

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

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

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

SUBMISSIONS OF COUNSEL FOR THE APPLICANT

Introduction

1. The applications before you today from Doug Schmuck on behalf of Doug's Opuia Boatyard all relate to activities associated with the boatyard located on the site at 1 Richardson Street, Opuia, on the adjacent esplanade reserve, and in the coastal marine area ("CMA") of Walls Bay in the Opuia Basin. The applications seek:
 - (i) renewal of expiring consents for discharge to land, air and the CMA;
 - (ii) early replacement of current coastal permits for structures in, and the occupation of, the CMA; and
 - (iii) new coastal permits for activities associated with a proposed upgrade of the boatyard and facilities, including the construction of new, and the demolition and reconstruction of existing structures in the CMA, capital and maintenance dredging, and extension to the existing area of exclusive occupation of the CMA.
2. A full description of the proposed activities and the context within which they will occur is contained in the staff report and is not repeated here. Mr Schmuck will respond to the planner's queries and elaborate on the reasons for the applications in his statement to the hearing.
3. As far as has been possible independent expert and professional advice has been pre-circulated. Unfortunately due to matters outside my control, not all of the information was to hand in time to enable its provision to the Commissioners and submitters prior to the hearing. Please accept my apologies.
4. The missing information will be provided to the hearing today.

Appearances

5. **Mr Schmuck** will present his statement responding to the queries and concerns of the planner and issues raised in the submissions. **Mr Andrew Johnson** from Total Marine Services Ltd (Total Marine") is also present at the hearing and is available to answer questions. Total Marine have assisted with the design and engineering required for the jetty, dredging, erosion and shellfish protection barriers. **Mr Brown**, Principal Marine Ecologist from 4Sight Consulting ("4Sight") will not be present but will respond in writing to any questions if required.

Jurisdictional issues

Applications for the jetty (APP.039650.01.01) and new rock wall (APP.039650.05.01)

6. The wharf/jetty and associated facilities are currently authorised by CON20030791410 (01) – (03), reissued in 2003 and expiring in 2036. At the time of its consideration the line of MHWS was approximate, as shown on SO 68634 the plan defining the boundaries of the now esplanade reserve.
7. In 2010, the actual line of MHWS in the vicinity of the slipway was established by survey and plotted on Thomson Survey plan 8095 a copy of which was attached to NRC CON20133124201 and is included within Mr Schmuck's application for coastal permits.
8. Total Marine has plotted the 2010 line of MHWS on their plan replicating NRC 4804/4, and on the other plans in the series numbered APP-039650-01-01 As can be seen, the effect of the 2010 line of MHWS is to place the abutment and a portion of the jetty, and the proposed rock wall, above the line of MHWS. As a consequence a land use consent is required for those matters.
9. At present, with the exception of the jetty abutment, both aspects are covered by coastal permits, a situation not changed by the proposed applications or their consideration. The jetty abutment is currently authorised by a landuse consent issued by the NRC under the transfer of powers agreed with the FNDC under s 33 of the Act.
10. Research to ascertain any changes to the administrative jurisdiction of both Councils has been inconclusive. It has to be assumed that land in the vicinity remains under the jurisdiction of the FNDC. I am advised however that the Transfer of Powers from FNDC for such circumstances remains in effect.
11. I am advised by Mr Schmuck that the jetty abutment remains in the same location as previous, and that the rock wall is to run along the line of MHWS notwithstanding its depiction on the plans. The effects of the structures on the environment have been considered and found to be no more than minor (paras 53-57; 69-73; 100-102). That conclusion is unlikely to change as a result of the reconsideration.
12. I submit therefore that the appropriate way forward is for the Council to reconsider the relevant parts of the applications for the jetty and the rock wall as a land use consent under the transfer of powers agreement it holds from the FNDC.

Qualification as an Expert Witness

13. Evidence filed by Jane Johnson and John Booth on 9 May 2018 and circulated on 10 May 2018 purports to be expert evidence in support of a decision to refuse consent to the applications.
14. Jane Johnson is a submitter against the applications. Her submission is wide ranging. It contains much opinion, surmise, and speculation. It contains little in the way of factual information or justification for her opinions. The submission is clearly seeking refusal of the application.
15. Jane qualifies herself as an expert in her evidence. However, she does not refer to or agree to abide by the Code of Conduct for expert witnesses in the Environment Court Practice Note 2014. Further it is clear from her submission that she is conflicted. It is I submit, not possible to be an objective expert witness for yourself in any circumstances, but particularly so when such strong views have been expressed in relevant documents.
16. From what I can see, John Booth did not make a submission to the application to the application. His experience and qualifications as set out in his evidence qualify him as an expert. However, he too does not refer to or agree to abide by the Code of Conduct for expert witnesses. In addition, there is nothing in his evidence to indicate who he has been engaged by and what, if any relationship he has with that party. As a consequence he could arguably, be making a very late submission
17. Section 7 of the Environment Court Practice Note is quite clear. An expert witness:
 - must comply with the Code of Conduct in preparing any ... brief of evidence, or in giving oral evidence to the Court (7.1(b));
 - has an overriding duty to impartially assist the Court within the experts area of expertise (7.2(a));
 - is not, and must not behave as an advocate for the party who engages the witness (7.2(b));
 - must declare any relationship with the parties calling them or any interest they may have in the outcome (7.2(b)).
18. Section 7.1(c) of the Practice Note requires leave from the Court before the evidence of an expert witness who has not read, or does not agree to comply with the Code of Conduct may be adduced.
19. It is acknowledged that this is a Council, not a Court hearing. , However it is now common practice and expected for expert witnesses to qualify themselves under the Code of Conduct when preparing evidence even at Council hearings.
20. In the circumstances, it is submitted that leave from the Commissioners is needed before the evidence from Ms Johnson and Mr Booth can be admitted and taken into account.

The submissions

21. The consultant planner notes that there were 44 submissions received to the applications, 17 of which were in support of the proposals. As you will have seen on your site visit, the boatyard is a boutique operation servicing a loyal to local and international population, although it is in the throes of a reconstruction and upgrade at present.
22. Boatyard activities in one form or another have been established in Walls Bay since 1966. The boatyard has been under Mr Schmuck's control since 1994. And it is fair to say that Mr Schmuck's efforts to create an efficient, sustainable and environmentally friendly operation have been well scrutinised and challenged by some members of the public ever since that time.
23. Much of the opposition over the years relates to the boatyard activities on the reserve which, it is claimed restrict access to and use of the reserve for picnicking and other activities. Of particular concern seems to be the ability to washdown, repair and maintain boats on a specified area and the location of a discharge containment system (the "CTS") on the reserve. Fierce opposition to Mr Schmuck's attempts to gain easements over the reserve for these purposes has led to Court action which has reached the Court of Appeal.
24. It is important to note that Mr Schmuck holds valid and extant resource consents for the boatyard's activities on the reserve. These include the recently expired discharge consents for which he is seeking renewal as part of the applications being considered today.
25. The consultant planner correctly notes that with the exception of ensuring the discharges are appropriately controlled, matters related to the reserve and easements over it are not relevant to the applications before the Council.

Compliance issues

26. Many of the submitters claim that the boatyard regularly breaches the conditions of the discharge consents in particular, and is responsible for contamination and siltation of the CMA. Those claims do not stack up.
27. Consideration of the Council's monitoring records will show that the boatyard has a very good compliance record. There is one outstanding Abatement Notice first issued in 2010 which requires concreting of part of the slipway. The Abatement Notice is however currently being held in abeyance, awaiting the final resolution of the easement issue.
28. However, even if there was an issue as to compliance (which there isn't), that is not a valid reason to decline to grant consent. As long ago as 1967, the Court of Appeal held, in *Barry and Auckland CC* that a Council is entitled to accept that an applicant will comply with the conditions of his consent. And, in *NZ Suncern Construction Ltd v Auckland CC*, the High Court held that the appellant's prior conduct could not be used to override any of the more explicit statutory criteria required to be considered.

Location of Offensive Odour and Occupation Boundaries

29. As noted by Mr Schmuck in his statement, the offensive odour boundary and the occupational area boundary do not coincide. I queried the reasons for this with Mr Maxwell from the Council. His response indicated that it was an oversight, that there was no particular reason for it and that it seemed sensible for the seaward boundaries to be aligned to reduce confusion. Mr Johnson from Total Marine has produced plans to correct the error and is able to answer questions if required.

Conclusion

30. The applications before you today seek renewal of consents for discharge for activities on the reserve and in the CMA, early replacement of current coastal permits and new coastal permits for extensions to the current activities in the CMA.
31. There are no substantive matters arising out of the submissions.
32. The staff report confirms that the effects of the applications will be no more than minor and consistent with the objectives and policies of the relevant planning documents. It recommends the applications be granted with conditions which the applicant has accepted, albeit with a couple of suggested amendments. Further evidence has been provided by the applicant to satisfy the concerns of the Harbour Master.
33. I submit therefore that the applications may and should be granted, subject to the conditions as proposed and/or amended.



Colleen Prendergast
Counsel for the Applicant
17 May 2018