values** of the local area, Ms Gilbert again rated these as being at the moderate to higher end of the spectrum. Acknowledging the character of the site itself and its immediate surrounds, she noted that matters contributing to her overall assessment included a range of Outstanding Natural Features, Outstanding Natural Landscapes, and Significant Ecological Areas, identified in the PAUP:OiP. She noted as well the contribution of the character of the area being a relatively low-key, sleepy or peaceful, rural or coastal area.<sup>37</sup>

[92] She noted that some care had been applied through recent planning instruments and development consents, in avoiding or mitigating adverse visual and

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<sup>36</sup> Ms Gilbert EIC, para 91.

<sup>37</sup> Ms Gilbert EIC, para 95.



landscape effects and to enhancing landscape values.<sup>38</sup>

[93] Ms Gilbert very properly and candidly acknowledged that the existing visual amenity and landscape values of the site itself do not rate as highly as the locality read in the round; however she offered her opinion that it would be artificial to consider the site in isolation from the wider landscape setting.<sup>39</sup> She nevertheless found positive characteristics on the site in relation to **natural character values**. These understandably included the dune lake features, and perhaps less expected but nevertheless in our view relevant and accurate, the darkness of the night sky in an area relatively devoid of artificial lighting.<sup>40</sup>

[94] Drawing these matters together, Ms Gilbert's view was that the site forms a part of what can properly be described as an "amenity landscape"; and one that rates toward the higher end of the spectrum in terms of people's appreciation of the pleasantness, aesthetic coherence and cultural or recreational attributes of the area. She added that unlike outstanding natural landscapes, amenity landscapes tend to encompass attractive working rural landscapes, of which she considered this to be one.<sup>41</sup>

[95] Mr Hudson was careful expressly to avoid offering repetitive evidence. He supported Ms Gilbert's evidence, and essentially built on it, in particular expressing the view that the Outstanding Natural Features and Landscapes that are present in the wider landscape in fact contribute to the areas adjacent to them including the site. He supported the proposition that the wider basin is properly categorized as an amenity landscape.<sup>42</sup>

[96] Mr Coombs disagreed with the views about amenity landscape offered by Ms Gilbert and Mr Hudson. He seemed to place emphasis on the fact that the locality was not classified as an "amenity landscape" in any district or regional classification in the PAUP:OiP. On this however we accept the submission made on behalf of the Council that that Plan does not include a specific overlay identifying amenity landscapes

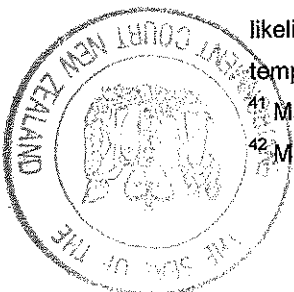
<sup>38</sup> Ms Gilbert EIC, paras 91(d) & 95(e).

<sup>39</sup> Ms Gilbert EIC, paras 93 & 96.

<sup>40</sup> Ms Gilbert EIC, paras 99 – 100. We consider that it is reasonable to note relative support for the likelihood that the locality will be largely devoid of artificial lighting, the notable exception being for temporary events as permitted activities, for the very short durations in the year when they can be held.

<sup>41</sup> Ms Gilbert EIC, para 103.

<sup>42</sup> Mr Hudson EIC, para 16.



because its strategic policy intent is directed to ONLs and ONFs on a region-wide basis as can be seen from the objectives and policies in the Regional Policy Statement B4 – Natural Heritage.

[97] Mr Coombs acknowledged in cross-examination that the fact that this locality was not identified as being part of an amenity landscape in the PAUP:OiP is of no present significance and does not mean that it does not have the characteristics of that type of landscape. He also properly conceded that Ms Gilbert had undertaken a more thorough analysis than his own<sup>43</sup>.

### ***Assessment of Landscape, Visual Amenity, and Character Effects***

[98] Again, it is appropriate to focus first on the evidence of Ms Gilbert, particularly as the evidence of Mr Coombs was only in rebuttal.

[99] Having offered the opinion that the site forms part of a wider amenity landscape, Ms Gilbert assessed potential visual effects of the proposal from a range of locations by day and by night, drawing particularly on the recent Shipwrecked Festival at Waitangi Weekend 2017 which she observed from those locations.

[100] By day, she considered that the camping and car parking component of larger events would be clearly visible from several vantage points along Ocean View Road and Atkins Road, the Spectacle Lake Recreation Reserve, and a number of the properties owned by s 274 parties along those two roads.<sup>44</sup> She noted that a contributing factor was the elevated location of the viewpoints relative to the activities, the visual exposure of the activity area, and the relatively reflective colours of the vehicles and tents at the event.

[101] She offered the opinion that the scale of camping and parking for the larger events bears little obvious connection to a working rural landscape having regard to its character, prominence, and extent. She described it as reading as “visual clutter throughout the valley floor”.<sup>45</sup>

[102] Having regard to the extent of pack-in and pack-out times being sought by the appellant, she expressed the view that there would be some visible disturbance on the site, particularly the camping and carparking areas which would be part of the



<sup>43</sup> Transcript pp70-71

<sup>44</sup> Ms Gilbert EIC, para 109.

<sup>45</sup> Ms Gilbert EIC, para 118.

perceived visual presence of events and exacerbating adverse visual amenity effects from the larger events.<sup>46</sup> Ms Gilbert expressed the opinion that collectively, the scale, character and frequency of the camping and parking component of the larger events would be likely to adversely affect the visual amenity values enjoyed from the vantage points.<sup>47</sup> She conceded that a line of poplar trees on the site would filter these effects for viewers on the Council reserve, and that those effects would therefore be negligible.

[103] Ms Gilbert considered potential effects from the Te Arai South precinct, where she considered mitigation might be available (which would be the subject of conditions of any consent) requiring a landscape restoration programme on the existing bund between the site and the precinct.<sup>48</sup>

[104] Ms Gilbert turned her attention to the nighttime situation, basing her opinions strongly on what she had observed during the Shipwrecked Festival at Waitangi Weekend. In this respect we recall other evidence that there were approximately 460 ticket holders, which is significantly short of the maximum number of 3,000 proposed by the appellant for the large festivals. Ms Gilbert considered that all sized events would be highly prominent at nighttime despite proposed conditions requiring lighting to be directed away from Spectacle Lake and the residential dwellings and fitted with covers to reduce light spill. She considered that this visual element would be incongruous in a largely working setting characterized by relatively low levels of lighting. Into this she factored the cumulative effects of the scale, character and frequency of events proposed, and she considered that they would detract from nighttime visual amenity values.<sup>49</sup>

[105] Returning to the situation overall, and having particular regard to the significant number of days over which events are proposed, she reached a similar conclusion with respect to landscape values in this relatively low-key and peaceful attractive working landscape that she considered to be "somewhat off the beaten track".<sup>50</sup>

[106] Putting things in what might be thought to be relatively pejorative terms, but with which we agree, Ms Gilbert considered that the locality would take on the identity of

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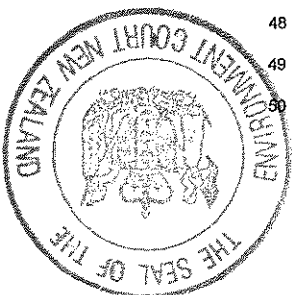
<sup>46</sup> Ms Gilbert EIC, para 119.

<sup>47</sup> Ms Gilbert EIC, paras 119-120.

<sup>48</sup> Ms Gilbert EIC, paras 122-124.

<sup>49</sup> Ms Gilbert EIC, paras 125-129.

<sup>50</sup> Ms Gilbert EIC, para 141-142.





"the music festival valley".<sup>51</sup> As to the nighttime situation, she considered that the potential effects would also adversely affect natural character values.

[107] Mr Hudson agreed strongly with Ms Gilbert, and contextualized the concerns by referring to a "sense of place of the local areas".<sup>52</sup>

[108] He considered that the adverse effects will be both individual and cumulative on visual and landscape values, and postulated that they would impact on characteristics of tranquility, perceived peacefulness, solitude, night darkness, and the sense of the area being a rural backwater. He believed these would be challenged by the "busyness" and character of the proposed activities.<sup>53</sup> Mr Coombs considered that Ms Gilbert and Mr Hudson were wrong about the likely scale of adverse effects. Regrettably, we think that he was struggling somewhat by drawing his comparisons of what is proposed, with the potential for a rural area to contain glasshouses, poly houses for silage storage, and white protective covers over grapevines. While these things might bear some visual contrast to green backdrops in a rural area, they are nevertheless things to be expected in such area. Farming activities are permitted in the relevant zone. Very properly, he conceded under cross-examination that the regular parking of large numbers of cars would have a more urban flavour than rural.

[109] We also felt that Mr Coombs was struggling somewhat in endeavouring to persuade us that 4 day large scale events with 3 day pack-in and 4 day-pack out periods, would be only "worst case scenario". We consider that they would be significant in themselves, notably greater than the permitted activity temporary events, and that the appellant proposes in addition significant numbers of smaller events.

[110] We consider as well that Mr Coombs started from an awkward position of not having identified the site as being part of an amenity landscape, so his evidence tended to lack context. This is a logical extension of the finding that we make in favour of the evidence of Ms Gilbert and Mr Hudson on the nature of the landscape, the visual amenity, and relative naturalness particularly at night.

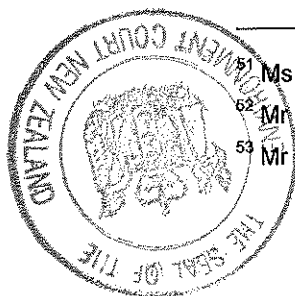
[111] Ms Gilbert quite properly and constructively offered the opinion that the site could sustain some level of event activity. In some significant measure, we think this aspect of her evidence underpinned the approach by the Council suggesting a

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<sup>51</sup> Ms Gilbert EIC, para 142.

<sup>52</sup> Mr Hudson EIC, para 22.

<sup>53</sup> Mr Hudson EIC, para 23.



compromise lying somewhere between the extent of events sought by the appellant, and outright rejection. She suggested that there might be no more than 12 events in total, comprising no more than four larger events up to 3,000 attendees, and no more than three 500 attendee events per year. She recommended a maximum of one event per month from the landscape perspective, and that there should be no events on consecutive weekends. In a little more detail she considered one of the larger events should be held during the winter months so that at least half of the public holiday long weekends between Labour Weekend and Easter would be free of any event; further that only one large event should occur between 25 December and 6 February when many people are on holiday.<sup>54</sup> She also recommended shortening the pack-in and pack-out times either side of events to two days each for the larger events and one day each for the smaller events. She recommended a focus on attendee numbers as opposed to ticket holders to answer some anxiety about numbers of staff, volunteers and guests of the appellant.

[112] Unlike Ms Gilbert, Mr Hudson did not propose particular levels of activity that might be appropriate from a landscape, visual amenity, or natural character perspective.

[113] We are minded to factor in Ms Gilbert's recommendations when making our overall assessment, but feel that that assessment will need to start even more importantly from the perspective driven by the need to avoid adverse effects on the threatened and endangered bird species in the locality. That said, it will be seen from the foregoing rather lengthy analysis of the landscape, visual and natural character evidence, that we strongly favour the evidence offered by Ms Gilbert and Mr Hudson, leading to a conclusion that adverse effects on the environment in these respects would, if the proposal were to be approved in manner suggested by the final draft conditions of consent lodged by the appellant, significantly more than minor, particularly at night, with some possible exception concerning the small events if appropriately controlled by conditions.

### **Fire risk**

[114] Mr Hall raised fire risk from outdoor fires and fireworks<sup>55</sup> on behalf of the parties who called him, which he called the "Te Arai South Forest Parties". The adjoining land

<sup>54</sup> Ms Gilbert EIC, paras 158-159.

<sup>55</sup> Hall EIC para 21



of those parties is close to the site and extensively covered by mature pine forest. Little other evidence was heard on this subject, although Ms Macnicol touched on it briefly in her evidence in chief<sup>56</sup>. She opined that the risk would be addressed in draft conditions 25 and 26. Condition 25 prohibits fire, except that fireworks and pyrotechnics can be used other than in any prohibited or restricted fire season subject to certain stated controls, many of which are to be left to an Events Management Plan. Some prescriptive controls are offered including size of fireworks and types of sounds emitted, and subject to the written approval of the holder of forestry rights on the adjoining land. New condition 26A requires the availability of a water tanker and firefighting equipment on site for the large and medium festivals, details to be approved by the appropriate council officer. Lesser standards are suggested for small events.

[115] We understand the attraction of fireworks displays at festivals and events, but wonder about the adequacy of the proposed conditions given the potential for a catastrophic outcome, mindful of one aspect of the definition of "effect" in s3 RMA, in subsection (f), *any potential effect of low probability which has a high potential impact*, into which category we hold this issue fits. We recognize that the holder of the forestry rights can approve the use of fireworks, but retain a concern about potential economic impact beyond that entity, for instance on forestry workers.

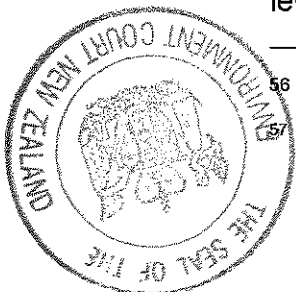
### Acoustic issues

[116] Evidence on noise was provided by acoustic experts Mr R Hegley (for the appellant), Mr J Cawley (for Auckland Council), Mr J Styles (for Ngati Manuhiri Settlement Trust) and Ms F Sami (for Dr Gravatt). In addition, in their submissions, local residents Mrs Fishlock, Mrs Bell, Mr Harris and Dr Gravatt each addressed the adverse effects of noise from music Festivals, given that they had experienced same during past festivals including the most recent permitted activity event over Waitangi weekend 2017.

[117] Messrs Hegley, Cawley and Styles met on three occasions<sup>57</sup> following which they produced a joint witness statement dated 9 March 2017. This recorded their agreement on all noise-related issues except for the extent of the reduction in noise levels through open windows. In addition, they recorded that they had not addressed

<sup>56</sup> Macnicol EIC para 5.25

<sup>57</sup> February 23, March 1 and March 9, 2017



the effects of noise on animals or birds as this was outside their area of expertise.

[118] Ms Sami did not participate in the expert conferencing although she noted in her evidence that following her review of the joint witness statement, she was in agreement with the methodologies, and with the exception of some of the draft conditions, the findings of the other experts<sup>58</sup>. She noted also that like the others, the effects of noise on animals or birds were outside her area of expertise<sup>59</sup>.

***Issues for evaluation***

[119] We have evaluated the effects of noise from festivals and events being held on the site under the following headings:

- the proposed noise limits and their relationship with provisions in the PAUP:OiC and the existing sand mining consent;
- the adverse effects of festival noise (amplified music) on residents who live nearby;
- the effects of festival noise (amplified music) on the wildlife which inhabit Spectacle Lake and in particular the critically endangered Australasian bittern;
- proposals (noise limits) in the applicant's draft conditions of consent for mitigating the effects of festival noise and in particular low frequency noise;
- the potential for reverse sensitivity effects on adjoining landowners and in particular the Ngati Manuhiri Settlement Trust land.

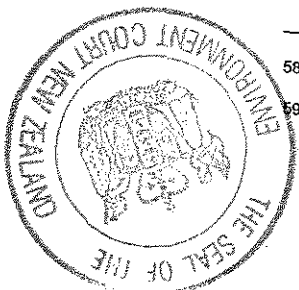
***The proposed noise limits***

[120] For the purpose of determining what noise limits might appropriately apply for music festivals and small events held on the appellant's site, the acoustic experts agreed that these should be aimed to achieve of a number of objectives. The noise levels between 10pm and 7 am should be controlled to prevent difficulties with people getting to sleep and/or being woken; during the day, the noise limits should provide an adequate level of amenity for activities sensitive to noise; there should be proper management of low frequency noise from amplified sound; and each of these objectives should be considered in the context of the frequency of the events

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<sup>58</sup> Sami EIC at 5.1

<sup>59</sup> Sami EIC at 5.2



proposed.<sup>60</sup>

[121] The experts agreed that compliance with the proposed noise limits should be sufficient to protect the majority of the population from adverse effects including allowing people to get to sleep at night and not causing them to be woken, as well as providing a reasonable level of amenity during the day.

[122] They noted that even with the noise limits which they had agreed; a minority of people could still be adversely affected and annoyed by the noise.

[123] As low frequency base noise is a primary trigger for sleep disturbance during an amplified music event, the experts sought guidance from a UK publication, the draft Good Practice Guide.<sup>61</sup> This discusses certain factors recommended to be considered when setting noise limits, including the number of events proposed in a year, whether an event runs overnight, whether the event is outdoors, whether there is a noise management plan in place, and the proximity of receivers.

[124] Mr Hegley and Mr Styles had undertaken measurements of the low frequency background noise levels around the Pierau site. These measurements in combination with findings from the Good Practice Guide were used by the experts in agreeing on two low frequency octave band noise limits for mitigating the adverse effects of such noise from the site.

[125] In order to provide the local community with some respite from the noise of amplified music, the experts also recommended that there should be a gap of no less than 10 days between events involving amplified sound.

[126] All of these recommendations were taken forward and included in the draft conditions of consent.

### ***Context of proposed noise limits***

[127] In the following table we have summarised:

- the PAUP:OiC noise limits for the Special Purpose-Quarry zone and the

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<sup>60</sup> Noise Experts Joint Witness Statement at 7.1

<sup>61</sup> Good Practice Guide on the Control of Noise from Places of Entertainment, Institute of Acoustics and Institute of Licensing (UK) December 2016

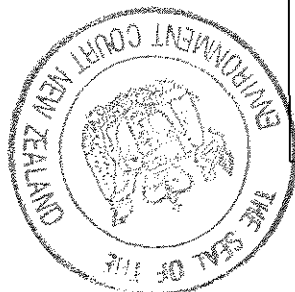


adjoining Rural Coastal zone;

- the PAUP:OiC permitted noise limits for Temporary Activities;
- the sandmining noise limits on the applicant's site (from the resource consent conditions for this);
- the proposed noise limits under the current application (from the final draft conditions of consent).

### Noise Limits: Proposed Consent, Relevant AUP Zones, Sand Mining Consent

Provision/Conditions	Period	Noise Limit	Related Conditions
PAUP:OiC Special Quarry Zone (Table H28.6.2.1.1) Note: Adjoining Rural Coastal Zone Limits from Table E25.6.3.1	Monday to Friday (0700-2100)	55dB LAeq	For the adjoining Rural Coastal Zone, same limit but Mon – Sat (0700-2200) and Sun (0900-1800)
	Saturday (0700-1600)	55dB LAeq	Adjoining Rural Coastal Zone covered above
	All other times including public holidays	45 dB LAeq 75 dB LAFmax	For the adjoining Rural Coastal Zone, same limit but all other times
PAUP:OiC Temporary Activities (E40.6.4 and Table E40.4.1)	All days (0900-2300 except to 0100 on New Year's Day)	70 dB LAeq	Up to 6 days but no more than 3 consecutive days in any 12 month period (equivalent to 2 events each of 3 days duration)  Limit 6 hours duration excluding 2 hours for sound testing between 0900-1900  Limit for 3 events increases to 80 dB LAeq for 3 hours of 6 hour total
Sand Mining Consent (L20829E)	All days except Sundays and Public Holidays (0630-1900)	50 dBA L10	Saturday afternoon work restricted to plant and machinery maintenance.
	All other times including Sundays and Public Holidays	40 dBA L10	Sundays or Public Holiday work restricted to rehabilitation of excavated areas.
Proposed conditions for this application	0700-2200 <i>With amplified music</i>	<u>Large festivals:</u>  50 dB LAeq(5 min)  <u>Medium festivals and smaller events:</u>  45 dB LAeq(5 min)  Both with no adjustments for SACs	Restrictions for medium and large festivals:  Day1: 2 hour sound checks per stage within 1000-2000  Day 2: Festival from 1600-0700 next day  Day 3: Festival from 1000-0800 next day  Day 4: Festival from 1300-2000

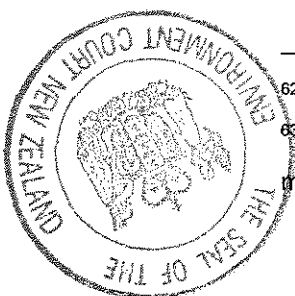


	0700-2200 <i>Without amplified sound</i>	55 dB LAeq	
	2200-0700 <i>With amplified music</i>	<i>All events</i> 40 dB LAeq(5 min) 52 dB Leq(5 min) @ 63 Hz 1/1octave band 54 dB Leq(5 min) @ 125 Hz 1/1octave band (No adjustments for SACs or duration)	No overnight amplified sound at end of Day 1 Day 2: Festival from 1600-0700 next day Day 3: Festival from 1000-0800 next day No overnight amplified sound at end of Day 4
	2200-0700 <i>Without amplified music</i>	40 dB LAeq(5min)	
	All amplified music at edge of Spectacle Lake	40dB Leq @125 Hz and @ 160Hz	Measured at outer edge of vegetation

[128] These limits apply at the notional boundary of any dwelling (generally speaking a line 20 metres from the wall of a dwelling or the legal boundary where closer) except that for noise from temporary activities<sup>62</sup> the assessment location is 1m from any dwelling outside of the venue.

[129] Comparisons between the decibel limits proposed in the consent conditions and the limits in the PAUP:OIC and the existing sand mine consent must take account of differences in the noise metric. For example, for the most part the metric of the PAUP:OIC noise limits is dB LAeq; for the sand mine limits, dB L10; and for the proposed conditions, dB Leq (5min).<sup>63</sup>

[130] Applying the more restrictive public holiday limits in the PAUP:OIC for the Special Quarry Zone as the basis for comparison, the proposed numerical limit for large day-time festivals with amplified noise is 5dB above the PAUP:OIC limit, and the proposed numerical limit medium festivals and smaller events with amplified sound numerical limit is the same as the PAUP:OIC limit. The proposed night-time numerical limit is 5dB less than the PAUP:OIC limit in addition to low frequency noise limits to mitigate the adverse effects of amplified sound at night.



<sup>62</sup> PAUP:OIP E40.6.1 (1)

<sup>63</sup> An Leq(5 min) noise limit means that the measured level is not to exceed the specified limit in any 5 minute sample. The default value for Leq is 15 minutes (NZS 6802:2008 at 8.2.2)

[131] The limits for events not involving amplified sound are the same as those for the PAUP:Oic Rural Coastal zone.

[132] The sand mine week-day noise limit is the same as the proposed day-time noise limit for large festival amplified sound. The sand mine does not operate at night or on Sundays although maintenance is permitted on Saturday afternoons and rehabilitation works on Sundays and public holidays.

### ***Effects of changing meteorological conditions***

[133] Mr Hegley disputed Mr Styles's claim that changes in wind conditions or temperature inversions could result in changes in noise levels of up to 30dB. Quoting a respected international publication, Mr Hegley said that at most the range of changes in the general noise levels would be about 15dB and for low frequency noise 11dB.<sup>64</sup>

[134] He said that he had undertaken measurements of the noise generated by the sound system intended for use at the festival site at three locations along Ocean View Road. These measurements had shown good correlation between the measured and his predicted noise levels, if anything showing the predicted levels to be conservative. He advised that the modelling of the predicted noise levels had been based on downwind conditions.<sup>65</sup>

### ***Extent of festivals and events***

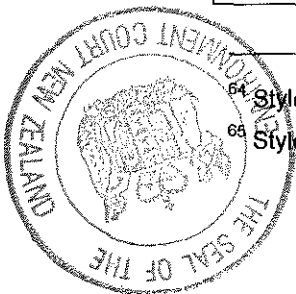
[135] The following table is based on information contained in condition 2 of the latest draft conditions of consent. It summarises the total number of days and nights in any year when it is suggested there could be large festival amplified sound, medium festival amplified sound and small event amplified sound.

#### **Annual Days/Nights of Music Under Proposed Conditions**

Event	Number of Festivals/Events	Days Per Year of	Days per Year of Amplified Music	Nights in Year of
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<sup>64</sup> Styles Rebuttal at 2.9

<sup>65</sup> Styles Rebuttal at 2.10





		Festivals/Events Involving Amplified Music	(Including Sound Testing)	Festivals/Events Involving Amplified Music
<b>Large Festivals</b>	2 music festivals per year of 4 days duration each	8 days	4 days per festival 2 festivals per year 8 days per year	2 nights per festival 2 festivals per year 4 nights per year
<b>Medium Festivals</b>	4 music festivals per year of 4 days duration each	16 days	4 days per festival 4 festivals per year 16 days per year	2 nights per festival 4 festivals per year 8 nights per year
<b>Small Events</b>	20 events per year of 2 days duration each with 5 events being music festivals, music to stop at 2400 hrs	10 days	2 days per event 5 music festivals 10 days per year	1 night per festival 5 festivals 5 nights per year (ending at 2400 hrs)
<b>Totals</b>		<b>34</b>	<b>34</b>	<b>12 all night plus 5 to midnight</b>

[136] Combining the information in this table with the numerical noise limit comparisons described earlier, for up to 8 days per year, the level of amplified sound could exceed the PAUP:OiC noise limit by up to 5 dB (at large festivals). For a further 26 days per year, the noise level from amplified sound level could be up to the PAUP:OiC noise limit (at medium festivals and small events).

[137] There could also be amplified sound for up to 12 nights (plus another 5 nights to midnight) under the proposed conditions, with the maximum level of the noise from this amplified sound being 5dB less than the PAUP:OiC limit, in addition to low frequency noise being mitigated by the low frequency octave band limits.

### ***Effect of noise on residents***

[138] In their submissions opposing the grant of consent, local residents articulated their concerns about the adverse effects of noise from amplified music festivals which had been held in the past on the Pierau site. These included descriptions of the adverse effects they had experienced during earlier festivals including the recent Shipwrecked Festival held on Waitangi weekend, 2017.



[139] Mrs Margaret Fishlock and her husband live in a house on an elevated site about 1.5km south west of the entrance to the appellant's property. The office and washing plant are located on their land directly opposite this entrance.

[140] Mrs Fishlock described the way in which the noise from the Waitangi weekend Shipwrecked Festival had affected her. She said that the noise of the amplified music was particularly noticeable when the wind was either blowing from the east (towards her house) or had dropped away. She said that as the weather was hot she needed to have windows open to provide cooling for sleeping. The beat and electronic sounds and at times people yelling and yahooing caused her to have very disrupted sleep. She said that once her brain had latched on to the beat, pitch, vocal lines and melody lines of the music she found it very difficult to switch off both at night and also during the day. Once her sleep had been disrupted by amplified noise during the nights of a festival, it took her a good week to recover.

[141] Mrs Lesley Bell lives with her husband in a house some 2 km west of the festival site. Their house does not have a direct line of sight to the events site. While she did not refer to sleep disturbance, Mrs Bell said that when there was a festival on and they were working in their vineyard, both she and her husband were subjected to the incessant beat of music which they could not get out of their heads.

[142] Mr Clifford Harris lives about 1.4 km north of the Pierau site atop a ridge with largely unimpeded views over the events site. He said that for him, noise was the most significant adverse effect from festivals, with a particular emphasis on what he described as a monotonous drumming sound rarely varying in tempo. On two occasions in 2015 even with all doors and windows closed and television turned on, the sound could be heard inside and he was not able to sleep. During the 2017 Waitangi weekend event, he said that the base noise was continually audible and that it woke both him and his wife in the early hours of the morning even though the windows were closed. Following his complaint to Auckland Council, he said that there was a marked decrease in volume and both were able to get back to sleep.

[143] In answer to a question from the court about whether he had become sensitised to the noise of amplified music, Mr Harris said that rather than getting used to it, he was anticipating what was to come and that this made him anxious.<sup>66</sup>

[144] Dr Lance Gravatt and his wife live about 3 km from the Pierau site. Dr Gravatt's

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<sup>66</sup> Transcript at page 310



submission did not mention whether he experienced adverse noise effects at his home. Rather, his primary concern about noise from amplified music was its effect on the enjoyment of the public using the walkways in the South Te Arai Precinct. He noted from the experts' joint witness statement that noise from music festivals could be as loud as 75 to 85dB LAeq at the walkway closest to the site. Also, the experts had said that while this would be an adverse effect on the users of the walkway, its occurrence would be infrequent and that such effects on publicly accessible areas are not normally an issue.

[145] Dr Gravatt had a different view, this being that when there was loud amplified music, the public would be deterred from using the walkways and therefore deprived of their enjoyment of the views to be experienced of the special ecological areas and the rural pastoral environment which opened up along the walkways.

***Potential effects of noise on Australasian bittern***

[146] In the ecology section of this decision we will discuss in some detail the bird habitats at Spectacle Lake including the habitat of the critically endangered Australasian bittern. Of particular relevance are concerns that amplified music could mask the male's mating call or "boom" with the potential for this to adversely affect its breeding cycle.

[147] We have noted already the advice of the acoustic experts that effects of noise on birds were outside their area of expertise. With this qualification, Ms Sami said that she had coordinated with Ms Myers (the ecologist engaged by Dr Gravatt) to gather a sample of relevant noise data during the Waitangi weekend Shipwrecked Festival to assist Ms Myers assess the potential effects of noise on the bittern. In a similar way, Mr Hegley had coordinated with Dr van Meeuwen-Dijkgraaf the ecologist engaged by the appellant.

[148] While Ms Sami's noise data had been gathered at five locations, her evidence focussed on the data recorded at two, the eastern and western boundaries of the Conservation zone bordering Spectacle Lake. The noise levels she had recorded at these locations were 45 dB Leq at 100 Hz (the same for both boundaries), 38 dB Leq (eastern boundary) at 160 Hz, and 27 dB Leq (western boundary) at 160 Hz.



[149] The Lmax readings at these same locations were 60 dB (100 Hz) and 40-53 dB (160 Hz) respectively.

[150] Ms Sami provided a copy of a sonogram of a Eurasian bittern which she had been told by Ms Myers was closely related to the Australasian bittern. This sonogram indicated that the maximum volume of a bittern's boom was 40dB. She said that the reference from which she had obtained the sonogram recorded neither the distance from the bittern where the recording was taken nor other details such as height above the ground, the wind speed or temperature.<sup>67</sup> Further, that the sonogram did not indicate whether the noise levels were A-weighted, Leq or Lmax.

[151] Nevertheless, she was of the opinion that the noise levels she had recorded during the Shipwrecked Festival at the frequency of the bittern boom would substantially mask the noise of a boom for a receiving mate.

[152] She also noted the ambient noise levels she had measured at the 100 Hz and 160 Hz frequencies were in the range of 20-23 dB Leq, both well below the maximum boom level of 40dB.

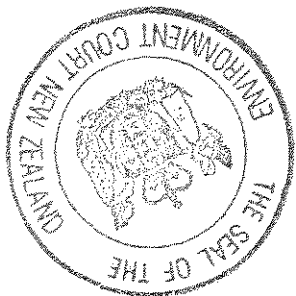
[153] Mr Hegley said that as the noise level from the proposed music would be reasonably steady, he considered that the appropriate noise metric for the protection of the bitterns should be Leq and not Lmax. Accordingly, his recommendation was that the music noise received at the location of the males should not exceed 40dB Leq (125Hz) (1/3) and 40 dB Leq (160Hz) (1/3).

[154] Drawing on information contained in Appendix 1 of Ms Sami's evidence and adopting the same location east of the lake as Ms Sami, but a different location on the western side (at the lake edge as opposed to the more distant Conservation Boundary) Mr Hegley identified the noise measurements from the Shipwrecked Festival as having been, for the 125 Hz octave, 33dB (east) and 28 dB (west) and for the 160 dB Hz octave, 27 dB (east) and 24 dB (west), both of which were less than the 40 dB limit proposed in the draft conditions.

[155] Mr Hegley noted also that the two measurement locations he had used were both adjacent to the vegetation at the edge of the lake. He had noted from Dr van Meeuwen-Dijkgraaf's evidence that the bittern's preferred habitat was in the reed beds

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<sup>67</sup> Handbook of the birds of Europe, the Middle East and North Africa: the birds of the Western Palearctic, Stanley Cramp, 1977, Vol 1.



and that these were around 0.5m below the ground level at these locations. This would mean that the birds would receive lower noise levels than those measured by Ms Sami due to the screening provided by the bank at the lake edge.

[156] While neither expert commented on the reason for the noise levels at the Conservation Boundary west of the lake being higher than at the lake, our inference is that this is because this boundary is at an elevation some 15-20 metres above the lake.<sup>68</sup> Mr Hegley said that he had not addressed the noise levels at this location as it was some way removed from the lake shore which he understood to be the bitterns' preferred habitat.

[157] Ms Sami responded that as Dr van Meeuwen-Dijkgraaf had noted in her rebuttal evidence that the bittern would also utilise scrub and more open habitat, she considered that noise measurements at the Conservation Boundary in the west (as opposed to the lake edge) were relevant to this bittern boom noise issue.<sup>69</sup>

[158] When asked if there was enough information to be confident that there would be no masking of the bitterns' booms with a 40dB limit, Mr Hegley quite properly replied that he did have some concerns. His qualifications were that he did not have the expertise to know if 40dB was in fact the correct limit and the reference material used for setting this limit did not define the conditions under which the noise level of the boom had been recorded.<sup>70</sup>

[159] In response to a question from Mr Allan about whether the noise limits he had proposed would cover the overall booming frequency range which was from about 100 Hz to 200 Hz, Mr Hegley said that in his opinion this range would be addressed by his proposed criteria for measuring the noise at the 125 Hz and 160 Hz octave bands.<sup>71</sup>

[160] Ms Sami pointed out that if 40dB was the maximum volume of a bittern's boom, a 40dB noise limit would result in greater masking for any booms which were less than 40 dB.

[161] Commenting on the ambient sound levels measured by Ms Sami, Mr Hegley said that he had undertaken measurements of the ambient sound at Mr Pierau's property in Ocean View Road. While his measurements and those undertaken by Ms

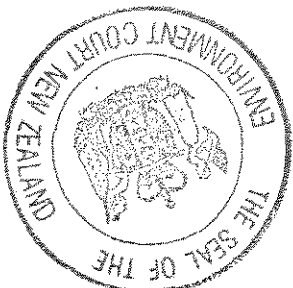
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<sup>68</sup> van Meeuwen-Dijkgraaf Rebuttal at 4.8

<sup>69</sup> Sami Supplementary Evidence at 2.2

<sup>70</sup> Rebuttal at 3.5, transcript at pages 29,30

<sup>71</sup> Transcript at page 34



Sami correlated well at the 63 Hz and 125 Hz frequencies, his A-weighted levels were considerably higher than those measured by Ms Sami (mid 50 dB LAeq compared with 31 db LAeq between 7.30pm and 9pm). He attributed this difference to the presence of crickets and cicadas in his measurements. He cautioned that ambient sound levels in the area could be variable and more pronounced if the effects of wind were considered.

[162] Ms Sami rebutted that in her measurements the noise from cicadas had been distinctly audible.

### ***Reverse Sensitivity***

[163] In their joint witness statement the acoustic experts noted that a future dwelling or papakainga could be established as close as 12m from the western boundary of the adjoining Te Arai South Forest site which could be as close as 50m from the proposed events site. The consequence of this proximity would mean that in order for the proposed noise limits to be met, only relatively quiet events could be held on the Pierau site once a dwelling or papakainga had been established on the site.

[164] We were told that the proposal also has the potential to generate reverse sensitivity noise effects on some neighbours and in particular Ngati Manuhiri, and that this is to be addressed by way of a covenant in the conditions (condition 26B of the draft conditions).

### ***Discussion***

[165] We were provided with copies of the consents issued by the Auckland Council for two earlier music festivals held on the Pierau site. The first (consent L61155) was issued on 31 January 2014 for a festival for music over a weekend (we presume Waitangi weekend although the specific dates were not stated in the consent). The second (consent L63747) was issued on 4 February 2015 for a one-off three-day event to be held over Waitangi weekend of that year.

[166] The noise limit in the 2014 consent was 40 dBA Leq between the hours of 11pm and 9am and for the 2015 consent, 55dBA Leq between the hours of 11pm and 2am and 40dBA Leq/75 dBA Lmax between 2am and 9am.

[167] The day-time limit for both festivals was 80 dB LAeq.



[168] The 2017 festival was undertaken under the permitted Temporary Activity rules of the new PAUP:OiP. The noise limit under these rules would have been 70dB LAeq between the hours of 9am and 11pm.<sup>72</sup> After 11pm, the Special Purpose-Quarry zone limits of 45 dB LAeq and 75 dB LAFmax would presumably have applied.

[169] For comparison, the proposed noise limits between the hours of 10pm and 7am under the current application (40dB LAeq(5 min), 52 dBLeq (5 min) at 63 Hz 1/1 octave band and 54 dB Leq (5 min) at 125Hz 1/1 octave band) are more restrictive than the Temporary Activity limits, and they also include limits for mitigating the effects of low frequency sound and a lower day-time limit.

[170] Our understanding is that because of the noise metric, the proposed night-time noise limit of 40dB LAeq(5 min) is a more restrictive control than the 40 dBA Leq limit which was in place after 2am during the 2014/2015 festivals. Also, these earlier festivals did not have controls on low frequency sound which we understand is an underlying cause of the Harris and Fishlock sleep deprivations.

[171] For one of the 2015 festivals, the noise limit between the hours of 11pm and 2am was 55 dB Leq reducing to 40dBA Leq after 2am. Given that a 10 dB increase in decibels is considered to represent a doubling in sound, we surmise that the even greater 15 dB difference (55dB less 40 dB) between 11pm and 2am could well have been the initiator of Mr Harris's late night/early morning sleep disruption during that festival.

[172] We note also that the proposed day-time noise limits of 50 dB LAeq (large festivals) and 45 dB LAeq (medium festivals and smaller events) are substantially less than the 70 dB LAeq Temporary Activity limit which would have applied for the Shipwrecked Festival and the 80 dB LAeq limit that applied for the 2014 and 2015 Festivals. These proposed lower limits and the limits proposed at Spectacle Lake will mean that if consent was to be granted, Mr and Mrs Bell would receive much reduced levels of noise when working in their vineyard compared with the noise levels they experienced during earlier festivals.

[173] As noted in the experts' joint witness statement, compliance with the proposed noise limits should be sufficient to protect the majority of people from adverse effects including allowing them to get to sleep at night and then not being woken, as well as providing a reasonable level of amenity during the day.

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<sup>72</sup> We note that there are duration limits applying within this period



[174] We have no evidence to assist us to know whether the Fishlocks, Harrises and Bells would fit within the "majority of people" spectrum. If they do not, and if consent was to be granted, even with the more restrictive noise limits proposed, these residents might still be adversely affected by sleep disruption and loss of amenity from the effects of amplified music from festivals on the Pierau site.

[175] The noise limits for the Special Purpose-Quarry zone were no doubt set against the requirements for the sand mining operation. The sand mine operates only on weekdays and Saturday mornings with noise limits of 50 dB on weekdays and 40 dB on Sundays and public holidays.

[176] We heard no evidence that sand mine noise is adversely affecting the local community, who, by and large live in a relatively serene rural environment.

[177] Under the temporary activity rules, the community could be impacted by the noise from amplified music for up to 6 days per year up until 10pm (except for New Year's Eve to 1am) but not overnight.

[178] The draft conditions allow for 2 large festivals, 4 medium festivals and 5 music events or a total of 11 music festivals/events per year. As provided for in the draft conditions, the 2 large festivals and up to 3 of the medium festivals could be held between December and February which would equate to one festival every 2 to 3 weeks. The draft conditions also provide for smaller events to be held during this same period, provided that the gap between all festivals and events is no less than 10 days.

[179] Two large festivals and 3 medium festivals would involve amplified music being played for a total of 20 days and 8 nights in addition to 2 days and 1 night (until midnight) for each small event that was held during this same period.

[180] Over a full year, the application would allow amplified music to be played for a total of 34 days and 12 nights - or 28 days and 12 nights over and above the numbers permitted under the Temporary Activity rules.

[181] Returning to the December to February period, for up to 8 days in this period, the noise level from day-time amplified sound could exceed the PAUP:OIC noise limit by up to 5 dB (during large festivals) and for a further 12 days, the noise level could be up to the PAUP:OIC noise limit (during medium festivals). For 8 nights during this same period, the maximum noise level from amplified sound could be 5dB (or less) than the PAUP:OIC limit with low frequency noise being mitigated by low frequency octave band





limits.

[182] We find that the noise levels from the amplified music under the proposed conditions to be more or less in line with those permitted under the temporary activity rule and those of the zone and therefore acceptable for individual festivals and events. Conversely, on a cumulative basis including nights, we find that the adverse effects of the regularity of the amplified music on the amenity of the local community under the proposed conditions, particularly over the summer months, to be at an overall level which is more than minor.

[183] There would appear to be reasonable certainty that the noise from amplified music can be controlled to limit the noise levels to no more than 40 dB at the tops of the banks of Spectacle Lake. It would also be reasonable to assume that there would be some reduction in these noise levels when measured at the bitterns' reed habitat which is about 0.5m below the top of the bank.

[184] But as the appellant's acoustic witness Mr Hegley told us, he did not have the expertise to know if 40dB was the correct level of a bittern's boom particularly as the reference material used for defining this had not described the conditions under which the noise had been recorded.

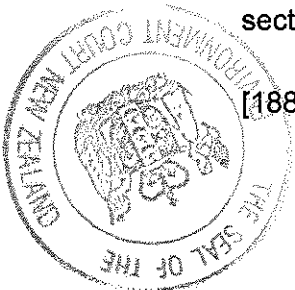
[185] And as Ms Sami has pointed out, if 40dB was the maximum volume of a bittern's boom, a 40dB noise limit would result in greater masking for any booms which were less than 40 dB.

[186] In this section of our decision on noise, we go no further in discussing the potential adverse effects of amplified noise on the bittern's boom and the consequences of this. We have addressed potential effects on the birds more fully in the section on ecology.

### **Ecological Issues**

[187] Three experts presented evidence on the ecological values of the dune lake environment and the effects of the proposal on it. Dr A van Meeuwen Dijkgraaf was called by the appellant, Dr T Lovegrove by Auckland Council and Ms S Myers by the section 274 parties (Gravatt and Others).

[188] The importance of the dune lake environment in this case is that the local



freshwater lakes support populations of several bird species that are classified as “threatened” or “at risk” under the New Zealand threat classification system;<sup>73</sup> and the wetland margin habitat itself contains several plant species that are regionally rare and uncommon.

***What are the ecological values of the Tomarata dune lakes?***

[189] The ecological values of the lakes have been thoroughly and we think accurately described in Dr Lovegrove’s evidence. The lakes have the following categorizations:

- Sites of Special Wildlife Interest (Department of Conservation).
- Priority Places for Protection (Mitchell *et al* 1992).
- Significant Natural Heritage Areas (Auckland Regional Policy Statement (Auckland Regional Council (1999)).
- Significant Natural Areas in the Auckland Council District Plan (Rodney Section) 2011 (Lake Tomarata and surrounding vegetation).
- Natural Lake Management Areas in Schedule 2 of the AUP-OiP.
- Significant Ecological Areas in the AUP-OiP in relation to Slipper Lake, Lake Tomarata and parts of the eastern and western sides of Spectacle Lake.

[190] Ms Myers explained that the ecological significance of the lakes lies in the areas of special habitat that they provide for wetland, shore and open country birds, despite the extensive loss of wetland habitat that has occurred previously in this area. She described the importance of the wetlands in New Zealand generally, noting that an estimated less than 10% of the country’s original wetland cover remains. She also commented on the regional significance of Lake Tomarata in terms of the indigenous plant species and communities present in the surrounding wetlands.

[191] In particular, she cited the presence of *Empodisma robustum* (wire rush), a peat-forming restiad or rush, which has a threat status of Regionally Critical, and a tall sedge *Machaerina complanata* with a threat status of Nationally Vulnerable. The *Empodisma robustum* fen community is found only at this site in the region.

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<sup>73</sup> Miskelly *et al.* 2008, referred to by Dr Lovegrove in evidence in chief, para 4.9



[192] Spectacle Lake provides wetland habitat in a band some 10-40 m wide. In this wetland, Ms Myers reported the presence of a range of species including the swamp coprosma (*Coprosma tenuiculmis*) which has a threat status of Regionally Data Deficient.

[193] Ms Myers confirmed Dr Lovegrove's evidence that the wetland vegetation around Lake Tomarata and Spectacle Lake is important habitat for Australasian bittern. The presence of healthy fish stocks that include longfin eel (At Risk, Declining), short fin eel, banded kokopu, black mudfish (At Risk, Declining) and good water quality are important components of the bittern habitat. No evidence indicated that fish would be affected directly or indirectly by festival activities.

[194] Ms Myers set the Tomarata dune lakes in context by explaining that they are part of a network of small lakes in the vicinity of Te Arai, that they are the only dune lakes in the ecological district, and the only ones on the east coast of the Auckland ecological region.

[195] Her evidence was that Lakes Tomarata and Spectacle meet three of the four National Priorities for Protection of Indigenous Biodiversity (MfE and DOC 2007), as follows:

- National Priority 1: to protect indigenous vegetation associated with land environments ... that have 20% or less remaining in indigenous cover. (The Tomarata dune lakes wetlands are in a land environment within which less than 10% indigenous vegetation cover remains).
- National Priority 2: To protect indigenous vegetation associated with sand dunes and wetland; ecosystems that have become uncommon due to human activity. (The Tomarata dune lake and wetland systems are in that category, as less than 10% of wetland habitat remains).
- National Priority 3: To protect the habitats of threatened and at risk indigenous species. (Lake Tomarata and Spectacle Lake contain such species).

[196] Dr van Meeuwen-Dijkgraaf noted that there has been considerable restoration of habitat carried out by the Applicant over an area of 11.8 hectares, increasing the area of wetland vegetation around Spectacle Lake to approximately 15.21 hectares. The dense reeds and scrub in the revegetated area are likely to provide habitat for fernbird. Dr van Meeuwen-Dijkgraaf also stated that rats, stoats and pigs are controlled



by the Applicant on his property, reducing the pressure of predation on the many sensitive species present<sup>74</sup>. We acknowledge that these actions are likely to have been of benefit to the habitat.

[197] All three witnesses provided evidence on the species currently inhabiting these lakes and in particular the following species which are classified as highly threatened under the New Zealand Threat Classification System (Department of Conservation): Australasian bittern (*Botaurus poiciloptilis*), classified as 'Threatened, Nationally Endangered'; fairy tern (*Sternula nereis davisae*), classified as 'Threatened, Nationally Critical'; and North Island fernbird (*Bowdleria punctata vealeae*), classified as At Risk, Declining.

[198] Dr Lovegrove provided details about each of these bird species as follows:

- Australasian bittern inhabit the wetland margins of all three lakes, utilizing the remaining habitat there. Low numbers of this species remain in New Zealand (possibly 500-600 birds). With such numbers, the presence of 5 or 6 bittern in the Tomarata dune lakes would trigger their recognition under the Ramsar Convention on Wetlands, an international convention to which New Zealand is a signatory. The species is ranked "globally endangered" by the International Union for the Conservation of Nature ('IUCN')<sup>75</sup>. Dr Lovegrove cited recent scientific research on this species which recommended that its threat status should be upgraded to the highest level, 'Nationally Critical'. There was no evidence however that this upgrade had yet taken place.
- Bitterns are shy and cryptic, usually hidden by the vegetation of the wetland margins, where they breed. (Dr van Meeuwen-Djikgraaf added that the species also inhabit scrub and more open habitat). The males' breeding call or 'boom' to attract females is uttered at a low frequency during the months September to December.
- Fairy terns feed on the surface of Spectacle and Slipper Lakes during the summer months January to March. This species is known to comprise a total of 40 birds which breed on beaches and dunes on the Pakiri to Waipu coastline and at Papakanui spit. Fairy terns from the Te Arai Stream colony

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<sup>74</sup> Her EIC para 3.11

<sup>75</sup> Myers EIC para 3.11



that is nearest to the proposed festival site fly directly to Slipper Lake and Spectacle Lake to feed. Ms Myers considered that foraging grounds such as Spectacle Lake are vital to maintain high breeding rates and for the survival of the species<sup>76</sup>.

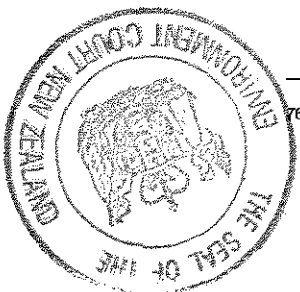
- Fernbirds are known to inhabit saltmarshes in the wetlands around the Tomarata dune lakes and Mangawhai estuary. Their habitat was described by Dr Lovegrove as very fragmented and local, with their long-term viability uncertain. (Dr van Meeuwen-Dijkgraaf pointed out that the species prefers dense reed-beds and scrub and may utilize Mr Pierau's revegetation area).

[199] The witnesses all provided evidence that several other species classified as threatened under the New Zealand Threat Classification System inhabit the Tomarata lakes (numbering 16, according to Dr Lovegrove's Appendix 1). These include grey duck (*Anas superciliosa*) 'Threatened, Nationally Critical'; North Island fernbird (*Bowdleria punctata vealeae*), classified as 'At Risk, Declining', pukeko (*Porphyrio porphyrio melanotus*) and black shag (*Phalacrocorax carbo*) 'At Risk, Naturally Uncommon'; little shag (*Phalacrocorax melanoleucos*) and Caspian tern (*Hydroprogne caspia*) 'At Risk Nationally Vulnerable'. Dr Lovegrove also listed banded rail (*Gallirallus philippensis assimilis*) 'At Risk Naturally Uncommon'; spotless crake (*Porzana tabuensis*) and marsh crake (*Porzana pusilla affinis*), both listed as 'At Risk, Relict', as possibly present. Several of these species are also cryptic, shy birds.

[200] Overall, the evidence on ecological values from all three ecologists convinces us that the dune lake complex is of significant conservation value as habitat. It contains a suite of threatened bird and plant species and communities and at least one threatened fish species. We find that the species of most critical concern are Australasian bittern (Nationally Endangered) and fairy tern (Nationally Critical).

***What would be the effects of the festivals on ecology and biodiversity?***

[201] Dr Lovegrove's evidence was that human disturbance, traffic, noise, lighting, fireworks and possibly dogs, would have the potential to produce a range of adverse effects in the event the consents are granted as applied for.



<sup>76</sup> Ms Myers EIC PARA 4.19

(i) *The existing situation*

[202] By way of context, we considered evidence about existing human disturbance in the environs of the Pierau site, in particular noting that there is public access to Lake Tomarata and Slipper Lake by road, that being relevant because festivals, particularly the larger ones, could attract people to visit these lakes.

[203] Access to Spectacle Lake is difficult as its margins are bounded by private property. Minor qualifications to this are on part of its western margin where the Spectacle Lake Conservation Reserve is located, where there is access by legal road adjacent to 550 Ocean View Road, and on its eastern margin where an unformed legal road (part of Atkins Road, directly adjacent to the Site) leads to the edge of the riparian margin. In evidence, Mr Harris told us that he used to be able to get into Spectacle Lake by kayak but that this is not currently possible. It seems that, at least currently, use of this lake for any type of boating is very limited.

[204] The proposed festival site is separated from the Spectacle Lake margin by paddocks, with an electric fence located some 30 m from the edge of the lake. During our site visit, access was gained to the lake margin via a fenced race and then across farmland on the site and through an existing gate in the electric fence. We were told that this fence is to be electrified and have mesh attached during festival events to discourage access to the lake.

[205] Dr Lovegrove discussed the potential for power-boating and water-skiing on Spectacle Lake (and Lake Tomarata) to disturb wildlife and noted the exclusion of such activities over the period 1 September to 19 December, (also noted by Ms Myers). This does not exclude the period of January to March when fairy terns are active in feeding on Spectacle Lake. We did not hear any evidence on the amount of powerboat or other powered vessel traffic on Spectacle Lake and gathered from Mr Harris's evidence (which seemed confirmed by observations on our site visit) that getting a boat into the water there might be difficult unless from one of Mr Pierau's properties. The proposed festivals could encourage additional use of that lake but no estimate of the existing or potential future number of users of the lake was put forward.

[206] Ms Myers referred in her evidence to a recent report on Lake Tomarata that recommended closing the lake to watercraft to avoid and mitigate the impacts of activities on the lake; however it appears this has not yet occurred.

[207] Concerning possible direct interference with bitterns nesting or otherwise active



in their habitat, from people moving through the lake margins or wetland, Ms Myers under questioning did not know of any evidence of physical effects (such as *ad hoc* tracks or trampled areas) of people accessing the Lake Tomarata wetlands or the conservation zone around Spectacle Lake. However she referred in her evidence<sup>77</sup> to a 2016 report about Lake Tomarata that described damage to marginal wetland vegetation by boating activities, stressing potential effects on water birds and disrupted nesting of wetland birds. If a larger number of people were to visit Lake Tomarata during festival events there could be the potential for additional disturbance.

[208] During our site visit it seemed confirmed that there is no established formed access to Spectacle Lake for pedestrians or lake users along the eastern margins. There is a gate in the fence accessed via a farm race and across pasture. While the lake edge is accessible via that route there was no evident easy access through the riparian vegetation to the water. The applicant proposes a 100 m buffer between Spectacle Lake and the festival zone, with several conditions to be put in place to prevent access by festival goers to the shoreline.

[209] We conclude from the evidence that there has been some effect on riparian margins of Lake Tomarata from boating but that away from the riparian edge there is no evidence that the wetland habitats surrounding the lakes are being physically adversely affected by people. The current effects relate mainly to the noise of seasonal use of Lake Tomarata by power-boats and jet skis and potentially all three lakes by kayaks and other non-powered waterborne activities. Spectacle Lake is the hardest to gain access to. Spectacle Lake and Lake Tomarata are important as habitat in which populations of bittern have established. Spectacle Lake is important for feeding by fairy terns. There is no information in evidence, however, on whether such use by the two species is stable, increasing or declining.

(ii) *Potential effects*

[210] The evidence established that the key issues to be considered under this head are music noise and a general increase in numbers of people in the vicinity, the question being whether each might produce adverse effects of general disturbance of habitat and on bird behavior.

[211] In relation to **noise generated by music**, we have described in the earlier section of this decision the information provided by the acoustic experts on the noise

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<sup>77</sup> Myers, EIC para 4.17



levels to be expected from the proposed activities and about the potential effects of noise in masking the mating boom of male bittern during the breeding season. This includes evidence from Ms Sami (referring to sonograms of the Eurasian bittern) that the maximum volume of the bittern's call was "40 dB". Dr Lovegrove recommended in his evidence that events that could result in noise above 40dB in the sensitive months of the breeding season when Australasian bittern boom, should be avoided, i.e., the months September to November<sup>78</sup> and this has been adopted in the applicant's latest revised conditions.

[212] However there remain some uncertainties about the "40 dB" limit. Mr Hegley was not sure that 40dB was the correct factual limit, as there was insufficient information provided on how the recordings were made as we have earlier recorded.

[213] There was no evidence presented about the effect of the audibility of the boom to female bittern if noise levels were to be maintained at approximately 40 dB, or the masking of that part of the boom cycle that is below 40dB<sup>79</sup>. That is, no evidence was provided as to whether it is the full boom cycle to which the females are responding, or just the loudest part of the boom. Bitterns boom at other times of year than the breeding period and at other times of day. No evidence was provided as to what these other booms mean in relation to bittern behaviour (e.g., relating to range protection, social or other behaviour). Dr van Meeuwen Dijkgraaf indicated that for sensitive species increased noise may limit communication between birds of the same species (including but not limited to breeding calls) or may prevent them from hearing predators. She considered predation by introduced mammals to be a key risk to avifauna generally, but noted (in our view very properly) that the appellant is undertaking animal pest control to reduce this risk in this environment<sup>80</sup>.

[214] The witnesses all indicated that little is known about the booming behavior of the species, and hence the information which they were able to provide was very limited in scope.

[215] No evidence was presented as to whether amplified music might adversely affect the fairy terns that use Spectacle Lake.

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<sup>78</sup> Lovegrove EiC para 6.3

<sup>79</sup> Sonogram produced in Sami EiC para 6.3

<sup>80</sup> EiC para 7.1





[216] Dr Meeuwen-Dijkgraaf commented<sup>81</sup> that fern birds are relatively tolerant of disturbance, as they have been observed near busy roads, but Ms Myers disputed that in her supplementary evidence<sup>82</sup>. Her opinion was that disturbance to their habitat has resulted in disappearance of the species from many parts of Northland. It was not clear whether either witness was referring to noise disturbance or physical habitat disturbance. This difference of opinion was not resolved between the witnesses, but is something we should be mindful of in ways we shall describe.

[217] In relation to **noise generated by the general activities of people** attending festival events, it appears that increased noise could limit communication within species. Dr Lovegrove cited literature that shows that birds specialized to wetland habitats are vulnerable to disturbance (cryptic and shy species). Generally, if such birds are disturbed beyond their tolerance they may be expected to move away from it. Ms Myers' opinion was that multiple events held on the festival site are highly likely to have significant effects on species that are highly sensitive to disturbance<sup>83</sup>, but did not know what frequency or size of events might have such effects.

[218] The wetland habitat around Spectacle Lake covers approximately 15.2 hectares. No evidence was provided about the number of Australasian bittern present, or the likely area of their ranges in the wetlands or in associated scrub and open habitat. Such data have not been collected, as Dr van Meeuwen-Dijkgraaf acknowledged in questioning. The cryptic nature of bittern and other shy wetlands species such as spotless crane evidently make them difficult to study.

[219] The habitat specificity of the species as described by the experts indicates to us that if the birds are forced to move away from noise or disturbance there is a very limited habitat within which to move locally (either at Spectacle Lake or elsewhere within the Tomarata dune lakes complex), and there is limited suitable habitat to which they could move in the wider general vicinity, the nearest being the Mangawhai estuary.

[220] In relation to the effect of noise disturbance of the festival activities on sensitive species Dr van Meeuwen-Dijkgraaf noted in her evidence<sup>84</sup> that, for small events, camping and associated activities would have few if any effects on avifauna provided the sound limit and physical restrictions on access to the lake edge were observed.

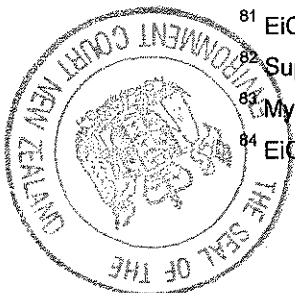
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<sup>81</sup> EIC para 3.10

<sup>82</sup> Supplementary para 2.5

<sup>83</sup> Myers EIC paras 4.5, 4.7 and 4.8

<sup>84</sup> EIC para 6.10



However when questioned about the effects on fairy tern she agreed that there is insufficient information to know how they are affected by noise and to what degree noise from the festival site could influence their use of the landscape which includes Spectacle Lake and indeed the broader dune lake complex.

[221] Dr Lovegrove also stated that it is unknown whether or to what degree fairy terns would be negatively affected by the noise of the events to the extent that they would change their behaviour and what that would mean for the survival of the species.

[222] When questioned about the effects on bittern of the general increase in disturbance of various sorts that multiple events would produce, De Meeuwen-Dijkgraaf indicated that there is significant uncertainty about aspects of bittern breeding behavior, for instance, from how far a bittern's boom will attract its mate, and that literature is very thin on the subject<sup>85</sup>.

[223] In relation to the **effects of lighting** at the festival site Dr Lovegrove supported the inclusion of a condition requiring all lighting to be baffled and directed away from Spectacle Lake<sup>86</sup>. He noted that the effects of light spillage on bittern, if this did occur, were unknown. He advised against the use of the suggested low-wattage light balloon but did not elucidate the reasons for this. When questioned<sup>87</sup> Dr Lovegrove said his concern was more about the potential for the low wattage balloon to attract night-flying seabirds such as petrels. He did not know if fairy terns foraged at night but confirmed they forage for fish they can see on the surface, suggesting a day-time activity. Dr van Meeuwen-Dijkgraaf made a comparison between the light from the proposed balloon (which we understand to be 11 lux at a horizontal distance of 35 m when the balloon is at 7m height) and a cellphone screen which she indicated can produce 20 lumen which would be approximately the amount of light falling on the ground 25 m from the anchor point. She was of the opinion that light from the balloon was unlikely to have any effect on Spectacle Lake and surrounding habitat.

[224] In relation to the potential **effects of dogs on wildlife**, a proposed condition restricts the bringing of all animals including dogs to the site. Dr Lovegrove agreed, during questioning<sup>88</sup> that the condition is consistent with the policies and rules for the adjacent Te Arai North and South precincts and indicated that he was satisfied with it

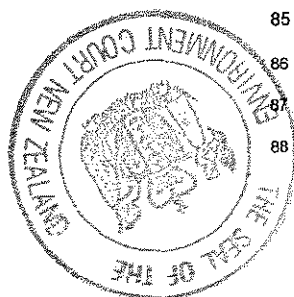
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<sup>85</sup> Transcript p65

<sup>86</sup> EiC para 6.6

<sup>87</sup> Transcript p177

<sup>88</sup> Transcript p179



provided it was enforced.

***What might be the risk of the festivals to ecology and biodiversity?***

[225] The revised proposed conditions afford certain considerations to bittern in condition 3A and to bitterns, fernbirds and fairy terns in condition 26b. We accept that these species are amongst the shyest of those present in the locality; also that the conditions that address them might benefit other endangered bird species present. The revised conditions are set out below followed by comments on what the revised condition achieves.

[226] The three ecologists all agreed that Spectacle Lake is a significant habitat supporting these endangered or at risk bird species.

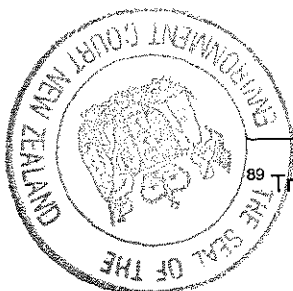
[227] They agreed also that the level of information available about them is limited, such that the effects of the proposed activities on the Pierau site cannot be known with any degree of certainty.

[228] Based on that, they agreed that a precautionary approach must be adopted to ensure that adverse effects from multi-event activities are avoided.

[229] Ms Myers considered that to be appropriately precautionary the proposal should not proceed. Dr Lovegrove considered that avoidance would be the most desirable option, adding that while he considered that individual events could be acceptable, it becomes a question of how often events happen<sup>89</sup>. Dr van Meeuwen-Dijkgraaf considered that with the proposed conditions in place, the proposal could proceed without significant adverse effects.

[230] Of relevance under this head, underlined by the relevant provisions of the NZCPS and the similar RPS provisions in the PAUP:OiP, are the following questions:

- Will the proposed activities of multiple events on the site if undertaken in accordance with the proposed conditions, avoid adverse effects on these species?
- Accepting the evidence of the three ecologists that a precautionary



approach must be adopted, what degree of precaution is warranted?

[231] On the first question, and importantly, the three ecologists agreed that the level of information available about these critically endangered birds is so limited that the effects of the proposed activities on them cannot be known with any degree of certainty.

[232] Nevertheless, and having accepted this evidence, we are bound to hold that we have a duty to reach a finding as to whether the proposed activities of multiple events on the site undertaken in accordance with the proposed conditions would avoid adverse effects on these species.

[233] Turning to the second question, all three ecologists agreed that a precautionary approach must be adopted to ensure that adverse effects on the species from multi-event activities are avoided, with two (Ms Myers and Dr Lovegrove) saying that in order to achieve an appropriate degree of precaution, the proposal should not proceed, and the third (Dr van Meeuwen-Dijkgraaf) that with the conditions in place, the proposal could proceed without significant adverse effects.

[234] The latest draft of the conditions specifically addresses protections for bittern in condition 3A (the banning of festivals in the mating period), and for bittern, fernbirds and fairy terns in condition 26b (restrictions on the use of fireworks).

[235] It is appropriate now to take those and other proposed conditions and analyze them concerning the level of protection they might provide to indigenous taxa and indigenous ecosystems and vegetation. We draw on evidence already recorded and findings to the extent already made:

*Condition 3A: No medium or large festivals shall occur from September to November (inclusive) to avoid the Australasian Bittern booming period.*

The evidence is that while the bittern breeding season extends from September and December, the most sensitive period for booming is between September and November. Bitterns also boom at other times of the year for other purposes. There is considerable uncertainty as to whether booming when festivals are in progress would be audible to other bittern and if not, what effect this might have on their mating, overall activity, the use of the habitat and their ranges.

*Condition 9: Small events shall only occur on the event site as shown on the drawings listed in condition 1 and shall not utilize the car parking and camping areas beyond the sand mine lake in any way.*



This limits activities at the northern end of the site. The camping area will move closer to the northern end of Spectacle Lake as sand mining proceeds, with the associated activities and noise becoming closer to the fairy tern feeding habitat.

*Condition 12...The Event Management Plan shall include: 12g Public education methods with respect to the ecological values of the lakes and surrounding area. Including measures that may be necessary to prevent trespass and access to Spectacle Lake.*

This provides a commitment to document the means by which access to Spectacle Lake will be minimized. Condition 23 also provides further detail on such education during medium and large events.

*Condition 15: The consent holder shall ensure that security personnel are employed for all medium and large festivals to ensure that patrons do not enter adjoining land via the event site; this includes Spectacle Lake, the marginal strip adjoining Spectacle Lake ....*

This should restrict access to Spectacle Lake through the site. It is arguable that patrons could access the lake via the legal road but that seems unlikely for as long as there remains no formed track or signage.

*Condition 22: The existing 5-wire electrified fence located on the western boundary of the event site ...shall have mesh attached for the duration of each medium or large Festival. Signage shall be installed at intervals along the site boundary advising festival patrons and crew that no access, swimming, dumping of waste or rubbish is permitted beyond the event site...This fence shall be maintained at a minimum distance of 100 metres from the edge of Spectacle Lake, for the duration of the consent (i.e., even as the sand mine expands and the camping and parking areas move). The electrified wire fence shall be live for the duration of each medium and large Festival.*

Taking condition 22 together with condition 15 and condition 23 which concern public education during the medium and large events, it is evident that considerable protection of Spectacle Lake and its margins is proposed. We consider it unlikely that the activities would result in more than negligible physical effects on the vegetation around Spectacle Lake. Lake Tomarata would be accessible to festival attendees. It is not known whether this would result in effects on the vegetation and ecosystem there that are greater than



those that would occur from the usual level of public use.

*Condition 39A: The consent holder shall ensure there are at least 10 days between any medium and large festivals involving amplified sound when there is to be no amplified sound generated from the site. This does not apply to small events.*

The 10-day stand-down period which might be of relevance to effects on both human neighbours and birds, does not apply to small events which might also have amplified music. The adequacy of a period of only 10-days between any medium and large events for providing relief from the adverse effects of Festivals and events on the endangered birds, is unknown.

*Condition 39B: When measured at the outer edge of the vegetation surrounding Spectacle Lake noise from amplified music shall not exceed 40 dB Leq at 125hz (1/3 octave) and 160 hz (1/3 octave).*

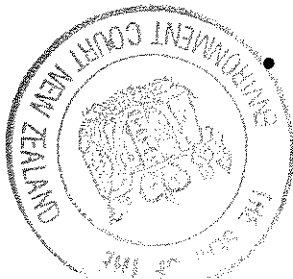
The evidence is that there is no certainty that a noise output of 40dB would not interfere with the bitterns' boom by masking it, whether parts of the booming cycle which are quieter than 40dB would be affected, and if they are, what this would mean to bitterns' overall activity and use of the habitat and their ranges.

[236] Other protective measures proposed in the conditions include:

- Fireworks are to be limited to small on-stage displays with no projectiles, loud bangs or explosions and are to be directed away from Spectacle Lake (*conditions 25 and 26*).
- Lighting is to include a low wattage balloon at 11 lux and a horizontal distance of 35 m but all other exterior lights will be fitted with covers and directed away from Spectacle Lake.

[237] The question is whether the proposed conditions would deliver sufficient protection for the endangered birds which the experts agreed must be the subject of a precautionary approach. In particular we note, drawing together our individual findings on each condition into one place:

- The ban on music festivals from September to November does not extend over the bitterns' full mating period which includes December.



- There is considerable uncertainty as to whether when festivals are in progress, booming will be audible to other bittern and if not, what effect this might have on their mating, overall activity, the use of the habitat and their ranges.
- The adequacy of a stand-down period of only 10-days of amplified sound from medium and large events for providing the birds with relief from the adverse effects of festivals and events, is unknown.
- There is no certainty that a noise output of 40dB would not interfere with the bitterns' boom by masking it; whether parts of the booming cycle which are quieter than 40dB would be affected; and if they were to be, what this would mean to bitterns' overall activity and use of the habitat and their ranges.

[238] It is necessary at this juncture to consider the legal underpinnings of the phrase "precautionary approach" as employed in the NZCPS and elsewhere.

### ***Precautionary Approach***

[239] The term "precautionary approach" having been employed and agreed in a general way by all ecologist witnesses, it is important to examine what such might entail. The term is not defined in the RMA, but is instead derived from the operation of section 104(1)(a), section 3, and the definition of "environment" in section 2. Section 3 is of importance, particularly parts (e) and (f). We set out the section as follows:

### **3 Meaning of effect**

In this Act, unless the context otherwise requires, the term *effect* includes—

- any positive or adverse effect; and
- any temporary or permanent effect; and
- any past, present, or future effect; and
- any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
- any potential effect of high probability; and
- any potential effect of low probability which has a high potential impact.

[240] The taking of a precautionary approach in RMA application cases is not to be



confused with a general precautionary principle found in environmental law.

[241] The primary feature of the application of the precautionary approach under the RMA in this case is the potential for serious or irreversible harm if adequate steps are not pre-emptively taken<sup>90</sup>, particularly where there is scientific uncertainty in the mix. Of relevance to this is Policy 3(1) of the NZCPS, which is [to] *adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.*

[242] We have identified all of these qualities in our findings about the rare and threatened species. That there is considerable scientific uncertainty about the potential effect of certain characteristics of noise on the birds was agreed at a high level by all ecological witnesses. The rarity of the several species (clearly represented by their threat classifications) is important to our consideration of this topic. Adverse effects if they resulted in negative impacts on breeding or loss of existing birds could conceivably reach an irreversible situation. Put somewhat earthily, in a worst case scenario, once they're gone, they're gone. These findings cause us ask the question whether avoidance should hold sway over the concepts of remediation and mitigation found in relevant provisions of the RMA. It is also relevant to consider what is meant by "avoid" in RMA terms.

### ***Avoiding, remedying or mitigating?***

[243] These terms occur in a number of relevant statutory contexts. In particular: Section 5(2)(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment" as one of the elements of sustainable management of natural and physical resources.

[244] In some instruments, "avoid" is singled out. Of particular relevance in this case,

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<sup>90</sup> Reference in this regard may particularly be made to cases such as *Sea-Tow Ltd v Auckland Regional Council* Decision No. A066/06; *Ngati Kahu ki Whangaroa Co-op Society Ltd v Northland Regional Council* [2001] NZRMA 299; and *Land Air Water Assoc v Waikato Regional Council* Decision No.A 110/01, where relevant principles are discussed including this one.





NZCPS Policy 11(a) provides that [decision-makers acting amongst other things under s104(1)(b)(iv)] are to protect indigenous biological diversity in the coastal environment by "avoid[ing] adverse effects of activities on, [amongst other things], (i) *indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists*; (ii) *taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened*. In contrast (but not bearing upon ecological matters), NZCPS Policies 13(1)(b) and 15(b) express and juxtapose all three terms.

[245] What does "avoid" mean in the context of Policy 11(a)? Concerning the above contrasted policies, where the juxtaposition of "mitigate" and "remedy" with "avoid" occurs, "avoid" has been held, with qualifications, to be "not allow" or "prevent the occurrence of". (One could postulate that in those provisions the use of the term "avoid" is actually more diluted than in Policy 11). See the Supreme Court's findings in *Environmental Defence Society Inc v NZ King Salmon Co Ltd*<sup>91</sup> as follows:

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership*, which was focused on the meaning of "avoid" standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to Policies 13(1)(a) and (b) and 15(a) and (b), which also juxtaposed the words "avoid", "remedy" and "mitigate". This interpretation is consistent with the Objective 2 of the NZCPS, which is, in part, "to preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate in protecting them from such activities".

[246] The Supreme Court proceeded to discuss the meaning of the term "inappropriate" which occurs in subsections (a) and (b) of s 6 RMA, and the two NZCPS policies under consideration in the case before it, and held<sup>92</sup> that the question of whether "avoid" and the terms discussed in paragraph [96] above, depends on whether the "overall judgment" approach or the "environmental bottom line" approach is adopted; and that it would have greater force under the latter.

[247] These issues are in something of a state of legal flux at the moment concerning

<sup>91</sup> [2014] NZRMA 195, at para 96, as follows:

<sup>92</sup> In para [97].



applications for resource consents<sup>93</sup>, in light of the progress of a case known as *R J Davidson Family Trust*, through the hierarchy of courts. In *R J Davidson Family Trust v Marlborough District Council*<sup>94</sup> the Environment Court made findings on these matters in the particular context of Policy 11 NZCPS. In an identically-named decision<sup>95</sup>, the High Court upheld the decision of the Environment Court. A month ago, the Court of appeal granted leave to appeal significant aspects of the High Court decision.<sup>96</sup>

[248] Counsel for the appellant addressed some of these matters in their opening submissions<sup>97</sup> (but not in reply submissions), and Counsel for the Council addressed some aspects in her submissions.<sup>98</sup>

[249] The appellant's analysis was conducted in the context of a prime submission that such an overall Part 2 analysis should be taken in cases about applications for consent. The approach on behalf of the Council was that a precautionary approach should be taken similar to that taken by the Environment Court in *R J Davidson Family Trust*.

[250] Our analysis of matters to do with the precautionary approach and the meaning of "to avoid" rolls into, and will be further considered in the next section of this decision immediately following.

### **Analyses: Precautionary Approach under NZCPS, or overall assessment under Part 2 RMA, leading to OUTCOME**

#### *Precautionary approach under NZCPS?*

[251] Concerning the first approach, we refer to the decision of the Environment Court in *R J Davidson Family Trust*, upheld by the High Court. Having set out the whole of

<sup>93</sup> *The King Salmon* decision of the Supreme Court concerned Plan Change applications.

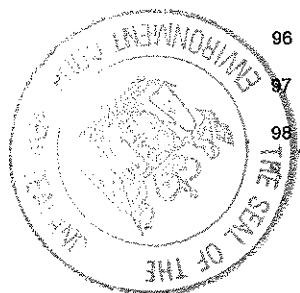
<sup>94</sup> [2016] NZEnvC 81.

<sup>95</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

<sup>96</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194.

<sup>97</sup> Paragraphs 6.1 to 6.6.

<sup>98</sup> At paragraphs 77 to 82.



Policy 11 NZCPS<sup>99</sup>, the Environment Court noted that the first important aspect of it was that certain adverse effects are simply to be avoided, namely the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous fauna. (Each of which not mutually exclusive). The two categories, indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists, and taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened, do not set out to implement s 6(c) RMA, because they do not refer to "habitats" or "significant habitats". They were instead held to particularize and implement s 5(2)'s direction for the "... *protection of natural ... resources*" by adoption of the two Threat Classification lists.

[252] We agree with the Environment Court in *R J Davidson Family Trust* about the source of statutory authority for NZCPS Policy 11(a)(i) and (ii) requirements for avoidance of adverse activities.

*Overall assessment under Part 2 ?*

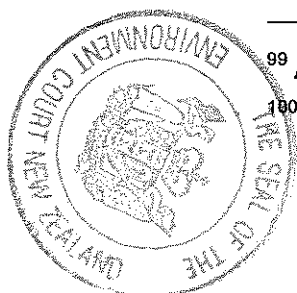
[253] As to the second possible approach, counsel for the appellant noted that under s 104 RMA, when considering an application for resource consent, a consent authority must, "subject to Part 2" have regard to effects on the environment amongst other things. They submitted that in the past, the Court has interpreted its duty to have regard to matters in this way to require a balanced approach, enabling an overall broad judgment against the matters listed in s104 and the purpose and principles of the Act in sections 5 to 8. They noted however that the High Court decision in *R J Davidson Family Trust* had cast doubt on that approach, essentially holding that as a consequence of the Supreme Court decision in *NZ King Salmon* there is no longer the need to refer back to Part 2 of the RMA in determining resource consent applications, absent invalidity, incomplete coverage, or uncertainty of meaning within the relevant statutory planning documents.

[254] Appellant's counsel pointed to a recent decision of the Environment Court *Envirofume Ltd v Bay of Plenty Regional Council*<sup>100</sup>, where, having set out the findings of the High Court in *Davidson* at paragraphs [76] and [77], concluded that Part 2 RMA remains relevant in resource consent cases for the following reasons:

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<sup>99</sup> At para 161.

<sup>100</sup> [2017] NZEnvC 12.



- (a) As an overview or check that the purpose of the Act and other Part 2 issues are properly covered and clear;
- (b) To focus the Court or decision-makers on the overall purpose of the consent in question; and
- (c) As a check that the various documents are recognised, provided for or given effect to the Act and other documents in the hierarchy.<sup>101</sup>

[255] The position is possibly further complicated by having regard to submissions on behalf of the appellant urging that the approach taken by the Environment Court in *Envirofume* should be preferred, because it is consistent with earlier reason of the High Court in *New Zealand Transport Agency v Architectural Centre Inc and Others*<sup>102</sup>, (sometimes known as the “Basin Bridge” decision) in respect of the meaning of the words “subject to Part 2” within the (submitted) analogous context of the assessment of notices requirement under s 171 RMA. Counsel then submitted that the “Basin Bridge” approach by the High Court should be preferred to that in *Davidson*, because of:

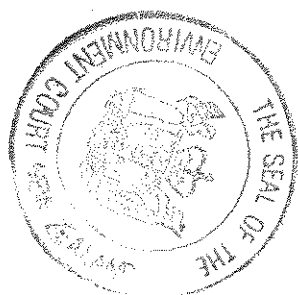
- (a) The plain meaning of the section and Parliament’s intent to explicitly provide for the matters in s 104(1) to be had regard to “subject to Part 2”;
- (b) The line of authority developed in *McGuire v Hastings District Council*<sup>103</sup>, and the Court of Appeal’s decision in *Environmental Defence Society Inc v Mangonui County Council*<sup>104</sup>; and
- (c) Purposive interpretation of the role of assessments for resource consent under s 104, where the statutory requirement to “have regard to” the matters in (a) to (c) is different from that which the Supreme Court is required to consider in respect of plan changes in *New Zealand King Salmon*, namely the requirement to “give effect to” various statutory documents in ensuring that the purpose of the Act is achieved.

<sup>101</sup> *Enviro Fume* decision at para [143].

<sup>102</sup> The “Basin Bridge” decision, [2015] NZHC 1991.

<sup>103</sup> [2001] NZ RMA 557.

<sup>104</sup> [1989] 3 NZLR 257.



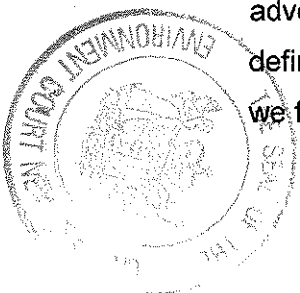
*The answer in the present case*

[256] Whether viewed through the precautionary approach lens, or by taking an overall assessment approach under Part 2, we find the outcome to be the same in this case.

[257] On the first approach, the relevant parts of Policy 11 NZCPS take authority from s 5(2)(c), and given our findings about the rare and threatened species, the considerable scientific uncertainty about the potential effect of certain characteristics of noise on them, their rarity, and the conceivably irreversible situation for their very existence that could arise from the potential adverse noise effects, we hold that avoidance in the absolute sense described in paragraph [96] of the Supreme Court **King Salmon** decision, is required, that the relevant parts of Policy 11 are true to Part 2, and there would be no need for an overall assessment under Part 2. We add our findings about significant adverse effects on landscape, amenity (including from noise in a cumulative sense) and natural character, acknowledge some positive effects (as discussed further below), and arrive at a conclusion after weighing all matters under s104 and the relevant provisions of the NZCPS that consent should not be given for the large and medium festivals.

[258] In the alternative, undertaking an overall assessment under Part 2, we start with our various findings on effects on the environment and note the significant adverse potential effects on the rare and endangered birds, and in landscape, visual amenity and natural character and cumulative noise terms. Also cumulative adverse effects of regularity of amplified music events on the local community. We do not overlook that positive effects must be had regard to as well, and that the proposal could provide for social and cultural wellbeing of communities (more the wider community than the local community), and in a small but not thoroughly quantified way for economic wellbeing. We can find that social and cultural wellbeing, and to a lesser extent economic wellbeing, would be served by granting approval.

[259] The major difficulty under s 5, the purpose of the Act, is with the potential adverse effects on the rare and endangered birds as part of the environment as defined; this being a major problem for much of the application except to the extent that we find below.



[260] Concerning s 6(a) of the Act, the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development, we recall that the Supreme Court held in *EDS v King Salmon*<sup>105</sup> that “inappropriateness” should be assessed by reference to that which is sought to be protected. We have found that the moderate to high values of the natural character of the locality would not be protected by grant of consent as finally sought in the appellant’s closing, particularly at night time.

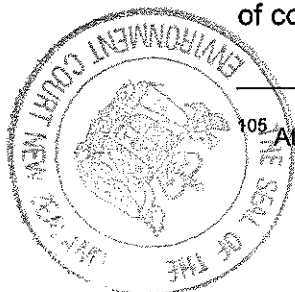
[261] We have held that the potential adverse effects for the rare and endangered bird species would not come under matters to be recognized and provided for under s 6(c) of the Act, the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Rather, they come under s 5(2)(c) which we have addressed above.

[262] Concerning s 6(e) of the Act, the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, we hold that if the neighbouring lands held as a result of a compensation settlement called for valid consideration, proposed conditions of consent would deal adequately with any concerns about reverse sensitivity. Matters in this regard would be neutral.

[263] Matters under s 7 would either not be engaged, or would be neutral, except in relation to subsection (c), the maintenance and enhancement of amenity values, (d), intrinsic values of ecosystems, and (f), maintenance and enhancement of the quality of the environment. For reasons given throughout this decision, those are three strong negatives for the proposal.

[264] Matters in relation to s 8 of the Act, the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), are either not engaged or are neutral because, if relevant, the proposed conditions of consent adequately address them

[265] The matters on which we have made findings against the proposal, when weighed against all other positive and neutral factors, militate strongly against the grant of consent in the form latterly sought by the Applicant.




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<sup>105</sup> At para [101].

[266] We are left with a situation where it is not appropriate to grant consent for the large and medium festivals, or small events with amplified sound, and we refuse to do so. We comment particularly that the compromise consent suggested by the Council will not meet our concerns, primarily because it is grounded in the evidence about landscape, visual amenity and natural character, with which it does not deal adequately; and even more importantly does not assist to avoid the serious potential effects on avifauna.

[267] Should the Appellant be interested in proceeding with the small events with carefully drafted conditions of consent, we indicate that consent could be forthcoming on the following basis which would avoid adverse effects on the rare and endangered bird species and on the moderate to high values of landscape, amenity, and natural character.

[268] There could be 20 such events per annum (but no music festivals) to span no more than two consecutive days each, with day events being from 8.30 am to midnight and overnight events from 7 am to midnight awake hours and midnight to 7 am sleeping/quiet time; with no outdoor amplification of music or other sounds; with a maximum of 200 guests or ticketholders; to occur any time during the year; with all outdoor lighting directed downwards and away from Spectacle Lake; with no fireworks and no outdoor fires; with two days to set up, and three days to pack down either side of the events. Detailed conditions of consent should be somewhat based on the final proposed draft conditions of consent lodged with the Appellant's submissions in reply as a starting point, but not to be contrary to any of the above; new draft conditions of consent to be the subject of consultation by the Appellant with the other parties and lodged with the Court for further detailed consideration if necessary, by 28 July 2017.

[269] We make these findings in full knowledge that the appellant is permitted to hold 2 temporary activity events per year in terms described earlier in this decision. We have held that that forms part of the existing environment but not any permitted baseline. Our concern is that if we were to authorize the larger festivals and events with amplified music, there would potentially be serious cumulative adverse effects on top of effects from the permitted activities. We have no jurisdiction concerning the permitted



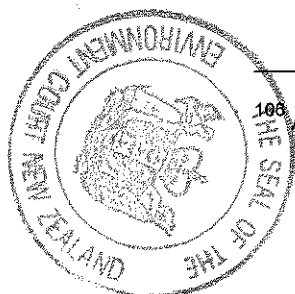
activities<sup>106</sup>, but wonder aloud for the benefit of those in the council who make planning policy, whether the permitted temporary activity rule is rather too much in “blanket” shape when it comes to sensitive receiving environments like the present.

**The council decision appealed from: s290A RMA**

[270] Section 290A RMA provides that we must have regard to the decision the subject of the appeal. In the present case the first decision was made by experienced hearing commissioners and quite thoroughly reasoned. The outcome is a little different before the Court in that we have not found the need for outright refusal of consent, should the appellant wish to gain consent for events that do not in our judgment cause the significant environmental harm perceived as likely by the commissioners. We have held that the small events could gain consent. Insofar as the medium and large proposed events are concerned however, our decision is similar to that of the commissioners.

[271] As is so often the case, many things changed between the time the appeal was lodged, and our issuing this decision. Without going to the lengths of reciting them all, notable amongst them have been:

- The Operative Rodney plan has been replaced in all material respects by the PAUP:OIC;
- The Unitary Plan has not only been the subject of Independent Hearing Panel recommendations to the council, but council decisions on those recommendations and council resolutions to make all relevant aspects of the plan operative;
- The status of the proposal changed during those processes from non-complying to discretionary, one consequence of which that the gateway tests in s104D RMA (through which the proposal had failed to pass), dropped away;
- Some witnesses before the council panel were not called before us, and we heard from some who were not called there;
- We heard cross-examination of witnesses;
- The traffic experts reached agreement during conference processes before our hearing was reached; other groups reached agreement on some disputed topics in their fields;
- The appellant reduced the scope of the proposal significantly, and proffered



<sup>106</sup>As to which see *Gravatt v Pierau* [2017] NZEnvC 38



tighter draft conditions of consent;

- Some technical legal disputes differed in nature before us in comparison to those advanced before the council panel.

### Costs

[272] Costs are reserved; any application to be made within 15 working days of this decision.

For the court:



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**LJ Newhook**  
**Principal Environment Judge**

