Northland Regional Council

Hearings Committee Agenda
DOUGLAS CRAIG SCHMUCK & INTERESTING PROJECTS LTD
APP.041365.01.01

Monday 3 August – Wednesday 5 August 2020
commencing at 9.30 a.m.

VENUE: Paihia Pacific, 27 Kings Road, Paihia

COMMITTEE: Dr. R Lieffering

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SUBMISSIONS

Copies of all submissions have been provided to the Hearings Committee under separate cover.

NOTE:
All pre-circulated material, including the agenda and written submissions, is taken as read at the hearing.

NORTHLAND REGIONAL COUNCIL
HEARING PROCEDURES

PRIOR TO THE HEARING

(1) The receipt of this hearing agenda does not preclude the possible resolution of any issues that were unresolved at any pre-hearing meeting before the date of the hearing. Discussions between Council staff, the applicant, and any person who made a submission may still take place, with a view to resolution or clarification of any outstanding issues.

(2) Any outcomes of any pre-hearing meetings will be reported to the Hearings Committee in staff reports.

EVIDENCE

If you intend to, at the hearing, read any additional evidence that expands on your evidence already provided to the Committee with the hearing agenda, please provide at least ten copies for circulation amongst those present at the hearing. It is normal for pre-circulated evidence to be taken as read at the hearing. No new submissions will be accepted at the hearing.

THE HEARING

(1) The Chairperson opens the proceedings by introducing the Committee and asking the parties to introduce themselves and their witnesses. The hearing procedure is to be as informal as possible but must, where appropriate, recognise tikanga Māori.

(2) The Council's officer may be asked by the Chairperson to briefly outline the application, describe the area and provide any other background information considered essential at this stage.

(3) The Council officer's report and recommendation is to be taken as read, but the officer may give additional verbal or written comments arising from earlier responses to the circulated hearing agenda.

(4) Applicants expand on their application material and produce any evidence not pre-circulated, adding any comments on the officer's verbal statements.

(5) Submittors expand on their pre-circulated submissions and produce any evidence not pre-circulated, adding any comments on the previous statements by the applicant or by the Council's officer.

(6) Normally only Committee members may question (through the chair) any of the parties to the application. **Any question** (as opposed to comments) **by any party shall be in writing** and given to the Chairperson for consideration as to whether it shall be put to any party. No cross examination will be allowed.

(7) Prior to the applicant exercising a right of reply, the Council's officer shall answer questions raised in material presented by the applicant and the submittors, and shall state any changes to his or her original recommendation.

(8) The applicant exercises a right of reply, taking the opportunity to cover matters raised by the Council's officer and submittors.

(9) The Chairperson will then either close or adjourn the hearing and then:

- If the hearing is closed, the decision will be notified to the applicant and the submitters within 15 working days or such extended time as may be determined under Section 37 of the Act.
- If the hearing is adjourned the reasons for the adjournment will be given (eg. further information required, the applicant's Right of Reply yet to be given etc) together with the length of time of the adjournment. Note that if the hearing is adjourned after the applicant's right of reply has been exercised, the hearing must be concluded within 10 working days after the right of reply has been exercised. At the end of the adjournment, the hearing will be concluded and the decision will be notified to the applicant and the submitters within 15 working days of the date of conclusion or such extended time as may be determined under Section 37 of the Act.
- The hearing will be recorded for quality assurance purposes only (a sound file copy of the recording may be obtained from the Hearings Administrator).

EXECUTIVE SUMMARY

Doug's Opua Boatyard ('DOBY') have applied for a suite of resource consents from the Northland Regional Council to provide for a number of activities associated with the existing boatyard and wharf structure at Walls Bay, Ōpua.

The application provides for the three separate consenting components as follows:

1. A new consent for activities that have previously been consented on the site and/or were subject to a consent application declined by NRC Commissioners, considered by the Environment Court (ENV-2018-AKL-351), appealed to the High Court, and now referred back to the Environment Court.
2. A consent for new activities not included in any previous approved consent or the application now before the Courts.
3. A Section 127 application to vary conditions of an existing consent.

In summary, the application seeks new resource consents and the replacement of existing resource consents associated with a proposed upgrade of the facilities associated with Doug's Opua Boatyard in Walls Bay, Ōpua. The application from Interesting Projects Limited T/A Great Escape seeks a change to their existing consent for a pontoon adjacent to the boat yard wharf. The application records that where the consent sought are granted, several existing consents will be surrendered pursuant to Section 138 of the Act.

The application was subject to public notification, with a total of 22 submissions received. Two of those submissions support the application while the remainder are opposed. At the time of preparing this report, one submitter in support wishes to be heard, while 13 submitters in opposition wish to be heard.

At the time of preparing this report, there is an outstanding matter associated with an appeal lodged by the applicant. The matters subject to appeal are discharge consents that were part of a suite of activities lodged by the applicant and declined by Hearing Commissioners in November 2018. The current application includes these discharge activities, despite these same activities currently being before the Environment Court. In the event that the Court issues any decision before any substantive hearing on this application occurs, substantial changes to the scope of the application and resulting assessment contained in this report may be required. More detail regarding the chronology and relevance of appeals is provided in this report.

This planning report assesses the extent of actual and potential adverse and positive effects that may arise from the proposal and considers the relevant planning provisions contained in various national, regional and district planning documents. Careful consideration has been given in particular to the NZCPS and RPS provisions addressing the occupation and use of the coastal marine area.

Based on the suite of technical reports and evidence provided, the conclusion reached is that the proposal will generate some minor adverse and positive effects. For most activities, the imposition of conditions is necessary to ensure that any potential adverse effects will be minor rather than more than minor. The extent and nature of the receiving environment is such that the proposal will not result in unacceptable adverse environmental effects.

The attachments provided for this report are in chronological order of receipt.

STATEMENT OF REPORTING PLANNER QUALIFICATIONS AND EXPERIENCE

Alister Hartstone – Reporting Planner

I am a director of Set Consulting Limited, a company established in early 2016 that provides planning consultancy services to both local government and private clients. I currently undertake work for private clients across the upper North Island and Hawkes Bay, and district and regional councils. I hold a Bachelor of Regional and Environmental Planning with Honours from Massey University. I am a Full Member of the New Zealand Planning Institute and an accredited Hearing Commissioner.

I have previously worked in local government across Manawatu and Northland, commencing in 1995. During that time, I have dealt with a wide range of planning-related matters. I was a Planner and Section Planner with the Far North District Council from 1996–2005 and the Resource Consents Manager at Whangarei District Council from 2005–2016. I have managed a multi-disciplinary team overseeing the processing of all planning-related applications, as well as being involved in development and review of plan changes, presenting evidence at Environment Court hearings, development contribution policy development and implementation, and strategic projects across the council and communities. In addition, I have been involved in several national working groups run by Local Government New Zealand and Ministry for the Environment.

I confirm that I am familiar with the subject site. I confirm that the evidence on planning matters that I present is within my area of expertise and I am not aware of any material facts which might alter or detract from the opinions I express. I have read and agree to comply with the Code of Conduct for Expert Witnesses as set out in the Environment Court Consolidated Practice Note 2014. The opinions expressed in this evidence, are based on my qualifications and experience, and are within my area of expertise. If I rely on the evidence or opinions of another, my evidence will acknowledge that.

ABBREVIATIONS USED IN THIS REPORT

NRC Northland Regional Council

FNDC Far North District Council

RMA Resource Management Act 1991

NZCPS New Zealand Coastal Policy Statement 2010

RPS Operative Regional Policy Statement for Northland

RCP Operative Regional Coastal Plan for Northland

RWSP Operative Regional Water and Soil Plan for Northland

RAQP Operative Regional Air Quality Plan for Northland

PRP Proposed Regional Plan for Northland

DOBY Doug's Opua Boat Yard

GEYC Interesting Projects Limited T/A Great Escape Yacht Charters

MHWS Mean High Water Springs

CMA Coastal Marine Area

NORTHLAND REGIONAL COUNCIL STAFF REPORT

APPLICATION NO.: APP.041365.01.01

REPORTING PLANNER: A Hartstone, Consultant Planner

APPLICANT: Douglas Craig Schmuck and Interesting Projects Limited (Section 127 application)

ACTIVITY SUMMARY: The application seeks consent for the following activities:

APP.041365.01.01	Reconstruct a wharf facility in the coastal marine area (including alterations to the wharf, floating pontoons, piles, stormwater pipe/s (attached to wharf), marina berths, slipway, signage, ladders, security and safety lighting, security gate).
APP.041365.02.01	Reconstruct a slipway in the coastal marine area (inclusive of slipway, turning block and associated cabling).
APP.041365.03.01	Place a hard protection structure (subsurface erosion barrier) in the coastal marine area.
APP.041365.04.01	Occupy space in the coastal marine area with structures associated with the Doug's Opua Boatyard, including a wharf facility, a slipway, a workboat mooring and associated dinghy pull, and a hard protection structure.
APP.041365.05.01	Occupy space in the coastal marine area in the vicinity of the wharf facility and slipway to the exclusion of others (occupation area).
APP.041365.06.01	Use the slipway in the coastal marine area for minor vessel maintenance.
APP.041365.07.01	Use the wharf facility structures and three work berth areas adjacent to the wharf in the coastal marine area for the purposes of vessel maintenance and chartering.
APP.041365.08.01	Use two berths associated with the wharf facility pontoon as a marina in the coastal marine area.

APP.041365.09.01	Disturb the foreshore and seabed in the coastal marine area during demolition and removal of unwanted structures, wharf facility and slipway reconstruction, and construction of a subsurface erosion.
APP.041365.10.01	Earthworks in the coastal riparian management area (for slipway reconstruction).
APP.041365.11.01	Capital dredging around berths, fairway and slipway in the coastal marine area.
APP.041365.12.01	Maintenance dredging to maintain vessel berths, fairway and slipway in the coastal marine area.
APP.041365.13.01	Discharge treated stormwater to the coastal marine area.
APP.041365.14.01	Discharge contaminants to land from vessel maintenance activities.
APP.041365.15.01	Discharge contaminants to air from vessel maintenance activities.
APP041365.16.01	Discharge contaminants to air in the coastal marine area from vessel maintenance activities.
APP.008270.01.03	S127 Change in resource consent conditions of AUT.008270.01.02 to reposition pontoon. The Consent Holder is Interesting Projects Limited T/A Great Escape. The application seeks a 5 year lapse date and a duration of 35 years for all consents sought.

LOCATION:	1 Richardson Street and Walls Bay, Ōpua.
LODGEMENT DATE:	8 January 2020 (noting a previous version of the application was lodged in October 2019).
NOTIFICATION DATE:	4 March 2020.
CLOSE OF NOTIFICATION DATE:	1 April 2020.
SUBMISSIONS RECEIVED:	Twenty (20) in opposition; Two (2) in support.

REPORT APPENDICES

A. Recommended Conditions of Consent.

B. Copy of Interesting projects Limited T/A Great Escape Yacht Charters consent AUT.008270.01.02.

C. Reyburn and Bryant letter dated 7 April 2020 addressing Court matters and appeal history.

ADEQUACY OF INFORMATION

A complete application was formally received by the council on 8 January 2020. That application has not been amended since lodgement and is the subject of this report.

No formal Section 92 request was made for more information during processing of the application. However, liaison with the FNDC has taken place as a consent application was lodged with the FNDC concurrently with the NRC consent application. The FNDC determined that the consent application before them would be considered separately from the NRC consent. A resulting decision granting consent was issued by the FNDC on 22 April 2020.

In assessing the information, the NRC determined that no independent technical or peer review of the reports provided with the application were necessary. This decision was made on the basis that the effects associated with the proposed activities have already been subject to scrutiny through previous consenting processes. There are no areas of disagreement between NRC staff and the content of technical reports provided.

Following close of public notification on 1 April 2020, the applicant's intentions regarding progression of the appeal of a previous council decision on discharges associated with the boatyard currently before the Courts was queried. This was on the basis that a High Court decision was issued on 20 March 2020 that set aside a previous decision of the Environment Court and remitted the matter back to that Court for further consideration. In response, the applicant provided a summary of matters the pertain to the history of litigation associated with the subject site and responded to a number of matters raised in the submissions. That document is attached as Appendix B to this report.

The applicant has since advised that, in the event the Environment Court issues a decision granting consent to the activities sought before any hearing on the current application concludes, they will no longer form part of the current application and will be withdrawn. Conversely, if the Court declines consent, the applicant may pursue the current application as presented and/or may appeal any decision of the Environment Court. A question that arises from this possibility is whether the Regional Council has the ability to make a decision on a suite of activities being sought where they have already been declined by both Commissioners and a Court. This is a question that has not been clearly addressed at the time of preparing this report.

Consideration has been given to the matters raised in the submissions received. There are no matters that have been raised that have not been adequately covered in the information provided. No new matters have been identified in submissions that require additional information from the applicant in order to be suitably considered.

In summary, the information provided with the application allows for consideration of the following matters on an informed basis:

- The nature and scope of the proposed activities that consent is being sought for.
- The extent and scale of the actual and potential effects on the environment.
- Those persons and/or customary rights holders who may be adversely affected.
- The requirements of the relevant legislation.

On this basis, it is considered that the application is supported by adequate information to determine the application in accordance with Section 104(6). The proposal has not changed or been revised in any material form or scale during the processing of the consent application.

REPORT FORMAT AND METHODOLOGY

As detailed above, the information provided with the application covers all relevant matters associated with the proposed activities. A number of technical assessments are provided within the application and comments have been provided from NRC staff addressing particular matters where required. Therefore, this report has been prepared to avoid any undue repetition or descriptions where suitable reference can be made to information in the application as is provided for under Section 42A(1A) of the RMA.

Where there is agreement on any particular matters, including technical assessments, this is identified in the report. Where there are any points of disagreement or difference of opinion, these shall be identified and the relevant points of difference of approach, assessment, or conclusions will be detailed.

Assessment of the proposed activity requires reference to a number of sections of the RMA and provisions in various planning documents. Unless considered necessary, reference will be made to the section and/or planning provision without a copy of that section or provision being included in the report in full.

The report is formatted into six sections as follows:

- The proposal and existing environment.
- Reasons for Consent.
- Notification, Submissions and Written Approvals.
- Procedural Matters.
- Section 104 Assessment.
- Other Relevant RMA Sections.
- Part 2 Matters.
- Conclusion and Recommendations.
- Recommended Conditions.
- Appendices.

1. THE PROPOSAL AND BACKGROUND

1. The proposal is described in Section 4 of the application prepared by Reyburn and Bryant Limited dated January 2020 ('the application'). The application consists of several new activities proposed in the CMA, a suite of activities seeking replacement (renewal consents), and a variation to an existing consent condition.

2. Paragraphs 4.2–4.18 of the application set out the various components of the application. It is noted that the application incorporates matters within jurisdiction of the FNDC. The matters addressed by the FNDC are covered further in this report.

3. Recognising the overlap of new and renewal consents for the activities sought, Sections 1.3–1.7 of the application set out the details of the activities now sought. These details are adopted for the purpose of this report. Overall, the key features of the proposal are as follows:

   (a) Consents for new activities consisting of a proposed sub-surface erosion barrier, capital dredging to provide all tide access for the jetty and to Veronica Channel, and replacement of two existing working berths with two marina berths.

   (b) Modified replacement (renewal) consents for three existing working berths (reduced from five), removal and reconstruction of the existing wharf (with some modification), earthworks to provide for site remediation and reconstruction of the slipway, maintenance dredging, stormwater discharges to the CMA, air and land discharges from boat maintenance activities, occupation of the CMA by various structures including the wharf and associated structures and berths, extension and modification of the existing exclusive occupation area in the CMA, and modification of the existing offensive odour boundary.

   (c) A Section 127 application to vary existing conditions of consent held by GEYC.

   (d) A consent period of 35 years is sought for all activities.

4. The background to the proposal is important to provide context to the application and some of the concerns raised in submissions. The application records that the current DOBY operation is reliant on a suite of consents granted by the Environment Court in 2002. Those consents, with the exception of air and stormwater discharge consents ('the discharge consents'), do not expire until 2036. The discharge consents were renewed in 2008. An application was made in 2017 for further renewal of these discharge consents along with a suite of activities similar to that now proposed. That application was declined by Hearing Commissioners in a decision issued in November 2018 and was subsequently appealed by the applicant to the Environment Court. The appeal was then refined such that it addressed the matter of the discharge consents with the other proposed activities withdrawn from the proceedings.

5. The Environment Court issued a decision in July 2019 which, while indicating a consent may be forthcoming, raised jurisdictional issues regarding the extent to which a consent could be granted on some of the land in question. The applicant appealed that decision to the High Court with the focus being on the jurisdictional issue. As a result of the High Court decision issued in March 2020, the matter has been remitted to the Environment Court for reconsideration. At the time of preparing this report,

no final decision of the Environment Court has been issued on the discharge consent applications. It is understood that the Court has been advised that the applicant has made application to the NRC for the same activities.

6. Further to the above, extensive litigation has taken place over an extended period of time regarding the creation of easements in favour of the applicant allowing for boatyard activities to take place over the esplanade reserve administered by the FNDC. While not directly related to any consents currently held or now sought by the applicant, it is an underlying matter that informs the current application. A decision issued by the Supreme Court in October 2019 confirmed that the easements across the esplanade reserve are valid and can be relied on by the dominant tenement (the applicant) to undertake activities on the esplanade reserve. While the easements provide for certain rights over the esplanade reserve, the ability to undertake those activities is subject to obtaining the necessary consents from the relevant council(s) – it is not possible to use the easements for their intended purpose without the appropriate resource consents in place.

2. THE EXISTING ENVIRONMENT

7. Section 2.0 of the application provides a description of the environment as it currently exists. In addition to this, Section A of the report entitled 'Assessment of Landscape, Natural Character, and Visual Effects' prepared by Littoralis Landscape Architecture dated March 2019 provides a description of the site and sets out the various components including physical characteristics and historical use.

8. While site visits have been undertaken to view the site, the applicant has recently advised that some works have commenced on the site to give effect to the FNDC consent. This has included removal of the slipway and turntable and earthworks.

9. As part of the existing environment, there are no known resource consents that have been granted but have yet to be exercised or given effect to that would have any relevance or effect on the proposed activities.

3. REASONS FOR CONSENT

10. Section 1.8 of the application lists the activities and associated suite of coastal permits, discharge and land use consents sought from the NRC. It is noted that the activities require consents under the RWSP, RCP, RAQP and PRP. The status of activities under the various rules range from controlled activities through to full discretionary activities. Having reviewed the assessment of the relevant rules, the identification of the relevant rules and determination of activity status under the Regional Plans is accepted subject to the following comments.

11. It is recorded that NRC advice provided soon after receipt of the application indicated that the proposed earthworks activity to remove contaminated soil above MHWS would not trigger the need for a controlled activity consent application under Rule C.6.8.3 Contaminated land remediation of the PDP. This was on the basis that the land in question is not considered to be 'contaminated land' as defined in the RMA. This activity does not form part of the application.

12. Section 1.7 of the application considers the extent of permitted activities that may be carried out on the site. The application states that:

"The permitted activity standards for air discharges under Rule C.7.2.1 'Wet abrasive blasting' (PRP), Rule C7.2.5 'Discharges to air from industrial and trade activities (PRP), and Rule 9.1.5 'The discharge of contaminants to air from wet abrasive blasting (including water blasting)' (RAQP) all require a subjective assessment of whether the discharge (paint fumes and un-contaminated spray mist) is "offensive or objectionable". While the technical assessment has determined that the discharges are not offensive and objectionable, given the subjectivity involved, resource consents have been sought regardless."

The application is assessed in this report on the basis that consent is required for these activities.

13. The application includes consent for earthworks exceeding 50 cubic metres (m^3) in volume within the Riparian Management Zone under Rule 34.3 of the RWSP, and earthworks within the Coastal Riparian and Foredune Management Area under Rule C.8.3.4 of the PRP exceeding 200 m^2 of exposed earth at any time. While the extent of the Riparian Management Zone is not easily defined in the RWSP, the PRP defines the Coastal Riparian and Foredune Management Zone as (in this case) an area 10 metres landward from the MWHS. The applicant has since confirmed that earthworks within this area will equate to a maximum of 10 m^3, including earthworks associated with installation of the Stormwater 360 system, and will not exceed 200 m^2 in area. On this basis, the extent of earthworks proposed will comply as a permitted activity with both the RWSP and PRP provisions in this respect and no consent is required.

14. The application seeks two marina berths under the RCP. The PRP includes Rule C.1.2.1 Vessels Not Underway – Permitted activity. This rule sets out what constitutes a permitted activity where a vessel is secured to a structure and, more particularly, a limitation regarding the timeframe (14 days) for any vessel being secured to a structure in enclosed waters. The activity of utilising a berth as intended would appear to infringe this rule and would require consent under Rule C.1.2.12 as a discretionary activity. The applicant may wish to clarify whether consent is required under this rule prior to or at the hearing.

15. The Section 127 application involves a variation to a condition of an existing consent held by GEYC. The extent of the variation relates to the repositioning of the pontoon as a result of the proposed wharf reconstruction, which will result in the activity operating from a 'different' location. The existing consent AUT.0082700.01.02 will need to be updated to reflect this should consent be granted. While not explicitly stated in the application, the applicant has since confirmed that only Condition 1 of that consent would require amendment to illustrate the new location based on a plan of the reconstructed wharf. However, references to the 'jetty' in Conditions 3, 5 and 6 of the consent will also require updating to reflect the reference to the reconstructed wharf as a 'wharf facility'. This is considered to be a consequential amendment resulting from any consent that may be issued for the reconstructed wharf.

16. Overall, the application is presented as a bundle of activities that overlap or are inter-dependent requiring consent under various Operative and proposed Regional Plan provisions. On that basis, the application is assessed as a discretionary activity.

4. NOTIFICATION, SUBMISSIONS, AND WRITTEN APPROVALS

17. The application was subject to public notification, with submissions closing on 3 October 2018. The following table summarises the submissions received within the submission period (in no particular order):

Name of Submitter	Oppose/ Support	Wish to be Heard	Relief Sought
N & K Campbell	Support	Not Heard	Grant
M B Larcombe	Oppose	Heard	Refuse
Ngā Tirairaka o Ngāti Hine	Oppose	Heard	Refuse
T Dunn	Support	Heard	
Mrs Maiki Marks	Oppose	Heard	Refuse
L Harris	Oppose	Not Heard	Refuse
K Sheridan	Oppose	Not Heard	Refuse
M Baker on behalf of Ngā Kiro Tāreha Kaiteke, Te Kēmara Whānau and Ngāti Rāhiri Ngāti Kawa	Oppose	Not Heard	Refuse
R C Dawson & G Wilkinson	Oppose	Not Heard	Refuse
D Dysart	Oppose	Heard	
G Hack	Oppose	Heard	Refuse
J Kearney	Oppose	Not Heard	Refuse
A S Kyriak	Oppose	Heard	Refuse
W A Mackie	Oppose	Not Heard	Refuse
J W Perkins	Oppose	Not Heard	Refuse
Opua Coastal Protection Society	Oppose	Heard	Refuse
H J Nissen	Oppose	Heard	Refuse
P Clark, Waikare Inlet Taiāpure Committee & Waikare Māori Committee for Te Kapotai	Oppose	Heard	Refuse
J Clark	Oppose	Heard	Refuse
M Rashbrooke	Oppose	Heard	Refuse
W Kearney	Oppose	Heard	Refuse
A Atkinson	Oppose	Heard	Refuse

18. Full copies of submissions have been circulated to the commissioner for consideration. None of the submissions have any technical information or reports attached.

19. A number of matters raised in submissions in opposition are addressed in the Procedural Matters section of this report below. Those issues that have been raised in the submissions in opposition that are relevant to the application and can be properly considered are summarised below:

- The application is contrary to the objectives and policies of the NZCPS 2010.
- The application is contrary to the RPS 2016.
- The proposal will result in significant adverse effects on the environment, being an esplanade reserve and its adjacent sea and on the recreational use of them.

- Relocation of the wharf is undesirable due to visual and natural character effects, exclusive occupation, and reduces availability of the CMA for recreational activities and should be built as close as possible to the original site.
- The proposed marina berths deprive the public the right of access to and use of the wharf and casual berthing at the pontoon, there is a lack of infrastructure servicing the marina berths, and is an appropriate development in this location.
- The exclusive occupation of the CMA is opposed.
- Capital dredging is inappropriate due to shallow profile, potential risk to marine life and navigational space concerns.
- Any vessel maintenance activities should be conducted only on the applicant's land and discharges limited to a minimum so as not to affect public access and enjoyment of CMA.
- Wind speed should not be relied on to control the spread of emissions.
- Public access to the CMA, the wharf, and reserve should not be impeded.
- The changes (lowering) of the slipway does not require the work identified beyond what has already been consented. This will avoid the need for the subsurface erosion barrier and will not adequately control discharges and emissions.
- Contamination of land, air and sea is culturally offensive to Māori, noting that kaimoana is still collected from the area.
- Effects on shellfish beds located in close proximity to the two marine berths due to contamination and dredging.
- The proposed dredging will carry more sludge into the mooring area. With activities at the wharf there is now no tidal flow along the main beach and the basin is considerably shallower as a result which will be exacerbated by more dredging.

20. It is recognised that a number of submissions in opposition include a suggestion that a limited scope of consent could be granted to activities where those activities generally reflect either the current or a more limited operation. The suggestions include a smaller exclusive occupation area than that sought, confining the activities to the boatyard including the discharges, and that no discharges should be allowed to affect the esplanade reserve.

21. One of the two submissions received in support states that they support the application as it will improve the operation of the boatyard, inclusive of discharge containment and the wharf, to meet changing environmental requirements.

22. The application is not supported by any written approvals from affected persons as per Section 95E.

5. PROCEDURAL MATTERS

23. A number of matters have been identified in the submissions received that are considered to fall outside the scope of the current application. These matters are addressed briefly below without making reference to specific submissions.

24. A number of submissions query the process of notification and timeframes available for making submissions due to the effects and Government response to the Covid-19 pandemic. Those concerns are acknowledged, although it is noted that all submitters have lodged their submissions in time and no late submissions have been received to date. Given the number and breadth of issues raised in submissions, it would not appear that any person has been unduly prejudiced such that they have either not been able to lodge a submission in time or cannot speak to their concerns. However, the Commissioner may wish to address that issue specifically at the time of the hearing.

25. A number of submissions identify concerns regarding the historic use of Walls Bay and the establishment and operation of the boatyard. The historical consenting of activities associated with the boatyard and the associated easements appear to have been addressed in previous decisions of both the NRC and Courts. There is no evidence that any detailed consideration of the finer points of the historical context assist in informing the assessment of effects on the current proposal.

26. Several submissions raise concerns that the current application is re-litigating previous applications that have either been declined or are subject to the current appeal, and components of the current application is therefore *res judicata* ('a matter already judged'). This may be a valid concern recognising that, at the time of preparing this report, a suite of discharge consents is sought from both the Environment Court and NRC (as part of this application). However, it is always open for a person to make application for any activity and that application must be accepted and treated on its merits. It then falls to the decision-maker to determine whether consent can be granted. The decision-maker may choose to consider any decisions made previously. A relevant component of that consideration is whether there are distinguishing features or changing circumstances that would allow any previous decision to be set aside.

27. Submissions make reference to the consideration of land use activities (particularly earthworks) under the jurisdiction of the FNDC. As recorded previously, FNDC has issued a resource consent for earthworks required to remove contaminated soils located on the site inclusive of parts of the esplanade reserve and this matter is addressed further below. Matters such as traffic and parking do not fall within the scope of the current application despite being referenced in the application. They do, however, provide some assistance in considering the servicing of the proposed marina berths. It is not possible to consider these matters as part of the current applications before NRC.

28. Several submissions state that the activities are not consistent with Section 229 of the RMA and that the status and use of the existing reserve should be upheld. Section 229 of the Act sets out the purposes of esplanade reserves and esplanade strips, including enabling public access to or along any sea, river, or lake. In this case, the status of the easements granted by FNDC in favour of the dominant tenement over the esplanade reserve has been confirmed by the Supreme Court. On that basis, Section 229 is not a relevant consideration of itself in assessing the effects of the application. Similarly, concerns about activities on the reserve, such as proposed future tree planting and implementation of a reserve management plan do not fall within the scope of the current application. Notably, no submission has been received from FNDC highlighting any concerns regarding proposed activities on the reserve.

29. Submissions refer to the proposal being contrary to Section 26 of the Marine and Coastal Area (Takutai Moana) Act 2011. Section 26 of the Act refers to Rights of Access, and states that:

Every individual has, without charge, the following rights:

(a) to enter, stay in or on, and leave the common marine and coastal area:

(b) to pass and repass in, on, over, and across the common marine and coastal area:

(c) to engage in recreational activities in or on the common marine and coastal area.

30. However, Section 26 is limited by subsections (2)-(4) which effectively state that the rights of access can be prohibited or restricted by enactments including regional plans and resource consents. On this basis, Section 26 cannot be relied on to ensure unfettered public right of access to the common marine and coastal area (for either the applicant or any submitter).

31. Submissions received from tangata whenua raise questions regarding a lack of consultation by the applicant. Section 36A of the RMA states that an applicant does not have a duty under the RMA to consult any person about an application. While this means that the applicant is not required by law to consult with tangata whenua regarding the proposal, the risk arises for the applicant where the application may not suitably identify and address cultural effects arising from the proposal. That matter is addressed further in this report.

32. Several submissions raise questions about the history of consents associated with current activities on the site, whether activities in some cases have a current consent, and identify conditions of existing consents that preclude activities now being sought. Correspondence received from the applicant dated 7 April 2020 (Appendix B) provides a response to these concerns and clarifies the status of the current activities and consents. In short, there are no known activities currently being undertaken on site that fall outside the scope of any existing consents. While proposed activities may be contrary to current consent conditions, that does not preclude those matters from being considered as part of the current application.

5.1 Proposed Regional Plan – Statutory Implications

33. The receipt and processing of the application has taken place at a time when the proposed Regional Plan for Northland ('PRP') is subject to resolution of appeals. Some of these appeals have been or are currently being resolved by mediation and consent orders, while others are likely to proceed to a Court hearing for a decision. As at June 2020, a number of appeals have been formally resolved and concluded by way of Consent Order. Where those matters directly affect PRP rules, those rules are deemed operative by way of Section 86F of the Act.

34. At the time of preparing this report, a number of Consent Orders have been issued by the Court on various matters. Of those, only one relates to any of the activities subject to the application. That Consent Order addresses coastal activities associated with Section C.1.5 Dredging, Disturbance and Disposal. It effectively confirms the discretionary activity status of the capital dredging activity and the controlled activity status of the maintenance dredging as proposed.

35. At the time of considering an application under Section 104 in order to make a decision, Section 104(1)(b)(vi) requires specific consideration of *'…a plan or proposed plan…'.* Therefore, an assessment of the relevant objectives and policies of both the operative Regional Plans and proposed Regional Plan is required in assessing and determining the application.

36. In undertaking an assessment under Section 104(1)(b), if that assessment concludes that a similar decision can be reached under objectives and policies of both the Operative and proposed Plans (i.e. either a decision to grant can be supported by both Plans or a decision to decline can be supported by both Plans), then no further assessment is required. However, if a different conclusion is reached under the objectives and policies of each Plan (i.e. a decision to grant under one Plan and a decision to decline under the other Plan), then further consideration of the relative weighting to be given to the Plans is required. The exercise of determining the weighting to be given to the respective Plan provisions is one largely guided by case law.

37. In summary:

(a) The proposal is required to be processed, considered, and decided on as a discretionary activity.

(b) An assessment of the objectives and policies of the Operative and proposed Regional Plans is required under Section 104(1)(b)(iv).

(c) Where that assessment determines that both the Operative and proposed Plan provisions leads to the same decision, no further assessment is required.

(d) Where that assessment determines that a different decision will be reached under the respective Operative and proposed Plan provisions (i.e. grant vs decline), an assessment of weighting to be given to the Operative and proposed Plan provisions is required.

38. While this matter will be assessed further in this report, the PRP is considered to be the predominant Regional Plan document in terms of assessment and decision-making on the applications.

5.2 Far North District Council Consent

39. As identified in this report, the FNDC has granted a land use consent on 22 April 2020. That consent decision records that the consented activity relates to:

'Excavation of contaminated soils for the remediation of the boatyard, reserve and slipway breaching the permitted standards for disturbing the soil under the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.'

40. Due to the jurisdictional boundary of MHWS, the land use consent issued by the FNDC relates to earthworks activities above MHWS. The application to NRC includes the earthworks activities in the coastal riparian management area (for slipway reconstruction), where the coastal riparian management area includes any land within a horizontal distance of 10 metres landward from the coastal marine area. It would appear that the only works required within the coastal riparian management area involving earthworks required to install stormwater management components. As the extent of earthworks meets the permitted activity thresholds of the relevant Regional Plans, all earthworks above MHWS fall solely within the ambit of the FNDC.

41. Understandably, some confusion has arisen among submitters regarding the status of the FNDC application given reference to matters in the application as notified. That has been clarified in the comments on the scope of submissions above.

5.3 Definition of Marina

42. One minor matter that has arisen is the use of the term 'marina berths' to describe the new activity sought for use of two berths under Rules 31.6.8(l) and (m) of the RCP[1]. Both rules specifically refer to 'marina development', however, it is not clear whether two berths adjacent to a wharf structure constitutes a marina development. The RCP includes definitions for 'marina', 'marina complex', and 'marina development'. The matter has not been reviewed in depth as the definition of marina may encompass what is proposed in the absence of any specificity regarding the number of berths that constitute a marina, and the RCP provisions have all but fallen away due to the PRP provisions being progressed.

6. RESOURCE MANAGEMENT ACT 1991 – SECTION 104 CONSIDERATIONS

43. Under Section 104B a council may grant or refuse consent for a discretionary or non-complying activity. If it grants the application, it may impose conditions under Section 108 of the RMA. A council must have regard to Part 2 of the RMA ("Purposes and Principles" – Sections 5 to 8), Sections 104, 104B, 104D, 108, and as relevant Sections 105 and 107 of the RMA.

44. In addition to the above matters, Section 104(2A) requires consideration where the applicant is exercising rights under Section 124 where existing discharge consents are relied on while seeking new consents as part of the current application (as well as before the Environment Court). Section 104(2A) requires consideration of the value of investment of the existing Consent Holder. No information has been provided in the application addressing this matter. Therefore, no further consideration of this matter is provided in this report although the applicant may wish to provide details prior to or at the hearing.

45. There are no known matters associated with trade competition or effects of trade competition that have arisen during the processing of this application that warrant consideration under Section 104(3)(a).

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[1] Form 9 and Section 1.8 of the application refers to Rule 36.68(l) and Rule 36.6.8(m). This appears to be a typographical error.

7. ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT

46. Section 104(1)(a) of the RMA requires a council to have regard to any actual and potential effects on the environment of allowing the activity. This includes any actual or potential positive as well as adverse effects. An assessment of the effects is set out below. It is recognised that the RMA lexicon as it relates to effects can be confusing and is a common complaint for persons unfamiliar with RMA processes. In terms of considering whether to grant consent to a discretionary activity or not, the term that is used in considering the extent of effects is whether those environmental effects are acceptable in the existing environment. Whether effects are acceptable or not is informed by whether such effects are less than minor, minor, or more than minor. Where any adverse effects are found to be more than minor, they are likely to be unacceptable.

47. This assessment has been guided by the information provided with the application, input from NRC staff, and submissions received. Where this input has been relied on it is referred to as such in the assessment. The assessment is presented generally under the same headings and in the same order as presented under Section 5 of the application for ease of reference, noting that some effects have been grouped together (e.g. ecological effects) and some additional adverse effects have been identified.

48. It is noted that a number of relevant assessment criteria contained in the RCP, RAQP, and RWSP are addressed under Section 6 of the application. While such criteria are not included in the PRP, they do provide helpful guidance in identifying the nature of the environmental effects that require consideration. Where appropriate, those assessment criteria will be referred to in the assessment of effects provided below.

49. It is recorded that Section 104(3)(a)(ii) specifies that a council must disregard those effects on a person who has provided written approval. No written approvals have been provided with the proposal.

50. For completeness, it is recorded that there are no matters under Section 104(1)(ab) that require consideration. The application does not provide for any measures for the purpose of ensuring that positive effects on the environment to offset or compensate for any adverse effects that will or may arise from allowing the activity.

7.1 Existing Environment

51. The extent of effects that arise from any proposal must be considered against the existing environment in which they are to be located. In that respect, there are three components that inform the existing environment:

(a) what lawfully exists in the environment at present.

(b) activities (being non-fanciful activities) which could be conducted as of right; i.e. without having to obtain resource consent.

(c) activities which could be carried out under a granted, but as yet unexercised, resource consent.

52. Section 5.1 of the application provides an assessment of the existing environment. Activities that could be carried out as permitted activities and any activities currently consented but yet to be given effect to are not considered to be relevant. Notably, there is a limited suite of activities that could be carried out as a permitted activity under any FNDC or NRC plans as defined under Section 5.2 of the application. It is considered that the scale and extent of these permitted activities do not readily assist in assessing the extent of effects of the proposal.

53. The existing environment does include a number of activities that are currently consented and undertaken by the applicant in the existing environment. Those activities are considered to have existing (actual) effects on the environment. The table provided in Section 5.1 of the application sets out those activities that currently operate under a consent that will not expire until 2036. The table identifies where the differences (if any) lie between what is currently consented and what is proposed. This is considered to be an appropriate assessment of the existing environment and one that should be adopted for the purpose of assessing the effects of the proposal given those consents effectively have another 16 years before they expire.

7.2 Wharf Demolition and Construction Effects

54. The existing wharf is intended to be dismantled with a new wharf constructed in a similar location (albeit outside the existing footprint). It is understood that the construction of the new wharf will not require any change to the existing abutment onto land.

55. The application offers a Demolition and Construction Management Plan as a condition of consent to address the manner in which the works are undertaken. That conditions include identification of '*Measures to ensure and maintain public access along the Ōpua-Paihia walkway (as far as practicable)'*. It is noted that the terms of the existing easements are expected to set the minimum requirement for reasonable access while any work to dismantle and construct the wharf is being undertaken. The applicant may wish to clarify what that minimum legal requirement is prior to or at the hearing to better inform the wording of the condition. In all other respects, the condition as offered is considered appropriate to address the proposed works.

7.3 Dredging Effects

56. Plans contained in Appendix 11 of the application set out the extent of capital dredging with batters of varying slopes (1:4 to 1:6) and the location and design of the sub-surface erosion barrier on the southern edge of the slipway and dredge area. Capital dredging below MHWS will involve removal of approximately 37 m^3 of contaminated sediment immediately adjacent to the slipway, with 4329 m^3 of sediment removed for the approach channel and marina berths. Maintenance dredging is then expected to be required annually, requiring removal of 300-500 m^3 of sediment. All dredging is expected to be undertaken by way of a barge mounted hydraulic excavator. The applicant has advised that, as a result of the dredging, the new slipway gradient will be 4% to approximately 1 metre into the CMA. From there, there is an existing break point where the gradient will increase to 6% (or thereabouts) to the bottom of the dredged area. From there the rails will be level.

57. A number of submissions raise concerns regarding the adverse effects of the capital dredging activity. Those concerns include effects on marine life, including the shellfish bed on the adjacent beach, and the activity generally being seen as inappropriate due to the bays shallow profile.

58. The application is supported by a report entitled Ecology and Sediment and Water Quality Assessment prepared by 4Sight Consulting Limited dated November 2019 ('4Sight report'). This report is attached at Appendix 14 to the application. That report specifically addresses potential effects associated with the capital dredging on shellfish and other marine biota, water quality and sediment. The report recognises the significance of the existing harvestable pipi bed in the bay and potential adverse effects on it. However, the report states that *'….the risk is assessed as low because of the small amount of material likely to be lost in the relatively small dredging project and inherently intermittent nature of the dredging operation.'* The use of a silt curtain as part of the dredging operation is considered to provide a suitable measure to avoid sedimentation of the pipi bed.

59. The 4Sight report considers the potential effects associated with increased turbidity effects associated with dredging activities. The report records that *'Available hydrodynamic modelling information and field observations indicate that there is only limited potential for fine sediment disturbed by the proposed dredging activity to disperse far beyond the close vicinity of the operations. The proposed silt curtain deployment will further mitigate against the possibility of adverse turbidity and sedimentation effects beyond the works footprint.'* Visual monitoring of turbidity within the works area during dredging is recommended in the report.

60. Section 4.1.4 of the 4Sight report addresses the timing of dredging activities noting that previous NRC advice records that dredging activities should only be conducted during the period April to September. That advice stands for the current application.

61. The 4Sight report acknowledges the intended removal of contaminated sediment and notes that 'On balance, effects from the proposed dredging activities in terms of contaminants are expected to be less than minor'.

62. In reviewing the application contents, it is considered that the timing and management of the dredging works is an important component should it be consented. It would be expected that the dredging activity required to remove contaminated sediment will need to be done separately from the balance of the dredging activity for the berths and channel. Some clarity about the sequence of these two activities should be provided prior to or at the hearing.

63. The extent of capital dredging must be carefully managed to avoid effects on the existing pipi beds. Assuming the dredging of contaminated sediments requires access over the esplanade reserve, this activity needs to avoid any undue impediment of public access over the reserve area.

64. The application does not set out any staging or progressive programme defining how these works are to be carried out across both land and the CMA, although it appears that the works should form part of one programme to be carried out at one time. On the basis of the information available, it is considered that suitable conditions can be imposed to ensure that any adverse effect associated with the construction works can be suitably managed. Any adverse effects associated with construction works, subject to the imposition of conditions, are considered to be minor.

65. In conjunction with the dredging activity, a sub-surface erosion barrier is proposed to be located on the immediate southern edge of the tidal foreshore area subject to dredging as defined in the 4Sight report. The purpose of that barrier is to stabilise the shellfish bed and to avoid any dredge batter extending into the shellfish beds. It is effectively a retaining wall that defines the edge of the dredging activity from the natural contour of the balance of the bay.

66. NRC staff have considered the provision of this barrier and the extent of any adverse or positive effects it may generate. NRC staff have indicated that, in keeping with policies that consider the appropriateness of hard protection structures, the use of hard protection structures to protect shellfish beds from dredging activities is considered to be the least preferred option. Softer protection measures including a shallow sloping batter is preferable with minimal modification to stable seabed levels. However, if engineering advice can confirm that a subsurface erosion barrier is an appropriate and effective means of supporting the shellfish bed, with any alternative being impractical or having greater adverse effects on the environment, then it may be acceptable.

7.4 Stormwater Discharges

67. The application identifies potential adverse effects associated with stormwater management and discharge to the coastal marine area from the land-based activities associated with the boatyard. These effects will be managed by way of a new stormwater collection and treatment system before discharge to the CMA. This is detailed in the report prepared by Vision Consulting Limited entitled 'Stormwater and Wastewater management Report' dated 7 June 2019 ('the Vision report'). For clarity, the reference to the wastewater component is not associated with domestic servicing of the boatshed but rather waste discharge to an FNDC trade waste connection.

68. The Vision report sets out the existing situation regarding management and disposal of stormwater across the site, noting that it identifies four Catchments A-D that contribute to stormwater flows through the site to the CMA. Catchment C is identified as the existing slipway, turntable, and hardstand area. The proposed stormwater management system involves isolating and treating the stormwater generated within Catchment C from the balance of the catchments. The report notes that stormwater generated within Catchments A, B, and D *'….are considered to be natural runoff (clean water) and not affected by the activities within the contained area of the slipway. These flows will now discharge directly into the CMA via primary (culvert) and secondary (overland) flow paths.'*

69. The management and treatment of stormwater within Catchment C will be directed to a Humes Stormwater 360 system, the layout of which is detailed in the plan attached as Appendix D to the Vision report. That system will be located below ground in the 10 metre separation between the proposed catchment grates that receive the runoff on the Catchment C and MHWS in order to allow the system to be 'gravity-fed'. The design specifications provided in the Vision report confirm that the cesspit has sufficient capacity for a 1 in 100 year rainfall event. The outfall from the system to the CMA will be from a 150 mm diameter pipe to be attached to the wharf structure.

70. The Vision report refers the resulting treatment and discharge of runoff to the CMA as complying with a suite of conditions agreed between NRC and the applicant. That suite of conditions is currently before the Environment Court and is therefore still subject to scrutiny by the Court before any formal decision is made. It is appropriate to utilise those conditions as part of any decision should consent be granted.

71. The proposed stormwater management system as outlined in the Vision report is considered to be an appropriate response to improve the current state of stormwater management on the site. The use of a 360 stormwater system is now an accepted practice for treatment prior to discharge to the CMA and in this case will achieve a suitable degree of treatment (based on the agreed set of conditions currently before the Court). Subject to conditions, the adverse effects associated with stormwater discharge are considered to be less than minor.

7.5 Effects on Natural Character, Landscape, and Visual Amenity

72. The application presents an assessment of natural character, landscape and visual amenity, and visual effects in Sections 5.6–5.8 respectively. The assessment of those effects relies on a report entitled 'Assessment of Landscape, Natural Character and Visual Effects' prepared by Littoralis Landscape Architecture dated March 2019 ('The Littoralis report') attached as Appendix 2 to the application. For ease of reference, the identified effects are addressed together in this report.

73. The Littoralis report details the existing nature of the site and surrounding environment in landscape and visual terms. In considering the potential changes to the landscape and visual elements associated with the site, it highlights that the site is not subject to any identified high or outstanding landscape or natural character or feature values as defined in the RPS.

74. The Littoralis report provides description of the proposal under Section C, noting that the description includes reference to improvement to the boatshed and regrading of the slipway, much of which falls outside the scope of the current application. Section D of the Littoralis report assesses the extent of visual amenity, landscape and natural character effects. In summary, the report concludes that:

- Visual amenity effects insofar as they are relevant to activities subject to the application are assessed as low to very low, which translates as less than minor effects. Those visual amenity effects relate mainly to views of the new wharf structure.
- Landscape effects arising from the proposal are considered to be very low, which translates as less than minor.

- Natural character effects associated with the coastal environment are assessed as very low, which translates as less than minor. It is noted that the report records that *'The proposed works are not anticipated to shift the natural character balance found at the site to a lesser level than currently exists. The proposed wharf is nominally closer to the headland to its north, but that slight shift is not considered to be influential upon the experience of natural character. Similarly, the slightly greater collective surface area of the intended wharf and its related pontoons occupies a larger "footprint" on the surface of the sea, but that small increase is not considered to be particularly perceptible nor to switch the structure to being unduly dominant.'*

75. A number of submissions raise concerns about the effects of the reconstructed wharf and refer back to findings made in the Commissioners decision of November 2018. It is not known whether the Commissioners had technical evidence addressing natural character, landscape, and visual assessment presented to them. However, in accepting the conclusion reached in the Littoralis report, it is considered that the extent of effects on visual amenity, landscape, and natural character, are less than minor. The report does not identify the need for any conditions to avoid or mitigate effects.

7.6 Effects on Cultural and Heritage Values

76. Section 5.10 of the application addresses both historic heritage and cultural values. It records the receipt of submissions raising concerns as part of a previous notified application and states that *'As a result of the history of the site and the relationship between the parties, the applicant has chosen not to engage in further consultation with tangata whenua, except to the extent of its obligations under MACA. The proposal relies on the public notification process.'* As recorded previously in this report, it is the applicants right to adopt this position under the Act.

77. The applicant has notified all known groups applying for recognition of customary marine title in accordance with Section 62 of the Marine and Coastal Area (Takutai Moana) Act 2011. At the date of preparing this report, no responses have been received from any notified parties. In addition, Section 6.14 of the application refers to the contents of the Te Rūnanga o Ngāti Hine Management Plan as informing the extent of any cultural effects.

78. The application states that improvements to stormwater management and resulting discharges to the CMA, removal of contaminated material and additional restrictions on activities resulting in potential discharges are considered to result in positive effects. Those positive effects are considered to suitably address any cultural concerns regarding the proposed activities. In conjunction with this, protection of the shellfish bed as a taonga recognised by tangata whenua has been provided for in the application.

79. Submissions raising general cultural concerns regarding the proposal have been received from the following parties:

- Ngā Tirairaka o Ngāti Hine,
- Mr Peter Clark, Waikare Inlet Taiāpure Committee and Waikare Māori Committee for Te Kapotai,

- Dr Baker on behalf of Ngā Kiro Tāreha Kaiteke, Te Kēmara Whanau and Ngāti Rāhiri Ngāti Kawa, and;
- Mrs Maiki Marks.

80. Setting aside the matters identified previously in this report as falling outside the scope of the application, the submissions raise valid questions regarding effects on kaimoana in the vicinity of the subject site as a food source, and the discharge of contaminants that are or may be culturally offensive. It is noted that the submission from Ngā Tirairaka o Ngāti Hine offers an opportunity for the applicant to engage in discussions regarding the concerns and there is no suggestion that offer has been withdrawn at the time of preparing this report. No specific sites of significance such as wāhi tapu have been identified in submissions as relevant considerations, although reference has been made to the importance of the stream running through the site.

81. Two matters are considered relevant in assessing effects on cultural values. The first is the extent of the existing environment as it relates to both existing consented boatyard and wharf activities and those cultural values that exist in the area. The degree of modification in Walls Bay that has taken place over time has resulted in the current environment. While this does not negate the cultural values that may be present, particularly those associated with the shellfish beds and stream, it provides a context against which those values must be considered.

82. The second matter is how the changes to the existing environment might adversely affect those cultural values to the extent that such effects are not acceptable. The applicant has highlighted improvements in the quality of stormwater discharges, removal of contaminated material, both of which are presently potential threats to the viability of the kaimoana source. The existing stream, which is culverted along the length of the DOBY property, is highly modified. While some minor changes to the management of that stream are proposed, it will remain a highly modified watercourse.

83. In the absence of any defining comments indicating significant adverse cultural effects, it is considered that any adverse effects on identified cultural values are likely to be acceptable.

7.7 Public Access and Exclusive use and Occupation

84. Section 4.17 addresses the matter of public access and records that: *'A security gate will be installed on the wharf, just before the T-head part of the structure.'* Further, it states that: *'The location of the security gate will allow public access down the wharf and small boat access, but it will prevent any access to hazardous areas.'* The implication of this is that the public will have access from the existing esplanade reserve over the existing abutment onto the wharf structure and up to, but not beyond, the gate.

85. There is a current approved exclusive occupation area around the existing wharf as defined by the 2002 Environment Court Consent Order. The existing dinghy ramp falls outside the current occupation boundary. As per Section 4.18 of the application, the proposed boundaries of the occupation area within the CMA are now intended to expand to encompass the whole of the reconstructed wharf facility and vessel berths. For clarity, the extent of the proposed exclusive occupation area is defined on the plan

prepared by Reyburn and Bryant Limited entitled 'Boat Yard Site Plan – Cover Sheet' and attached as Appendix 17 to the application.

86. The application acknowledges that temporary construction activities may take place within the CMA associated with the demolition and construction of the wharf. This is considered to be a necessary and unavoidable component of undertaking the works. Subject to ensuring that suitable navigation is maintained for moorings and access to Veronica Channel, and the extent of construction activities are limited in time and a defined area, public access within the CMA is unlikely to be obstructed such that any unacceptable adverse effect will arise.

87. In addition, the application seeks two marina berths that will be managed by DOBY and '….will provide for the temporary berthing of vessels for accommodation purposes. They will be provided on a lease basis and not sold as private property.' No details are provided regarding the terms of occupation or servicing of the berths.

88. The existing environment consists of the existing exclusive occupation area, wharf and pontoon, and associated five working berths. Condition 2 of the Coastal Permit issued by Consent Order in 2002 records that *'…the Consent Holder shall allow reasonable public access to and through this area* (being the exclusive occupation area) *and reasonable public access to and use of the wharf and pontoon structures.'* Several of the submissions in opposition seek that the public access requirement that applies to the current wharf and CMA should continue to apply to the exclusive occupation area and wharf now sought. In addition, submissions are concerned at the increase in size of the exclusive occupation area.

89. The application places emphasis on the hazards associated with the operation of the boatyard and wharf. However, there is no detail regarding how the current wharf and working berths have operated to date under the current condition requiring reasonable public access, and what those hazards are. As it stands, the activities that can be carried out in conjunction with the working berths involve survey and inspection of boats for maintenance. Activities involving cleaning down of vessel hulls or preparation of vessel hulls for painting cannot be undertaken if these involve discharges to the coastal marine area. These activities are presumably benign enough to justify two permanent marina berths as now sought, along with the GEYC activity, without exposing these activities to any hazards. Further, the proposed location of the security gate is beyond the location of the working berths – based on the plans provided, the public have access to the working berths but not to the GEYC pontoon and two marina berths beyond the gate.

90. Having considered limitations on other wharfs and coastal structures in the Northland area, there are few restrictions on public access associated with marinas and wharfs that have operational functions, particularly during daylight hours. Many marinas and wharf facilities allow for repair work within berths without unduly restricting public access. It is not clear why restrictions on public access would now be sought following many years of operation and what appears to be down-sizing of the boat yard operation.

91. There is no evidence to suggest that, having operated under the terms of the 2002 Consent Order, there are new hazards or concerns that have arisen which no longer make the area safe for public access.

92. In terms of the two proposed marina berths, these are currently working berths that can be occupied on a permanent basis for repairs and maintenance. There would appear to be little difference in effects where two of these berths are occupied permanently, possibly without repairs and maintenance taking place. The loss of public access in this respect is considered to be limited, noting that Section 27 of the Marine and Coastal Area provides for the public to utilise the wharf and berths for such activities as loading and unloading cargo and passengers. There is no suggestion in any evidence or submissions indicating that there has been any demand or need for the public to use these berths at any time. It is considered unlikely that public demand for access to the wharf in the context of the wider area of Ōpua will be such that provision for two permanent berths as proposed will unduly impede public access. However, should evidence suggest that unimpeded public access to these areas of the wharf should be retained, then either one or both of these berths may need to be removed from the proposal.

93. The increase in the area defined for exclusive occupation compared to the existing consented area is substantial. It is noted that granting consent to an exclusive occupation area does not imply that public access is restricted to this area. However, areas for exclusive occupation should reflect the minimum area required to carry out the activity it supports. Given the extent of dredging required and provision of the subsurface erosion barrier (subject to engineering confirmation), some extension of the exclusive occupation area to the south of the wharf may be considered appropriate in the circumstances. However, the need for other areas is not justified in the application. The applicant should adduce further evidence to explain the reason for the expanded exclusive occupancy area.

94. While the applicant may require use of that area to carry out activities under the consent, continued reasonable public access can and should be available to all areas unless there is a specific reason why it should not be. There is no clear reasoning as to why public access should be restricted to any part of the exclusive occupation area including the wharf.

95. On the basis of the above, it is considered that reasonable public access to and through the exclusive occupation area sought and over the entire reconstructed wharf from the existing esplanade reserve landward of MHWS should be required as a condition of consent.

7.8 Air Discharge Effects

96. The applicant provides for discharges to air resulting from activities associated with boat repair activities. The resulting air discharges are particulate emissions from sanding activities, water vapour associated with water blasting, and odour arising from application of antifouling and paints.

97. A report prepared by AECOM Limited entitled 'Doug's Opua Boatyard – Air Quality Assessment – Slipway Reconstruction' dated 7 October 2019 provides an assessment of the effects of these activities ('the AECOM report'). That report is attached as Appendix 15 to the application. The AECOM Report provides monitoring results associated with activities undertaken as part of the boatyard operation, assesses the effects of the activities (noting that modelling is provided to consider health effects of painting and antifouling emissions), and recommends a number of conditions to

avoid or mitigate the extent of effects of the discharges. It is noted that the wind direction plays an important role in mitigating or avoiding effects associated with these activities.

98. The extent to which discharges occur and what effects (including amenity effects) they may have on the public walking across the esplanade reserve area adjacent to the boatyard has been raised in submissions. In particular, reference is made to objectionable odours and the need to implement suitable containment of discharges, so they are restricted to the boatyard site.

99. At the time of preparing this report, the applicant has confirmed that the nature and extent of the discharge consents sought in the current application are the same as those before the Court. NRC staff and the applicant have agreed on a set of conditions to manage the effects of the discharges. Those conditions have been forwarded to and are now in front of the Court. The AECOM report provided with the application is understood to form the technical basis for presenting those conditions to the Court.

7.9 Noise Effects

100. Section 5.13 of the application addresses noise effects, noting that the matter of noise only relates to activities within the CMA. There are no submissions that indicate that noise is of concern, and it is expected that the demolition and construction of the wharf and dredging activities can comply with the permitted activity requirements for construction noise in industrial and commercial areas specified in Table 6 under Rule C.1.8 Coastal Works general conditions of the PDP, noting that the DOBY site is a Commercial Zone under the FNDC District Plan.

101. Any adverse effects associated with noise are considered to be less than minor and acceptable.

7.10 Biosecurity

102. The application discusses potential adverse effects associated with biosecurity in Section 5.14. More particularly, that adverse effect can be described as potential for introduced and invasive species to adversely affect native and/or existing biota, particularly as a result of a concentration of vessels travelling from environments with different habitat features.

103. The NRC adopted the Marine Pathway Management Plan from 1 July 2018 as a means of preventing the introduction of new marine pests and to slow the spread of established marine pests within the region. The rules in that Plan are currently applicable to the wharf and associated berths and will apply to all vessels. On this basis, any biosecurity effects are considered to be less than minor and acceptable.

7.11 Earthworks and Contaminated Soils and Sediments

104. The removal of contaminated sediments located below MHWS is addressed in Section 5.15 of the application. The assessment is supported by a report prepared by Haigh Workman Limited entitled 'Geoenvironmental Appraisal 1 Richardson Street, Ōpua for Doug's Opua Boatyard' dated December 2019 (the Haigh Workman report'). That report generally follows a prescribed format for assessment of contaminated

materials prescribed as part of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011. The report is the basis for the granting of the consent and associated imposition of conditions by the FNDC for removal and remediation of contaminated soil above MHWS. At the time of preparing this report, it is understood that much of the remediation work approved under that consent has been carried out.

105. As previously recorded in this report, the removal of contaminated soils does not trigger any Regional Plan rule. The removal of sediments below MHWS requires consideration as part of the capital dredging activity that requires consent under both the RCP and PRP.

106. The Haigh Workman report identified localised contamination consisting of elevated copper, lead, mercury, and zinc levels posing a risk to the aquatic environment. Removal of these contaminants involves dredging and removal of 37 m^3 of sediment material consisting of a 300 millimetre (mm layer of material being removed over an area of 123 square metres (m^2). The extent of this area is defined on the Proposed Remediation Plan (ref Drawing No. 15115/10) attached as Appendix A to the Haigh Workman report.

107. In addition, the 4Sight report considers the effects associated with mobilisation of contaminants. In particular it notes that '….there will only be very localised dispersal of this suspended sediment and any associated contaminants due to the low current speeds and limited capacity for sediment transport. 4Sight also advise that the deployment of the silt curtain during dredging operations will further reduce the potential for the dispersal of contaminants.'

108. It is appropriate to adopt the recommendations contained in the Haigh Workman report recognising that the removal of all contaminated materials should be carried out at one time in conjunction with earthworks required to lower the slipway. The report specifically identifies the expectation that conditions will be imposed requiring strict adherence to the Remediation Action Plan. This will need to include appropriate measures to avoid mobilisation of contaminants in sediments during excavation below MHWS. Subject to ensuring strict compliance with the Remediation and Site Management Plans contained in the Haigh Workman Report, it is considered that any actual or potential adverse effects associated with contaminated soils and sediments located on the site will be alleviated to an acceptable extent. It is anticipated that the upgrading of the stormwater management system on the site, controls on air discharges, and ongoing monitoring of activities will ensure contaminant levels remain at an acceptable and safe level once remediation and validation actions are completed.

7.12 Cumulative Effects

109. A cumulative effect is defined in Section 3 of the Act as any effect which arises over time or in combination with other effects. Given the extent of existing activities that constitute the existing environment, consideration of any cumulative effects is confined to and potential combination of effects resulting from the new activities in conjunction with the existing environment.

110. Public access to the CMA is a matter that is relevant in this respect. The cumulative effect of allocating exclusive occupation rights to Consent Holders over time can 'chip away' at the public domain. For a cumulative effect to occur, the granting of a consent to an activity must 'tip the balance' such that an adverse effect will arise as a result of granting consent. In this case, the applicant has an existing exclusive occupation right that is valid until 2036 with structures located within that area. The current application seeks a broadening of that occupation right inclusive of permanent marina berths. This would increase some limitation on public access in the northern area of Walls Bay beyond what is currently existing. However, there are no other areas in the common marine and coastal area within the immediate vicinity that enjoy exclusive occupation rights nor restrict public access in any way. The granting of consent will not result in an adverse effect on the loss of public access to the CMA when read in conjunction with any other developments in the area.

111. No other matters are considered relevant in addressing cumulative effects.

7.13 Coastal Processes

112. While not directly addressed in Section 5 of the application, some consideration is given to actual or potential effects on coastal processes resulting from the proposed activities. The 4Sight report includes detail regarding the currents and sediment transport models applicable to the site and wider area. That report is informed by information prepared by Total Marine Services that considers the effects of the wharf and dredging activities on beach morphodynamics and sediment transportation associated with the proposed activities in Walls Bay.

113. NRC staff have reviewed this information and confirmed that any effects on existing coastal processes will be minimal and therefore acceptable.

7.14 Ecological Effects

114. While not directly addressed in the application, the effects on subtidal and intertidal habitat and biota are recorded under Section 5.4 of the application. This is informed by the 4Sight report which provides a detailed assessment of the biota and actual and potential effects on them as a result of the current and proposed activities. No terrestrial ecological effects are identified as part of the assessment and no such effects have been raised in submissions as being of concern.

115. The 4Sight report provides a detailed assessment of ecological effects, particularly in terms of dredging activities. Those effects are assessed as less than minor in the medium to long term, which is understood to equate to a year or less from the time of capital dredging taking place. A similar conclusion has been reached for the effects of maintenance dredging, noting that this will be a relatively small scale and may be undertaken on an annual basis.

116. The 4Sight report includes test results for metal concentrations in shellfish flesh and utilises a reference site at Te Haumi to compare results. The report records that: *'The metal concentrations in the pipis collected as all sites did not exceed levels stipulated in the New Zealand Food Standards and copper was well below that cited in previous regulations.'* It may be inferred that the operation of the boatyard has not resulted in contamination of the shellfish bed, although the report does not specifically state this.

117. Submissions have raised concerns regarding the potential effects on marine life within the capital dredging area and in the wider environment. The 4Sight report is considered to adequately address these concerns.

118. Based on the information provided with the application, it is considered that any ecological effects associated with the proposed activities will be less than minor and therefore acceptable.

7.15 Navigation Effects

119. Advice has been sought from the Regional Harbourmaster regarding any potential implications arising from the proposal that may have any effects on the use and navigation of the existing moorings and Veronica Channel. Some submissions do raise concerns about possible implications for mooring users and the public navigating the area.

120. The Harbourmaster has advised that concerns expressed as part of the previous application in 2018 still remain – it appears the applicant has not made attempts to address these issues as part of the current application. Those concerns are summarised as follows:

- The Regional Harbourmaster is not been convinced of the benefit of a dredged channel to the jetty facility through a dedicated mooring field, although he is reasonably comfortable with the proposed dredging in the immediate vicinity of the proposed new jetty facility i.e. dredging associated with the jetty berth areas and with the adjacent slipway as these areas are well away from the existing moorings.
- The Harbourmaster is able to direct the movement of the relocation of vessels and moorings within a Mooring Area as a permitted activity. The Walls Bay mooring area is presently highly allocated and a high degree of precision is required for the placement of moorings to ensure that maritime incidents do not occur as a result of movement of moorings.
- The Harbourmaster has indicated that he would not be prepared to issue any direction to move or relocate moorings (and their associated vessels) in respect of the Applicant's proposal. Based on the information provided to him to date, the Harbourmaster has raised the following particular concerns:

  (a) No management plan has been provided to the Harbourmaster with details of how the moorings and their vessels will be safety moved prior to dredging, securely stored during dredging and replaced upon the conclusion of the dredging activities.

(b) To date the Applicant has not provided sufficient detail of the proposed dredging area and location (lack of specific location co-ordinates for the position of the channel and batters) in order that potentially affected moorings can be specifically identified. The Harbourmaster considers that there may be significantly more moorings affected by the proposed channel dredging than those identified in the application.

(c) No details of how the dredging operator proposes to undertake the dredging within this highly allocated mooring area has been provided with the application. More details of the operational footprint of the dredge barge (including buffer distances) and how the dredger proposes to manage the dredging activity whilst ensuring safety of adjacent vessels and moorings is required.

(d) The dredging operator is not a contractor that has been approved for the removal, upgrade and replacement of moorings, and may lack the required plant and equipment to ensure the replacement of moorings with the precision required and upgraded configuration.

(e) Mooring configurations (i.e. ground and intermediate chain lengths) may need to be upgraded to accommodate the increased depth of the dredged channel and batters.

(f) No agreements appear to be in place as to who will bear the cost of any removal, storage or replacement of moorings and vessels during the proposed dredging.

- The Harbourmaster has indicated that a detailed Mooring Management Plan for the proposed dredging prepared by an approved mooring contractor would be required to be provided before he would consider approving the movement of moorings and vessels to enable the proposed dredging to occur.

121. The Harbourmaster has confirmed that he considers the above matters could be addressed by way of conditions of consent. That assumes that approval will be forthcoming to relocate affected moorings should the required information be provided.

122. It would be expected that prior to or at the time of the hearing, the applicant will have made some progress in addressing the concerns expressed above. Failing that, the Harbourmaster's advice indicating that conditions can address the necessary concerns and requirements can be imposed as a condition of any consent such that any adverse effects will be acceptable.

7.16 Effects Associated with Section 127 Application

123. The application records that, in addition to the consents sought for the DOBY activities, a variation to existing conditions of consent is sought for the consent held by GEYC. A copy of that consent is attached to this report as Appendix B. As previously stated, the scope of the Section 127 application relates to recognition of the change of location of the charter operation in the event that the reconstructed wharf that forms part of the substantive application is granted. It stands that if consent to the wharf is not granted, the Section 127 application cannot be granted.

124. Any adverse effects associated with the minor relocation of the floating structures and resulting change to the consent conditions are considered as part of the activity to demolish and reconstruct the wharf.

7.17 Positive Effects

125. Any positive effects arising from the granting of consent are a relevant matter under Section 104(1)(a). Section 5.17 of the application sets out a number of positive effects arising from the proposal. Insofar as the provision of a boat repair activity provides a service with some minor economic and social benefit within the boating community for those that use the service, it is accepted that there is some positive effect arising from the operation of the boatyard. In addition, some of the works will address health and safety requirements to ensure the boatyard operation is meeting minimum standards. Provision of dredging will generate some positive effect for those that access the public dinghy racks by having improved water access. There is no evidence presented to quantity what any economic benefit to either the applicant or wider public may be.

126. The application records that improvements to the stormwater management and treatment on the site and removal of contaminated coastal sediments will result from the granting of consent. While these are posited as positive effects, these activities are considered to be associated with remediation of longer-term actual adverse effects of the historic boatyard activity on the environment. It would be more appropriate to treat these activities as remediation of actual environmental effects associated with the boatyard activity rather than any positive effect.

127. Overall, it is considered that some relatively minor positive effects will arise from the proposed activities, where most of those effects will be limited to the benefit of the applicant. It is recognised that some minor public benefit may arise from the improvement of all tide access for dinghy rack users. With the exception of improved all tide access, any public benefit is not likely to extend beyond that which currently exists in the environment.

7.18 Conclusion – Actual and Potential Effects

128. Based on the above assessment, it is considered that the actual and potential effects arising from the proposal as set out in the application will be minor or less than minor. This is concluded on the basis that conditions can be imposed to address various potential adverse effects associated with activities. Notably, the conditions recommended for the avoidance and mitigation of discharge effects have been largely agreed between NRC staff and the applicant and are currently before the Environment Court.

129. The matter of the extent of exclusive occupation area and public access has been considered. The applicant does need to clarify the reasons for seeking the expanded exclusive occupation area as it may be excessive, particularly to the north of the reconstructed wharf. While the application seeks exclusion of the public from identified areas associated with the reconstructed wharf, there is no substantive reason for this to occur. It would therefore be appropriate to include a condition of consent that ensures that reasonable public access is maintained over the

reconstructed wharf and within and through the exclusive occupation area, which effectively 'rolls over' the previous condition imposed by the 2002 Consent Order.

130. As an overall judgement, and subject to the proviso above, it is considered that suitable information has been provided to confirm that the effects of the activities generally as sought are appropriate and acceptable in the environment.

8. RELEVANT PROVISIONS OF POLICY STATEMENTS AND PLANS

131. Section 104(1)(b) of the RMA requires the council to have regard to the relevant provisions of applicable plans and policy statements. These are discussed below.

8.1 National Environmental Standards – Section 104(1)(b)(i)

132. There are currently five national environmental standards. These relate to air quality, sources of drinking water, telecommunication facilities, electricity transmissions and contaminated soil. These are not considered relevant to the consideration of this application, noting that the FNDC consent addresses the contaminated soils matter.

8.2 Other Regulations – Section 104(1)(b)(ii)

133. There are no other Regulations that are considered to be directly relevant to the proposal.

8.3 National Policy Statements – Section 104(1)(b)(iii)

134. There are currently five national policy statements. These relate to urban development capacity, freshwater management, renewable electricity generation, electricity transmission and the New Zealand Coastal Policy Statement. The only NPS that is considered relevant to the assessment of this application is the NZCPS. This is discussed below.

8.4 New Zealand Coastal Policy Statement – Section 104(1)(b)(iv)

135. Section 6.12 of the application provides a detailed assessment of the relevant objectives and policies contained in the NZCPS. That assessment identifies that Objectives 1–6, and most of the policies are relevant to the proposal. It then proceeds to identify the relevant objectives and policies with consideration of the proposed activity against those provisions. While the content of the assessment provided in the application is generally accepted, the following analysis provides additional consideration of relevant provisions.

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- *maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;*
- *protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and*
- *maintaining coastal water quality and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.*

136. The assessment of effects indicates that the proposal is consistent with this objective. Notably, the proposal will have minimal effects on ecological processes and water quality as there is no representative or significant natural ecosystem or site of biological importance that may be affected by the proposal. The removal of contaminated sediment and improvements to the stormwater management system will assist in addressing the maintenance of coastal water quality.

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- *recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;*
- *identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and*
- *encouraging restoration of the coastal environment.*

137. None of the lower-order planning documents (including the RPS) identify the site or surrounding area as being subject to any area of high or outstanding natural character or outstanding landscape values. The site has a history of commercial use and is zoned as such. The Littoralis report has addressed the actual and potential effects on natural character and landscape. The conclusion reached is that those effects will be less than minor and therefore appropriate and acceptable in the environment.

Objective 3

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:

- *recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;*
- *promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;*
- *incorporating mātauranga Māori into sustainable management practices; and*
- *recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.*

138. The applicant has chosen not to consult with tangata whenua and has relied on the notification process. While this is the applicants right, it does not assist in making an informed decision on addressing the principles of Te Tiriti o Waitangi and considering cultural effects, and does not engender any interaction between parties that may be of benefit to both. The submissions received identify the role of as kaitiaki and raise concerns about existing and ongoing effects of the boatyard activities. Those concerns are acknowledged, noting that the NRC is not able to consider or respond to matters that fall under claims before the Waitangi Tribunal.

139. Having considered the content of submissions, the relevant cultural effects relate to preservation of the existing shellfish beds in Walls Bay. The evidence indicates that provision of the sub surface erosion barrier, removal of contaminated sediments on the slipway, and improvements to stormwater management will result in retention of the shellfish beds as a potentially sustainable and viable source of kaimoana. In the absence of any evidence indicating other specific cultural concerns or effects, it is considered that the Objective can be met.

Objective 4

To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:

- *recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;*
- *maintaining and enhancing public walking access to and along the coastal marine area without charge, and where there are exceptional reasons that mean this is not practicable providing alternative linking access close to the coastal marine area; and*
- *recognising the potential for coastal processes, including those likely to be affected by climate change, to restrict access to the coastal environment and the need to ensure that public access is maintained even when the coastal marine area advances inland.*

140. The proposal by its nature occupies part of the coastal marine area. The application seeks to restrict public access to parts of the wharf due to potentially hazardous activities. Having assessed the information provided with the application, there is insufficient justification to limit public access to the wharf as proposed. The proposal as presented is not considered to meet this Objective unless more detail is provided that clarifies what hazards have been introduced into the operation that have not existed since 2002 when public access over the wharf and surrounding CMA was required by condition.

141. It is possible to impose a condition requiring reasonable public access to the wharf and surrounding CMA which addresses this matter.

Objective 5

To ensure that coastal hazard risks taking account of climate change, are managed by:

- *locating new development away from areas prone to such risks;*

- *considering responses, including managed retreat, for existing development in this situation; and*
- *protecting or restoring natural defences to coastal hazards.*

142. The application records that *'The nature of the proposed DOBY land-based activities are such that they are not sensitive to natural hazards.'* Based on the technical evidence provided with the application and advice from NRC staff, this is accepted and adopted for the purpose of this report.

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- *the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;*
- *some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;*
- *functionally some uses and developments can only be located on the coast or in the coastal marine area;*
- *the coastal environment contains renewable energy resources of significant value;*
- *the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;*
- *the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;*
- *the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and*
- *historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.*

143. The proposal generally meets this objective. The boatyard operation requires a coastal location and the current location is considered as appropriate given the existing operation and recognition through zonings as an area suitable for mooring/marina activities. The habitat values associated with the shellfish bed will be protected by virtue of the limitations on dredging and construction of the sub surface erosion barrier. While concerns have been raised regarding occupation of the CMA and possible limitations to public access, this has been addressed by continuing to require public access to the wharf and surrounding area. No historic heritage will be lost or damaged by the proposal.

144. The relevant NZCPS policies identified and assessed in the application are as follows:

- Policy 2 – The Treaty of Waitangi, Tangata Whenua and Māori;
- Policy 5 – Land and Water Managed or held under other Acts;

- Policy 6 – Activities in the Coastal Environment;
- Policy 13 – Preservation of Natural Character;
- Policy 14 – Restoration of Natural Character;
- Policy 15 – Natural Landscapes and Features;
- Policy 18 – Public open Space;
- Policy 19 – Walking Access;
- Policy 21 – Enhancement of Water Quality;
- Policy 22 – Sedimentation;
- Policy 23 – Discharge of Contaminants; and
- Policy 25 – subdivision, Use and Development in areas of Coastal Hazards Risk.

145. In addition to the above, the following policies are considered relevant:

- Policy 4 – Integration, recognising that the proposal involves activities both above and below mean high water springs and, in particular, where the proposed remediation of contaminated soils and activities associated with improvements to the boatyard above MHWS will be administered by the FNDC.
- Policy 11 – Indigenous Biological Diversity (Biodiversity), noting that the information provided does not identify any indigenous taxa, ecosystems or vegetation types, where effects are to be avoided under Clause a. of the Policy. The effects on biodiversity will not be significant where mitigation measures are intended to protect the existing shellfish bed from any effects associated with the dredging activity.
- Policy 12 – Harmful Aquatic Organisms, notably where the provision and ongoing maintenance of marina berths are identified as activities that could have adverse effects on the coastal environment by causing harmful aquatic organisms to be released or otherwise spread. This matter has previously been addressed in considering effects on biosecurity, noting that it is addressed by way of implementation of the Regional Council's Marine Pathway Management Plan and conditions.

146. Based on the information provided with the application and the assessment of effects contained in this report, it is considered that the suite of relevant policies identified above can be met. This is subject to consideration of three key policies as follows.

147. Policy 6 – Activities in the Coastal Environment sets out matters that must be recognised, considered, promoted, and taken into account when undertaking activities in the coastal environment and coastal marine area. Of those matters, several relating to activities within the coastal marine area are directly relevant to the proposal. These are set out and assessed below:

a. recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations;

148. The application places little emphasis on the economic and social wellbeing generated by the proposal, presumably on the basis that the boatyard activity exists. The matter of cultural wellbeing has been considered in the effects assessment.

b. recognise the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;

149. At present, the existing activities are required to allow public access over the wharf and through the exclusive occupation area. While the application seeks to restrict public access onto the wharf, this is not considered appropriate to maintain public access within this area of the CMA. To achieve the purpose of this clause, the existing condition allowing reasonable public access should be retained in the event consent is granted.

c. recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

150. Boatyard activities, the wharf, and marina berths by their nature have a functional need to be sited in the coastal marine area. Whether the proposal is located within an appropriate place depends on a number of factors, including the zoning, extent of adverse effects in the receiving environment, and policy directives. There are no features or characteristics of the site or proposal identified through the processing of the consent applications that suggest the proposal is not appropriate and does not have a functional need to be sited where it is.

d. recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; and

151. This policy is largely a corollary of clause c. above. The policy is directive in terms of minimising establishment of activities that do not need to be sited in the coastal marine area. There are no components of the proposed activity within the coastal marine area that do not have a functional need to be located as proposed.

e. promote the efficient use of occupied space, including by:

i. requiring that structures be made available for public or multiple use wherever reasonable and practicable;

ii. requiring the removal of any abandoned or redundant structure that has no heritage, amenity or reuse value; and

iii. considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay.

152. The application seeks an enlarged area for exclusive occupation to accommodate the reconstructed wharf, dredging, and berthing activities. A number of submissions question whether the enlarged occupation area is necessary and justified. The Policy requires efficient use of occupied space. The activities to be accommodated within the proposed exclusive occupation area include a wharf for boatyard, charter, and marina berthing, public access to the wharf and surrounding CMA, and public use of dinghy ramp with all-tide access. While the defined exclusive occupation area is

enlarged, there is no reason to suggest this does not achieve efficient use of that space.

153. As discussed previously in the report, conditions addressing matters such as use of the marina berths, provision of public access, and restrictions on activities associated with the working berths (particularly in terms of discharges) should be applied to ensure the occupation area is used effectively.

154. Policy 18 – Public Open Space directs the recognition of the need for public open space within and adjacent to the CMA for public use and appreciation by:

a. ensuring that the location and treatment of public open space is compatible with the natural character, natural features and landscapes, and amenity values of the coastal environment;

b. taking account of future need for public open space within and adjacent to the coastal marine area, including in and close to cities, towns and other settlements;

c. maintaining and enhancing walking access linkages between public open space areas in the coastal environment;

d. considering the likely impact of coastal processes and climate change so as not to compromise the ability of future generations to have access to public open space; and

e. recognising the important role that esplanade reserves and strips can have in contributing to meeting public open space needs.

155. Public access is a central theme in a number of the submissions. The effects of the proposal in terms of public access have been considered in this report. The proposal will not unduly restrict public access to the CMA based on a condition requiring reasonable public access and suitable controls on discharges to air that may affect the use of the existing esplanade reserve. There is a balance to be struck between allowing appropriate public access over the esplanade reserve, recognising and providing for the rights of the dominant tenement in terms of easements over the esplanade reserve, and allowing activities to occur within those easement rights that are not offensive or objectionable (and therefore maintains amenity values) to the public using the esplanade reserve.

156. Policy 19 – Walking Access addresses the provision of walking access to and along the coast that is practical, free of charge, and safe for pedestrian use. The current proposal will not change the nature of the existing walking access along the esplanade reserve, noting that the Supreme Court decision confirms the easement rights conferred to the dominant tenement allowing for boatyard activities over the reserve. There is no intention to impose any restriction on public walking access to, along or adjacent to the CMA that is not already part of the existing environment.

8.5 Regional Policy Statement – Section 104(1)(b)(v)

157. By virtue of Section 62(3) of the RMA, a regional policy statement must give effect to the NZCPS. The Operative Regional Policy Statement for Northland ('RPS') was made operative *inter alia* to give effect to the NZCPS. The RPS contains a number of provisions that give effect to the contents of the NZCPS in a 'finer-grained' level of detail applied to the coastal areas of Northland.

158. In reviewing both the RPS provisions and the assessment provided in Section 6.11 of the application the assessment provided in the application can be accepted and adopted for the purpose of this report subject to the following comments.

159. Objective 3.2 focuses on improvement of the overall quality of Northland's coastal water, including a particular focus on:

> *….(d) Improving microbiological water quality at popular contact recreation sites, recreational and cultural shellfish gathering sites, and commercial shellfish growing areas to minimise risk to human health; and….'*

160. The evidence provided as part of the application indicates that improvements to the stormwater treatment and discharge associated with activities on the boatyard site, containment of discharges from vessels using the wharf and marina berths, removal of contaminated materials, and installation of a subsurface erosion barrier, will minimise any risk to human health and assist in sustaining the existing shellfish beds.

161. Objective 3.10 Use and Allocation of Common Resources includes consideration of allocation of coastal water space. There does not appear to be any competing demands for allocation of the CMA in this area. Policy 4.8 further refines and directs the means of achieving the objective. The wording of the Policy in full is provided below as it may be central to matters raised in submissions regarding public access, and (without further clarification from submitters) concerns that the proposal is not consistent with the RPS.

> *(1) Only consider allowing structures, the use of structures and other activities that occupy space in the common marine and coastal area where:*
>
> *(a) They have a functional need to be located in the common marine and coastal area, unless the structure, use or activity is consistent with Policy 4.8.1(2);*
>
> *(b) It is not feasible for the structure, the use or the occupation of space to be undertaken on dry land (land outside the common marine and coastal area), unless it is consistent with Policy 4.8.1(2);*
>
> *(c) It is not feasible to use an existing authorised structure; and*
>
> *(d) The area occupied is necessary to provide for or undertake the intended use.*
>
> *(2) Occupation of space and structures (and their use) that are contrary to Policy 4.8.1(1) (a) and (b) may be appropriate where they will make a significant positive contribution to the local area or the region.*

(3) If the public are excluded from using a structure or common marine and coastal area, the exclusion is:

(a) Only for the time period(s) and the area necessary to provide for or undertake the intended use ;or

(b) Necessary to ensure the integrity of the structure; or

(c) Necessary to ensure the health and safety of the public.

162. The operation of a boatyard and wharf area clearly has a functional need to be located in the CMA and requires allocation of space to do so. The area intended for occupation may be necessary to provide for the intended use although it is recognised that the area sought is larger than currently exists.

163. Clause (3) specifically addresses the matter of public access. There are no reasons to permanently exclude public access for the duration of activities proposed nor to ensure the integrity of the structure(s). The applicant's proposition is that health and safety concerns require public exclusion from areas of the wharf, however, this does not appear to be supported by evidence. Subject to reasonable public access being available to all areas, this policy is met.

164. Objective 3.12 addresses Tangata whenua role in decision-making and states *'Tangata whenua kaitiaki role is recognised and provided for in decision-making over natural and physical resources'.* Policies 8.1.1 and 8.1.2 address *inter alia* tangata whenua participation in the resource consent process.

165. The applicant has relied on the notification process to seek the views of tangata whenua on the proposal. Unfortunately, a lack of engagement does not engender any partnership or associated understanding of the cultural values associated with the site and proposed activities. It is left to the formal process of decision-making to determine the relationship between tangata whenua, their role as kaitiaki, and their connection to cultural values associated with the site. Based on the submissions received and the matters that the NRC can consider as part of the application, the cultural values associated with the shellfish bed and potential effects on that bed from dredging activities are of importance. The extent of those effects have been considered and, subject to conditions ensuring the viability of the shellfish bed is retained and any associated discharge of contaminants are avoided, any adverse effects on those values may be largely avoided.

8.6 A Plan or Proposed Plan – Section 104(1)(b)(vi)

166. There are four documents that fall to be considered under Section 104(1)(b)(vi), being:

- Operative Northland Regional Coastal Plan (RCP);
- Operative Regional Water and Soil Plan (RWSP);
- Operative Regional Air Quality Plan (RAQP); and
- Proposed Regional Plan for Northland (PRP).

167. All of the operative plans precede the RPS. In the case of the RCP, it precedes both the RPS and NZCPS 2010. The PRP has progressed through the Schedule 1 process of the RMA to the point where the appeal period has closed. Appeals have been lodged and the NRC is currently working through mediation on various matters. In some cases, consent orders have been issued by the Court resolving those appeals. On this basis, a large part of the PRP is now beyond challenge and operative as per Section 86F. While that suggests that the PRP in all respects attains significantly more weight than the operative Plans in the decision-making process, those operative Plans still require some consideration at this time.

168. For the purpose of avoiding repetition, Sections 6.3–6.5 of the application where it lists the applicable assessment criteria for activities in the RCP, RWSP, and RAQP are adopted for the purpose of this report, with the exception of those matters (such as extent of public access) already addressed in this report. It is noted that the assessment of effects, and findings therein, address the majority of the various standards and criteria identified in those Plans.

169. Section 6.6 of the application addresses the PRP provisions and notes that the location is zoned as Mooring Zone. The site is not affected by any notations identifying high or outstanding natural character values, nor significance in terms of natural or cultural values. The application identifies seven relevant objectives and supporting policies, noting that the application states '*All (policies associated with the seven objections) except the natural hazard chapter D.6 contain polices that are relevant to the proposed DOBY activities*'.

170. In reviewing both the Appeals version of the PRP provisions and the assessment provided in Section 6.6 of the application, the assessment provided in the application can be accepted and adopted for the purpose of this report subject to the following comments. The information provided with the application is considered to adequately address the effects on ecological values, coastal erosion risk, coastal processes and effects on natural character. On this basis, the relevant Objectives and Policies of the PRP have been had regard to and no conflicts between the proposal and those provisions have been identified.

171. Objective F.1.7 addresses use and development in the coastal marine area. The Policies identified in D.5 Coastal of relevance to the proposal are:

- Policy D.5.15 Marinas – Managing the effects of marinas; and
- Policies D.5.24 and D.5.25 as they relate to dredging activities.

172. The relevance of these provisions relates to the two proposed marina berths located adjacent to the wharf. The Policies direct that facilities must be available to service the berths including shore-based facilities such as parking and boat racks. It is understood that these services may be available within the DOBY site. The provision of the berths will not result in any inappropriate loss of public access given the berths replace two previous working berths and the recommendation that public access should be retained to this area. As the two berths are relatively discreet in terms of occupation and use, and are an ancillary use of the wharf, the proposal is considered to meet the Policy 5.15.

173. With regard to the dredging activity, Policy D.5.24 relating to dredging activities focus on ensuring dredging does not cause long term erosion or damage any authorised structure. Based on the evidence provided with the application, neither long-term erosion or damage to any authorised structure will occur. Policy D.5.25 recognises benefits of dredging and the necessity for it where it provides for the continued operation of existing infrastructure and to maintain or improve access and navigational safety. The dredging is intended to provide all-tide access which is not currently available for the wharf and slipway activities. In addition, it provides ready access for members of the public to utilise the dinghy ramp for mooring access. While the Harbourmaster has raised some concerns regarding navigational matters, these can be addressed by way of conditions of consent.

174. Objective F.1.8 addresses the role of tangata whenua in decision-making, and more particularly ensuring that their role as kaitiaki is recognised and provided for in decision-making. Policies identified in D.1 Tangata Whenua of relevance to the proposal are:

- D.1.1 and D.1.2 as they relate to assessing effects on tangata whenua and their taonga; and
- D.1.4 and D.1.5 as they relate to identifying and managing effects on places of significance to Māori.

175. As addressed previously in this report, the applicant has relied on the public notification and submission process to inform any assessment on cultural effects. Submissions have been received from parties who represent the kaitiaki of the area. While the area is not identified as containing any site of cultural significance, the existing shellfish bed is considered to be a source of kaimoana. The effects of the activities on the shellfish bed and the associated mitigation measures have been assessed and are considered to be acceptable.

176. Objective F.1.12 relates to adverse effects from discharges to air. The Policies identified in D.3 Air of relevance to the proposal are:

- D.3.1 General Approach to Managing Air Quality;
- D.3.3 Dust and odour generating activities; and
- D.3.4 Spray generating activities.

177. The general nature of the discharges to air consist of odour, particulates associated with sanding, and water vapour from water blasting. Based on the technical information included in the application, conditions can be imposed that address the timing and extent of discharges. These conditions are currently before the Environment Court having been agreed between the applicant and NRC staff. This includes consideration and mitigation of any amenity effects associated with water vapour generated by water blasting.

178. It is acknowledged that the use of the esplanade reserve may constitute an area sensitive to discharges as anticipated under Policy D.3.1.9. However, that is tempered by rights afforded by easements over the esplanade. In addition, Policy D.3.1.11 sets an expectation that discharges from industrial and trade premises should generally be enabled where best practicable options are adopted to prevent or minimise adverse

effects and significant adverse effects on human health and amenity values. The conditions are considered appropriate in adopting the best practicable option and ensuring the effects are acceptable in the existing environment.

8.7 Conclusion – Consistency with Planning Provisions under Section 104(1)(b)

179. Section 104(1)(b) requires a consent authority to have regard to relevant provisions of various statutory planning documents. The above assessment addresses the various provisions in national and regional documents. The hierarchical relationship between the NZCPS, RPS, and Regional Plans (particularly the PRP in this case) is a key element given the majority of the proposed activity is located within the CMA. The proposal is considered to be generally consistent with the provisions of all of these documents.

180. Based on the information provided with the application, the site is considered appropriate in terms of providing for the occupation and use of the CMA for various activities as sought. It has a functional need to be located in the coastal marine area. The site is not identified as containing any significant values, is part of a modified environment, and no significant cultural effects have been identified. The zoning of the CMA area recognises the existing mooring activities and accommodates activities such as marinas and dredging in appropriate locations. The effects associated with stormwater and air discharges have been assessed as appropriate and acceptable and this satisfies many of the objectives and policies.

181. Importantly, there is no directive in any of the documents that requires avoidance of any activities or associated effects. There are some provisions that the proposal may not be consistent with (such as those relating to consultation with tangata whenua and provision of public access) but are not considered to be contrary to. In the case of public access, while the application seeks restricted public access this is not considered to be justified based on the information provided with the application. Rather than recommend declining the application in this respect, a condition requiring reasonable public access will ensure the activities meet the relevant objectives and policies in the NZCPS, RPS and Regional Plans that address this matter.

9. OTHER MATTERS – SECTION 104(1)(C)

182. Section 104(1)(c) requires the council to have regard to '….any other matter the consent authority considers relevant and reasonably necessary to determine the application'.

183. The consideration of alternatives is a matter that can be considered when determining a decision, where the extent of actual and potential adverse effects may be significant and involves discharge of any contaminant. Section 3 of the application provides a detailed assessment of alternatives as they relate to the stormwater discharge consents. In this case, the extent of adverse effects arising from the proposal are not considered to reach a threshold where consideration of alternatives is necessary.

184. The installation of the new stormwater system is considered to be an appropriate response to ensure that the continuing discharge of stormwater from the boatyard meets the required standards. It is noted that avoiding any discharge into the CMA is not a practical alternative, and that using a suitable proprietary system such as that proposed is considered to be the most viable option available to ensure that the discharge of contaminants via stormwater from the site is eliminated as far as practicable.

185. It is recognised that the activities on the site have an extensive background in terms of consents and litigation matters. Several submissions record frustrations and concerns that the current application is a repeat of a previous application that has been considered and declined. This is understandable. It is unusual for any applicant to follow the consenting path that the activities sought has followed, particularly where the same discharge consent matters are now before both the NRC and Environment Court.

186. This report has been prepared having read an extensive number of background documents, including the 2018 Section 42A staff report and addendum, the resulting 2018 Commissioners decision, the Environment Court and subsequent High Court decisions, and Supreme Court decision. It is noted that evidence presented by submitters at the previous hearing in 2018 provided substantive information that informed the commissioners decision to decline the application. The opportunity to present similar evidence addressing the current application is again afforded to submitters. However, the position taken in preparing this report is that the application and the activities sought has been presented afresh with some changes. It is therefore assessed on its merits without recourse to decisions that may have been made previously unless it is considered necessary.

187. For completeness, the issues of precedent effect and Plan integrity are generally not matters that warrant consideration unless a proposal is a non-complying activity. In this case, the suite of applications together constitute a discretionary activity.

10. OTHER RELEVANT RMA SECTIONS

10.1 Matters Relevant to Discharge and Coastal Permits – Section 105

188. Section 105(1) sets out matters to be had regard to, in addition to Section 104(1), when considering discharge and coastal permits. The application includes discharge and coastal permits and this requirement is therefore relevant. The application does not contain any assessment of the matters under Section 105.

189. The following comments address the matters under Section 105(1)(a)-(c):

- the discharges relate to stormwater and air discharges. The sensitivity of the receiving environment is well documented in the application and accepted as being a modified environment, noting that the location and use of the esplanade reserve is relevant in this respect.

- The reasons for the choice of managing discharges for stormwater and air discharges is defined in the application and have had regard to in preparing this report. The proposal inclusive of conditions to upgrade the existing stormwater system and manage discharges to air reflects the requirement to improve the existing environment.
- No clear consideration of alternatives to the discharges proposed are identified. It is noted that in this case, discharges into any other receiving environment may not be considered reasonable or practicable.

10.2 Restrictions on Discharge Permits – Section 107

190. Section 107 places specific restrictions on discharge permits. The 4Sight report addresses the matters under Section 107(1) and confirms that the discharge activities will not give rise to any of the effects identified in Section 107(1)(c)-(e) and (g).

10.3 Conditions of Resource Consents – Section 108

191. Recommended conditions are set out below in this report. The conditions address the full suite of consent applications including discharge consents currently before the Environment Court. It is expected that some conditions may require further refinement depending on evidence that may be provided prior to or at the hearing.

192. As recorded previously, a condition is included which requires reasonable public access to be available to all areas of the wharf and through the CMA area subject to the defined exclusive occupation area.

10.4 Duration of Resource Consents – Section 123

193. The application seeks a proposed lapse date of five years for the consents in terms of giving effect to the activities sought, and a 35 year term. A 35 year term is considered reasonable for the activities sought and is consistent with the RMA's limitation on 35 years for a coastal permit duration. Notably, no submissions have made any comment on the terms sought.

10.5 Review Condition – Section 128

194. Given the nature of the activities sought and the extent of the existing structures and activities, a review condition has been recommended for inclusion in the consent conditions. The review condition would allow the opportunity to review the consent condition to:

- Deal with any adverse effects on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage;
- Require the Consent Holder to adopt the best practicable option to avoid or mitigate any adverse effects on the environment; and
- Deal with any other adverse effects on the environment which the exercise of the consent may have an influence on.

11. PART 2 MATTERS

195. As defined under current case law[2], an assessment of Part 2 matters is not required unless there are issues of invalidity, incomplete coverage or uncertainty in the planning provisions. The proposal has required consideration against a suite of planning provisions of which the NZCPS is the prevailing document. All the documents considered contain provisions that are relevant to the proposal. There is no evidence to suggest the relevant provisions are invalid, incomplete or present uncertainty in making any decision. At worst, the validity of the RCP may be in question given its promulgation under a previous version of the NZCPS. However, this has no significance in terms of the manner in which the application has been assessed, given that the PRP assumes significant weight as part of the assessment. No assessment of the application against Part 2 provisions is therefore required.

12. CONCLUSION

196. The proposal has been assessed against the relevant provisions of Section 104. Section 104B states that:

'After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.'

197. It is often stated that the RMA is not a 'no effects' statute. Invariably, a proposal of any significant scale such as that proposed will result in some form of lasting effect. In this case, the existing environment consists of a number of activities that form part of the existing environment based on the current consents in place until 2036. The information provided with the application covers a wide suite of effects, both positive and adverse. The substance of the submissions that are within scope have been considered, particularly in terms of effects on public access, cultural effects, and effects of discharges. There is no indication in any of the information provided or submissions received to indicate that the adverse effects arising from the proposal in any respect warrant a decision to decline. Where effects of concern have been identified, conditions of consent can suitably address these matters.

198. The relevant planning provisions have been considered in some detail for those activities in the CMA, noting that the NZCPS 'sets the scene' for those activities in lower-order documents. There are no demonstrable inconsistencies or conflicts with the policies of the NZCPS. It falls then that the proposal is considered to be consistent with the relevant coastal-related provisions contained in the RPS and PRP.

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[2] R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316.

199. The discharge consents sought are intended to replace existing consents as provided for under Section 124. This matter has introduced some complexity given the same consents are before the Environment Court. The situation as understood at the time of preparing this report is that there is no legal impediment to NRC considering the discharge applications based on the information presented as part of the application. The assessment of effects and recommended conditions that address the discharge consents sought reflect the current position of NRC staff via a suite of conditions that have been presented to, and which are currently before the Environment Court.

200. On that basis, it is considered that the purpose of the RMA is best served by the granting of consent. The recommended decision and conditions are provided in Section 13 of this report. The recommendation includes provision for the surrender of existing consents as identified in the application. A separate recommendation for the proposed amended conditions is also provided to accommodate the Section 127 decision as it affects the existing consent AUT.008270.01.02.

13. RECOMMENDATION

Recommendation A

Pursuant to Sections 104 and 104B of the Resource Management Act 1991, consent is granted to Doug's Opua Boatyard for the following resource consents, subject to the terms and conditions set out attached to this decision as Appendix A.

AUT.041365.01.01	Reconstruct a wharf facility in the coastal marine area (including alterations to the wharf, floating pontoons, piles, stormwater pipe(s) (attached to wharf), marina berths, slipway, signage, ladders, security and safety lighting, security gate).
AUT.041365.02.01	Reconstruct a slipway in the coastal marine area (inclusive of slipway, turning block and associated cabling).
AUT.041365.03.01	Place a hard protection structure (subsurface erosion barrier) in the coastal marine area.
AUT.041365.04.01	Occupy space in the coastal marine area with structures, including a wharf facility, a slipway, a workboat mooring, and associated dinghy pull, and a hard protection structure.
AUT.041365.05.01	Occupy space in the coastal marine area in the vicinity of the wharf facility and slipway to the exclusion of others (occupation area).
AUT.041365.06.01	Use the slipway in the coastal marine area for minor vessel maintenance.
AUT.041365.07.01	Use the wharf facility structures and three work berth areas adjacent to the wharf in the coastal marine area for the purposes of vessel maintenance and chartering.
AUT.041365.08.01	Use two berths associated with the wharf facility pontoon as a marina in the coastal marine area.
AUT.041365.09.01	Disturb the foreshore and seabed in the coastal marine area during demolition and removal of unwanted structures, wharf facility and slipway reconstruction, and construction of a subsurface erosion.
AUT.041365.11.01	Capital dredging around berths, fairway and slipway in the coastal marine area.
AUT.041365.12.01	Maintenance dredging to maintain vessel berths, fairway and slipway in the coastal marine area.
AUT.041365.13.01	Discharge treated stormwater to the coastal marine area.
AUT.041365.14.01	Discharge contaminants to land from vessel maintenance activities.
AUT.041365.15.01	Discharge contaminants to air from vessel maintenance activities.
AUT.041365.16.01	Discharge contaminants to air in the coastal marine area from vessel maintenance activities.

Recommendation B – APP.008270.01.03

Pursuant to Section 127, consent is granted to amend conditions of the existing consent AUT.008270.01.02 held by Interesting Projects Limited T/A Great Escape Yacht Charters. The amendments to the relevant conditions are identified below, where deletions are shown as ~~strike through~~, and insertions are identified as **underscored and bolded text**.

INTERESTING PROJECTS LIMITED T/A GREAT ESCAPE, PO BOX 461, PAIHIA 0247

To undertake the following activity in Walls Bay, Opua at or about location coordinates 1701530E 6091859N:

AUT.008270.01.03	**Place and use a floating structure in the coastal marine area alongside a wharf facility at Doug's Opua Boat yard, for the purpose of maintaining and servicing charter trailer yachts.**

Subject to the following conditions:

~~To place and use a floating structure alongside the existing jetty at Doug's Opua Boat yard, for the purpose of maintaining and servicing charter trailer yachts, Map Reference Q05:123 537 subject to the following conditions:~~

1 This consent is to use only those parts of the coastal marine area at Opua Basin ~~for the purposes of the consent as shown on NRC Plan No. **3014A attached**~~**, and applies only to the structure identified as 'Prop. Charter Pontoon Berth'** on the Reyburn and Bryant drawing referenced as **Northland Regional Council Plan Number 4952/1 attached**. The floating structure shall only be located on the northern side of the existing ~~jetty~~ **wharf facility**.

……..

3 The colour of the floating structure shall blend in with that of the ~~jetty~~ **wharf facility** and the surrounding landscape, such that the floating structure is unobtrusive when viewed from anywhere on Beechy Street.

……..

5 Vessel toilets shall not be discharged whilst the vessel is alongside the floating structure or the ~~jetty~~ **wharf facility.**

6 All vessel cleaning slops containing chemicals and all rubbish removed from vessels whilst at the floating structure or adjoining ~~jetty~~ **wharf facility** shall be disposed of on land to an authorised disposal facility.

APPENDIX A: RECOMMENDED CONDITIONS OF CONSENT

AUT.041365.01.01 **Notified New**
Notified Replacement

DOUGLAS CRAIG SCHMUCK, C/- DOUG'S OPUA BOATYARD, 1 RICHARDSON STREET, OPUA 0200

To carry out the following activities associated with a boat yard operation on Part Lot 1 and Lot 2 Block XXXII Town of Ōpua and Section 3 Blk XXXII; Sections 1-3 SO 68634 (NA121C/187), Part Russell Harbour Bed Deposited Plan 18044 (NA399/138) and in the coastal marine area at and adjacent to Walls Bay, Ōpua, Bay of Islands between location coordinates 1701619E 6091913N and 1701491E 6091813N.

AUT.041365.01.01 Reconstruct a wharf facility in the coastal marine area (including alterations to the wharf, floating pontoons, piles, stormwater pipe(s) (attached to wharf), marina berths, slipway, signage, ladders, security and safety lighting, security gate).

AUT.041365.02.01 Reconstruct a slipway in the coastal marine area (inclusive of slipway, turning block and associated cabling).

AUT.041365.03.01 Place a hard protection structure (subsurface erosion barrier) in the coastal marine area.

AUT.041365.04.01 Occupy space in the coastal marine area with structures including a wharf facility, a slipway, a workboat mooring, and associated dinghy pull, and a hard protection structure.

AUT.041365.05.01 Occupy space in the coastal marine area in the vicinity of the wharf facility and slipway to the exclusion of others (occupation area).

AUT.041365.06.01 Use the slipway in the coastal marine area for minor vessel maintenance.

AUT.041365.07.01 Use the wharf facility structures and three work berth areas adjacent to the wharf in the coastal marine area for the purposes of vessel maintenance and chartering.

AUT.041365.08.01 Use two berths associated with the wharf facility pontoon as a marina in the coastal marine area.

AUT.041365.09.01 Disturb the foreshore and seabed in the coastal marine area during demolition and removal of unwanted structures, wharf facility and slipway reconstruction, and construction of a subsurface erosion barrier.

AUT.041365.10.01 Earthworks in the coastal riparian management area (for slipway reconstruction).

AUT.041365.11.01 Capital dredging around berths, fairway and slipway in the coastal marine area.

AUT.041365.12.01 Maintenance dredging to maintain vessel berths, fairway and slipway in the coastal marine area.

AUT.041365.13.01 Discharge treated stormwater to the coastal marine area from a proprietary stormwater system.

AUT.041365.14.01 Discharge contaminants to land from vessel maintenance activities on Part Lot 1 and Lot 2 Block XXXII Town of Ōpua and Section 3 Blk XXXII Town of Ōpua (NA21C/265); Sections 2 and 3 SO 68634 (NA121C/187).

AUT.041365.15.01 Discharge contaminants to air from vessel maintenance activities on Part Lot 1 and Lot 2 Block XXXII Town of Ōpua and Section 3 Blk XXXII; Sections 1-3 SO 68634 (NA121C/187); Part Russell Harbour Bed Deposited Plan 18044 (NA399/138).

AUT.041365.16.01 Discharge contaminants to air in the coastal marine area from vessel maintenance activities within an occupation area adjacent to the wharf.

Subject to the following conditions:

General Conditions

1 The council's assigned monitoring officer shall be notified in writing of the date that the installation of the proprietary stormwater treatment system is intended to commence, at least two weeks prior to the works. Notice shall also be provided to the council's assigned monitoring officer two weeks prior to commencement of demolition construction, and/or maintenance works, capital dredging and each maintenance dredging operation on each occasion.

2 The Consent Holder shall arrange for a site meeting between the Consent Holder's contractor and the council's assigned monitoring officer prior to the installation of the proprietary stormwater treatment system, and the wharf facility reconstruction works. No works shall commence until the council's assigned monitoring officer has completed the site meeting. If this site meeting cannot occur during this period due to the Council's assigned monitoring officer not being available, then works can commence on the date specified.

Advice Note: *Notification of the commencement of works may be made by email to info@nrc.govt.nz.*

3 As part of the written notification required by Condition 1, the Consent Holder shall provide written certification from a suitably qualified and experienced person to the council's assigned monitoring officer to confirm that all plant and equipment entering the coastal marine area associated with the exercise of these consents are free from unwanted or risk marine species.

4 All structures and facilities covered by these consents shall be maintained in good order and repair.

5 The coastal marine area shall be kept free of debris resulting from the activities authorised by these consents.

6 Noise levels associated with the exercise of these consents shall not exceed those set out in Schedule 1 (**attached**).

7 The Consent Holder shall submit an updated Operational Management Plan to the council's Compliance Manager for certification within three months of the date of commencement of these consents. The Operational Management Plan shall cover all aspects of:

(a) The operation and maintenance of the wharf;

(b) The operation and maintenance of the slipway;

(c) Measures to avoid the discharge of contaminants to coastal waters during operation or maintenance of the slipway or during maintenance activities undertaken on or adjacent to the wharf;

(d) The operation and maintenance of the wash-water treatment and disposal system, including as-built plans of the treatment system;

(e) The operation and maintenance of the stormwater treatment system, including as-built plans of the stormwater treatment system;

(f) Measures to minimise the discharge of contaminants to ground;

(g) Measures to minimise the emissions and any adverse effects on the environment from the discharges to air including training procedures which explain the correct use of the water blaster to minimise the effects associated with water spray;

(h) Contingency measures for unforeseen or emergency situations.

8 The operation and maintenance of the boatyard operations and wharf facilities and marina facility shall be carried out in accordance with the certified Operational Management Plan. If there are any differences or apparent conflict between these documents and any conditions of these consents, the conditions of consent shall prevail.

9 The Consent Holder shall review the Operational Management Plan in consultation with the council at no greater than three yearly intervals. The reviewed Operational Management Plan shall not take effect until its certification by the council's Compliance Manager.

10 A copy of these consents shall be provided to the person who is to carry out the works associated with these consents. A copy of the consents shall be held on site, and available for inspection by the public, during demolition, construction and/or maintenance and dredging.

11 In the event of archaeological sites or kōiwi being uncovered, activities in the vicinity of the discovery shall cease and the Consent Holder shall contact Heritage New Zealand Pouhere Taonga. Work shall not recommence in the area of the discovery until the relevant Heritage New Zealand Pouhere Taonga approval has been obtained.

Advice Note: *The Heritage New Zealand Pouhere Taonga Act 2014 makes it unlawful for any person to destroy, damage or modify the whole or any part of an archaeological site without the prior authority of Heritage New Zealand Pouhere Taonga.*

12 The Consent Holder shall, on becoming aware of any discharge associated with the Consent Holder's operations that is not authorised by these consents:

(a) Immediately take such action, or execute such work as may be necessary, to stop and/or contain the discharge; and

(b) Immediately notify the council by telephone of the discharge; and

(c) Take all reasonable steps to remedy or mitigate any adverse effects on the environment resulting from the discharge; and

(d) Report to the council's Compliance Manager in writing within one week on the cause of the discharge and the steps taken or being taken to effectively control or prevent the discharge.

For telephone notification during the council's opening hours, the council's assigned monitoring officer for these consents shall be contacted. If that person cannot be spoken to directly, or it is outside of the council's opening hours, then the Environmental Emergency Hotline shall be contacted.

Advice Note: *The Environmental Emergency Hotline is a 24 hour, seven day a week, service that is free to call on 0800 504 639.*

13 These consents shall lapse on 31 July 2023, unless before this date the consents have been given effect to.

14 Prior to the expiry or cancellation of these consents, the structures and other materials and refuse associated with these consents shall be removed from the consent area, and the consent area shall be restored to the satisfaction of the council, unless an application has been properly made to the council for the renewal of these consents or the activity is permitted by a rule in the Regional Plan.

15 The council may, in accordance with Section 128 of the Resource Management Act 1991, serve notice on the Consent Holder of its intention to review the conditions annually during the month of July for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment; or

(c) To review discharge to air conditions relating to controls over timing of, and equipment used for, application of antifoulant and equipment to mitigate effects of air discharges.

The Consent Holder shall meet all reasonable costs of any such review.

Surrender of Consents

16 The Consent Holder shall surrender, in writing to the council, resource consents AUT.007914.01.03, AUT.007914.02.01, AUT.007914.07.01, AUT.007914.08.01, AUT.007914.09.01, within one month of the completion of the wharf and marina facility construction and slipway refurbishment works.

AUT.041365.01.01–AUT.041365.09.01 – Conditions relating to Wharf and Marina Facility, Subsurface Erosion Barrier, Slipway, Dinghy Ramp, Stormwater Culverts, Workboat Mooring and Dinghy Pull

17 This consent applies only to the structures and facilities identified on the **attached** Reyburn and Bryant Limited drawings referenced as Northland Regional Council Plan Numbers **4952/1, 4952/2** and **4952/3** and **attached** Total Marine Limited drawings reference as Northland Regional Council Plan Numbers **4953/1, 4953/2, 4953/3, 4953/4, 4953/5** and **4953/6**.

18 The structures and facilities shall be constructed and maintained in accordance with the **attached** Reyburn and Bryant Limited drawings referenced as Northland Regional Council Plan Numbers **4952/1, 4952/2** and **4952/3** and **attached** Total Marine Services Limited drawings referenced as Northland Regional Council Plan Numbers **4953/1, 4953/2, 4953/3, 4953/4, 4953/5** and **4953/6**.

19 As part of the notification required by Condition 1 of this consent, a Demolition and Construction Management Plan (DCMP) shall be submitted to the councils Compliance Manager for certification. As a minimum, the DCMP shall include the following:

(a) The expected duration (timing and staging) of the demolition and construction/refurbishment works including disposal sites for unsuitable material.

(b) Details of sediment controls (e.g. silt curtains/screens) to be established during the demolition and construction works, including during dredging for the slipway refurbishment.

(c) The commencement and completion dates for the implementation of the sediment controls.

(d) Measures to ensure protection of the shellfish bed during the works.

(e) Monitoring procedures to ensure adverse effects on water quality beyond works area in the CMA are minimised.

(f) Measures to prevent spillage of fuel, oil, and similar contaminants.

(g) Contingency containment and clean-up provisions in the event of accidental spillage of hazardous substances.

(h) Means of ensuring contractor compliance with the DCMP.

(i) The name and contact telephone number of the person responsible for monitoring and maintaining all sediment control measures.

The Consent Holder shall undertake the activities authorised by this consent in accordance with the certified DCMP. Certification and compliance with the DCMP does not override the requirement to comply with any/all other conditions of this consent.

Advice Note: *The council's Compliance Manager's certification of the DCMP is in the nature of certifying that adoption of the DCMP is likely to result in compliance with the conditions of this consent. The Consent Holder is encouraged to discuss its proposed DCMP with council monitoring staff prior to finalising this plan.*

20 The seaward end of the wharf and marina facility pontoon shall be marked with the number **41365** in black lettering on a white background clearly displayed and in such a manner as to be clearly visible from the sea.

21 On completion of the reconstruction of the wharf and marina facility, subsurface barrier, culverts, and dinghy pull, the Consent Holder shall provide to the council's assigned monitoring officer a plan defining the location of the features within the coastal marine area, such plan to include suitable GPS co-ordinate data (using Transverse Mercator 2000) in order for the council to be able to locate the features.

22 All rock or other materials used in the construction of the subsurface erosion barrier shall be free from material that could contaminate the adjacent foreshore.

23 All vehicles or equipment entering the coastal marine area associated with the exercise of these consents shall be in good state of repair and free of any leaks e.g. oil, diesel etc.

24 An oil spill kit, appropriate to the plant and equipment being used, shall be provided and maintained on site during demolition, construction or maintenance works.

25 Works associated with demolition, construction and/or maintenance of the structures and facilities shall only be carried out between 7.00 a.m. and sunset or 6.00 p.m., whichever occurs earlier, and only on days other than Sundays and public holidays.

26 The exercise of these consents shall not result in any conspicuous oil or grease film, scums or foams, floatable or suspended materials, or a reduction in natural visual clarity of more than 20%, or emissions of objectionable odour in the coastal water area, as measured at any point 10 metres from the facilities during demolition, construction, or maintenance of the facilities.

27 Immediately upon completion of the installation of the wharf and marina facility structures (and associated capital dredging) the Consent Holder shall notify the following organisations in writing of the installation of the facilities. Evidence of this notification shall be provided to the council's assigned monitoring officer.

Hydrographic Surveyor
Land Information New Zealand
PO Box 5501
Wellington 6145

Far North District Council
Private Bag 752
Kaikohe 0440

The Maritime Safety Inspector Maritime New Zealand
PO Box 195
Ruakākā 0151

The Consent Holder shall include a scale plan of the completed works with the notification.

28 The Consent Holder shall have the structural integrity of the reconstructed wharf and marina facility and slipway structures inspected and reported on by a Chartered Professional (Structural) Engineer. The first inspection shall be undertaken prior to July 2035 and the wharf and marina facility structures shall be re-inspected at ten yearly intervals prior to the month of July in 2045, with a final inspection undertaken prior to 31 January 2054, being six months before the expiry date of this consent. An inspection report from the Chartered Professional Engineer shall be provided to the council's assigned monitoring officer within two weeks of completion of the inspection. The inspection report shall identify any maintenance that is required, the timeframe within which this maintenance is required to be carried out and shall confirm, or otherwise, the ongoing structural integrity and security of the structures.

29 The Consent Holder shall carry out all the maintenance required as a result of the inspections undertaken in accordance with Condition 28 above within the timeframe(s) prescribed in the inspections report. The Consent Holder shall notify the council's assigned monitoring officer as soon as the maintenance works have been completed on each occasion.

30 In the event of failure or loss of structural integrity of any part of the wharf and marina facility covered by this consent, the Consent Holder shall immediately:

- Retrieve all affected structure elements and associated debris that might escape from the marina and dispose of these on land where they cannot escape to the coastal marine area; and
- Advise the Regional Harbourmaster for Northland and the council's Compliance Manager of the event and the steps being taken to retrieve and dispose of the affected structure facility elements and debris.

Advice Note: *The purpose of this condition is to avoid navigation safety being compromised by floating debris and avoid contamination of the coastal marine area.*

AUT.041365.05.01 – Occupation of Space in the CMA

31 The Consent Holder shall have exclusive occupation rights within the 'Occupation Area' identified on the Northland Regional Council Plan Number **4953/1**, except that the Consent Holder shall allow reasonable public access to and through this area and reasonable public access to and use of the wharf and pontoon structures.

32 Within three months of giving effect to this consent, the Consent Holder shall provide to the Council's assigned monitoring officer a plan defining the location of the boundaries of the Occupation Area, such plan to include suitable GPS co-ordinate data (using Transverse Mercator 2000) in order for the council to be able to locate the boundaries.

AUT.041365.06.01–AUT.041365.08.01 – Use of the Slipway, Wharf and Marina Facility

33 Maintenance of vessels and structures within the consent area shall not occur outside of the hours 0700-2000 Monday to Friday and 0800-2000 Saturday, Sunday and Public Holidays except in emergencies which directly involve the safety of people or vessels.

34 There shall be no discharge of untreated sewage into the coastal marine area from vessels berthed at the marina.

Advice Note: *For compliance purposes, discharges of untreated sewage will be determined by direct observation of discharges as well as by identification of the presence of human PCR markers within water samples from the marina where these are not present in background water quality.*

35 Concentrations of metals in seabed sediments as measured at any point 10 metres from the facilities shall not exceed the following:

- 65 milligrams per kilogram of Copper,
- 50 milligrams per kilogram of Lead;
- 200 milligrams per kilogram of Zinc;
- 80 milligrams per kilogram of total chromium;
- milligrams per kilogram of total nickel; or
- 1.5 milligrams per kilogram of total cadmium.

36 No vessel shall be used for overnight accommodation while berthed at the marina, unless either:

(a) The vessel is equipped with a sewage treatment system which is specified in Schedule 5 and 7, or is compliant with Schedule 6, of the Resource Management (Marine Pollution) Regulations 1998 and which is installed, maintained, and operated in accordance with the manufacturer's instructions; or

(b) The vessel is equipped with a sewage holding tank that has an effective outlet sealing device installed to prevent sewage discharges, this device remaining activated in the sealed state or position at all times while the vessel is moored; or

(c) The vessel is equipped with a portable toilet on board. For the purposes of this condition a portable toilet is defined as a sewage containment device constructed of impermeable materials which is fully self-contained and removable, and consists of two independently sealed chambers comprising a water holding tank and a sewage holding tank separated by a slide valve; or

(d) The vessel (if equipped with a built-in through hull toilet facility and no sewage holding tank) has an effective outlet sealing device installed on the toilet facility, with the outlet sealing device from the toilet facility being maintained in a sealed state, and the toilet sealed, at all times while the vessel is moored.

37 No discharge of wastes (e.g. sewage, oil, contaminated bilge water) shall occur from any vessel occupying the working or marina berths or from any other activity carried out at the facilities unless the discharge is authorised by a resource consent, or is permitted by a rule in a Regional Plan or by provisions of the Resource Management (Marine Pollution) Regulations 1998.

38 The three working berths associated with the wharf shall not be used as a marina.

39 Monitoring and testing of water and sediment quality in the vicinity of the facilities will be carried out by the council. Various elements of the approved monitoring and testing programme may be carried out by the Consent Holder with the agreement of the council's Compliance Manager. The testing programme associated with the monitoring shall generally follow that set out in the **attached Schedule 2**. The testing programme may, upon consultation between the council's Compliance Manager and the Consent Holder, be amended, subject to the agreement of the council's Compliance Manager.

AUT.041365.01.01–AUT.041365.03.01 and AUT.041365.09.01–AUT.041365.12.01 – Disturb the Foreshore during Demolition, Construction and Maintenance of a Wharf and Marina Facility and Associated Structures, and During Dredging

40 Prior to the commencement of demolition, construction and dredging works and before the site meeting required by Condition 2, the northern extent of the shellfish bed on the intertidal beach south of the slipway and the Occupation Area identified on the Total Marine Services Limited drawing referenced as Northland Regional Council Plan Number **4953/5** shall be determined and generally marked with white survey pegs driven into the foreshore. The pegs shall be removed upon completion of the dredging works and construction of the subsurface erosion barrier shall be completed in accordance with the drawings identified in Condition 18.

41 Foreshore disturbance from demolition, construction and dredging activities authorised by these consents shall avoid disturbance of the shellfish beds located on the intertidal beach outside of the Occupation Area identified on the Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**.

AUT.041365.10.01–AUT.041365.12.01 – Earthworks and Capital and Maintenance Dredging (including removal of contaminated sediments)

42 No dredging associated with these consents shall commence until a Dredging and Mooring Management Plan has been submitted to the councils Compliance Manager for certification. The Dredging and Mooring Management Plan shall be developed in consultation with the Regional Harbourmaster for Northland, and contain written direction of the Harbourmaster to authorise the movement of a mooring and attached vessel that is affected by the proposed capital dredging. The removal and relocation of the mooring shall be undertaken by a mooring contractor approved by the Harbourmaster.

43 The dredging activity involving the removal of contaminated sediments as defined on the Proposed Remediation Plan identified on the Haigh Workman drawings referenced as Northland Regional Council Plan Numbers **4594/1** and **4594/2** shall be carried out and completed prior to the balance of capital dredging occurring. Completion of the works is deemed to be receipt of the Site Validation Report as required under Condition 44 below.

44 The removal of contaminated sediments shall be undertaken in accordance with the Proposed Remediation Plan contained in the Geotechnical Appraisal report prepared by Haigh Workman Limited dated December 2019. On completion of all works under the Proposed Remediation Plan, the Consent Holder shall provide to the council's Compliance Manager a Site Validation Report confirming the extent of remediation works and results of validation testing.

45 Where in-situ soil treatment by immobilisation is adopted as part of the Proposed Remediation Plan as per Condition 44 above, the Consent Holder shall ensure that any temporary stockpiling and treatment of materials on the site is located and treated in a manner such that no material or untreated stormwater generated from any stockpile enters the coastal marine area.

46 Dredging operations shall be undertaken in accordance with the certified Dredging and Moorings Management Plan certified under Condition 42 above.

47 Dredging shall be confined to the defined dredging area identified on the **attached** Total Marine Services Limited drawing referenced as Northland Regional Council Plan Number **4953/3**.

48 The depth of capital dredging and any subsequent maintenance dredging shall not exceed 1.5 metres below chart datum, with the exception of the marina berths that shall not exceed 2.0 metres below datum, and batters are not to exceed 1:6 and 1:4, as detailed on the **attached** Total Marine Services Limited drawing referenced as Northland Regional Council Plan Number **4953/3**.

49 On completion of the capital dredging, the Consent Holder shall provide to the council's assigned monitoring officer a plan defining the location of the dredging area and batters within the coastal marine area, such plan to include suitable GPS co-ordinate data (using Transverse Mercator 2000) in order for the council to be able to locate the extent of the dredging.

50 Maintenance dredging shall not take place more frequently than once in any consecutive 12 month period.

51 All dredged spoil shall be fully contained whilst being transported to the disposal site and shall be disposed of on land at a location authorised to take such material.

52 The council's assigned monitoring officer shall be notified in writing as soon as capital dredging is completed, and on completion of each maintenance dredging operation.

53 No discharge of wastes (e.g. sewage, oil, bilge water) shall occur from any vessel associated with the exercise of this consent.

54 Dredging works shall only be carried out between 1 April and 30 September.

55 Work associated with the dredging shall only be carried out between sunrise and sunset, as defined in the New Zealand Nautical Almanac, and appropriate navigation signals shall be shown at all times during dredging activities.

56 The exercise of these consents shall not cause any of the following effects on the quality of the receiving waters, as measured at or beyond a 100 metre radius from the dredger:

(a) The visual clarity, as measured using a black disk or Secchi disk, shall not be reduced by more than 50% of the background visual clarity at the time of measurement;

(b) The turbidity of the water (Nephelometric Turbidity Units (NTU)) shall not be increased by more than 50% of the background turbidity at the time of measurement;

(c) The Total Suspended Solids shall not exceed 40 grams per cubic metre above the background measurement;

(d) The production of any conspicuous oil or grease film, scums or foams, or floatable or suspended materials, or emissions of objectionable odour; and

(e) The destruction of natural aquatic life by reason of a concentration of toxic substances.

57 Monitoring of dredging shall be undertaken in accordance with the **attached Schedule 3**.

AUT.041365.13.01, AUT.041365.14.01 and AUT.041365.15.01 – Discharge Stormwater and Discharges to Land and Air

58 Prior to the exercise of these consents, a wash water collection and proprietary stormwater treatment system shall be constructed in accordance with the design identified in the Vision Consulting Limited Report dated 7 June 2019 and shall be configured in accordance with the **attached** Thomson Survey drawing referenced as **4950A** and Vision Consulting Limited drawing referenced as Northland Regional Council Plan Number **4955**.

AUT.041365.13.01 – Discharge Treated Stormwater to the Coastal Marine Area

59 Prior to treatment, all stormwater from areas of land used for the maintenance of vessels shall be directed to a proprietary stormwater treatment system prior to discharge to the coastal marine area.

60 The proprietary stormwater treatment system shall perform to the following standards under normal operating conditions:

(a) Retain all particles larger than 60 micrometres (μm) in diameter.

(b) Have a total suspended solids (TSS) concentration in the effluent of ≤ 20 g/m³ or, if this limit is exceeded, then no less than 90% TSS shall be retained.

(c) Have a total Copper concentration in the effluent of ≤ 20 mg/m³ or, if this limit is exceeded, then no less than 80% Cu shall be retained.

(d) Have a total Zinc (Zn) concentration in the effluent of ≤ 50 mg/m³ or, if this limit is exceeded, then no less than 80% Zn shall be retained.

(e) Have a total Lead (Pb) concentration in the effluent of ≤ 10 mg/m^3 or, if this limit is exceeded, then no less than 80% Pb shall be retained.

Advice Note: *For the purposes of this condition 'Normal Operating Conditions' shall mean – The treatment of stormwater from rain intensities of up to a 10 mm/hr rainfall event. Rainfall intensities over this are not normal operating conditions.*

61 To enable the collection of samples from the proprietary stormwater treatment system, easy and safe access shall be provided at all times to a point at the inlet to the stormwater treatment system and a point immediately after the outlet from the treatment system and prior to the connection to the stormwater discharge pipe.

62 The discharge of stormwater from the proprietary stormwater treatment system shall not result in any of the following effects, as measured at or beyond a 20 metre radius from the stormwater outlet:

(a) Cause the pH of the receiving water to fall outside of the range 6.5 to 9.

(b) Cause the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials in the receivingwater.

(c) Cause any emission of objectionable odour in the receivingwater.

(d) Cause any significant adverse effects on aquatic life or public health.

63 The proprietary stormwater treatment system, and all associated equipment, shall be adequately maintained so that it operates effectively at all times. The Consent Holder shall keep a written record of all maintenance carried out on the proprietary stormwater treatment system and shall supply a copy of this record to the council's assigned monitoring officer immediately on written request.

AUT.041365.14.01 – Discharge to Land

64 The discharges to land authorised by this consent only apply to those areas above mean high water springs within the 'Proposed Discharge to Air and Offensive Odour Boundary' identified on the **attached** Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**.

65 High and low pressure water blasting, and wet abrasive blasting of vessel hulls shall be confined to concrete and bunded areas on the areas identified as 'Area A' and notated as 'Extent of proposed slipway reconstruction' on the **attached** Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**. Wash water from water blasting and wet abrasive blasting shall be discharged to trade waste via the wash water collection and proprietary stormwater treatment system to be installed and operated under Conditions 58–63 above.

66 When the water blasting, wet abrasive blasting or wet sanding operations are being undertaken, the waste water collection and stormwater treatment system shall automatically direct wash water to a pump chamber and then to attenuation tanks prior to discharge to trade waste/public sewer (through the use of a fox valve or similar). The catch pit is to be sized so that it does not overtop during water blasting.

67 When the water blaster is not being used, all working areas on the washdown pad shall be maintained clean of debris.

68 All visible waste, including discoloured water, shall be hosed from the washdown pad immediately after completion of any water blasting operation. The wash water collection system shall be sufficiently flushed following pressure blasting activities to ensure that contaminated washdown water is not disposed of in coastal waters via the stormwater network.

69 Vessel washdown activities shall not be undertaken during persistent heavy rainfall events.

70 All work areas shall be bunded, to prevent debris from vessel maintenance entering water bodies. The bunding shall be sufficiently impermeable to prevent leakage of contaminants.

71 Washdown areas and work areas used for dry or wet sanding, spray painting and other boat maintenance activities shall be cleared of accumulations of residues, paint flakes and any other debris at the end of each work session, or by the end of each working day, whichever occurs first.

72 All waste material, including antifouling residue, paint flakes and marine growth, removed from vessel hulls or generated from the cleaning or maintenance of vessels, shall be stored on Doug's Opua Boat Yard in a sealed unit prior to being disposed of at an off-site facility that is authorised to accept such wastes. The Consent Holder shall provide evidence by way of tracking verification (i.e. receipts) of the disposal location, upon written request from the council's assigned monitoring officer.

73 Wet sanding shall be confined to concrete and bunded areas. The area used for wet sanding shall be bunded so stormwater from these areas is directed to the wash water collection and stormwater treatment system.

AUT.039650.15.01 – Discharge Contaminants to Air from Land

74 This consent only applies to the areas landward of mean high water springs identified as the 'Proposed Discharge to Air and Offensive Odour Boundary' on the **attached** Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**.

75 This consent does not authorise dry abrasive blasting activities.

76 The preparation or smoothing of vessel hulls or superstructure including removal or smoothing of antifouling using a sanding or grinding device shall only be undertaken using an appropriate dust collection system that is operating effectively.

77 A permanent weather station capable of measuring wind speed and direction at a height of 6 metres shall be installed on the boat yard site.

78 Sanding and grinding operations shall only be conducted when the wind speed is between 0.5 m/s and 5 m/s (as an hourly average). The application of antifouling and paint shall only be undertaken when the windspeed is greater than 0.5 m/s and when apparent wind on the slipway is from the northeast to the south southeast (wind is blowing up the slipway through an angle of 45 to 170 degrees).

79 All spray application of antifouling paint shall comply with Environmental Protection Agency rules including setting up of a controlled work area around the vessel being coated with antifouling paint.

80 Temporary signage shall be placed on the edge of the reserve and at the bottom of the slipway notifying the public that painting of vessels is taking place. The signage shall be designed to comply with the requirements of the Environmental Protection Agency rules.

81 Temporary screens shall be erected between the blasting area and the walking track at all times during high pressure water blasting to mitigate the effects of spray drift.

82 All equipment used to avoid or mitigate any adverse effects on the environment from emissions to air shall be maintained in good working order.

83 The Consent Holder's operations shall not give rise to any dust, overspray, or odour beyond the 'Proposed Discharge to Air and Offensive Odour Boundary' identified on the **attached** Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1** which is offensive or objectionable.

84 Daily records of all occasions when water blasting, wet abrasive blasting and spray coating activities are undertaken shall be kept by the Consent Holder. These records shall be made available to the council's assigned monitoring officer on written request and include:

(a) Details of vessels being water blasted/wet abrasive blasted;

(b) Item(s) being spray coated;

(c) Location at which spray coating occurred;

(d) Date and time (Hours) of operation each day, including a record of the wind speed and direction at the commencement and conclusion of works on each day;

(e) Number of spray coating units being used; and

(f) Types and volumes of coating materials being applied.

85 The maximum daily paint application rate for all paints, excluding those which contain diisocyanate compounds, shall be restricted to no more than 30 L/day.

86 The use of diisocyanate based paints shall be restricted and limited to no more than 15 L/year.

87 Diisocyanate painting shall only be undertaken when the wind is from the northeast through to south southeast direction (i.e. 45° to 170°). The Consent Holder shall advise the councils assigned monitoring officer, in writing, when diisocyanate painting is to occur at least 24 hours beforehand on each occasion.

AUT.039650.16.01 – Discharge Contaminants to Air in the Coastal Marine Area

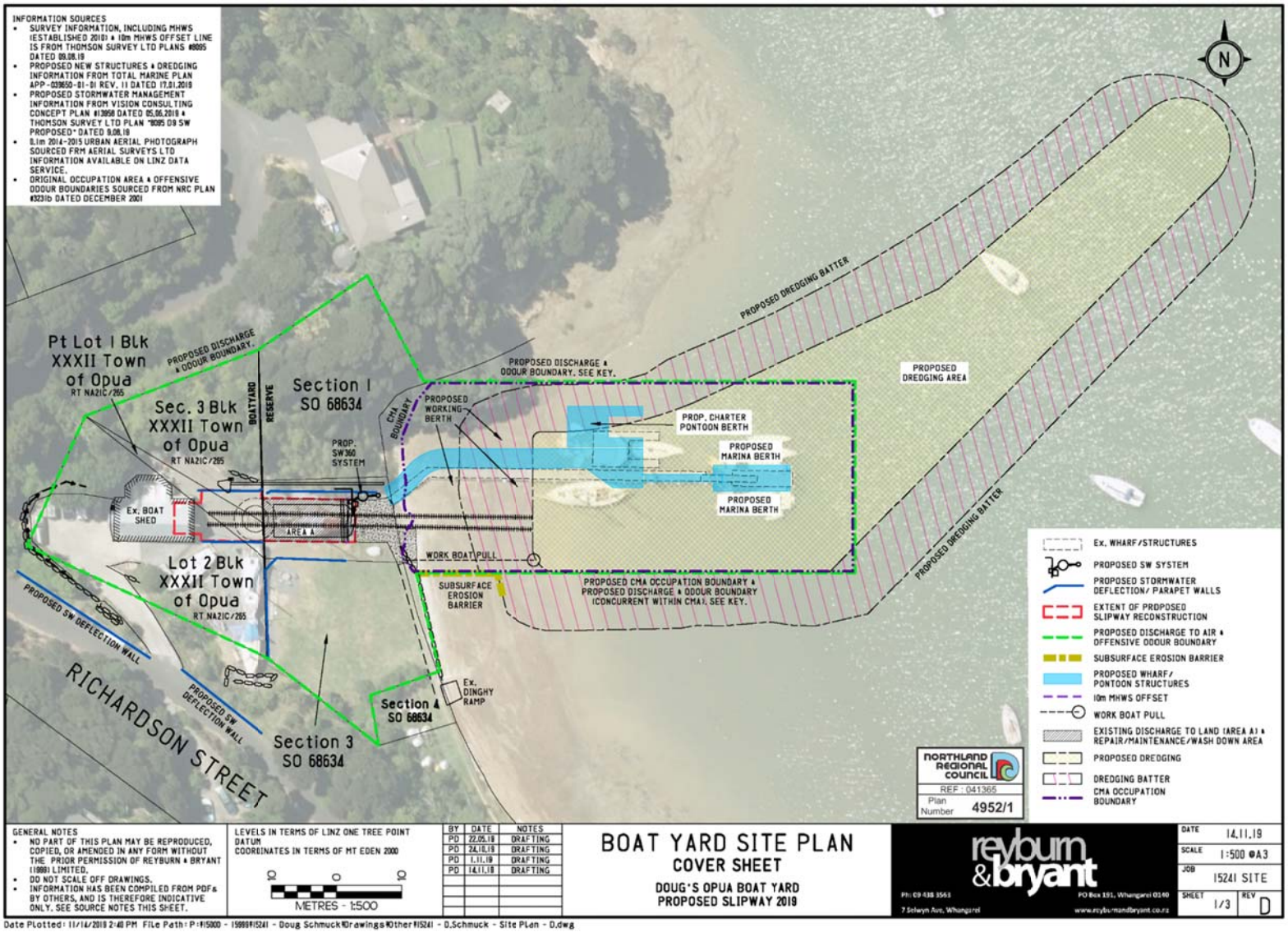
88 This consent only applies to the area identified as the 'Proposed Discharge to Air and Offensive Odour Boundary' within the coastal marine area identified on the attached Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**.

89 The preparation or smoothing of vessel hulls shall not be undertaken in the coastal marine area except for minor repairs not exceeding 200 mm in diameter which shall only be undertaken within the Occupation Area boundary. The preparation or smoothing of vessel or facility superstructure or hulls (in the case of minor repairs) using a sanding device shall not be undertaken unless a dust collection apparatus that is operating effectively is attached to the device.

90 The exercise of this consent shall not give rise to the discharge of contaminants which are noxious, dangerous, offensive or objectionable beyond the 'Proposed Discharge to Air and Offensive Odour Boundary' identified on the attached Reyburn and Bryant drawing referenced as Northland Regional Council Plan Number **4952/1**.

91 The exercise of this consent shall not give rise to the discharge of contaminants into water or onto the seabed.

EXPIRY DATE:	All Consents	**31 JULY 2055**


INFORMATION SOURCES
• SURVEY INFORMATION, INCLUDING MHWS (ESTABLISHED 2010) & 10m MHWS OFFSET LINE IS FROM THOMSON SURVEY LTD PLANS #8895 DATED 09.08.19
• PROPOSED NEW STRUCTURES & DREDGING INFORMATION FROM TOTAL MARINE PLAN APP-039650-01-01 REV. 11 DATED 17.01.2019
• PROPOSED STORMWATER MANAGEMENT INFORMATION FROM VISION CONSULTING CONCEPT PLAN #13958 DATED 05.06.2019 & THOMSON SURVEY LTD PLAN "8895 09 SW PROPOSED" DATED 9.08.19
• 0.1m 2014-2015 URBAN AERIAL PHOTOGRAPH SOURCED FRM AERIAL SURVEYS LTD INFORMATION AVAILABLE ON LINZ DATA SERVICE.
• ORIGINAL OCCUPATION AREA & OFFENSIVE ODOUR BOUNDARIES SOURCED FROM NRC PLAN #3231b DATED DECEMBER 2001
N
Pt Lot 1 Blk XXXII Town of Opua
RT NA21C/265
PROPOSED DISCHARGE & ODOUR BOUNDARY.
Sec. 3 Blk XXXII Town of Opua
RT NA21C/295
BOATYARD RESERVE
Section 1 SO 68634
CMA BOUNDARY
PROPOSED WORKING BERTH
PROP. SW360 SYSTEM
PROPOSED DISCHARGE & ODOUR BOUNDARY. SEE KEY.
PROPOSED DREDGING BATTER
PROPOSED DREDGING AREA
PROP. CHARTER PONTOON BERTH
PROPOSED MARINA BERTH
PROPOSED MARINA BERTH
Ex. BOAT SHED
AREA A
WORK BOAT PULL
Lot 2 Blk XXXII Town of Opua
RT NA21C/265
SUBSURFACE EROSION BARRIER
PROPOSED CMA OCCUPATION BOUNDARY & PROPOSED DISCHARGE & ODOUR BOUNDARY (CONCURRENT WITHIN CMA). SEE KEY.
PROPOSED DREDGING BATTER
PROPOSED SW DEFLECTION WALL
RICHARDSON STREET
PROPOSED SW DEFLECTION WALL
Ex. DINGHY RAMP
Section 4 SO 68634
Section 3 SO 68634
Ex. WHARF/STRUCTURES
PROPOSED SW SYSTEM
PROPOSED STORMWATER DEFLECTION/ PARAPET WALLS
EXTENT OF PROPOSED SLIPWAY RECONSTRUCTION
PROPOSED DISCHARGE TO AIR & OFFENSIVE ODOUR BOUNDARY
SUBSURFACE EROSION BARRIER
PROPOSED WHARF/ PONTOON STRUCTURES
10m MHWS OFFSET
WORK BOAT PULL
EXISTING DISCHARGE TO LAND (AREA A) & REPAIR/MAINTENANCE/WASH DOWN AREA
PROPOSED DREDGING
DREDGING BATTER
CMA OCCUPATION BOUNDARY
NORTHLAND REGIONAL COUNCIL
REF : 041365
Plan Number 4952/1
GENERAL NOTES
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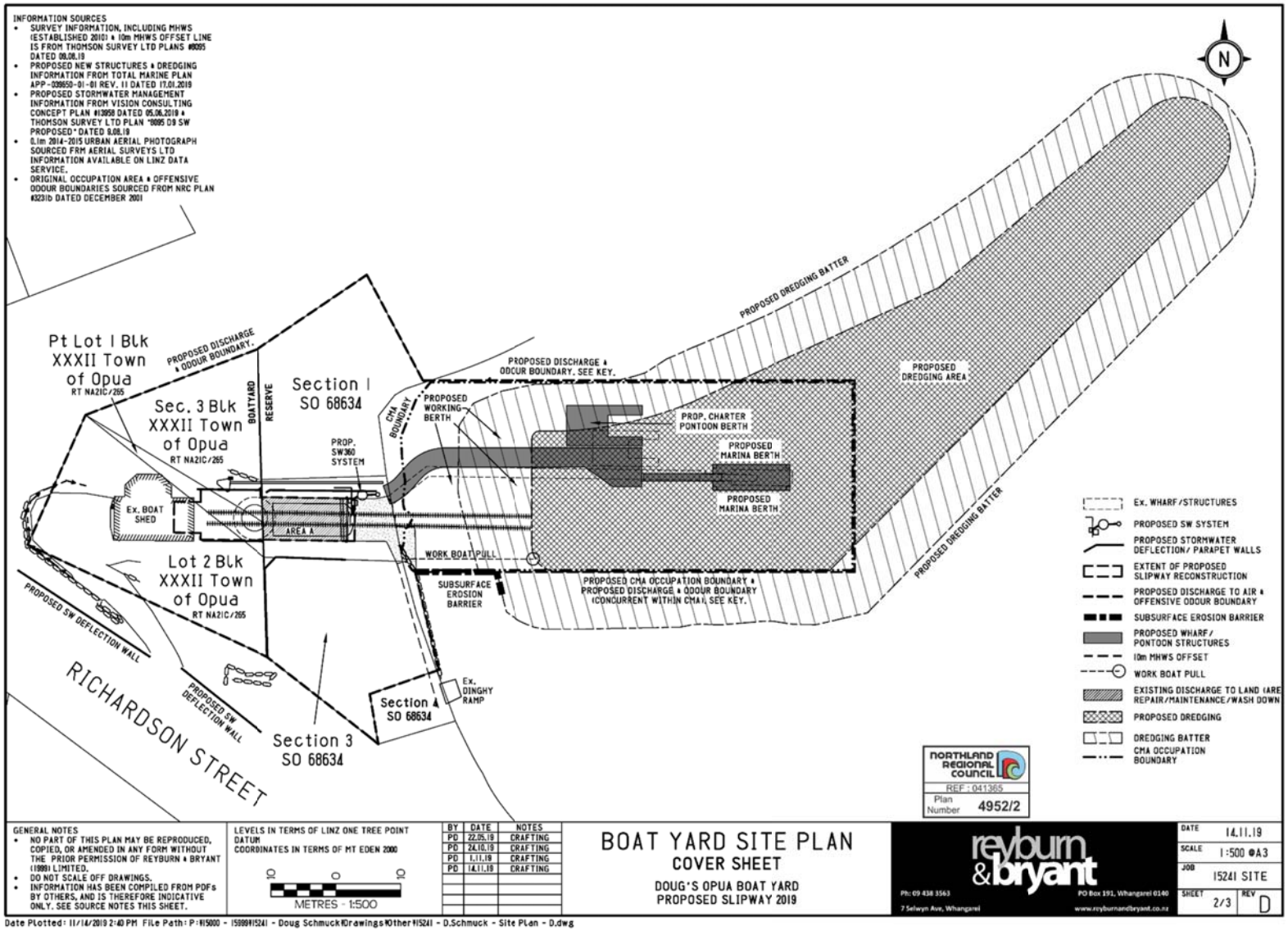
• DO NOT SCALE OFF DRAWINGS.
• INFORMATION HAS BEEN COMPILED FROM PDFs BY OTHERS, AND IS THEREFORE INDICATIVE ONLY. SEE SOURCE NOTES THIS SHEET.
LEVELS IN TERMS OF LINZ ONE TREE POINT DATUM
COORDINATES IN TERMS OF MT EDEN 2000
METRES - 1:500
BY DATE NOTES
PD 22.05.19 DRAFTING
PD 24.10.19 DRAFTING
PD 1.11.19 DRAFTING
PD 14.11.19 DRAFTING
BOAT YARD SITE PLAN
COVER SHEET
DOUG'S OPUA BOAT YARD
PROPOSED SLIPWAY 2019
reyburn & bryant
Ph: 09 438 3563
7 Selwyn Ave, Whangarei
PO Box 191, Whangarei 0140
www.reyburnandbryant.co.nz
DATE 14.11.19
SCALE 1:500 @A3
JOB 15241 SITE
SHEET 1/3
REV D
Date Plotted: 11/14/2019 2:48 PM File Path: P:\15000 - 15999\15241 - Doug Schmuck\Drawings\Other\15241 - D.Schmuck - Site Plan - D.dwg



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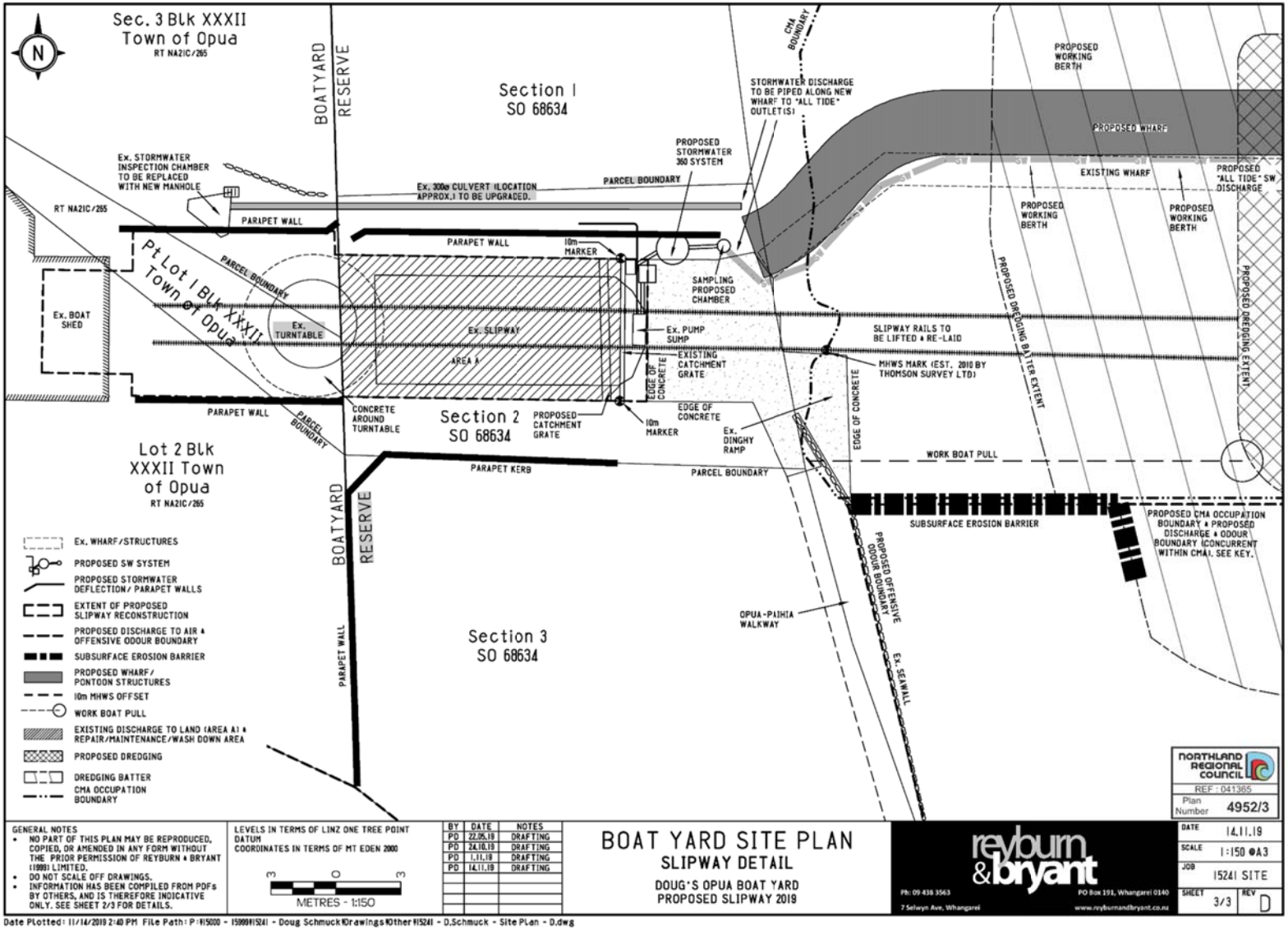
Sec. 3 Blk XXXII
Town of Opua
RT NA2IC/265
BOATYARD RESERVE
Section 1
SO 68634
CMA BOUNDARY
STORMWATER DISCHARGE TO BE PIPED ALONG NEW WHARF TO "ALL TIDE" OUTLET(S)
PROPOSED WORKING BERTH
PROPOSED WHARF
PROPOSED STORMWATER 360 SYSTEM
Ex. STORMWATER INSPECTION CHAMBER TO BE REPLACED WITH NEW MANHOLE
Ex. 300ø CULVERT (LOCATION APPROX.) TO BE UPGRADED.
PARCEL BOUNDARY
EXISTING WHARF
PROPOSED "ALL TIDE" SW DISCHARGE
RT NA2IC/265
PARAPET WALL
10m MARKER
PROPOSED WORKING BERTH
PROPOSED WORKING BERTH
Pt Lot 1 Blk XXXII Town of Opua
SAMPLING PROPOSED CHAMBER
PROPOSED DREDGING BATTER EXTENT
PROPOSED DREDGING EXTENT
Ex. BOAT SHED
Ex. TURNTABLE
Ex. SLIPWAY
AREA A
Ex. PUMP SUMP
SLIPWAY RAILS TO BE LIFTED & RE-LAID
EXISTING CATCHMENT GRATE
MHWS MARK (EST. 2010 BY THOMSON SURVEY LTD)
EDGE OF CONCRETE
CONCRETE AROUND TURNTABLE
Section 2
SO 68634
PROPOSED CATCHMENT GRATE
10m MARKER
EDGE OF CONCRETE
Ex. DINGHY RAMP
EDGE OF CONCRETE
WORK BOAT PULL
Lot 2 Blk XXXII Town of Opua
RT NA2IC/265
PARAPET KERB
PARCEL BOUNDARY
SUBSURFACE EROSION BARRIER
PROPOSED CMA OCCUPATION BOUNDARY & PROPOSED DISCHARGE & ODOUR BOUNDARY (CONCURRENT WITHIN CMA). SEE KEY.
PROPOSED OFFENSIVE ODOUR BOUNDARY
OPUA-PAIHIA WALKWAY
Section 3
SO 68634
Ex. SEAWALL
Ex. WHARF/STRUCTURES
PROPOSED SW SYSTEM
PROPOSED STORMWATER DEFLECTION/ PARAPET WALLS
EXTENT OF PROPOSED SLIPWAY RECONSTRUCTION
PROPOSED DISCHARGE TO AIR & OFFENSIVE ODOUR BOUNDARY
SUBSURFACE EROSION BARRIER
PROPOSED WHARF/ PONTOON STRUCTURES
10m MHWS OFFSET
WORK BOAT PULL
EXISTING DISCHARGE TO LAND (AREA A) & REPAIR/MAINTENANCE/WASH DOWN AREA
PROPOSED DREDGING
DREDGING BATTER
CMA OCCUPATION BOUNDARY
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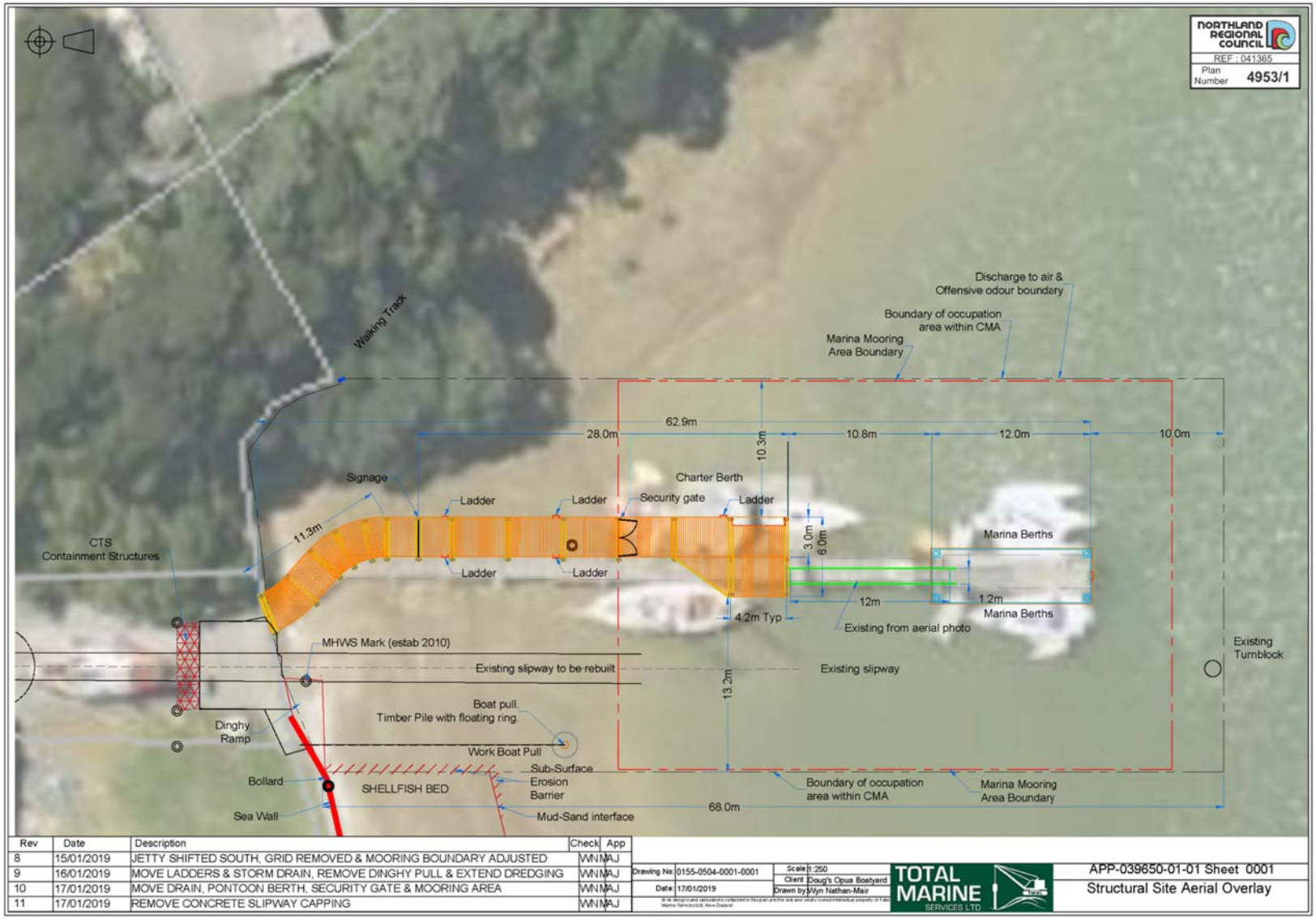
JOB 15241 SITE
SHEET 3/3
REV D
Date Plotted: 11/14/2019 2:40 PM File Path: P:\15000 - 15999\15241 - Doug Schmuck\Drawings\Other\15241 - D.Schmuck - Site Plan - D.dwg

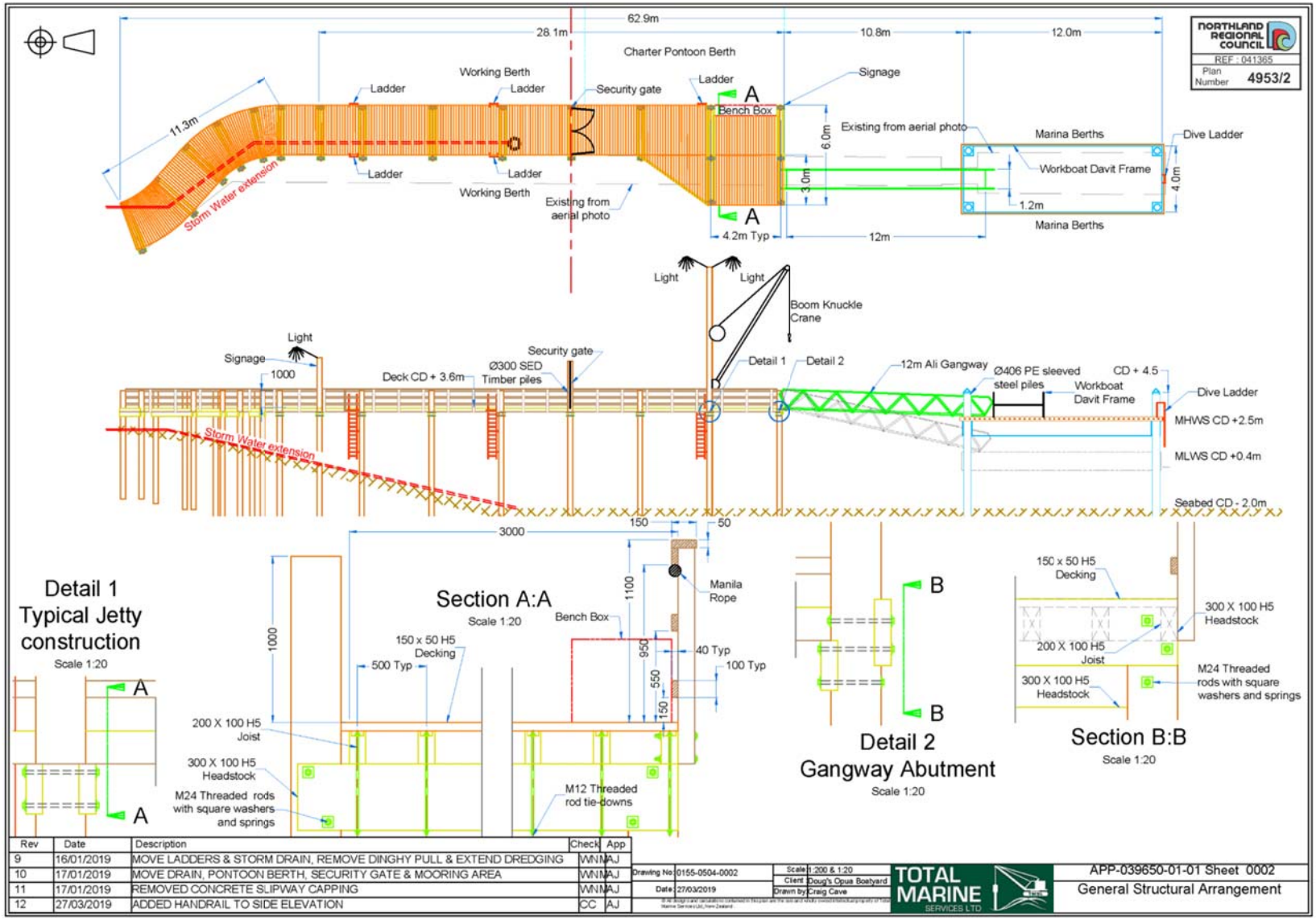


Rev	Date	Description	Check	App
8	15/01/2019	JETTY SHIFTED SOUTH, GRID REMOVED & MOORING BOUNDARY ADJUSTED	WN	MAJ
9	16/01/2019	MOVE LADDERS & STORM DRAIN, REMOVE DINGHY PULL & EXTEND DREDGING	WN	MAJ
10	17/01/2019	MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA	WN	MAJ
11	17/01/2019	REMOVE CONCRETE SLIPWAY CAPPING	WN	MAJ

Drawing No: 0155-0504-0001-0001
Date: 17/01/2019
Scale: 1:250
Client: Doug's Opua Boatyard
Drawn by: Wyn Nathan-Mair

TOTAL MARINE SERVICES LTD

APP-039650-01-01 Sheet 0001
Structural Site Aerial Overlay



Rev	Date	Description	Check	App
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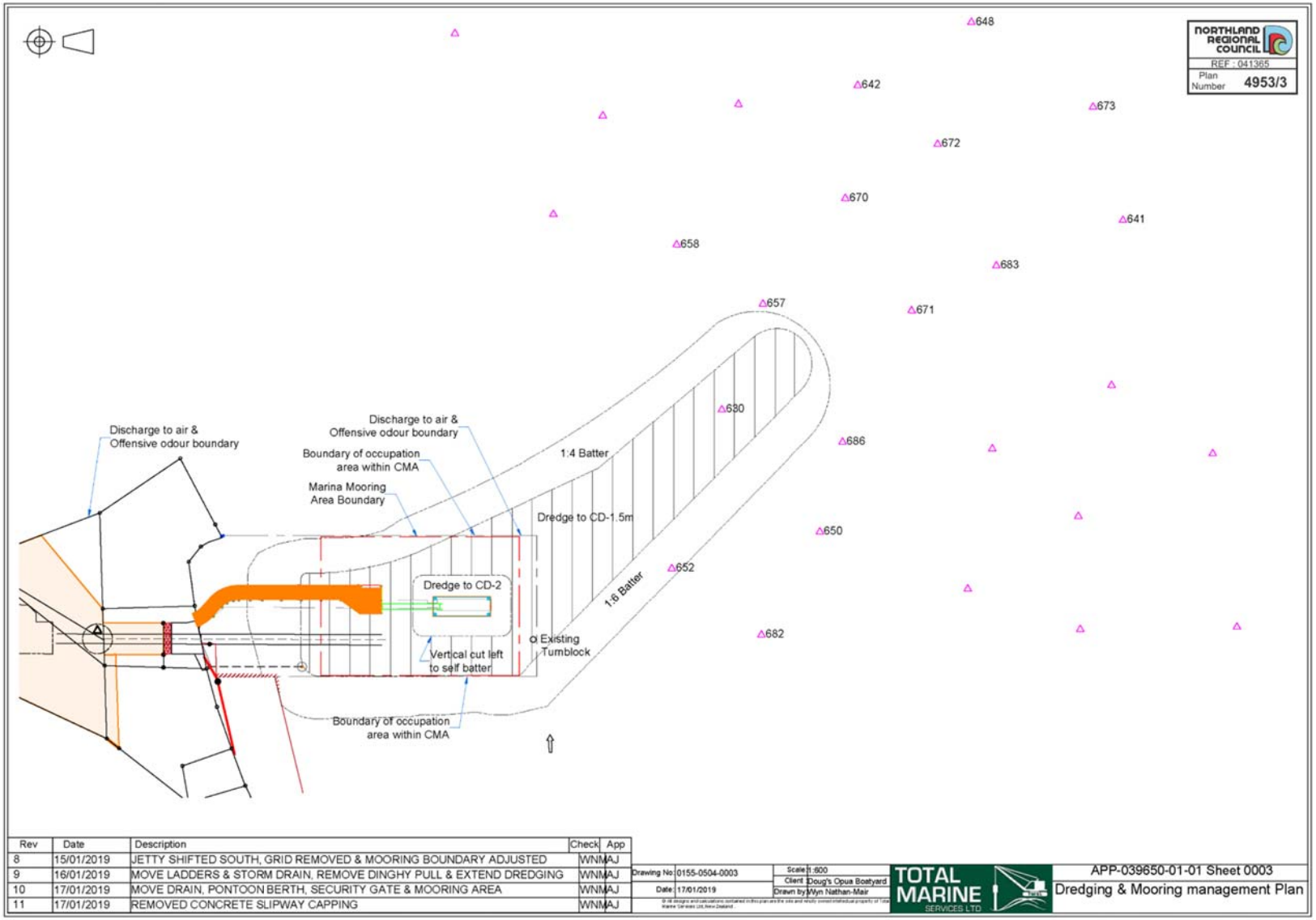
10	17/01/2019	MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA	WNM	AJ
11	17/01/2019	REMOVED CONCRETE SLIPWAY CAPPING	WNM	AJ
12	27/03/2019	ADDED HANDRAIL TO SIDE ELEVATION	CC	AJ

Drawing No: 0155-0504-0002
Date: 27/03/2019
Scale: 1:200 & 1:20
Client: Doug's Opua Boatyard
Drawn by: Craig Cave

TOTAL MARINE SERVICES LTD

APP-039650-01-01 Sheet 0002
General Structural Arrangement



Rev	Date	Description	Check	App
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9	16/01/2019	MOVE LADDERS & STORM DRAIN, REMOVE DINGHY PULL & EXTEND DREDGING	WNM	AJ
10	17/01/2019	MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA	WNM	AJ
11	17/01/2019	REMOVED CONCRETE SLIPWAY CAPPING	WNM	AJ

Drawing No: 0155-0504-0003
Date: 17/01/2019
Scale: 1:600
Client: Doug's Opua Boatyard
Drawn by: Wyn Nathan-Mair

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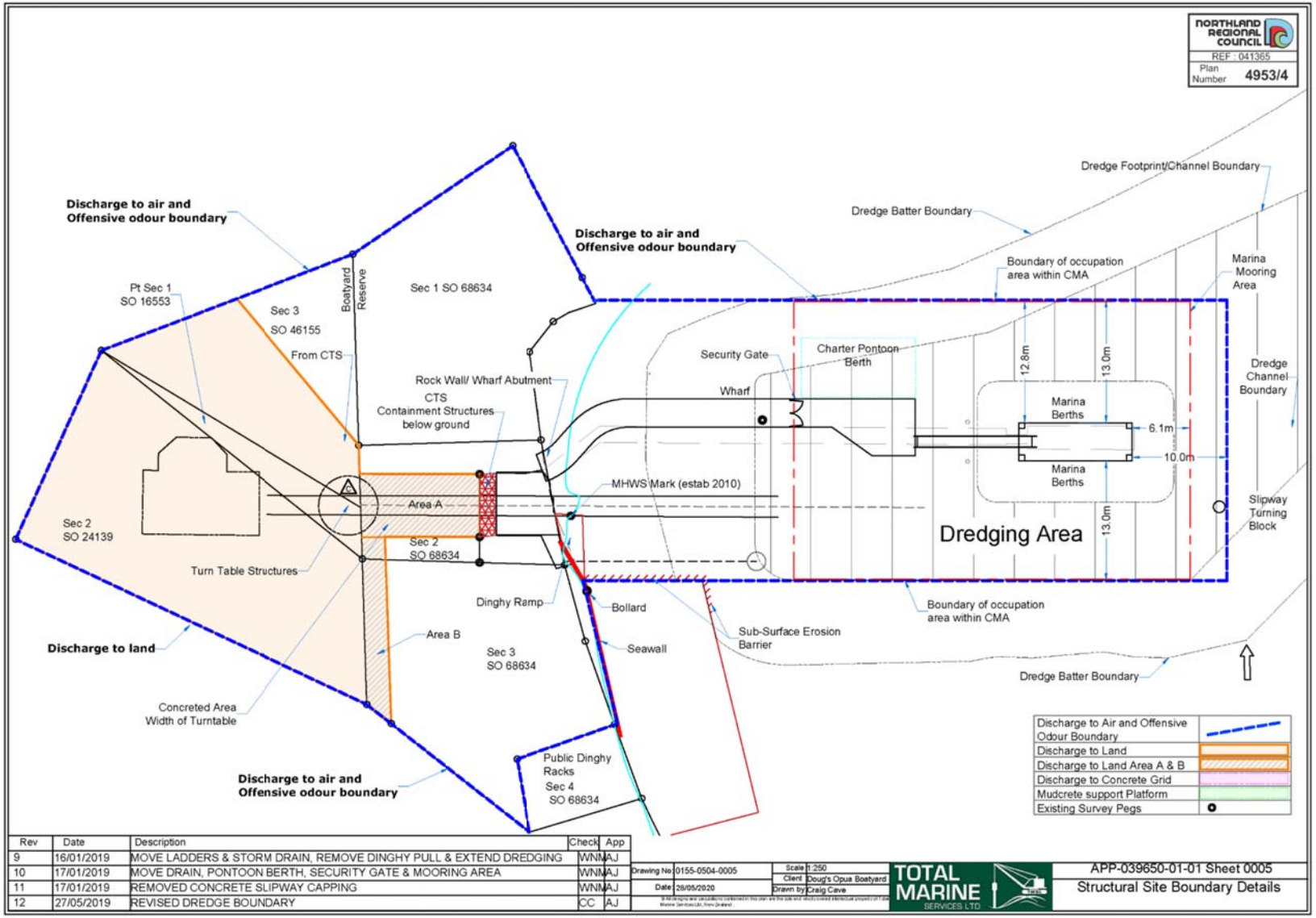
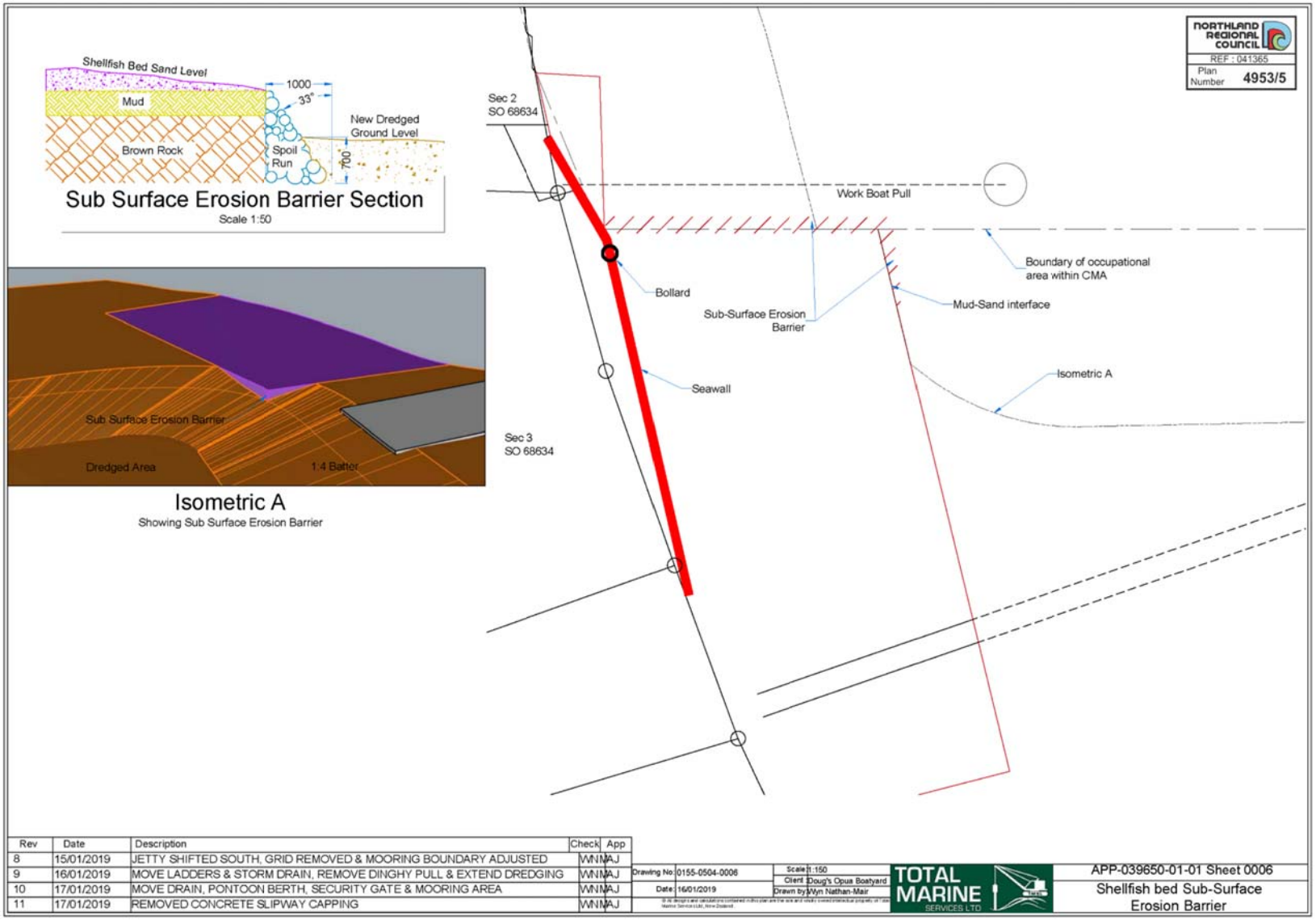
TOTAL MARINE SERVICES LTD

APP-039650-01-01 Sheet 0003

Dredging & Mooring management Plan


NORTHLAND REGIONAL COUNCIL
REF : 041365
Plan Number 4953/4
Discharge to air and Offensive odour boundary
Discharge to air and Offensive odour boundary
Discharge to air and Offensive odour boundary
Discharge to land
Pt Sec 1 SO 16553
Sec 3 SO 46155
From CTS
Boatyard Reserve
Sec 1 SO 68634
Rock Wall/ Wharf Abutment
CTS Containment Structures below ground
Area A
Sec 2 SO 24139
Sec 2 SO 68634
Turn Table Structures
Area B
Sec 3 SO 68634
Concreted Area Width of Turntable
Dinghy Ramp
Bollard
Seawall
Public Dinghy Racks
Sec 4 SO 68634
MHWS Mark (estab 2010)
Dredge Footprint/Channel Boundary
Dredge Batter Boundary
Boundary of occupation area within CMA
Marina Mooring Area
Security Gate
Charter Pontoon Berth
Wharf
Marina Berths
Marina Berths
12.8m
13.0m
6.1m
10.0m
13.0m
Dredging Area
Dredge Channel Boundary
Slipway Turning Block
Boundary of occupation area within CMA
Sub-Surface Erosion Barrier
Dredge Batter Boundary
Discharge to Air and Offensive Odour Boundary
Discharge to Land
Discharge to Land Area A & B
Discharge to Concrete Grid
Mudcrete support Platform
Existing Survey Pegs
Rev | Date | Description | Check | App
9 | 16/01/2019 | MOVE LADDERS & STORM DRAIN, REMOVE DINGHY PULL & EXTEND DREDGING | WNM | AJ
10 | 17/01/2019 | MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA | WNM | AJ
11 | 17/01/2019 | REMOVED CONCRETE SLIPWAY CAPPING | WNM | AJ
12 | 27/05/2019 | REVISED DREDGE BOUNDARY | CC | AJ
Drawing No 0155-0504-0005
Date 28/05/2020
Scale 1:250
Client Doug's Opua Boatyard
Drawn by Craig Cave
TOTAL MARINE SERVICES LTD
APP-039650-01-01 Sheet 0005
Structural Site Boundary Details



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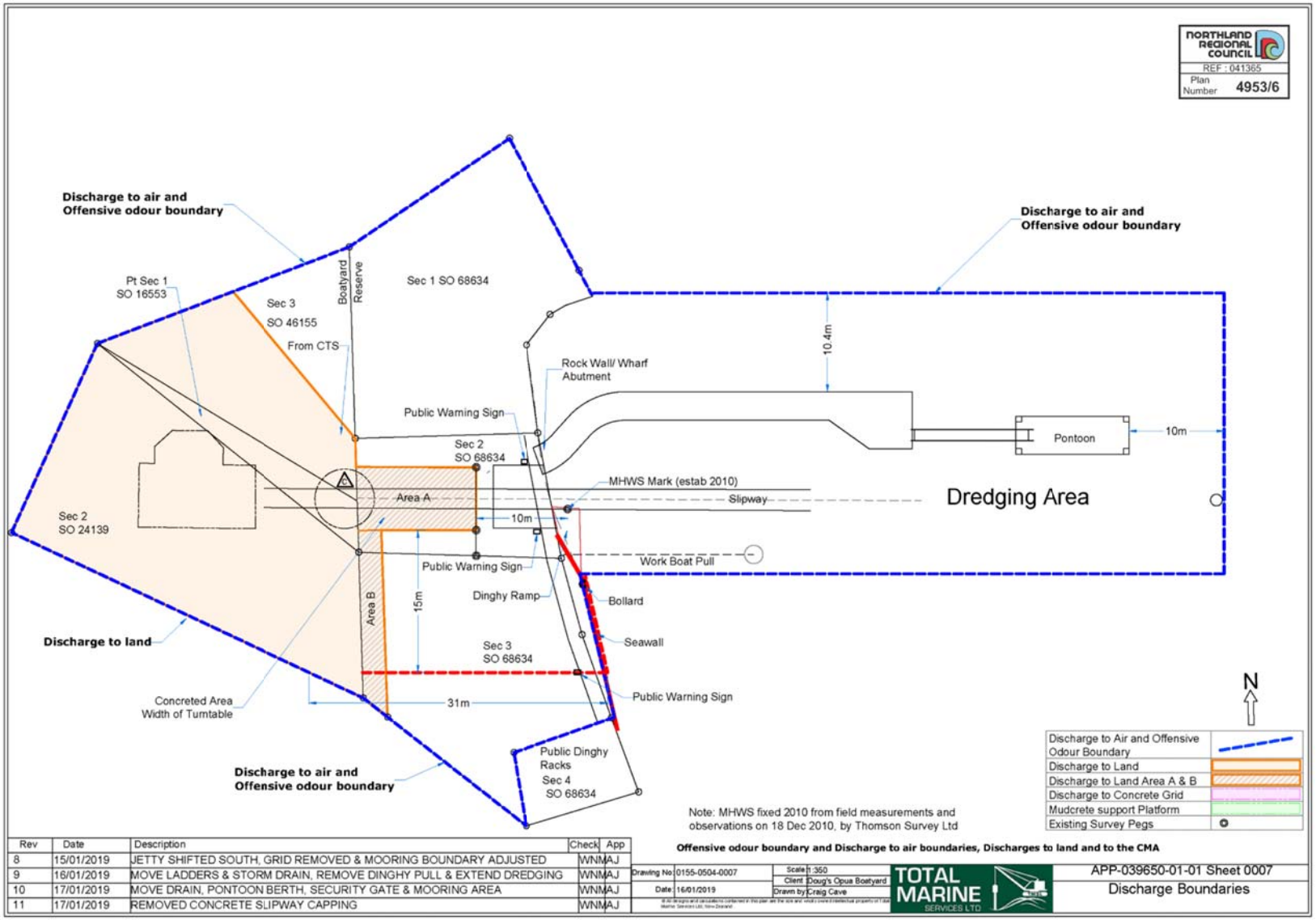
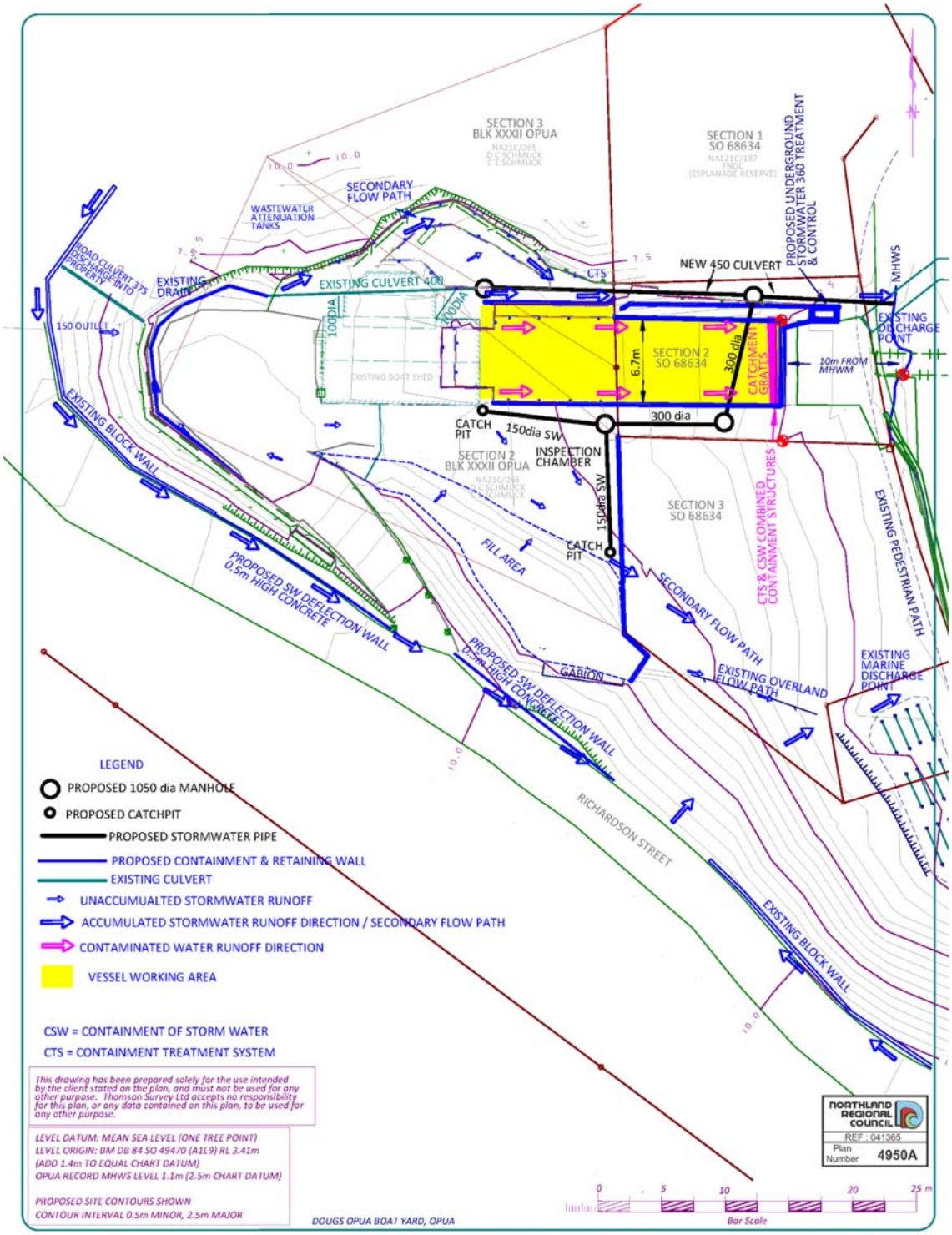
9	16/01/2019	MOVE LADDERS & STORM DRAIN, REMOVE DINGHY PULL & EXTEND DREDGING	WN	MJ
10	17/01/2019	MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA	WN	MJ
11	17/01/2019	REMOVED CONCRETE SLIPWAY CAPPING	WN	MJ

Drawing No: 0155-0504-0006
Date: 16/01/2019
Scale: 1:150
Client: Doug's Opua Boatyard
Drawn by: Wyn Nathan-Mair

TOTAL MARINE SERVICES LTD

APP-039650-01-01 Sheet 0006
Shellfish bed Sub-Surface Erosion Barrier


NORTHLAND REGIONAL COUNCIL
REF : 041365
Plan Number 4953/6
Discharge to air and Offensive odour boundary
Discharge to air and Offensive odour boundary
Pt Sec 1 SO 16553
Sec 3 SO 46155
From CTS
Boatyard Reserve
Sec 1 SO 68634
10.4m
Rock Wall/ Wharf Abutment
Public Warning Sign
Sec 2 SO 68634
Pontoon
10m
MHWS Mark (estab 2010)
Area A
Slipway
Dredging Area
Sec 2 SO 24139
10m
Work Boat Pull
Public Warning Sign
Dinghy Ramp
Bollard
Area B
15m
Discharge to land
Seawall
Sec 3 SO 68634
Concreted Area Width of Turntable
31m
Public Warning Sign
Public Dinghy Racks
Sec 4 SO 68634
Discharge to air and Offensive odour boundary
N
Discharge to Air and Offensive Odour Boundary
Discharge to Land
Discharge to Land Area A & B
Discharge to Concrete Grid
Mudcrete support Platform
Existing Survey Pegs
Note: MHWS fixed 2010 from field measurements and observations on 18 Dec 2010, by Thomson Survey Ltd
Offensive odour boundary and Discharge to air boundaries, Discharges to land and to the CMA
Rev | Date | Description | Check | App
8 | 15/01/2019 | JETTY SHIFTED SOUTH, GRID REMOVED & MOORING BOUNDARY ADJUSTED | WNMAJ
9 | 16/01/2019 | MOVE LADDERS & STORM DRAIN, REMOVE DINGHY PULL & EXTEND DREDGING | WNMAJ
10 | 17/01/2019 | MOVE DRAIN, PONTOON BERTH, SECURITY GATE & MOORING AREA | WNMAJ
11 | 17/01/2019 | REMOVED CONCRETE SLIPWAY CAPPING | WNMAJ
Drawing No 0155-0504-0007
Date 16/01/2019
Scale 1:350
Client Doug's Opua Boatyard
Drawn by Craig Cave
TOTAL MARINE SERVICES LTD
APP-039650-01-01 Sheet 0007
Discharge Boundaries



THOMSON SURVEY
315 Kerikeri Rd
P.O. Box 372 Kerikeri
Email: kerikeri@tsurvey.co.nz
Ph: (09) 4077360 Fax (09) 4077322
Registered Land Surveyors, Planners & Land Development Consultants

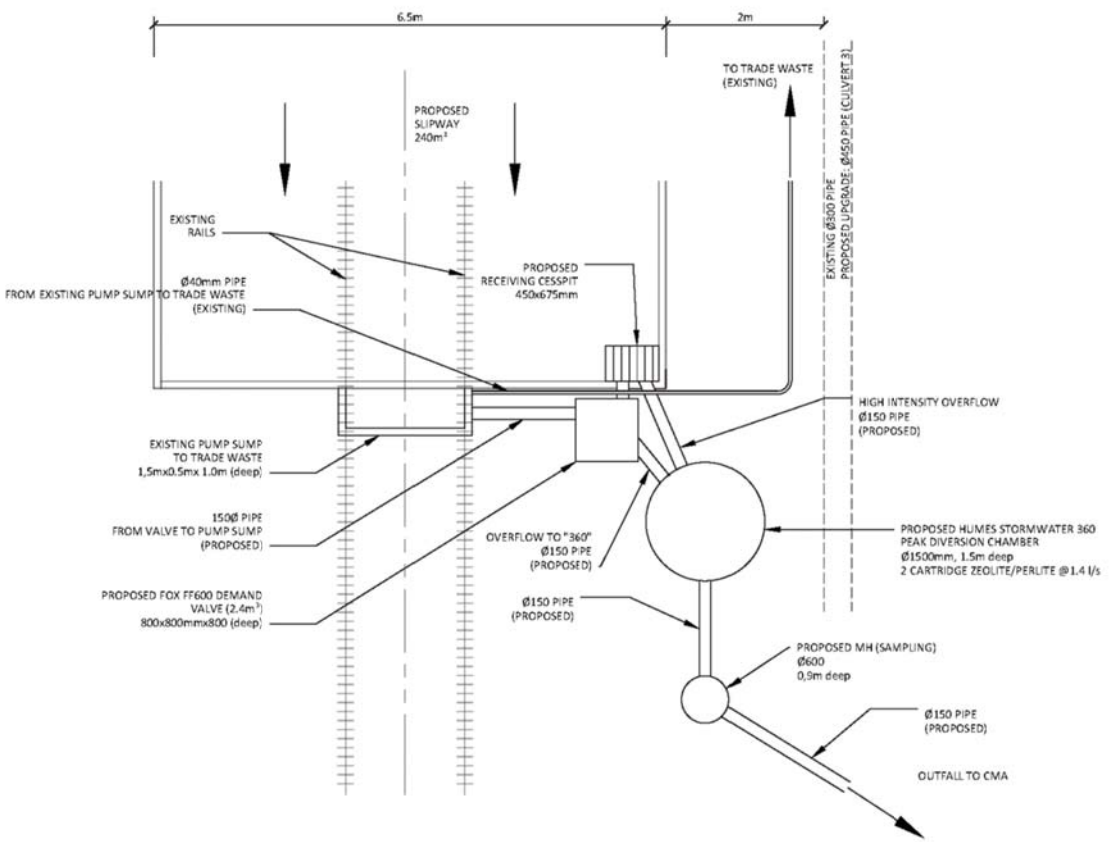
DOUGS OPUA BOAT YARD PROPOSED CONTAINMENT & STORMWATER MANAGEMENT

	Name	Date
Survey	SH	2017
Design		
Drawn	SL	17.12.18
Approved		
Rev	SL	28.05.20

ORIGINAL
SCALE 1:250
SHEET SIZE A3

Surveyors Ref. No: 8095

8095/ENGINEERING/D9/SW PLAN 28.05.2020.lcd



NORTHLAND REGIONAL COUNCIL
REF : 041365
Plan Number 4955

CONCEPT PLAN

VISION CONSULTING
Engineers & Planners

CLIENT	PROJECT	DRAWING TITLE
DOUG SCHMUCK	DOUGS OPUA BOAT YARD PROPOSED SLIPWAY 2019	SW AND WW DISPOSAL CONCEPT PLAN

			SCALE 1:50
SURVEY			SHEET 1 of 01
DESIGN	WP	05/06/2019	PROJECT 1395.8
DRAWN	LP	05/06/2019	THIS ARTWORK IS THE COPY RIGHT MATERIAL OF VCE© REV
CHECKED	WP	05/06/2019	
APPROVED	WP	05/06/2019	

No.	REVISION	BY	DATE

SCHEDULE 1

ENVIRONMENTAL STANDARDS – NOISE

CONSTRUCTION NOISE

Based on Table 2, NZS 6803: 1999 "Acoustics – Construction Noise", Standards New Zealand:

Time of Week	Typical Duration	Typical Duration (dBA)		Short Term Duration		Long Term Duration	
		L_{eg}	L_{max}	L_{eg}	L_{max}	L_{eg}	L_{max}
Weekdays	0630 – 0730	60	75	65	75	55	75
	0730 – 1800	75	90	80	95	70	85
	1800 – 2000	70	85	75	90	65	80
	2000 – 0630	45	75	45	75	45	75
Saturdays	0630 – 0730	45	75	45	75	45	75
	0730 – 1800	75	90	80	95	70	85
	1800 – 2000	45	75	45	75	45	75
	2000 – 0630	45	75	45	75	45	75

Construction Sound levels shall be measured in accordance with New Zealand Standard NZS 6803:1999 "Acoustics – Construction Noise". Measurement shall be at any point on the line of Mean High Water Springs (MHWS) on the adjacent foreshore any point 100 metres from the jetty and marina facility.

Note:

- "Short-term" means construction work any one location for up to 14 calendar days.
- "Typical duration" means construction work at any one location for more than 14 calendar days, but less than 20 weeks.
- "Long-term" means construction work at any one location with a duration exceeding 20 weeks.

OPERATION NOISE

Noise emitted from any activity associated with the wharf and marina facility, when measured at the boundary of the zone, shall not exceed the following noise levels as measured at or within the boundary of any residential site not under the control of the Consent Holder.

Operation Sound levels shall be measured in accordance with New Zealand Standard NZS 6801:2008 Measurement of Environmental Sound, and assessed in accordance with NZS 6802:2008 Acoustics – Environmental Noise.

SCHEDULE 2

TESTING PROGRAMME FOR WATER AND SEDIMENT QUALITY

DURING OPERATION OF WHARF AND MARINA FACILITY

Water Quality Sampling

Testing shall be carried out for *E. coli* (*Escherichia coli*). Faecal source tracking, using PCR analysis for human markers, may be triggered should the *E.coli* levels be found to be above background levels **or** 50% above relevant Microbiological Water Quality Guidelines, whichever is lower.

Samples will be taken within the footprint of the Wharf and marina facility , the precise location(s) of which will be determined following consultation by council monitoring staff with the Consent Holder. A minimum of one sample is to be submitted for *E.coli* testing from within the area of the wharf and marina berths, and an upstream and a downstream control site.

PCR analysis may not necessarily be undertaken on all elevated results within the marina from a single sampling event but will include as a minimum the upstream control and at least one marina site.

A minimum of four one off sampling events are to be undertaken within the marina annually. Sampling should be undertaken over a period of a slack tide. Should sampling identify the need for further investigations, these will be targeted to specific areas and undertaken in liaison with the Consent Holder.

Marine Sediment Quality Sampling

Testing for metals in the seabed from within the wharf and marina facility and at upstream and downstream control sites will be carried out annually. Samples will be collected from the top two centimetres of the sediment.

Sediments will be analysed for the following:

- Total copper
- Total zinc
- Total lead
- Total chromium
- Total nickel
- Total cadmium

STORMWATER DISCHARGE

The stormwater discharges will be sampled at point of discharge, being after the proprietary system before any mixing, during a moderate rainfall event following an extended dry period. Samples will be analysed for TSS, Copper, Lead and Zinc.

A sample may also be collected from a pre-treatment location and at a post treatment location.

SCHEDULE 3

DREDGE MONITORING PROGRAMME

During dredging operations, daily inspections of the waters adjacent to the dredge excavation areas will be undertaken by the dredging contractor, or the Consent Holder's nominated agent, in order to identify any visually observable change in clarity (turbidity) of the receiving waters at or beyond 100 metres from the point of the dredging operations. Results of the daily inspections are to be recorded in a written log book by the Consent Holder or the Consent Holder's nominated agent, and submitted weekly to the council's assigned monitoring officer by email.

Should the visual inspection indicate any change in clarity at or beyond 100 metres from the point of the dredging operations, then the Consent Holder will implement the following monitoring programme to assess compliance with the relevant conditions of this consent.

Clarity measurements, using Secchi disc methods are to be taken at the boundary of the down-current edge of the mixing zone within the area of changed clarity. The same measurements are to be taken at least 50 metres up-current from the dredging activity to be used as control measurements for comparison with the down-current effect measurements. Three measurements are to be undertaken at each upstream and downstream location and the median used to assess compliance with the water quality standards stated and identified in the consent. Results of this monitoring are to be reported to the council's monitoring officer in writing within one week of the occurrence of monitoring.

APPENDIX B: COPY OF INTERESTING PROJECTS LIMITED T/A GREAT ESCAPE YACHT CHARTERS CONSENT AUT.008270.01.02

AUT.008270.01.02
Transfer

Resource Consent

Document Date: 23.03.2018

Pursuant to the Resource Management Act 1991, the Northland Regional Council (hereinafter called "the council") does hereby grant a Resource Consent to:

INTERESTING PROJECTS LIMITED T/A GREAT ESCAPE, PO BOX 461, PAIHIA 0247

To place and use a floating structure alongside the existing jetty at Doug's Opua Boat yard, for the purpose of maintaining and servicing charter trailer yachts, Map Reference Q05: 123 537 subject to the following conditions:

1 This consent is to use those parts of the coastal marine area at Opua Basin for the purposes of the consent as shown on NRC Plan No. **3014A attached**. The floating structure shall only be located on the northern side of the existing jetty

2 The Consent Holder shall maintain on the floating structure the number **8270** in black lettering on a white background clearly displayed, and in such a manner as to be visible at all times.

3 The colour of the floating structure shall blend in with that of the jetty and the surrounding landscape, such that the floating structure is unobtrusive when viewed from anywhere on Beechy Street.

4 No more than three boats shall be berthed at the floating structure at any time.

5 Vessel toilets shall not be discharged whilst the vessel is alongside the floating structure or the jetty.

6 All vessel cleaning slops containing chemicals and all rubbish removed from vessels whilst at the floating structure or adjoining jetty shall be disposed of on land to an authorised disposal facility.

7 Noise emitted from any activity, when measured at the boundary of the zone (as defined below), shall not exceed the following noise levels:

Time Period	*Noise Limit*
0700 hrs to 2200 hrs	*50 dBA L_{10}*
2200 hrs to 0700 hrs the following day	*45 dBA L_{10}*
	65 dBA L_{max}

Within the Coastal Marine Area, the boundary of the zone shall be the arc described by a 100 metre radius from the source of the noise, and, where the arc would lie outside the coastal marine area, the boundary shall be the line of Mean High Water Springs.

Northland REGIONAL COUNCIL

ELEC RC APRIL 2018 (REVISION 6) A1065054

Sound levels shall be measured in accordance with New Zealand Standard NZS 6801:1991 Measurement of Sound and assessed in accordance with NZS 6802:1991 Assessment of Environmental Sound.

8 The floating structure shall not be used for the permanent mooring of vessels. For the purposes of this condition "permanent mooring" means the use of the floating structure for any particular charter trailer yacht for longer than one week.

9 Boat servicing or maintenance that is likely to cause contaminants to enter the coastal marine area shall not be carried out at the facility (e.g. removal or application of paint or antifouling, activities involving oil or grease).

10 Maintenance of vessels and the floating structure shall not occur outside of the hours 0700-2000 Monday to Friday and 0800-2000 Saturdays, Sundays and Public Holidays, except during emergencies which directly involve the safety of people or vessels. The Consent Holder shall keep a record of every emergency event and also inform the Council within 24 hours of any emergency occurrence.

11 The Consent Holder shall maintain all facilities covered by this consent in good order and repair.

12 Except to the extent that discharges are made from vessels as part of their normal operations in accordance with regulation 15 and Schedule 4 of the Resource Management (Marine Pollution) Regulations 1998, the Consent Holder shall keep the coastal marine area free of debris resulting from the Consent Holder's activities.

13 Except to the extent that discharges are made from vessels as part of their normal operations in accordance with regulation 15 and Schedule 4 of the Resource Management (Marine Pollution) Regulations 1998, notwithstanding any other conditions of this consent, the discharge shall not cause water quality of the receiving waters of Opua Basin at a point 50 metres from the floating structure to fall below the following classified standard, being Class CB:

Purpose	Provides for contact recreation in coastal waters
Natural visual clarity	Not reduced more than 20%
Natural hue	Not changed more than 10 Maunsell units
Oil/grease film, scum, foam, odour	No conspicuous oil or grease film, scums or foams, floatable or suspended materials, or emissions of objectionable odour
Faecal Coliforms	Based on not fewer than 5 samples within any 30 day period: median < 150/100 ml and 80%ile < 600/100 ml
Other toxicants and parameters	As per Drinking Water Standards for New Zealand 1989

14 Except to the extent that discharges are made from vessels as part of their normal operations in accordance with regulation 15 and Schedule 4 of the Resource Management (Marine Pollution) Regulations 1998, where from any cause, contaminant or other material associated with the Consent Holder's operation escapes, otherwise than in conformity with this consent, the Consent Holder shall:

(a) Immediately take such action, or execute such work as may be necessary, to stop and/or contain such escape; and,

(b) Immediately notify the Council by telephone of an escape of contaminant; and,

(c) Take all reasonable steps to remedy or mitigate any adverse effects on the environment resulting from the escape; and,

(d) Report to the Council in writing within 1 week on the cause of the escape of the contaminant and the steps taken or being taken to effectively control or prevent such escape.

15 The Council may, in accordance with Section 128 of the Resource Management Act 1991, serve notice on the Consent Holder of its intention to review the conditions of this consent. Such notice may be served annually during the month of August. The review may be initiated for any one or more of the following purposes:

(a) To deal with any adverse effects on the environment that may arise from the exercise of the consent and which it is appropriate to deal with at a later stage, or to deal with any such effects following assessment of the results of the monitoring of the consent and/or as a result of the Council's monitoring of the state of the environment in the area.

(b) To require the adoption of the best practicable option to remove or reduce any adverse effect on the environment.

(c) To provide for compliance with rules in any regional plan that has been made operative since the commencement of the consent.

(d) To deal with any inadequacies or inconsistencies the Council considers there to be in the conditions of the consent, following the establishment of the activity the subject of the consent.

(e) To deal with any material inaccuracies that may in future be found in the information made available with the application. (Notice may be served at any time for this reason.)

(f) To change existing, or impose new limits on consent conditions.

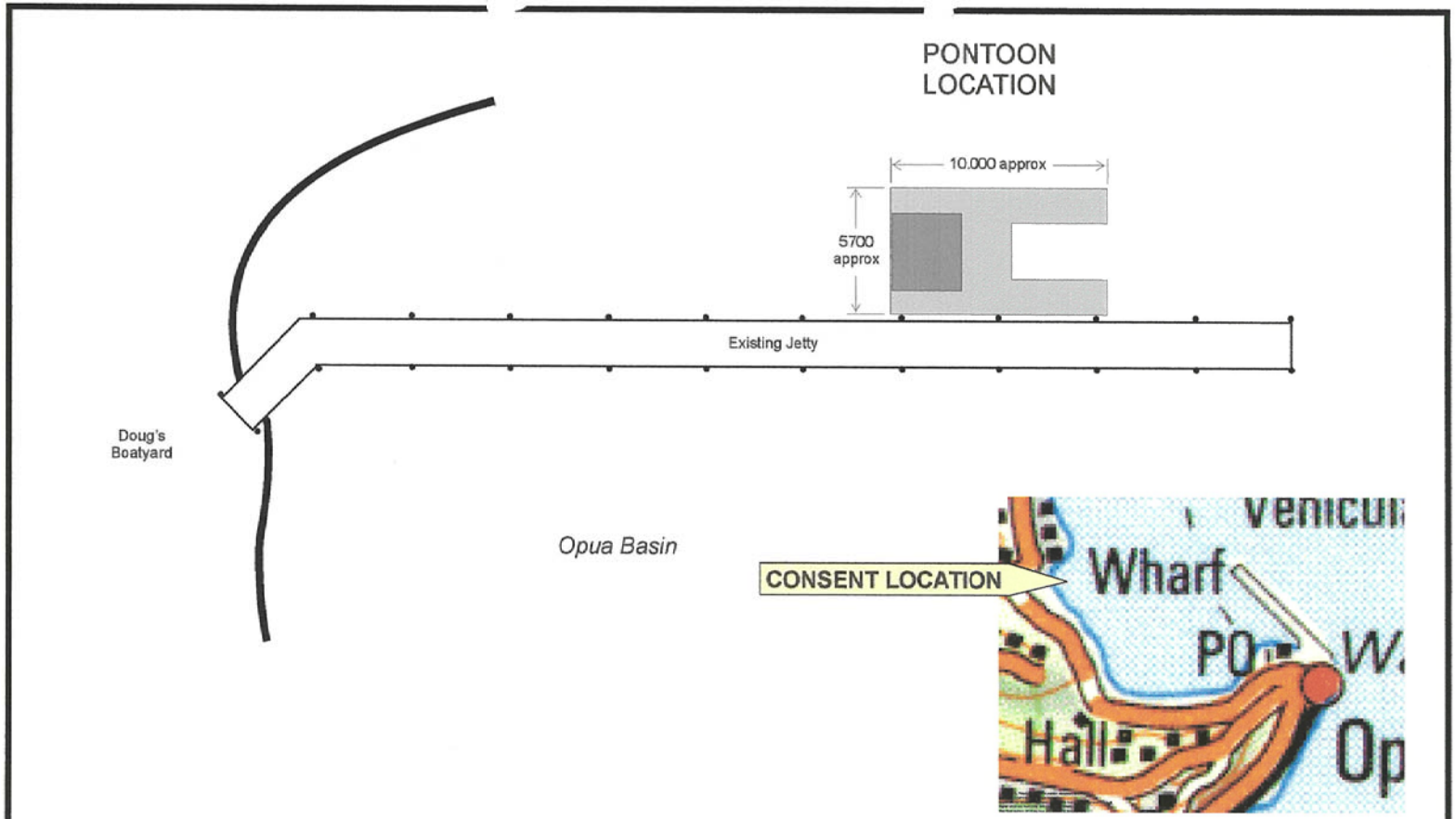
The Consent Holder shall meet all reasonable costs of any such review.

16 Monitoring of the consent will be carried out by the Regional Council. Various elements of the monitoring may be carried out by the Consent Holder with the prior written agreement of the Regional Council.

17 Upon the expiry, cancellation, or lapsing of this consent, the Consent Holder shall remove all structures and other materials and refuse associated with this consent from the consent area, and shall restore the consent area to the satisfaction of the Regional Council.

EXPIRY DATE: **30 MARCH 2036**

This consent is granted this Eleventh day of December 2002 under delegated authority from the council by: D L Roke, Consents Manager



Map Reference: NZMS 260: Q05: 123-537

	By	Date
Dwn.	C N Anderson	08/97
App'd		11/97
Amendment		
No.	By	Date
A		8/02

RESOURCE CONSENT CON20020827001
for
Great Escape Yacht Charters
Pontoon - Opua Basin - Bay of Islands

A

NORTHLAND REGIONAL COUNCIL

Scale	Plan No.
N.T.S.	3014A

APPENDIX C: REYBURN & BRYANT LETTER DATED 7 APRIL 2020 ADDRESSING COURT MATTERS AND APPEAL HISTORY

Alissa Sluys

From: Brett Hood <brett@reyburnandbryant.co.nz>
Sent: Wednesday, 8 April 2020 3:08 PM
To: Alister Hartstone
Cc: Paul M
Subject: Dougs Opua Boat Yard (DOBY)
Attachments: Kyrial v NRC EnvC C146-98.pdf; Declaration decision [2014] NZEnvC 101 02-05-14 (2).pdf; Schmuck v Northland Regional Council.pdf; 20-04-05 letter to A Hartstone (letterhead).pdf; SC 66-2018 Schmuck v Opua Coastal Preservation.pdf; Schmuck press release (final).pdf

Hi Alister

Please find **attached** a letter with associated attachments summarising some the important consenting history for DOBY, and some preliminary comments in relation to some of the matters raised by submitters. You will see I have **attached** the relevant cases for your reference, but I have also summarised them in the letter to save you some time.

Kind Regards

Brett Hood
Director

reyburn & bryant
PLANNERS • SURVEYORS

m 021 609 798 | **p** 09 438 3563 | **f** 09 438 0251
PO Box 191 Whangarei 0140 | www.reyburnandbryant.co.nz

Find us on Facebook

7 April 2020

Attention: Alister Hartstone

Email: alister@setconsulting.co.nz

Dear Alister

RE: DOBY - APP.041365.01.01 – PRELIMINARY RESPONSE TO MATTERS RAISED IN SUBMISSIONS

Following the close of submissions, I thought it would be useful to summarise some of the litigation pertinent to DOBY, and to address some of the matters raised in the submissions.

Relevance of Treaty and Waitangi Claims

While there is a duty to take into account the *principles* of the Treaty of Waitangi under section 8 of the RMA, this does not impose on the applicant (or a local authority) the obligations of the Crown under the Treaty or its principles, or empower them to consider or resolve claims arising under the Treaty of Waitangi Act 1975. Case authorities have confirmed that the RMA and Treaty claims processes are separate, and the Crown's obligations to redress past breaches of the Treaty stand apart from the RMA process.[1] Treaty claims, therefore, have no relevance to the determination of this resource consent application.

Relevance of MACA claims

There are no customary title orders pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) that apply to the Opua Town Basin (including the area occupied by DOBY). Applications under the MACA are still to be determined by the High Court. As is the case for Treaty claims, this is a separate process that stands apart from the RMA process.

The easements

Many of the submitters continue to raise concerns about the use of part of the reserve for boat maintenance activities. This is a matter that has now been clarified by the Supreme Court (see further explanation below). There is no need or indeed jurisdiction for the NRC to revisit this issue again through this consent process. The matter is now closed.

Alleged lapse of slipway reconstruction consent

Some of the submitters argue that the consents[2] for the reconstruction of the slipway and the concrete wash down area with associated discharge containment system have lapsed because those activities

---

[1] In *Hanton v Auckland City Council [1994] NZRMA 289*, page 20, the Court confirmed that a local authority is not subject to the obligations of the Crown under the Treaty, rather the consent authority is required to take those principles into account in reaching its decision.

In *Hokio Trusts v Manawatu-Wanganui Regional Council [2017] NZHC 1355* at [75] the Court held that "the Environment Court is not properly concerned with giving effect to the Treaty, but taking into account the principles of the Treaty.

In *Norris v Northland Regional Council [2012] NZEnvC 124 at [11]* the Court held that the presence of a Treaty claim does not embargo the RMA process.

[2] Condition 2(b) of RC 2000812 (see Environment Court Consent Order in Appendix 3 of the application).

have not been undertaken (or given effect to pursuant to section 125 of the Act).[3] This is a misunderstanding of the case law. These activities are part of a multifaceted consent which Judge Kirkpatrick found had been given effect to and had not lapsed.[4]

While the declaration decision is definitive, for your information further background is as follows:

In 2010 the NRC issued an Abatement Notice requiring the washdown area to be concreted as required by condition 2(b). The notice required this work to be completed within one month of the necessary approvals being obtained from the Department of Conservation ("DOC") and the Far North District Council. The reason why the work has still not yet been undertaken can be explained by the litigation following the DOC decision.

The DOC decision (as the Minister's delegate) was received in August 2013. It consented to some of the easements approved and declined others. The reason for declining some of the easements was based solely on a jurisdictional point; that section 48(1)(f) did not authorise easements providing for wash down, the repair and maintenance of boats on the reserve or the discharge of contaminants and noise over the reserve.

Mr Schmuck sought judicial review of the DOC decision. The preliminary question as to the jurisdictional point was upheld by Justice Heath. By that stage the delegations under the Reserves Act had changed, and the FNDC was now the Minister's delegate. The FNDC considered and consented to the easements earlier declined by the DOC as the Minister's delegate. OCP sought judicial review of that decision, ultimately resulting in the matter being decided by the Supreme Court late last year.[5]

Landscape Plan

The inclusion of the landscape plan prepared by Littoralis Landscape Architecture has created some confusion amongst submitters (and for that matter the FNDC). Specifically, despite the application stating that the landscape plan was contingent on the FNDC Parks Division approving the plan, and that the plan was only provided as an indication of what could be done rather than as specific mitigation for the proposed consents, some submitters appear to think that the landscaping is critical to and/or proposed as part of the application. It is not.

To reiterate, the landscape plan is <u>indicative</u> only, and could only be implemented with the support of the FNDC, and likely through a subsequent review of the Reserve Management Plan.

Public access to the wharf

Several submitters have objected to the public being excluded from the proposed reconstructed wharf.

The first point to note is that the 2002 consent was to place, use and maintain a wharf and to use the structures for the purposes associated with a boatyard (see (08) in Figure 1 below). This is its primary purpose.

Condition 2 of the 2002 consent states that "*the Consent Holder shall allow reasonable public access to and through this area in reasonable public access to and use of the wharf and pontoon structures*". While the 2002 consent is of limited relevance to the application currently before he Council, it is worth noting that the consent provided for "reasonable" public access, which was an acknowledgement that unfettered public access may from time to time conflict with the primary purpose of the wharf.

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[3] A Kiriak, Dysart, OCPS, Marks,

[4] *Douglas Schmuck v Far North District Council and Northland Regional Council* [2014] NZEnvC 101, at [28] – [44] or

[5] *Schmuck v Opua Preservation Incorporated SC 66/2018 [2019] NZSC 118*

Notwithstanding the 2002 consent, the application does not propose a blanket public exclusion. Specifically, access is controlled for health and safety reasons, noting that the primary purpose of the wharf is for activities associated with boat maintenance.[6]

As outlined in the application, there is support in the NZCPS for restricting public access for health and safety purposes. It should also be noted that despite the restriction on "reasonable" public access for health and safety purposes relating to the wharf structure, there is no such restriction in terms of the use of the dinghy pull. This, coupled with proposed capital dredging adjacent to the wharf, will benefit yacht owners who are currently confined to high tide access only or they must drag their dinghys around 100m across the mudflats. In short, the proposed improvements in all-tide access to the wharf structure will also be an improvement for other craft accessing the CMA in this locality (including dinghys, kayaks, SUPS).

To place, use and maintain:

(01) A wharf, wharf abutment and walking track security lighting, discharge piping and access pontoon;

(02) A slipway, complete with cabling and a dinghy ramp;

(03) Those parts of a timber and stone seawall and associated reclamation that lie within the Coastal Marine Area;

(05) A workboat mooring and pull; and

(06) Existing signage and hoardings.

(07) To carry out maintenance dredging of seabed material at the slipway.

(08) To use the above structures for purposes associated with the boatyard, including survey and inspection of ships and safe ship management, gridding of vessels for maintenance, marine brokerage of vessels for sale and/or charter in conjunction with the boatyard office.

(09) To occupy an area of seabed associated with the slipway and wharf structures.

Figure 1: Activities subject to coastal permit NLD 99 7914 (2002 consent order).

Differences between the 2018 application and the current application

Many of the submitters refer to the 2018 application that was declined by the NRC hearing Commissioners and the reasons for that decision as justification for declining the current application. By way of background, the 2018 application was appealed by the applicant. Apart from the discharge permits (which proceeded to the Environment Court) the rest of the appeal was subsequently withdrawn at the first Case Management Conference with the consent of the NRC and the Environment Court on the express basis that a further application for the activities would be filed in the future.

[6] Refer to pages 46, 68, 84, and 94 of the AEE.

The first thing to say about the 2018 decisions is that, in my opinion, it was a poor decision that was not based on the evidence before it. Notwithstanding that, the application was different to the current application before the NRC.

Key differences are as follows:

1. The proposed wharf reconstruction will now be 1m further to the north than the existing wharf rather than 5m as proposed in the 2018 application. This alleviates the concern raised in the 2018 Commissioners decision (paragraph 329) that the movement of the proposed wharf 5m to the north and closer to the shoreline and walkway was undesirable from a landscape and natural character perspective. Also, the proposed new wharf is exactly the same length as the existing wharf (it does not block the navigation channel as contended by some submitters). Furthermore, unlike the current application, the 2018 application was not supported by an assessment from a professional landscape architect.

2. The 2018 application included proposed mudcrete grids in the CMA (either side of the wharf) and the associated discharge of washed down water onto these grids in the CMA. The current application does not include mudcrete grids, and there are now very restrictive conditions proposed in respect to what maintenance activities can and can't take place at the working berths.

3. The 2018 application included new seawalls. The current application does not.

4. The current application involves a reduction in the length of the slipway in the CMA by more than half of what was proposed in the 2018 application.

5. There has been a reduction in the proposed capital dredging extent and volume from the 2018 consent. Specifically, the dredge depth has been reduced by 0.5m, and the area to be dredged no longer extends out to the last mooring on the fairway (near the ferry boat channel). This translates to an approximate halving of the proposed capital dredge volume. Also, while up to 7 moorings were impacted by the 2018 dredge proposal, only Mr Schmucks own mooring is affected by the current proposal.

A comparison of the 2018 and current resource consent plans is provided in Figure is 2 and 3 below.

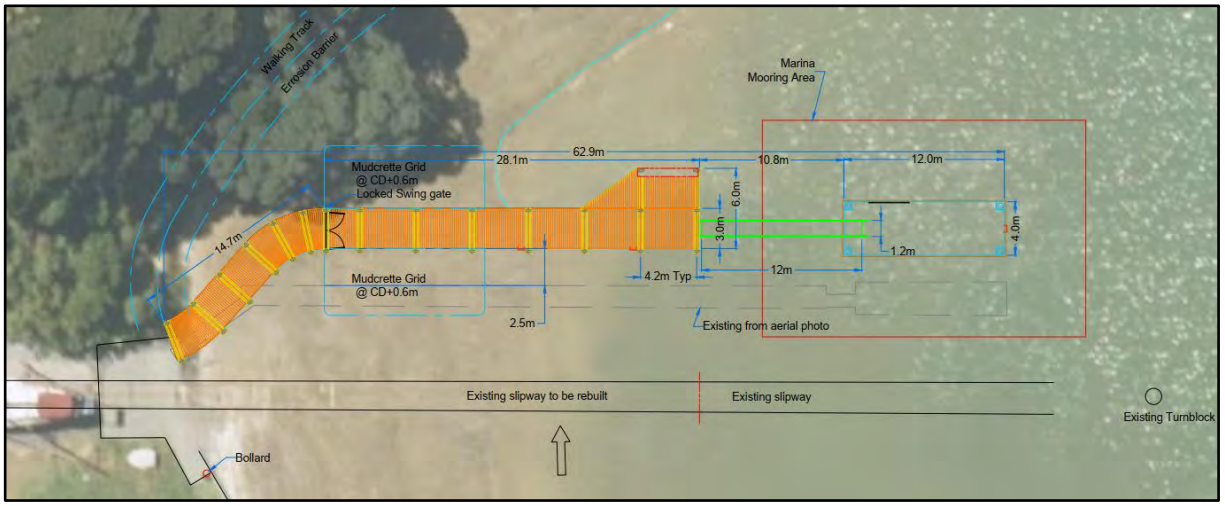

Figure 2: 2018 Application to NRC (note the relative location of the existing wharf versus the current application below)

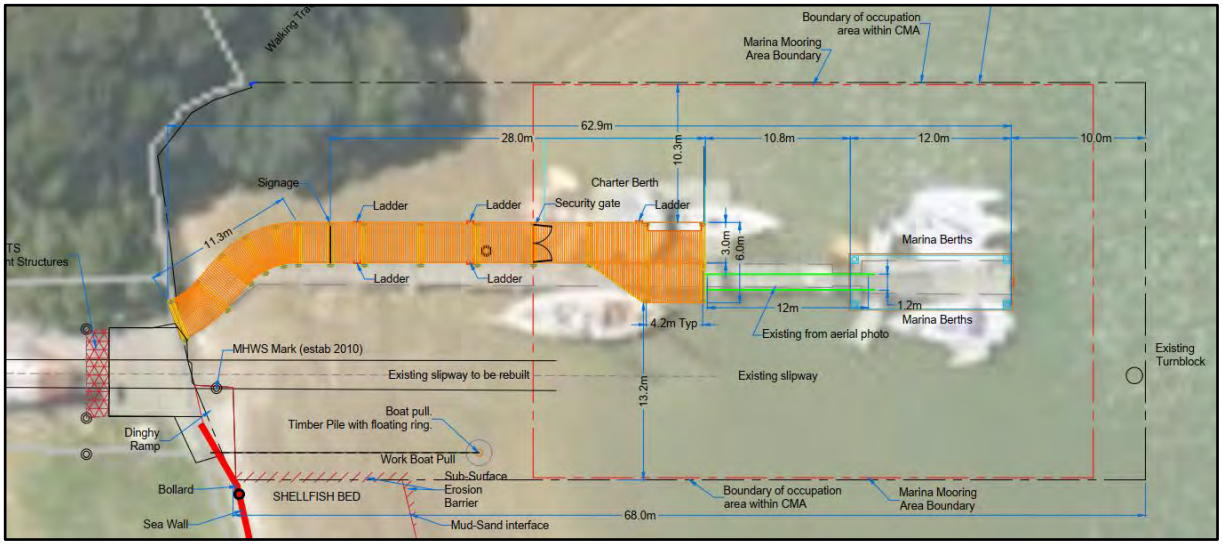

Figure 3: Current application to the NRC

Landscape and visual effects

As stated earlier, the current application is supported by an assessment by a professional landscape architect. The resulting report concludes that the effects are somewhere between low and very low. This opinion accords with the commentary in the 1998 decision by J Jackson in *A Kiriak v NRC EnvC C146-98* which dealt with an application by Great Escape Yacht Charters to establish the charter berth and associated structure alongside the wharf. Relevant excerpts from the decision pertinent to the visual effects relative to the existing environment are as follows:

24. The adverse effects identified by the appellants were:

- visual effects
- traffic effects
- effects on intertidal flora and fauna
- potential pollution effects

As for visual effects these need to be examined in the context of the Opua Basin as a whole. We recognise that while the Bay of Islands is exceptionally attractive even by New Zealand standards, Opua Basin is one of the most modified parts of the Bay of Islands. The jetty alongside which it is proposed to tie the pontoon is within a few hundred metres of the main Opua wharf. Between the wharf and the jetty is the basin which is full of moored yachts. Other signs of human activity are everywhere. There is a regular ferry service from Opua to Russell (Kororareka) as well as the usual wharf traffic. To the south of the main Opua wharf there are a number of boat building and other commercial activities.

25. Across the waterfront there is a public walkway which is a most attractive feature of the coastline between Opua and Waitangi. On the hillside to the west of the proposal there is an attractive bush covered face with pohutukawas and other species of dominant trees and above that on the ridge tops are houses, including houses of some of the appellants. Many of the houses on the ridge above Doug's Boat Yard will not be able to see the jetty and the pontoon, although we accept that a few will. However they are, in our opinion, at a sufficient distance so that the pontoon and cabin will not protrude unduly into their view. The houses are high enough so that the eye can easily look over the pontoon to the yachts and bay and vista beyond.

26. Looking at the site from the Opua wharf there is a pleasant combination of the natural and commercial in the setting of the jetty, with the slipway and boat building shed behind against the dark green of the pohutukawas on the steep coastal slopes. The near presence of the residences on the ridges above adds to the overall developed feeling of the Opua Basin. The cabin on the pontoon will not protrude unduly, as it is designed, so we were told, to look like the cabin on a ferry. It has portholes and a curved coach roof to create that effect. Other large non-yacht-like structures are in the vicinity including the much larger assymetrical cabins on the ferry.

There is nothing in the application currently before the NRC which materially changes the visual and landscape effects of the existing structures in the CMA from those considered by Judge Jackson. The decision is discussed further below.

A Kiriak v NRC EnvC C146-98 (J Jackson) [Decision date: 22 December 1998]

In 1997 Great Escape Yacht Charters applied for a resource consent to use a floating structure for maintaining and servicing charter yachts alongside the existing wharf and boatyard. The NRC approved the application, but the matter was then appealed to the Environment Court by a number of parties including two that are now opposing the current consent application (A Kyriak and H Nissen).

Notably, none of the appellants called any professional witnesses in that case. This has been a continuing theme ever since where, despite vehement opposition to subsequent resource consents lodged by Mr Schmuck, these repeat submitters (and others) have never provided expert evidence to provide a basis for the concerns that they raise.

Ultimately the appeal failed.

Of relevance, the decision also confirmed that Mr Schmuck held a deemed coastal permit for the structures in the CMA (paragraph 22).

Declaration Schmuck ENV-2013-AKL-000032 (J Kirkpatrick) [Decision date: 2 May 2014]

In 2014 Mr Schmuck applied to the Environment Court for declarations about the existence, terms and validity of resource consents relating to his boatyard, slipway and ancillary activities. The resource consents in question were those granted in the Consent order dated 31 January 2002.

The declarations from this decision that are particularly relevant to the current application, noting that some of the submissions contend otherwise, are as follows:

C. Land use consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 commenced on the date of that Consent Order.

D. Land Use Consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 has been given effect to.

This declaration deals with those submitters who continue to allege that elements of the 2002 consents have lapsed.

Schmuck v Opua Preservation Incorporated SC 66/2018 [2019] NZSC 118 [Decision date: 29 October 2019]

The appeal related to whether easements for washdown and repair and maintenance activities on the reserve could validly be easements. In its decision, the Court of Appeal had held that the easements were invalid on common law grounds relating to the nature of an easement. The Supreme Court allowed the appeal and confirmed the easements as registered. In each case, the easements provide for the activities authorised by resource consent and impose conditions accordingly. The areas of the reserve referred to in the easement document are shown on the plan in Figure 4 below.

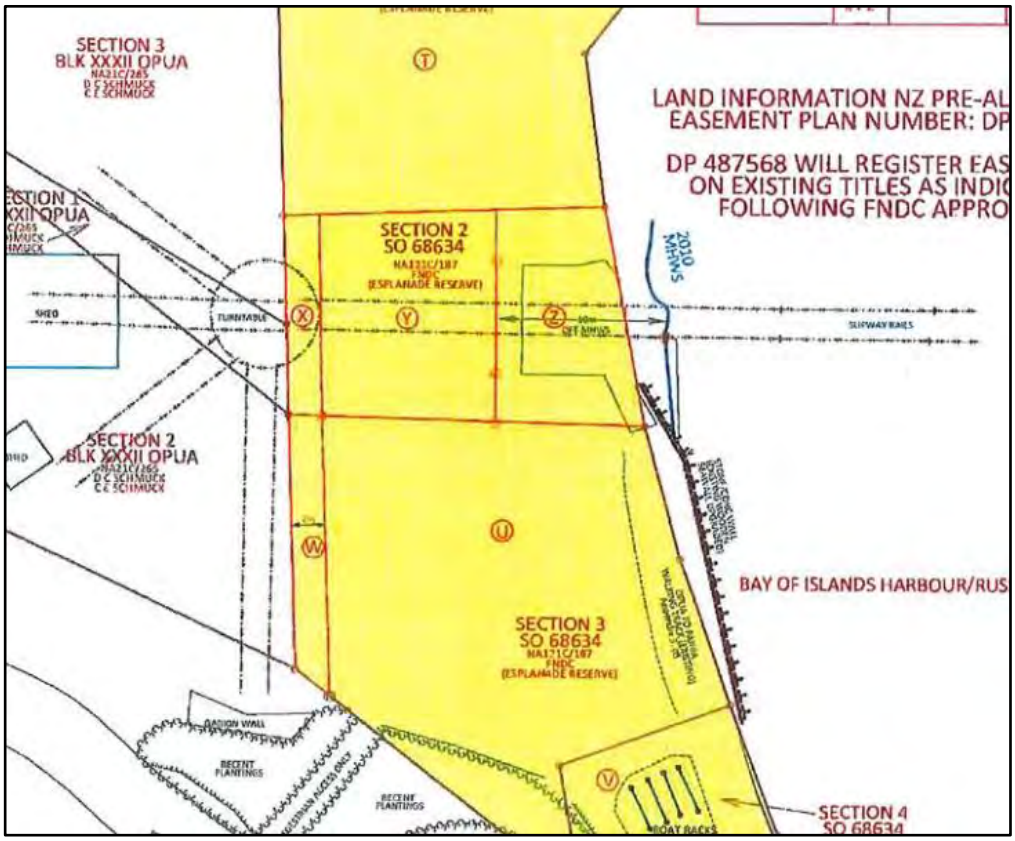

Figure 4: Areas of the reserve referred to in the easement document

The terms of the easements are set out below. As outlined in the decision, the easements that were subject to challenge were easements A4, A5, A6 and C (highlighted in bold).

A. An easement over [the land comprised of the areas marked X, Y and Z on the plan (the XYZ area)] to permit the following:

1. Construction and maintenance of a commercial marine slipway including a turntable and all of its integral parts, fixtures, supporting members, attachments, utilities and non-permeable surfaces.
2. The movement of boats along the slipway between the dominant tenement and the water.
3. The construction and maintenance of a concrete wash-down area with associated discharge containment systems to be located above a line 10 m above MHWS.
4. The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.
5. The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.
6. The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.
7. A stormwater and conduit drain.
8. A security light pole.
9. Associated utilities for power and water.
10. Safety signage.
11. A wharf abutment.
12. A concrete dinghy ramp (where this does not otherwise lie within the coastal marine area).

Subject to the following conditions:

1. That all activities shall be carried out in accordance with any relevant resource consent.

2. That in respect of the repair and maintenance of boats, the following shall apply:

(a) win boats which by virtue of the length or configuration cannot be moved so that they are entirely within the dominant tenement, are placed on cradles located entirely within the dominant tenement but protrude into the airspace above [the XYZ area] and/or [the land comprised of the areas marked U and W on the plan (the UW area)], such boats may be repaired or maintained at any time of the year;

(b) as a small portion of the turntable encroaches onto [the XYZ area], boat cradles that are located on any part of the turntable but that do not otherwise encroach onto [the XYZ area] may utilise the turntable at any and all times of the year, and boats placed on such cradles may be repaired or maintained at any time of the year;
(c) when boats which by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement, are unable to be placed on cradles located entirely within the dominant tenement in accordance with clause (a) above, and are not located on the dominant tenement in accordance with clause (b) above, such boats may be placed on cradles located within that part of [the XYZ area] marked X and Y on [the plan], and such boats may be repaired or maintained for an aggregated period of no more than 60 days in any 365 day period commencing on or after the date the easement is registered;

(d) No boat cradles or part thereof may be positioned on any part of [the XYZ area] marked Z on [the plan] other than for the purpose of haulage of a boat;
(e) to enable the Far North District Council to monitor compliance with the 60 day annual usage limit contained in clause (c) above, the boatyard's operator shall continue to keep operational diaries recording the use of the areas marked X and Y on [the plan] for the repair and maintenance of boats, and such diaries shall be made available to the Council's monitoring officers on request.

B. An easement over [the areas marked T, U, W, X, Y and Z on the plan], to permit the following:

Access to and reconstruction of the slipway between the dominant tenement and MHWS and the concreting of that part of the slipway situated above a line 10 metres from MHWS.

Subject to the following conditions:

1. That any earthworks material which is surplus to slipway reconstruction requirements shall be secured within [the XYZ and UW area] and secured so that siltation and erosion does not occur, or be removed from the site.
2. That all activities shall be carried out in accordance with any relevant resource consent.

C. An easement 2 m wide over [the areas marked W and X on the plan], to permit the following:
Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.
Subject to the following conditions:
1. That all activities shall be carried out in accordance with any relevant resource consent.
2. That this easement shall expire after 10 years from the date of registration, subject to a right of renewal every 10 years, provided that in the event of the boatyard property being redeveloped and alternative access not being provided as part of the redevelopment, any request for renewal will be viewed less favourably.

D. An easement over [the areas marked T, U, V, and Z on the plan], to permit the following:

1. Existing wooden and stone retaining walls (where these do not otherwise lie within the coastal marine area).

E. An easement [over the areas marked T, U, V, W, X, Y and Z on the plan], to permit the following:

1. The discharge of contaminants to air, soil, and water in accordance with any relevant resource consent;
2. The emission of noise in accordance with any relevant resource consent.

AND the following conditions shall apply in respect to the above easements:

1. The grantee shall keep current a public liability insurance policy for a minimum of $1,000,000 (one million dollars).
2. If required by Council the grantee shall make an inducement payment to Council and/or pay an annual rental as may be agreed upon between the parties.
3. The grantee shall surrender the easements to the Council at the Council's request if and when the boatyard ceases to operate, and shall reinstate the area to the satisfaction of the Council.

The decision of the Supreme Court confirmed all these easements (including those highlighted in bold).

Importantly the easements provide for:

1. The washing down boats on the easements X, Y and Z.
2. The erection of screens around the wash down perimeter.
3. The maintenance and repair of vessels that are too large to be entirely contained within the boatyard site.

It is also notable that the easements are subject to conditions including that "*activities are carried out in accordance with any relevant resource consent*". As confirmed by Judge Kirkpatrick in the declarations under *ENV-2013-AKL-000032*, relevant resource consents exist for the activities being carried out within these easements. This includes the 2002 consent order, and the 2008 discharge permits (still in operation under s124(1)(d) of the RMA pending resolution of the Environment Court appeal recently referred back from the High Court).

Obviously, the subsequent decision on the resource consents now before the NRC will need to continue to be consistent with the terms of the easements.

Schmuck v Northland Regional Council CIV-2019-488-000075 [2020] NZHC 590 [Decision date: 20 March 2020]

Following the 2018 NRC hearing panel decision to decline the application for various resource consents, these were appealed to the Environment Court. Subsequently, the discharge permits (to air, water and land) were heard by the Environment Court, while all other aspects were withdrawn.

Following an interim decision by the Environment Court where the Court refused the renewal of the discharge consents as they applied to the reserve on the basis that it lacked jurisdiction to grant renewals, Mr Schmuck appealed this decision to the High Court.

The High Court allowed the appeal and remitted the matter back to the Environment Court for further consideration and with the following directions:

(a) The discharge consents apply to activities on the reserve (as well is the boat yard land);
(b) The evidence will need to be further considered in light of (a); and
(c) The discharge system proposed by the Court in its decision is one on which the parties may comment and/or produce evidence.

In light of the High Court direction that the discharge consents apply to activities on the reserve as well as the boat yard land, the discharge system proposed by the Environment Court in its decision is rendered impractical and evidence will be produced to that effect.

Summary

The existing easements and resource consents applicable to DOBY are inextricably linked. The easements are subject to the need for appropriate resource consents for the activities, and the activities must be consistent with the terms of the easements. Therefore, this is a fundamental requisite for the application currently before the NRC.

Based on the submissions received, there are certain persons and groups that continue to dispute declarations and decisions of the Environment Court, and also the decision of the Supreme Court. This is inappropriate, and at some point before the Council hearing the NRC hearings Commissioner will be asked to make it clear that these matters are of no relevance to the current proceedings.

This is not another opportunity for these same people and groups to relitigate the same issues they have been pursuing for the last 20 years. That is not fair on the applicant, and it is a waste of Council time and ratepayer money. The hearing must be specific to the matters that the Council have jurisdiction to consider, with a focus on the effects of the activities on the environment. To that end, as has been the case for the last 20 years, the submitters have not produced any evidence to support the concerns around environmental effects. Their focus remains on what they consider to be inappropriate activities on a public reserve (notwithstanding that easements and resource consents are in place for those activities).

I trust that you will find this information useful. The boat yard has a long and complicated history, but it is one that you must understand in order to do justice to the processing of this resource consent.

Yours faithfully

Brett Hood
Director

Encl. *Schmuck v Northland Regional Council CIV-2019-488-000075 [2020] NZHC 590, Declaration Schmuck ENV-2013-AKL-000032 (J Kirkpatrick), A Kiriak v NRC EnvC C146-98 (J Jackson), Schmuck v Opua Preservation Incorporated SC 66/2018 [2019] NZSC 118*

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 101

IN THE MATTER	of an application for declarations under Section 311 of the Resource Management Act 1991 (**the Act**)
BETWEEN	DOUGLAS SCHMUCK (ENV-2013-AKL-000032)
	Applicant
AND	FAR NORTH DISTRICT COUNCIL, NORTHLAND REGIONAL COUNCIL
	Respondents
AND	BAY OF ISLANDS COASTAL WATCHDOG INC
	Section 274 party

Hearing:	19 March 2014 at Paihia
Court:	Environment Judge DA Kirkpatrick
Appearances:	Ms CH Prendergast for Douglas Schmuck Ms JS Baguley and Mr JGA Day for Far North District Council Mr C Dall on behalf of Northland Regional Council Mr M Leiding on behalf of Bay of Islands Coastal Watchdog Inc
Date of Decision:	2 May 2014

DECISION OF THE ENVIRONMENT COURT

The Court makes the following declarations pursuant to section 310(a) and (h) of the Act:

A. **The opportunity for the Far North District Council to review condition 8 of land use consent RC2000812 in accordance with the last sentence of that condition expired on 1 February 2003.**

B. **Condition 12 of land use consent RC2000812 does not require the Far North District Council to undertake a mandatory review of the conditions of that consent.**

C. **Land use consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 commenced on the date of that Consent Order pursuant to s116(1) of the Act.**

D. **Land use consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 has been given effect to pursuant to s125(1A)(a) of the Act.**

REASONS FOR DECISION

Introduction

[1] Mr Schmuck (**the Applicant**) has applied for declarations about the existence, terms and validity of certain resource consents relating to his boatyard, slipway and ancillary activities at Walls Bay, Opua.

[2] The land to which this application relates is of three types:

(i) Private land owned and occupied by Mr Schmuck containing his boat building shed, boatyard and a slipway with a turntable, situated on land known as Doug's Opua Boatyard;[1]

[1] Legally described as Sec 2 SO 24139, Pt Sec 1 SO 16553, Sec 3 SO 46155, Blk XXXII Town of Opua.

(ii) An area of esplanade reserve vested in the Far North District Council (**the District Council**) containing a slipway and part of the turntable with ancillary utilities;[2] and

(iii) A portion of the coastal marine area adjacent to the esplanade reserve containing a slipway and a wharf with a pontoon.

[3] Attached to this decision as **Appendix 1** is a plan of these three areas, taken from the Consent Order dated 31 January 2002 (**the Consent Order**) which granted the resource consents which are the subject of this proceeding, and which may assist in understanding the layout of the various activities. As will become clear, the focus of this proceeding is in relation to the works and activities on the area of esplanade reserve.

[4] The declarations sought by Mr Schmuck are grouped into five matters:

1. A declaration as to the existence and scope of the land use consent for the boatyard and the slipway. While there is no dispute between any of the parties about the granting of the resource consents, nor is there any issue raised in the pleadings as to the terms and conditions of those consents as they were granted, the District Council raises an issue about whether the Court's discretion should be exercised to make such a declaration in the present circumstances.

2. A declaration which effectively seeks to amend part of the Consent Order dated 31 January 2002. This is opposed by the District Council.

3. Three declarations relating to the review conditions attached to the land use consent. The District Council abides the making of these.

4. Four declarations as to the scope and extent of the land use consent, including its date of commencement, whether it has been given effect to, and whether certain activities on the esplanade reserve are lawful on the basis of implied landowner consent by the District Council. There is no dispute as to the date of commencement of the land use consent, but Bay of Islands Coastal Watchdog (**BOICW**) challenges whether

[2] Legally described as Sec 1-4 SO 68634 (Title Identifier NA 121C/187).

the land use consent has been given effect to and the District Council opposes the declarations relating to implied landowner consent.

5. Four declarations as to the existence and scope of the coastal and discharge permits under the jurisdiction of the Northland Regional Council (**the Regional Council**). There is no dispute about these consents, but the District Council's objection to the first declaration is also pertinent to these.

[5] While some statements in the affidavit evidence filed on behalf of the Applicant and the District Council indicate areas of possible dispute as to compliance with some aspects of the land use consent, both counsel for the District Council in submissions and Mr Killalea its Principal Planner, in his affidavit sworn on 10 October 2013, advised that the Council's position was to assist the Court but otherwise abide the Court's decision on this application. I note that no current enforcement action is on foot by the District Council in relation to Mr Schmuck's activities.

[6] I was advised that the only currently outstanding enforcement issue is in relation to an Abatement Notice dated 27 October 2010, issued by the Regional Council. The subject of the notice is discharges from washdown of the hulls of vessels on the turntable and slipway. The notice specifies that the work required to be done is, firstly, to install an impervious surface around the turntable and on the slipway to capture all contaminants from waterblasting boats and direct them to the treatment system and, second, to concrete the area of the slipway identified on an attached plan which is located on the esplanade reserve. The notice states that the first item was to be done by 10 November 2010 (and this has occurred) and the second is required to be done "*within one month of the necessary approvals being obtained from the Department of Conservation and the Far North District Council.*" While the District Council has authorised this work, the Director-General of Conservation has not. The Regional Council has therefore not cancelled the notice.

[7] As will become apparent, this impasse is symptomatic of the issues confronting the operation of the boatyard and its associated slipway. As will also become apparent, resolution of these issues in these proceedings is made difficult by the status of the esplanade reserve under the Reserves Act 1977 and this Court's lack of jurisdiction to address issues arising under the Reserves Act.

Background

[8] Boat building activities have occurred at Walls Bay for many years. Boatyard activities started in about 1972, after the grant of a specified departure consent on 17 November 1971 by the Bay of Islands County Council to Mr E T Leeds. In 1976 consent for a new slipway in the current location was given by that Council and it was built between 1977 and 1979. In 1988-89, approvals were granted by the Council and by the Minister of Conservation for the jetty.

[9] Litigation involving boat building activities on this site has also occurred for some time.[3] In particular, the establishment of the boatyard and slipway at Walls Bay has been considered by the Court previously in ***Schmuck v Far North District Council***.[4] That decision was in respect of an appeal against an abatement notice. In considering a defence based on existing use rights, Judge Sheppard reviewed voluminous affidavits and set out a history of the site down to the hearing before him in 2000 at paragraphs [7] – [18] of the decision which I have drawn on for my brief summary in [8] above. For present purposes, the important point is that because no authority had been given to carry out boatyard activities on the esplanade reserve, the Court did not uphold the defence of existing use rights and accordingly disallowed the appeal.

[10] Faced with that ruling and in order to regularise the position of his boatyard in terms of the resource consents needed for its existence and operation, Mr Schmuck applied in 2000 to the Far North District Council for land use consent in relation to both his own property and the esplanade reserve, and to the Northland Regional Council for a range of coastal and discharge permits. These were granted (noting that the District Council granted the land use consent in part, declining certain activities in relation to the esplanade reserve) subject to conditions and were then subject to appeals by the Applicant (RMA 381/01), by the submitters ET & MC Leeds (RMA 387/01) and by the Director-General of Conservation (RMA 393/01).

[11] These appeals were ultimately resolved by a Consent Order made by the Environment Court and dated 31 January 2002. That Consent Order amended the decisions of both the District and the Regional Councils as shown on the Schedule attached to the order. Since the making of that Consent Order, certain of the consents

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[3] See, e.g., ***Kyriak v Schmuck***, A155/98, relating to an application for an interim enforcement order , and ***Kyriak v Schmuck***, A135/99, relating to three separate proceedings about the site.
[4] A26/2000.

under the jurisdiction of the Regional Council have been renewed or replaced, but there is no issue before me about those consents.[5]

[12] In summary, to the extent relevant for present purposes, the currently existing resource consents associated with the boatyard and slipway are:

(i) Land use consent RC2000812 granted by the Far North District Council and amended in terms of the Consent Order dated 31 January 2002 in respect of the boatyard site and the esplanade reserve;

(ii) Coastal permits CON199907914(01)-(09), granted by the Northland Regional Council in respect of works and structures in the Coastal Marine Area (including a wharf and a slipway), uses associated with the boat yard, and occupation of the seabed associated with the wharf and slipway;

(iii) Discharge permits CON200607914(10)-(15) granted by the Northland Regional Council in respect of discharges of treated wash water to the CMA, contaminants to air and to ground from certain types of boatyard activities, and stormwater to the CMA;

(iv) Coastal permits CON201207914(16)-(17) granted by the Northland Regional Council in respect of a sea wall and dinghy ramp extension; and

(v) Land use consent CON201207914(18) granted by the Northland Regional Council under a transfer of functions, powers and duties from the Far North District Council in respect of portions of the dinghy ramp located above mean high water springs.

[13] The terms of the land use consent RC2000812 in the Schedule to the Consent Order are in a somewhat unusual format. They appear to be taken directly from the decisions made by the Far North District Council, and are in three sections:

(i) Section A, relating to the private land known as "Doug's Opua Boatyard" authorising a commercial marine slipway, a boatyard and paint cleaning station, a boat building shed and an office, together with a

[5] Mr Dall, the Consents/Monitoring Senior Manager of the Regional Council, presented a very helpful affirmation summarising the position in relation to these consents, from which I have taken relevant details.

stormwater containment system and a discharge containment system, as well as authorising the reconstruction and concreting of the slipway and boatyard.

(ii) Section B, relating to activities and structures on the esplanade reserve, including a commercial marine slipway with a turntable, a concrete washdown area and associated discharge containment system as shown on an attached plan and to be located above 10 metres above mean high water springs, with a stormwater and conduit drain, security light pole and associated utilities, safety signage, wharf abutment and existing wooden and stone retaining walls. The consent also authorises the reconstruction of the slipway between the boat yard property and mean high water springs and the concreting of that part of the slipway situated above a line 10 metres from mean high water springs. It also authorises the carrying out of washing down of boats provided that repairs and maintenance may be carried out on the reserve only in accordance with condition 8 to the consent.

(iii) Section C records that the District Council refused its consent for certain activities and structures on the esplanade reserve, being the stormwater containment system, the discharge containment and the use of the concrete slipway for boat repair and maintenance.

[14] A review of sections B and C indicates that there is potential conflict where certain activities that appear to be granted on appeal (as shown in bold type) in section B also appear to be refused in terms of section C. Ordinarily an order of the Environment Court would not include reference to any matters for which consent had been refused by the original consent authority, other than to the extent that the Court's decision on appeal granted consent to such matters. If (as here) the refusal of consent was the subject of the appeal, then normally the Court's order would set out what the Court decided rather than repeat the decision at first instance. The possible convenience of the parties in using the format and content of the original District Council decision as a basis for the Consent Order, without addressing the fact that Part C would not reflect the amendments that were to be made in Part B, is now more than offset by the inconsistency on the face of the Consent Order and the clear need for that to be remedied. Mr Schmuck seeks to remedy this by means of the second declaration he has applied for, but this is opposed by the District Council on the grounds that it is inappropriate for the Court to amend its own order by way of a

declaration. For the reasons I will set out below, there is much force in that submission.

[15] The conditions attached to the land use consent RC2000812 relevantly include the following:

> 3) That the Discharge Containment System and the Stormwater Containment System shall be located as far as is practicable within the Consent Holder's site with these arrangements being to the satisfaction of the District Council's Resource Consent Manager.
>
> 4) Except as provided in Condition 8 that no materials, tools or other items shall be placed or left on the Esplanade Reserve except as may be necessary for the passage of boats on the slipway and only whilst those activities are being carried out.
>
> ...
>
> 8) Except as provided herein any repair or maintenance work on vessels shall be undertaken within the Consent Holder's site. Vessels may be washed down within that area of the Esplanade Reserve marked "A" on the attached plan *(attached as Appendix "A" to this decision)*. Any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the Consent Holder's site may be repaired or maintained on that part of the Esplanade Reserve marked "A" on the attached plan. That part of the Esplanade Reserve marked "B" on the attached plan may be used for the purposes of permitting the repair or maintenance of any vessel standing on the southern branch of the slipway marked "C" on the attached plan. Notwithstanding condition 12 the Council may review condition 8 one year after the date of this consent if requisite approvals under the Reserves Act 1977 have not been received for use of Area "A" and "B".
>
> 9) Except as provided in this consent no vessel shall be left on the slipway within the Esplanade Reserve. All relevant safety requirements shall be adhered to at all time. The only permitted closure of the Esplanade Reserve is for safety reasons during vessel haulage. No more of the Esplanade Reserve shall be closed than is absolutely necessary.
>
> ...
>
> 12) The District Council reserves the right, pursuant to section 128 of the Act, to review the conditions herein should it decide there is evidence that the activity creates an adverse effect not currently mitigated through conditions of consent. Such a review shall occur one year after the issue of this decision and every two years thereafter.
>
> ...

[16] It can be seen that these conditions also create some conflict with the scope of section C of the land use consent. I will discuss this conflict in detail below.

[17] These amended conditions were lodged with the Court together with a Memorandum dated 21 December 2001 signed by or on behalf of the parties to the appeals. The Memorandum includes the following paragraphs:

> 5. The amendments to the conditions, all of which are within the ambit of the original application as notified and are in the scope of the relief sought in the appeals, have meant that the boatyard's use of the reserve will be more restricted than was consented to by the respondents. Potential adverse effects will be mitigated further.
>
> 6. All parties acknowledge that, before using the reserve in the manner consented to, the applicant must obtain the consents of the respective authorities and the Minister of Conservation under the Reserves Act 1977. This is a case where it is necessary to define the areas of reserve required for use in connection with the resource consents before considering the boatyards application for appropriate easements under the Reserves Act 1977 to match those resource consents.

These paragraphs are of importance to the question of whether the land use consent in relation to the esplanade reserve has been "given effect to" in terms of s125 of the Act, as discussed below. As noted at the outset of this decision, the Environment Court has no jurisdiction over matters under the Reserves Act 1977. I am referring to such matters in this decision to the extent that they are relevant to considering and determining Mr Schmuck's application for declarations as to giving effect to the land use consent and to whether the use of the esplanade reserve may be lawful. These comments may also assist the parties and other readers of this decision to understand this case and my decision.

[18] The Court made the Consent Order on 31 January 2002. Mr Schmuck then proceeded to apply to the Far North District Council, as the administering body of the esplanade reserve, for easements in relation to those parts of the land use consent and the discharge consents granted by the Regional Council which affected the esplanade reserve. The process followed was not straightforward, but it is outside the scope of this proceeding for me to rehearse it here. Ultimately the District Council appointed a commissioner to hear that application and submissions on it. In a report dated 22 December 2005 the Commissioner recommended the granting of the easements sought by Mr Schmuck, and the District Council adopted that recommendation on 9 March 2006.

[19] The District Council then sought the regional conservator's consent to the granting of such easements, by letter dated 20 March 2006. By letter dated 27 August 2013, the Regional Conservator declined consent to certain easements, and granted consent to certain others. Essentially, the basis for declining consent to certain easements was that they related to repair and maintenance activities rather than access between the boatyard and the coastal marine area: the Regional Conservator consented to easements for the latter purpose and refused consent for those for the former purpose. I have read both the Regional Conservator's decision and also the report from the Statutory Land Management Adviser to the Department of Conservation on which that decision is based. I note that the decision states that the easements which were declined are not capable of being authorised under the provisions of s48 of the Reserves Act 1977, and this jurisdictional reason is discussed in some detail in the Statutory Land Management Advisor's report to the Regional Conservator. Within the confines of my own jurisdiction, I observe that a previous Regional Conservator had, some 11 years before, signed the memorandum of the parties in support of the Consent Order dated 31 January 2002. By that settlement of his appeal, the Director-General of Conservation consented to the grant of the resource consents for certain repair and maintenance activities to occur on the esplanade reserve within the limits set by the amended conditions of consent. I note that the report of the Statutory Land Management Advisor acknowledges this previous action and simply states that the Minister's exercise of discretion under the Reserves Act is not fettered by the RMA process. I lack the jurisdiction to make any comment on that reasoning.

[20] I also note that on 17 June 2013, during the period when the request from the District Council was before the Regional Conservator, the Minister of Conservation delegated to Councils the power to grant easements under s48 of the Reserves Act 1977 without the need to obtain the consent of the Minister or another delegate. That delegation to the Council did not, however, alter the process by which Mr Schmuck's application was proceeding, having commenced some years previously.

[21] I stress that this is merely this Court's reference to matters that are beyond its jurisdiction for the purposes of assisting others who may read this decision to understand the position which is more complex than one might anticipate. I am advised by counsel for the Applicant that further steps may be taken by him in relation to the decision of the Regional Conservator; I am not aware of what those may be. For the purposes of this decision, I simply note on that basis that the process of

obtaining authorisation for use of the esplanade reserve by way of easement pursuant to s48 of the Reserves Act 1977 has not yet been completed.

Issues for the Court

[22] On their face, the declarations sought by the Applicant raise legal issues relating to the content and effect of the resource consents and I will address these in terms of the particular declarations. From the affidavits and the manner in which the matter was argued before me, however, the underlying issues in this case relate to:

(i) the use of an area of esplanade reserve for slipway and boatyard purposes involving the repair and maintenance of vessels;

(ii) the public interest in managing the use of esplanade reserves to protect access to and along the coastal marine area; and

(iii) the relationship between resource consents under the Resource Management Act 1991 and easements under the Reserves Act 1977.

[23] In considering these issues in the context of this proceeding, the Court must be mindful that its jurisdiction under s310 of the Act is confined to matters arising under the Act. The proper scope of declaratory relief and the exercise of the Court's discretion to make declarations under that section does not extend to matters under other legislation or rules of law, unlike the powers of the High Court under the Declaratory Judgments Act 1908. The Environment Court has no jurisdiction to declare a position under the Reserves Act 1977 or in relation to the general law of property. While the Court may refer to other law where relevant and necessary,[6] such reference must clearly be confined to ensure that the specific jurisdiction in s310 of the Act is not exceeded.

Declaration 1 - Existence of Resource Consents

[24] As explained at the hearing by his counsel, the Applicant's real concern is that the existence of resource consents is challenged, with some suggestion that they may be "revoked". Mr Schmuck is also concerned that the Walls Bay Esplanade Reserve Management Plan adopted by the Council pursuant to s41 of the Reserves Act on 21 February 2013 does not deal properly, in his view, with the slipway. Hence, I was

[6] See re ***Coromandel Marine Farmers Association (Inc)*** (unreported) HC Auckland CIV-2006-419-000877, 7 March 2008, Cooper J at paragraph [16]

told, he sees a real issue which requires the making of the first declaration in relation to the existence and scope of the land use consent and the four declarations in relation to the coastal and discharge permits as granted by the Regional Council and confirmed by the Court in the Consent Order.

[25] It is clear beyond doubt, by virtue of the Consent Order made by the Environment Court on 31 January 2002, that there are a number of consents held by the Applicant, trading as Doug's Opua Boatyard, as summarised in paragraph [12] above. In terms of ss104, 116 and 290 of the Act, it is therefore beyond argument that these consents were confirmed with amendments and commenced on 31 January 2002. I note that the reserve management plan refers to the Consent Order as a relevant consideration to the statutory requirements for such a document. Beyond that observation, I have no jurisdiction to inquire into the content of the reserve management plan or the process that led to its adoption.

[26] Having commenced in terms of s116 of the Act, there are six ways in which a resource consent can cease to exist:

(a) by terminating according to its own terms pursuant to s123 of the Act, which governs the duration of consents;

(b) by lapsing in accordance with s125 of the Act, where the consent is not given effect within (in this case) five years after the date of commencement, and that lapse date is not extended;

(c) by being cancelled pursuant to s126 of the Act by notice from the consent authority if the consent has not been exercised during the preceding five years;

(d) by being cancelled pursuant to s132(3) of the Act after a review of consent conditions, if the consent authority finds that the application for consent contained inaccuracies that materially influenced the decision made on the application, and there are significant adverse effects on the environment resulting from the exercise of the consent;

(e) by surrender pursuant to s138 of the Act by the consent holder giving written notice to the consent authority;

(f) by being cancelled pursuant to an enforcement order pursuant to s314(1)(e) made by the Environment Court on the application of the

> local authority or consent authority where the Court is satisfied that the information accompanying the application contained inaccuracies relevant to the making of such an order which materially influenced the decision to grant consent.

There is no provision in the Act by which a resource consent can otherwise be "revoked". While in ordinary conversation one might use that word to describe one or other of the statutory mechanisms listed above, it is preferable in a proceeding such as this to use the pertinent statutory language.

[27] It is common ground among the parties that no issue arises in the present case as to termination, cancellation (either through non-exercise or through inaccuracies in the application) or surrender. The particular issue that does arise in the present proceeding is about lapsing. This issue is also the subject of the second part of the fourth declaration sought by the Applicant, but given its general existential importance to the consents I will address it in detail now.

Lapsing

[28] BOICW asserts that the land use consent in relation to the esplanade reserve has lapsed because it was not given effect within five years of the date of commencement, and no application for extension of the lapse date was ever made. The argument is that the consent holder could not give effect to the land use consent in respect of works and activities on the esplanade reserve because no right to occupy any part of the esplanade reserve by easement pursuant to s48 of the Reserves Act 1977 has been obtained. BOICW says that lack of such authorisation under the Reserves Act means that the land use consent has not been given effect in terms of s125 of the Act.

[29] The District Council did not fully join in this argument, either for or against, beyond offering some observations on it while stating that it accepts that there are valid resource consents on foot in relation to the Applicant's activities on the esplanade reserve as contained in the Consent Order. The issue does not arise in relation to the coastal and discharge permits, so the Regional Council was not involved in this issue.

[30] The Applicant sought, as the second part of his proposed fourth declaration, that the Court declare that the land use consent RC2000812 has been given effect to

by virtue of the performance of the activities authorised by the consent. He opposed this argument by BOICW on the basis that the regimes under the Resource Management Act and the Reserves Act are quite different. Reference was made to the decision of the High Court in ***Coleman v Kingston & Rodney District Council***[7] where the High Court considered the relationship between rights under the Act as opposed to property rights in terms of the Property Law Act 1952. Hammond J noted:[8]

> [25] This is not the first occasion on which suggested conflicts between the Property Law Act 1952 and the Resource Management Act have arisen. Doubtless, this is fundamentally because persons possessed of traditional ownership rights regard with concern any interference with what they consider the fullest measure of the incidents attaching to those ownership rights. What the legislature did in the Resource Management Act was to add an overlaying tier of concerns with respect to environmental issues. And provided always that the local authority acts stays [sic] within the four corners of the RMA, the provisions of that statute must be strictly observed...
>
> [28] On my appreciation, the arguments for counsel for the respondents are correct on this point, for three reasons:
>
> - The Resource Management Act floats, rather like oil on water, across the top of ownership rights without affecting the underlying substance. The Resource Management Act 1991 and the Property Law Act 1952 have different objectives and do not conflict (*New Zealand Suncern Construction Limited v Auckland City Council* [1997] NZRMA 419; *and Haddon v Auckland Regional Council* [1994] NZRMA 49) ...

[31] Without doubting the correctness of that approach, it does not, with respect to the arguments of counsel who relied on it, fully address the point being made by BOICW. As I understand it, that point is that for a resource consent to be given effect, it must lawfully be given effect. If the manner in which the consent is given effect is in any way unlawful, then the consent will lapse unless the unlawful aspect is remedied prior to the lapse date.

[32] There does not appear to have been any prior consideration in this Court or by the higher Courts whether the phrase "*given effect to*" in s125(1A) of the Act requires that the giving effect be lawful in terms of any other applicable legislation or rule of law. Case law relation to the meaning of "*given effect to*" in the context of the lapsing of consents has been focussed on the physical aspects of a consent and any relevant

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[7] Unreported: HC, Auckland, AP103-SW00, 3 April 2001, Hammond J
[8] Ibid. at paragraphs [25] and [28]

impediments to putting those physical aspects in place.[9] None of those cases discuss the issue of whether there may be a legal impediment to giving effect to a resource consent except in the context of where that legal impediment holds up the actual physical works.

[33] In the present case, of course, the resource consents held by the Applicant were in the nature of retrospective consents, to "tidy up" the consenting issues relating to the boat yard and slipway which were identified in the decision of the Environment Court disallowing his appeal against an Abatement Notice.[10] In this case, the physical works were in place, and the boatyard and slipway activities were occurring when the Consent Order was made. On the basis of the cases on the meaning of "given effect to", the consents in this case were given effect to in fact on the day they commenced. The issue raised by BOICW is whether they were given effect in law.

[34] As I put to counsel, the codified provisions of the Act relating to the administration of resource consents are normally not to be read as being subject to other legal requirements. I referred during the hearing to the case of ***One Tree Hill Borough Council v Lowe***[11] where the High Court considered whether there were existing use rights attaching to creation of a second dwelling unit on a residential site. A self-contained flat had been created within an existing house before the relevant part or provision of the district scheme became operative, but the building work had not been undertaken in accordance with the relevant bylaws applicable at the time. On that basis, the issue was whether the second unit had been "lawfully established." The Planning Tribunal had held it was not,[12] on the basis that to be lawful the building work had to be done according to the Council's bylaws.

[35] The relevant statutory provision was then s90(1)(a)(i) of the Town and Country Planning Act 1977 (**TCPA**) which provided:

> **90 Existing use may continue—**

[9] See the progression through the decisions in ***GUS Properties Ltd v Blenheim Borough Council*** (unreported SC M394/75, 24 May 1976); ***Cooke v Auckland City Council*** [1996] NZRMA 511(PT); ***Goldfinch v Auckland City Council*** [1997] NZRMA 117 (HC); ***Body Corporate 97010 v Auckland City Council*** [2000] NZRMA 202 (HC) and [2000] NZRMA 529 (CA); and most recently ***Biodiversity Defence Society Inc v Solid Energy NZ Limited*** [2013] NZHC 3283; (2013) 17 ELRNZ 337.

[10] ***Schmuck v Far North District Council***, Decision A26/2000

[11] Unreported: HC, Wellington, M270/84, 25 March 1986, Chilwell J

[12] ***One Tree Hill Borough Council v Lowe*** (1983) 9 NZTPA 457 (PT)

> (1) Any land or building may be used in a manner that is not in conformity with the district scheme or any part or provision of it as in force for the time being if—
>
> (a) The use of that land or building—
>
> (i) Was lawfully established before the district scheme or the relevant part or provision of it became operative [; and]
>
> (ii) Is of the same character, intensity, and scale as, or of a similar character, intensity, and scale to, that for which it was last lawfully used before the date on which the district scheme or the relevant part or provision of it became operative; . . .

[36] Section 10 of the Act relevantly provides:

> **10 Certain existing uses in relation to land protected**
>
> (1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—
>
> (a) . . . —
>
> (i) The use was lawfully established before the rule became operative or the proposed plan was notified; and
>
> (ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified: . . .

[37] It is immediately apparent that s90(1)(a) of the TCPA was a predecessor provision to s10(1)(a) of the RMA. Although there are a number of differences between s90 TCPA and s10 of the Act, the phrase "lawfully established" is used in the same context and for the same purpose. I note that the Environment Court has twice previously accepted the authority of ***Lowe*** in the context of the current Act and in relation to the phrase "lawfully established" in section 10, although neither of those decisions specifically considered the point in issue in this case.[13]

[38] The key issue before the High Court in ***Lowe*** was whether the phrase "lawfully established" should be assessed in terms of the planning legislation relevant to the particular case, or whether the Court should also consider whether the use had

[13] ***Lendich Construction Ltd v Waitakere CC*** Decision No A77/99 at [12] and ***Stretton v Bilkey & Ors*** Decision No A68/2000 at [26] and [38]-[43]

been lawfully established in respect of any other relevant law such as (in that case) a building by-law. The High Court noted that in general the use of land and buildings is affected by a large number of statutory and common law provisions. The Court drew a distinction between planning legislation and other legislation affecting the use of land and building and held that a use will be "lawfully established" for the purposes of s90(1)(a)(i) where it was established in accordance with the planning legislation (including subordinate legislation) then in force.

[39] After a careful review of relevant aspects of planning law in New Zealand, Canada and Australia, Chilwell J observed:[14]

> In general, the use of land and buildings is affected by a large number of statutory and common law provisions; clearly there will be an area of overlap, in terms of subject matter, between (on the one hand) planning statutes and subordinate legislation and (on the other hand) other statues, rules of common law, and regulatory measures such as bylaws. The existence of an area of overlap may give rise to some difficulty: for instance it would seem anomalous if, in determining whether a use was lawfully established within the meaning of s90(1)(a)(i), regard could be had to breaches of a regulatory measure where that measure took the form of a planning ordinance, but not where the same measure had been enacted as a bylaw, even though it could properly have been incorporated into the provisions of a planning scheme.
>
> Yet, despite the potential for overlap in some circumstances, planning statutes and schemes are not the same as bylaws, but rather part of a single, distinct and separate legislative scheme relating to the use of land.
> ...

[40] Chilwell J also noted that although the effect of existing use rights is that the person carrying on that use may continue to do so despite the fact that it does not comply with the district scheme, the use does not become lawful for all purposes:[15]

> The effect of the present section 90(1) where it applies, is that the person carrying on the non-conforming use may continue to do so despite the fact that it does not comply with the District scheme, but the use does not become lawful for all purposes. In establishing and carrying on a use, one is still bound to observe the requirements laid down by the general law apart from planning law, and still liable, in the event that any of those requirements are not met, to such sanctions as the law may provide. To enlist the existing use provisions of the 1977 Act as a supplementary means of ensuring compliance with rules relating to land use arising outside of the scope of planning statutes, or of punishing non-compliance with such rules, is neither necessary nor conducive to the effective functioning of the law relating to existing use rights. ...

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[14] ***Supra*** at pp 30-31
[15] ***Supra*** at page 32

> It is my opinion that the requirement for a use to be "lawfully established" in order to come within section 90(1)(a)(i) was enacted with a view to controlling a use established in breach of a provision such as section 38A of the 1953 Act or section 33 of the 1977 Act (where there was no operative district scheme) or in breach of a district scheme.

[41] After reviewing cases dealing with whether an activity was "lawful" for the purposes of the planning statute, Chilwell J then concluded on this issue, and referred with approval to a decision of the Planning Tribunal which had considered a similar issue but in a different context, as follows:[16]

> In conclusion it appears to me that, as counsel for the appellant submitted, a use will be "lawfully established" for the purposes of s90(1)(a)(i) where it was established in accordance with the planning legislation, and any subordinate legislation thereunder, then in force; there is no basis for importing into the planning legislation the concept of "planning orientated bylaws" or any requirement that a use be established and compliance with all such bylaws before it will qualify for protection under s90(1)(a)(i). This approach accords with that of the Planning Tribunal in Cotter v Christchurch City Council (No. C17/79, B 2564), an appeal against a grant of planning consent under section 74 of the 1977 Act. The appellant contended that the proposed use or work would contravene the Christchurch Hospital Act 1887 and statutory trusts created under it, and would therefore be unlawful. The Tribunal said, at page 4 of its decision :-
>
> > "As a general proposition, we hold that all planning consents are subject to the general law. Planning consent given pursuant to the Town and Country Planning Act 1977 does not by itself render lawful a land use which by the general law or by some other statutory provision may be unlawful. The term 'public interest' is defined in the Town and Country Planning Act 1977 to include 'all matters which in the circumstances of the case can be of public interest'. We apprehend that definition to relate to the matters covered by the statute, and generally therefore, to relate to matters of town and country planning. It is to be noted that this definition is different from that contained in the 1953 Act. If that is not the position, this Tribunal may be called upon in this case and in other cases to determine the legality of proposed land uses by reference to matters which are outside its jurisdiction. If the appellant considers that the proposed bridge will contravene the provision of the Christchurch Hospital Act 1887 and its amendment, then his proper course is to have that matter determined in another jurisdiction."

[42] Certain aspects of ***Lowe*** are confirmed by statutory provision now. Rules in a District Plan have the force and effect of a regulation in force under the Act: see s76. Compliance with the Act does not remove the need to comply with all other applicable Acts, Regulations, By-laws, and rules of law: see s23(1).

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[16] ***Supra*** at page 41

[43] In my opinion, the approach taken in ***Lowe*** to the consideration of "lawful establishment" being confined to a consideration of planning legislation is equally applicable to the scope of "given effect to". Planning legislation is intended to be read as a code,[17] or at least an integrated and holistic regime of environmental management.[18] As made clear in ***Lowe***, it is not appropriate to use such provisions of the Act as any kind of alternative mechanism to enforce other legal requirements. In my view, the issue of whether a consent holder has lawfully "given effect to" the consents is, in at least the main material respect of lawfulness, the same issue as whether a person has "lawfully established" an existing use.

[44] The issue of the lawfulness of the activities on the esplanade reserve does not, in my opinion, demonstrate any contravention of any control based on the Act. While control may well also be able to be exercised in relation to the use of the esplanade reserve in terms of other legislation or the general law, I consider, on the authority of ***One Tree Hill BC v Lowe***, that I must disregard those other legal controls when deciding whether Mr Schmuck has given effect to the consents he holds in terms of s125 of the Act on his application for declarations under s310 of the Act. On that basis I do not accept the argument advanced by BOICW that the land use consent has lapsed by reason of any alleged lack of authorisation under the Reserves Act.

Lack of Landowner Agreement

[45] BOICW advance two further arguments as to why the land use consent may have lapsed.

[46] Firstly, they suggest that the lack of authorisation under the Reserves Act means that there is no landowner agreement permitting access to the esplanade reserve. On its face, this argument does not present any resource management issue for essentially the same fundamental reason identified above in relation to the principal lapsing issue: that the consenting regime under the Act does not conflict with, and is not determined by, the law of property. I note that, perhaps for this reason, the District Council as the landowner does not join in support of BOICW's argument on this point.

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[17] ***Ideal Laundry Ltd v Petone Borough*** [1957] NZLR 1038; ***McGuire v Hastings District Council*** [2002] 2 NZLR 577 at [20]

[18] ***Falkner v Gisborne District Council*** [1995] 3 NZLR 622; [1995] NZRMA 462; ***Springs Promotions Ltd v Springs Stadium Residents Association Inc*** [2006] 1 NZLR 846; [2006] NZRMA 101 at [58]-[62]

[47] Counsel for the Applicant tentatively suggested that the District Council might be estopped from denying that it had in some manner given its approval as landowner to the Applicant. Counsel for the District Council responded that she was surprised by the raising of any issue as to estoppel. As this is also an area outside the scope of s310 of the Act, I do not need to resolve that.

[48] Being careful not to stray into any adjudication of issues under the Reserves Act which will likely arise if this argument is pursued before another forum with competent jurisdiction, I simply note that the refusal of consent by the Minister of Conservation to a decision by the District Council to grant certain easements under s48 of the Reserves Act may not be the same as an absence of consent from the District Council as the landowner of the esplanade reserve. While one can appreciate why a person in the Applicant's position would seek formal tenure by way of an easement to protect his interests in the slipway and any ability to use it for boatyard purposes, it is not clear to me (at least to the extent that I need to consider the point for present purposes) that such use requires an easement as opposed to some other form of licence, concession, permit or other right or authority (as those various types of permission are identified in the Reserves Act). But I can only refer to that issue and cannot take it further.

Agreement of Parties to Consent Order

[49] The second further argument advanced by BOICW, which does raise an issue within the scope of the jurisdiction of the Environment Court at least insofar as it concerns the practice and procedure of this Court, is that the memorandum of the parties presented to the Environment Court seeking the Consent Order amounts to a form of contract.

[50] BOICW, which was apparently not a party to any of the proceedings which were disposed of by the Consent Order, notes that the memorandum includes the following statement:

> 6. Before using the reserve in the manner consented to, the applicant must obtain the consents of the respective authorities and the Minister of Conservation under the Reserves Act 1977. This is a case where it is necessary to define the areas of reserve required for use in connection with the resource consents before considering the boat yard's application for appropriate easements under the Reserves Act 1977 to match those resource consents.

[51] A memorandum of parties seeking a consent order, signed by the parties themselves or by their counsel as attorneys, represents at least an agreement of those parties to compromise the issues in the proceeding as set out in the draft consent order. It may contain other elements that could be regarded by the parties as constituting a further agreement, but that would be a matter to be considered under the law of contract (including any issue as to privity) by a court of general civil jurisdiction and is not a matter affecting the jurisdiction of the Environment Court. For present purposes in relation to the application for declarations, I do not think that the Applicant's subscription to the memorandum estops him from now asserting that he has given effect to the resource consents to which the Consent Order relates. This is for at least two reasons.

[52] Firstly, the statement in paragraph 6 of the memorandum is not carried through into the terms or any condition of any of the resource consents. A resource consent may commence at a later date than otherwise provided for in s116 of the Act, but the resource consent or a determination of the Environment Court must state that. I can find no such statement in the Consent Order or in any of the resource consents attached to it.

[53] The Planning Tribunal addressed a comparable situation in ***Re an application by Hilder***,[19] concerning the lawfulness of activities undertaken by Port Otago Limited in relation to a reclamation at Boiler Point, Port Chalmers, in terms of a deemed coastal permit created by Order in Council. Condition 1 of that coastal permit required Port Otago to comply with all conditions and requirements specified in approvals, consents, rights or authorities granted under the town planning process or applied to water rights under the water and soil legislation. It was suggested that the effect of this condition was to delay the commencement of the consent until those other approvals had been granted, otherwise Port Otago would not be able to comply with the condition. The Planning Tribunal did not accept that argument, holding that there was nothing in the deemed coastal permit that expressly stated any date for its commencement and that Port Otago was by law required to comply with the terms of any other consents that it needed. Had it been intended that the deemed coastal permit was not to commence until any other consents had been obtained, then the Order in Council could have said just that.

[54] The commencement of resource consents is generally addressed by s116 of the Act. Pursuant to that provision, these consents commenced when the Environment

[19] Decision C67/94

Court determined the appeals by way of the Consent Order, because the consents do not state a later date. In this case there is no indication in either the memorandum of the parties or the Consent Order that the date of commencement of the consents pursuant to s116 would be anything other than the date of the order. In condition 8 (quoted above at [15]), which provides for very limited repair and maintenance work to be undertaken on the esplanade reserve, the final sentence clearly contemplates that the Council might review that condition one year after the date of consent if approvals under the Reserves Act had not been received. Contrary to the slight suggestion otherwise by counsel for the District Council, that sentence is inimical to the proposition that the consent would not be exercised until those approvals were received. I address condition 8 further below in relation to the third declaration sought.

[55] The second reason is that, as I have noted previously, the Consent Order did not relate to the establishment of the boat yard and slipway: those works and the activities associated with them were already in place and occurring. This must have been known to all parties. This argument for BOICW would require me to find that the Applicant was agreeing to cease his boatyard and slipway activities on 21 December 2001 until such time as the Consent Order was made and, beyond that, such time as both the District Council and the Minister might deal with any processes under the Reserves Act. That is fanciful. The issues in relation to the grant of easements under the Reserves Act have still not been resolved, over twelve years later. Acceding to this argument would mean that the resource consents confirmed by the Court with the consent of the parties would be useless for an indefinite period. I cannot interpret the memorandum to have such an unreal effect on the resource consents.

[56] A possible further issue is whether this argument begs the question of what use of the slipway on the esplanade reserve might continue in terms of any other provision of the Reserves Act, and not just the application for easements under s48, as referred to above at [47]. I cannot consider that issue, as it is outside the jurisdiction of the Court.

[57] On the basis of my first and second reasons, I do not accept the argument for BOICW that the Applicant is prevented by any agreement in the memorandum of the parties from giving effect to the land use consent for the slipway on the esplanade reserve.

Declaration 2 - Amendment of Consents

[58] The second declaration sought by the Applicant is concerned with the apparent inconsistencies between Section B (listing uses granted consent in part) and Section C (listing uses refused consent) of the land use consent, and seeks that the references to the stormwater containment system, the discharge containment system and the use of the concrete slipway for boat repair and maintenance be deleted from Section C and inserted into Section B.

[59] In relation to the containment systems, the Consent Order records an amendment to condition 3 (quoted above at [15]) stating that these are to be located as far as is practicable within the Consent Holder's site with these arrangements being "to the satisfaction of the District Council's Resource Consent Manager." It is implicit that that this could mean that these systems might be on the esplanade reserve but subject to the Manager's apparently unfettered satisfaction.

[60] In relation to the use of the slipway for repairs and maintenance, the Consent Order records a new condition 8 (quoted above at [15]) making certain limited provision for such activity on the esplanade reserve. As observed by counsel for the District Council, this condition is not a straightforward one and I am not surprised by her report that there are issues with its practical enforcement.

[61] While I may reach those understandings from my reading of the land use consent and I have already (at [14] above) noted the potential conflict between sections B and C of the land use consent, neither of those provides any basis for the Court to make a declaration under s310 of the Act which would effectively amend an earlier order of the Court. There is no possible basis on which such a declaration could be made. The circumstances of this case provide no foundation for a review by way of rehearing pursuant to s294 of the Act or for the application of Rule 1.15 (correction of accidental slip or omission) or of Rule 12.8.8 (recalling judgment) of the District Courts Rules 2009 pursuant to s278(1) of the Act. The relevant power given in s310(a) is to declare the existence or extent of a right under the Act, not to create or amend such a right.[20] If the consent is to be amended, then presumably an application under s127 of the Act would be required with all that entails.

[20] ***Hastings District Council v G R Skinner Ltd*** Decision W 86/98

Declaration 3 - Review Conditions

[62] The third declaration sought by the Applicant is concerned with the powers to review the land use consent. It is in three parts.

[63] The first part seeks a declaration that the right of the District Council to review condition 8 has expired. Condition 8 is quoted above at [15]. The final sentence provides: "*Notwithstanding condition 12 the Council may review condition 8 one year after the date of this consent if requisite approvals under the Reserves Act 1977 have not been received for use of Area "A" and "B".*"

[64] Condition 12 is the general review condition, which I address next. The date of the consent is 31 January 2002, that being the date of the Consent Order. It was common ground before me that approvals (whether requisite or not is not for this Court to say) under the Reserves Act 1977 have not been received for the use of Areas "A" and "B" (as depicted on the attached plan). More than a year has passed. It accordingly follows that the review power conferred by this sentence of condition 8 has now expired. The District Council did not demur from this conclusion and said it would abide the Court's decision, noting that it retained the power to review pursuant to condition 12 of the land use consent and s128(1)(a) of the Act.

[65] The second part seeks a declaration that condition 12 does not require mandatory review of the conditions. Condition 12 is quoted above at [15]. While the condition commences by stating that the District Council reserves the right to review the conditions, it concludes by stating that such a review "shall" occur at certain intervals. The District Council expressly acknowledged and agreed before me that condition 12 does not provide for a mandatory review and that there is no power to impose a mandatory review condition under s128(1) of the Act. It said it was unaware of any dispute among the parties about this.

[66] It is beyond the scope of this decision to deal fully with the potential for the word "shall" to create a dispute where none need otherwise exist. It is sufficient to observe that s128 of the Act is expressed in discretionary terms: that a consent authority may serve notice on a consent holder of its intention to review the conditions of a resource consent in certain circumstances. No right needs to be reserved by the consent authority given this statutory provision. The consent must, in

terms of s128(1)(a), specify the time or times when such a review may occur,[21] but it cannot compel a review to occur.[22]

[67] The third part seeks a declaration that any amendments to conditions pursuant to a review under s128 cannot have the effect of preventing an activity for which the consent was granted and must consider whether as a result of the change the consent would still remain viable.

[68] The law in relation to the content and validity of conditions of resource consent is extensive and detailed. Some cases address the principle raised by this third part of the third declaration sought.[23] But almost invariably, the application of such a principle depends on the facts of the case, the circumstances of the parties and other matters of degree, so that a bare hypothetical statement of principle is not really helpful to anyone. Again, there is no present issue between any of the parties about this. There is no current review process, nor did the Applicant point to any condition of the land use consent which could be said to be contrary to this principle, whether generally or in some specific way.

Declaration 4 – Scope and extent of land use consent

[69] The fourth declaration sought by Mr Schmuck is ostensibly about the scope and extent of the land use consent granted by the District Council and confirmed, with amendments, in the Consent Order. It is in four parts, but starts with a preamble which refers not only to the grant of resource consent for activities on the esplanade reserve but also to the issues of landowner consent, Ministerial "ratification" of the Council's decision to grant easements under the Reserves Act and the Council's forbearance of enforcement action until the easement application is finally resolved. Perhaps not surprisingly, the District Council was unhappy with the presence of the preamble.

[70] Given the clear limits in s310 of the Act, the form of any declaration sought from the Court must be worded so as to keep within the jurisdiction conferred by that section. As discussed above, and indeed as acknowledged by counsel for the Applicant during the hearing, matters relating to landowner consent under either the general law of property or the Reserves Act, or the role of the Minister of

[21] ***NZ Rail Ltd v Marlborough District Council*** [1994] NZRMA 70 at 91 (HC)
[22] ***Queenstown Adventure Park (1993) Ltd v Queenstown Lakes District Council*** Decision C096/94
[23] See, e.g., ***Kiwi Property Management Ltd v Hamilton City Council*** (2003) 9 ELRNZ 249 at [64]-[65] and ***Newbury Holdings Limited v Auckland Council*** [2013] NZHC 1172 at [63]-[67]

Conservation under the Reserves Act, or enforcement issues associated with the land as a reserve, are all outside the jurisdiction of this Court. A declaration which depends on such matters is not one the Court can make under s310.

[71] In a more general sense, an application for a declaration which is couched in conditional terms creates an immediate issue as to the appropriateness of such a declaration. Ideally, an application for a declaration should be based on a factual position which is either not in dispute or is capable of being determined by the Court, and should be expressed in terms which are not contingent on other processes. The preamble does not satisfy any of those criteria.

[72] Having said that, as counsel for the District Council noted, the four parts that follow the preamble can usefully be considered without it and I will proceed to do that.

Date of Commencement

[73] The first part raised by Mr Schmuck is that the date of commencement of the land use consent is the date of the Consent Order, being 31 January 2002. No issue is expressly raised by anyone about that.

[74] As I have already noted, s116 of the Act is clear in its terms. The Environment Court determined the appeals in relation to the resource consents by way of an order which is sealed and dated, and those resource consents do not state any later date for their commencement. Therefore the resource consents commenced on 31 January 2002, being the date of the Consent Order.

"Given Effect To"

[75] The second part of the fourth declaration sought is that the land use consent has been given effect to by virtue of the performance of the activities authorised by the consent.

[76] There is no issue about the works and activities relating to the boatyard and slipway having been in existence when the consents commenced. In physical terms, as with any retrospective consent, the resource consents were given effect to at the moment they commenced.

[77] The issue raised by BOICW of whether the resource consents were lawfully given effect to in relation to the esplanade reserve in the absence of any easements under the Reserves Act has been addressed in detail above. For the reasons I have already given, the requirements of the Reserves Act do not affect the application of s125 of the Act. On that basis, the land use consent has been given effect to.

Implied Landowner Consent

[78] The third and fourth parts of the fourth declaration, as sought, are both dependant on a finding of implied landowner consent by the District Council to boat washdown and repair and maintenance activities on the esplanade reserve by virtue of either the District Council's decision under the Reserves Act to grant the necessary easements for such activities or its apparent decision not to take enforcement action until the easement application is finally resolved.

[79] The District Council objects to the making of such declarations on the ground that its consent as a landowner is not a matter within the scope of s310(1)(a) or (h). I agree that the matters raised by these parts are beyond my jurisdiction.

Discretion to make declarations

[80] As noted previously, the power of this Court to make declarations is conferred by s310 of the Act. It is conferred in discretionary terms, but without any criteria for the exercise of that discretion being included in the statute. It is relevantly expressed to be in relation to "this Act". It is appropriate therefore to consider case law in relation to the making of declarations to guide that discretion, but bearing in mind that those cases decided by the High Court under the Declaratory Judgments Act 1908 may relate to the much broader jurisdiction which that Court has.

[81] It is of the essence of the judicial function to interpret and apply the law in terms of the facts of a particular case. With respect to statutes, the courts have the function of authoritatively construing legislation to give effect to the will of Parliament. The courts are never entitled to decline to determine the legal meaning of a relevant enactment on the ground that it is not clear, as it is the courts' role to provide that clarity. [24]

[24] ***Electoral Commission v Tate*** [1999] 3 NZLR 174 (CA) at [30]-[36]. As to the reference there to *The Laws of New Zealand*: "Courts", The Rt Hon Justice Hardie Boys, now see in that work para 134, at pp 153-5, esp. fn 4.

[82] The breadth of the scope of the High Court's jurisdiction was summarised by Barker J in ***Auckland City Council v Taubmans (NZ) Ltd and ors***[25] in the following terms:

> I deal, first and briefly, with the question of the appropriateness of the remedies sought. Although the Court does not lightly entertain what is an application for an advisory opinion, nevertheless the remedy of declaration is being used more frequently. In proper cases, it does provide a proper vehicle for a party to seek the opinion of the Court on a proposed course of action. The Court will not normally give an opinion in a vacuum but there is here a set of circumstances as outlined where the parties and the public interest will clearly be assisted by determination of the Court. I need refer only to the words of Cooke, P in ***Re Chase*** [1989] 1 NZLR 325, 332, 334 for a discussion of the breadth of the remedy of declaration. In any event, there is a clearly justiciable issue in the application to remove the caveats and a declaration can be seen as a step in the route necessary to be traversed to decide that particular application.

[83] That case concerned an application for a declaration as to the meaning and effect of s40 of the Public Works Act 1980 in circumstances where the Council had acquired most of a central city block for the purpose of a bus terminal and car park, but wished to transfer that land to a developer who planned to develop a casino and hotel there, together with a public transport terminal and an underground carpark.

[84] The quoted passage should be read in conjunction with the decision of Thorp J delivered the following year in ***Auckland City Council v Attorney-General.***[26] This was a subsequent application by the Council where it sought a similar declaration but not in respect of any particular site; this application was dismissed. After referring to the passage quoted above, Thorp J noted that the words of Cooke P there referred to expressed an expansive view, and that the other judgments in ***Re Chase*** were in somewhat less expansive terms. In particular, he referred to the following passages in the judgment of Henry J in that case:[27]

> (a) That in all cases where declarations have been granted -
>
> > "there has been a real question raised by the proceedings in which the plaintiff has a relevant interest":
>
> (b) The statement by Lord Dunedin in ***Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*** [1921] 2 AC 438, 448, that:

[25] [1993] 3 NZLR 361
[26] [1995] 1 NZLR 219
[27] [1989] 1 NZLR 325 at 343

> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.": and
>
> (c) "In those and other cases cited by counsel it is apparent that the Court acted only when there was a right in issue which required protection or enforcement. Examples are ***Gouriet v Union of Post Office Workers*** [1978] AC 435, ***Malone v Metropolitan Police Commissioner*** [1979] Ch 344, ***Nixon v Attorney-General*** [1930] 1 Ch 566, and ***Turner v Pickering*** [1976] 1 NZLR 129.
>
> In my view it can seldom if ever be a function of the Court to make findings on issues which bear no relationship in a real sense to the rights of the parties inter se and the absence here of a right requiring protection, enforcement, or even judicial recognition is I think so strong a factor in the exercise of the discretion as to be fatal to the case for the administrator."

[85] In the context of the Act, similar concerns about the existence of a real issue between the parties have been expressed by the Planning Tribunal.[28]

[86] Subsequently, the Court of Appeal has returned to what may be seen as the more expansive approach. In ***Burrell Demolition Ltd v Wellington Regional Council***,[29] the Court said:

> [12] Although discretionary in nature, the power given to the Environment Court to make declarations is a useful tool in the administration of the Act. We agree with Doogue J that particularly when parties who are faced with a live issue, as these parties were, combine to seek declaratory assistance, the Environment Court should be slow to decline relief. It is not appropriate to seek to compile an exhaustive list of circumstances when it may be right nevertheless to refuse declaratory relief. We also agree with Doogue J that the fact that the Environment Court Judge found the formulation of the declaration sought too precise and restrictive was not a sufficient reason of itself to decline to make any declaration at all. Having become acquainted ourselves with the construction issues, we do not consider that it would have been an unduly onerous task for the Judge to reformulate the declarations to accord with her views or simply to express those views and leave it to counsel to lodge draft declarations to reflect them.

[87] Importantly, as observed by this Court in ***Application by Far North District Council***,[30] the last proposition in that passage is not relevant where other parties oppose the making of a declaration on the ground, for example, that it is not necessary to do so.

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[28] ***Applications by Canterbury Frozen Meant Co Ltd & ors*** (1993) 2 NZRMA 282 at 285; and ***Application by Christchurch City Council*** [1995] NZRMA 129 at 134-5.
[29] Unreported: CA161/01, 18 March 2002.
[30] Decision A 073/2004

[88] I have set out above at [4] a summary of the declarations sought by the Applicant.

[89] In relation to the first and fifth declarations sought, these would simply restate the consents which were confirmed by the Court in terms of the Consent Order. No issue as to the validity or literal content of that Consent Order has been raised before me. While the Applicant suggested that there might be some issue as to the possibility that the consents might be revoked, no one advanced any such argument before me and, as discussed above, I cannot see any present basis for revocation of any of the resource consents under the Act. In these circumstances I consider that the making of such declarations would be at least without any utility; at worst, any declaration I might make now could create some inconsistency with the Consent Order which would result in confusion and uncertainty, which is precisely what a declaration is intended to dispel.[31] For those reasons there will be no declarations restating the existing resource consents.

[90] In relation to the second declaration sought, such a declaration would purport to amend the existing land use consent by altering the text as attached to the Consent Order. As discussed above at [57]-[60], there is no basis on which such a declaration could be made.

[91] The application for the third declaration seeks clarity as to the meaning and effect of the provision for review of conditions in conditions 8 and 12 of the land use consent. The District Council abides the making of such declarations. While the conditions appear clear enough on their face, given the position adopted by the District Council and the potential for dispute, for the reasons set out at [62]-[65] I am willing to make the declaration as to the first two parts: that is, interpreting the text of conditions 8 and 12 in the context of the relevant provisions of the Act.

[92] The third part of the third declaration is addressed above at [66]-[67]. Notwithstanding the position of the District Council, I do not consider it appropriate to make such a declaration. Unlike the first two parts, this third part is in general terms unrelated to any of the conditions attaching to the land use consent. It could be no more than an advisory opinion. Without any specific facts to attach to, it would not be useful even for that general purpose.

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[31] ***Electoral Commission v Tate*** [*supra*] at [32]-[33]

[93] The fourth declaration is in four parts. The first part relates to the date of commencement of the land use consent and I have addressed this at [72]-[73]. While this matter appears beyond any doubt to me, it represents the application of the law to relevant facts and I will make such a declaration for the sake of any assistance it may give the Applicant.

[94] The second part of the fourth declaration, relating to whether the land use consent has been "given effect to" or whether it has lapsed or is otherwise incapable of being given effect, raises the most significant issues in this proceeding. I have dealt with these matters in detail above at [28]-[56] and [74]-[76]. Given the argument advanced by BOICW and the significance of it to the Applicant, it is clearly a justiciable issue affecting the rights and interests of the parties. It is therefore appropriate that the Court reach a conclusion and make a declaration. For the reasons I have set out, I will make the declaration sought by the Applicant.

[95] The third and fourth parts of the fourth declaration raise issues concerning whether the use of the esplanade reserve is lawful pursuant to implied consent on the part of the District Council as landowner. For the reasons set out at [45]-[47] and [77]-[78], the Court does not have the jurisdiction under s310 of the Act to make any such declaration involving matters concerning the Reserves Act 1977 or the general law of property.

Decision

[96] For the foregoing reasons, I make the following declarations:

A. The opportunity for the Far North District Council to review condition 8 of land use consent RC2000812 in accordance with the last sentence of that condition expired on 1 February 2003.

B. Condition 12 of land use consent RC2000812 does not require the Far North District Council to undertake a mandatory review of the conditions of that consent.

C. Land use consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 commenced on the date of that Consent Order.

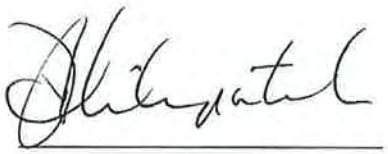
D. Land use consent RC2000812 granted by the Far North District Council and confirmed with amendments by the Environment Court by the Consent Order dated 31 January 2002 has been given effect to.

[97] In all other respects, the application is dismissed.

Costs

[98] The Applicant has been partly successful and partly unsuccessful. The District Council and the Regional Council abide the outcome. The principal legal issue as raised by BOICW concerning whether other legal requirements may prevent a resource consent from being given effect does not appear to have been addressed by the Environment Court previously and is a matter of general importance. In light of those factors, my tentative view is that costs should lie where they fall. However, if any party thinks otherwise, then any application for costs should be made within 10 working days of the date of issue of this decision, with any person against whom any such application is made having a further 10 working days to respond.

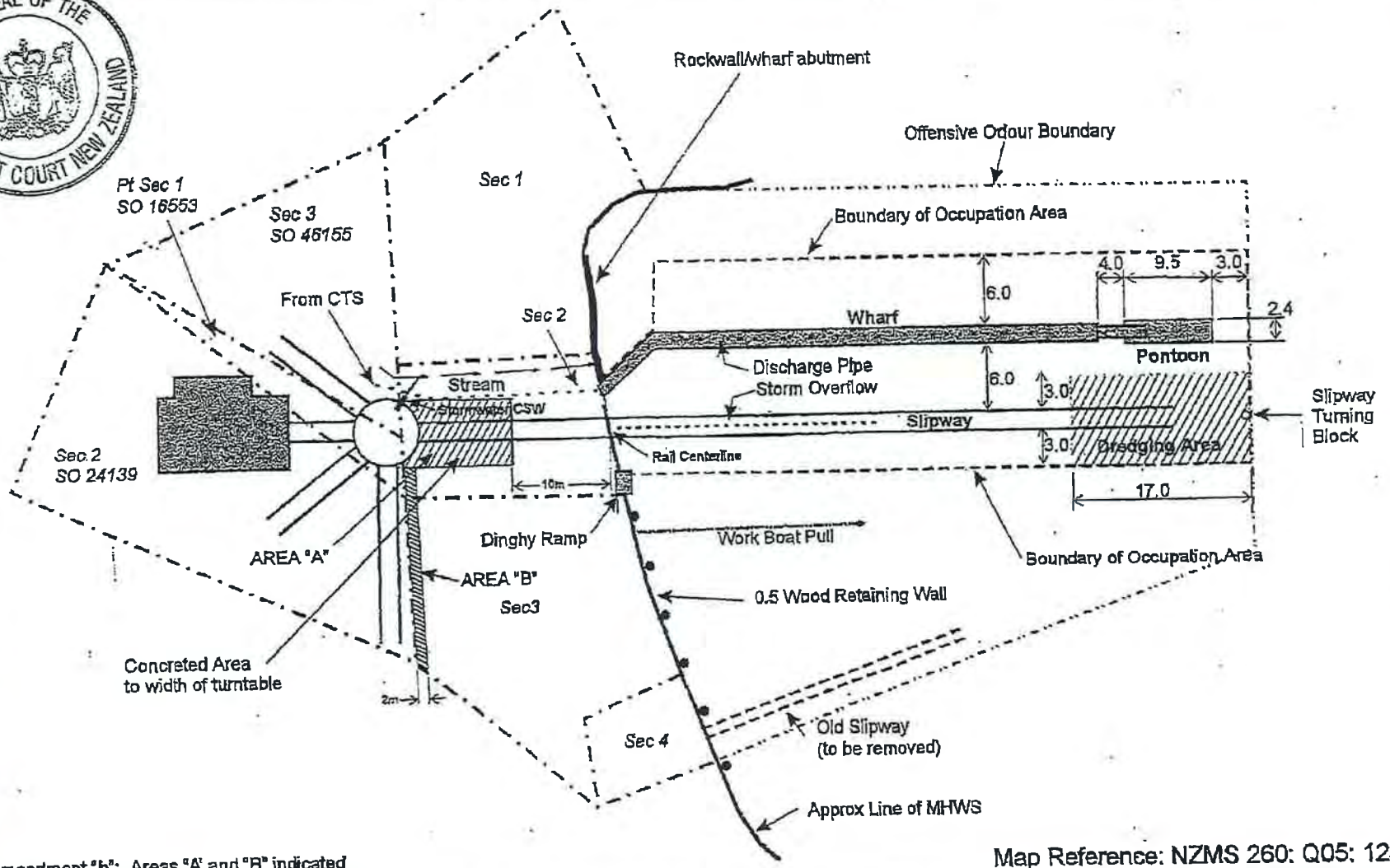
SIGNED at AUCKLAND this 2nd day of May 2014



DA Kirkpatrick
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Note: Dimensions in Metres



Map Reference: NZMS 260: Q05: 123-537

Amendment "b": Areas "A' and "B" indicated
Amendment "a": Washdown area in CMA deleted

	By	Date
Dwn.	C N Anderson	
App'd		

Amendment		
No.	By	Date
a	C N Anderson	03/01
b	C N Anderson	12/01

RESOURCE CONSENT NLD 99 7914
for
Doug's Opua Boat Yard
Boat Maintenance Facilities - Opua

NORTHLAND REGIONAL COUNCIL

Scale	Plan No.
N.T.S.	32311h

APPENDIX 1

Decision No: C 146 /98

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of seven appeals under section 121 of the Act

BETWEEN **A KYRIAK**

RMA : 898/97

J R CROWDEN

RMA : 901/97

E T LEEDS

RMA : 902/97

H B EVERSON

RMA : 911/97

OPUA DISTRICT RATEPAYERS' ASSOCIATION INC

RMA : 912/97

H NISSEN

RMA : 913/97

T E KYRIAK

RMA : 921/97

Appellants

AND **NORTHLAND REGIONAL COUNCIL**

Respondent

AND **GREAT ESCAPE YACHT CHARTERS LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Dr A H Hackett
Mr I G McIntyre

HEARING at **WAITANGI** on 21, 22 and 23 September 1998

APPEARANCES

Mr M Chambers for Great Escape Yacht Charters Limited
Mrs A Kyriak for the appellants other than Mr T Kyriak
Mr T Kyriak for himself
Mr R Bell for the Northland Regional Council

DECISION

Index

[A] Introduction

1. These are seven appeals under section 120 of the Resource Management Act 1991 ("the Act" or "the RMA") against a decision of the Northland Regional Council ("NRC" or "the Regional Council") granting a coastal permit to the applicant Great Escape Yacht Charters Limited ("Great Escape"). The application dated 25 July 1997 was for the *"use of floating structure for maintaining and servicing charter yachts"* alongside an existing jetty and boatyard (called "Doug's Boat Yard") in Richardson Street at Opua. The application was accompanied by a number of documents including a three page document which comprises:
   - an amateurish attempt at an assessment of environmental effects;
   - a location plan;
   - various elevations of the proposed pontoon; and
   - a 1:50 scale plan of the pontoon.

2. The supporting documents make it clear that the trailer/sailer yachts used by the applicant in its chartering business will be able to tie up alongside the pontoon or in its U-shape. One advantage of the pontoon over the jetty is that people chartering the trailer/sailers (which heel readily) will be able to step from the pontoon at almost any stage of the tide onto the deck of the trailer/sailers which will be the same level as the deck of the pontoon. This will be of considerable benefit both to people (charterers) who are inexperienced with boats when loading their gear onto the yachts and to people loading water and fuel. The pontoon will have other uses: the decks are to be a working area, and there is a superstructure containing a workshop and an office. The pontoon is 10 metres long and approximately 4 metres wide. It will be self-propelled and is, in effect, a large, cumbersome boat.

3. The NRC granted a resource consent to Great Escape on 13 November 1997:

"to place and use a floating structure for [sic] alongside the existing jetty at Doug's Opua Boat Yard, for the purpose of maintaining and servicing chartering trailer yachts."

This was later amended by the NRC to *"maintaining and servicing charter trailer yachts"* to accord with the application. The seven appellants then appealed to this Court.

4. We heard three witnesses in the case, two for the applicants and an engineer for the Regional Council. The appellants called no witnesses. At the hearing Mrs Kyriak, for six of the seven appellants, sought to obtain leave to call evidence as to the effects of the proposal on the amenities of the appellants. We hold that it is too late to do that, but can reassure the appellants we do consider the effects on amenities on the basis of the Council's evidence and our site inspection.

5. The first witness for the applicant was Mr T J Dunn, one of the partners in the applicant business. He described the proposal in considerable detail. In support of the applicant we also heard from Mr D Schmuck, the proprietor of Doug's Boat Yard. He stated he had purchased the foreshore licence from a Mr Elliott, a former owner of the boatyard. He confirmed that he has given his approval to the use of the jetty and also the facilities on his land to Great Escape.

6. Two other potentially relevant aspects were identified by Messrs Dunne and Schmuck. The first is that the Far North District Council ("the District Council") has stated in writing that no resource consent is needed in respect of parking or use of other facilities on Doug Schmuck's land. The second is that Mr Schmuck himself has applied for a suite of resource consents

relating to use of his land and the adjoining legal road between his land and the water and also for an extension of the jetty. Applications have been made to the District Council and the Regional Council but not yet dealt with by either. We make no comment on the two issues raised except these:

(a) if anybody considers that further resource consents are required, then they may apply to the Environment Court for enforcement orders (preferably after advising Great Escape);

(b) if we confirm the consent granted by the Regional Council to Great Escape Yacht Charters then the consent's existence will have to be considered by the Regional Council in deciding whether or not to grant Mr Schmuck a coastal permit to have a pontoon at the end of the jetty.

7. An application for a resource consent is required for any activity in the coastal marine area unless there is a rule in the Regional Coastal Plan allowing the activity. In this case the Transitional Regional Coastal Plan is deemed to be constituted by the Bay of Islands County Council 1979 District Scheme.[1]

However that plan applied only down to the mean highwater mark and did not apply in the seabed and waters of the Bay of Islands. So the only part of that plan operating in the coastal marine area is the area between the mean highwater mark and mean highwater springs.[2] Because it is not proposed to locate the pontoon above mean highwater mark, the site is not included in that part of the coastal marine area which is covered by the Transitional Coastal Plan. Accordingly there can be no applicable rule in

1 Section 370(1) and (2)(a) of the Act

2 *Paihia and District Citizens Association Incorporated v Northland Regional Council* A77/95

the Transitional Regional Coastal Plan and therefore a resource consent is required.

8. We have set out our decision in the following way: First we deal with some jurisdictional issues [Part B]. Then we have to identify and consider the various relevant matters listed in section 104(1) of the Act. These arise under paragraphs (a), (b), (c), (d), (e) and (f) of section 104(1). We cover effects under section 104(1)(a) in Part C, and the Resource Management (Marine Pollution) Regulations 1998 which are relevant by virtue of section 104(2) in Part D. The relevant instruments under section 104(1)(c)-(f) are grouped together in Part E. Other matters raised under section 104(1)(i) are in Part F. The exercise of our discretion is discussed in Part G and the outcome is stated in Part H.

[B] Jurisdictional Procedural Issues

9. A number of jurisdictional procedural issues arose in the case. One was that the approvals lodged by various parties referred only to the pontoon and not to the fact that it was to have a superstructure enclosing a workshop and office. However no party who gave such approval appeared before us to say that they had been misled in any way by the application and/or the, admittedly primitive, assessment of environmental effects (called an "AEE"). In the absence of such evidence and because there is an AEE under the Fourth Schedule to the Act, we consider that we are entitled to rely on the approvals as approvals of the whole project.

10. Of more significance was criticism of the public notification of the proposal. The public notification stated that the application was for:

"Coastal permit to locate and use a floating structure alongside an existing jetty at Doug's Opua Boat Yard, for the purpose of maintaining and servicing chartered trailer yachts. Map reference: Q05:124 536. (Reference: HG70)."

Two criticism were levelled at this. The first was that it did not draw attention to the fact that some aspects of the activity, generated by use of the pontoon, would occur on the adjacent land, in particular parking, rubbish disposal and use of toilets and possibly the disposal of sewage waste from the boats. Secondly the appellants submitted that the notification did not draw peoples' attention to the fact that the floating structure was more than a simple raft but also included a superstructure enclosing the office and workshop.

11. As for the first point while we later consider the effects of the land based activities under section 104(1)(a) we have to consider here whether anyone would have been so misled by the public notification in respect of those land based effects that they would have failed to make a submission. Whereas had they known of the land based effects they might have done so. This case can be compared with ***Wanaka Marina Limited v Queenstown Lakes District Council***[3]. There Wanaka Marina Limited had applied for a resource consent from the Queenstown Lakes District Council in respect of a marina extension on Lake Wanaka close to an inland beach at Wanaka. The proposal was for an extension to an existing marina by adding a further 28 marina berths. It was clear from the statutory instruments that parking would be required on a public reserve along the foreshore of the lake but the application had not in any way drawn attention to that fact and nor had the public notification. The public could not have known from the terms of the application that there might be a substantial on-shore impact. The Court

[3] Decision C98/98

held that the application and assessment of environmental effects were so inadequate that they declined jurisdiction in the matter.

12. In this case the application makes it clear that parking will be provided elsewhere and also that there is a toilet at Doug's Boat Yard. We hold that the assessment of environmental effects constituted by the written proposal is adequate, having regard to the scale of the proposal, applying ***Hubbard v Tasman District Council***[4]. As for the notification we do not consider the omission of the land based activities invalidates it. It may have been desirable for those effects to have been identified in the proposal but since they are not matters for which resource consent needs to be sought from the Regional Council their omission is not a jurisdictional matter. That aspect is what distinguishes the case from ***Wanaka Marina***.

13. Nor does the failure to identify the superstructure invalidate the notification, especially since the word *"structure"* has been used in the notification. If it referred to a *"raft"* then that might have given people the impression of a flat object not much above the water line but the use of the open word *"structure"* was enough to alert people to the fact that they might need to look at the application itself to see precisely what was proposed. If they had done so then, as we have said, the application and its supporting documents give clear and well drawn illustrations of the proposed pontoon and the building on it.

14. To the extent that it is relevant we also notice that there are a number of appellants in this case including a local ratepayers' association. If anyone else had been concerned even after the submission period had closed then they could have placed their resources behind the ratepayers association's appeal. There is also evidence that this application has received some

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[4] Decision W1/95

publicity so we do not consider that it is likely that anyone else has been prejudiced by not being aware of what was proposed. In the circumstances we hold that the application and notification were adequate.

15. Mrs Kyriak in her lengthy and careful submissions raised the issue as to whether the proposal should be dealt with on its own or whether it should be considered with the applications for resource consents by Mr Schmuck or his company. A related submission was that the proposal was really just a part of the operation of Doug Schmuck's Boat Yard Ltd. We cannot accept that latter point either as a matter of law or as a matter of fact. Mrs Kyriak said the proposal depended on the existence of the jetty and the boat yard: the first as a means of getting to the pontoon, and the second for its toilet and carparking. The jetty may be essential to the proposal, but the toilet and carparks, while useful and relied on, are not in our view essential to the operations of the applicant. In any event, the applicant has applied for its own resource consent and, on the facts of this case, we hold it is entitled to have the matter determined without adjournments. Nor should the applicant be drawn into what may be a matter of real complexity when Mr Schmuck's applications are heard. And finally, as we have already suggested, we do not wish this case to be a dummy run for Mr Schmuck's applications. Far too many of Mrs Kyriak's submissions related to the facts and lawfulness of the operations of Doug's Boat Yard Ltd.

Section 12

16. First we need to determine what resource consent is actually necessary. Broadly speaking a coastal permit under section 12 of the Act can cover two matters:

- Structures and activities under section 12(1);

- Occupation under section 12(2).

The parties (grouping all the appellants together since they effectively presented a common case) argued slightly differently on this. Mr Chambers for the applicant simply requested whatever coastal permits were necessary on the basis they had all been applied for in the one application dated 25 July 1997. The Regional Council's position was that a coastal permit was necessary for the structure under section 12(1)(a) but no resource consent was necessary to occupy since there was already a deemed coastal permit in respect of the coastal marine area around a jetty in favour of Mr D Schmuck and his company. The appellants argued that there was no deemed coastal permit and so resource consents were needed for both the structure and the occupation.

17. An inordinate amount of time and paper was spent on this issue. Since the application was clearly for a coastal permit it was within the Regional Council's power, and is therefore within our power, to grant a coastal permit for occupation as well as for a structure and therefore the only relevance of the issue as to whether there is a deemed coastal permit is that that would give the applicant more flexibility as to where it could locate the pontoon on the jetty. If on the other hand, the occupation coastal permit was included in the original application then the applicant would be confined to the site shown on the site plan within a reasonable margin of tolerance.

18. The reason that the Regional Council argues that there is a deemed coastal permit under section 384 of the Act is that there is a resolution dated 17 November 1988 of the former Northland Harbour Board which states:

"Resolved:

(1) that the Board grant Mr B D Elliot of Elliot's Boat Yard, Opua, a foreshore licence under section 165 of the Harbours Act 1950 for the area of the slipway and jetty as shown on the attached plan, subject to:

(a) the applicant obtaining planning approval under the Town and Country Planning Act 1977 and structural plan approval under section 178 of the Harbours Act 1950;

(b) reasonable public access being allowed to the public.

(2) (a) The licence to be for a term of 14 years commencing from the date that structure's approval under section 178 of the Harbours Act 1950 is obtained.

(b) Rental for the first year to be $500 plus GST. Subsequent annual rental to be in accordance with the policy for Foreshore Licence fees as approved by the Board from time to time.

(c) A processing fee of one year's rental to be payable.

(3) That the foreshore licence be executed by the Board.

(4) The Harbour Engineer and Harbour Superintendent be given authority to approve the detailed plans of the structure when submitted under section 178 of the Harbours Act 1950.

(5) The Department of Conservation be informed in terms of (1) above. ..."

We were given evidence that both the planning approval and the structural plan approval had been given. However it was common ground that no foreshore licence under section 165 of the Act had been executed under the seal of the Board.

19. Mr Kyriak for himself, and Mrs Kyriak for all the other appellants, had two general arguments as to why in fact there was not a foreshore licence. They were:

(a) that the foreshore licence had not been executed under seal and therefore there was no licence at all which could be a deemed coastal permit;

(b) that the Board's resolution was expressly subject to condition (3) quoted above that the foreshore licence be executed by the Board.

20. The foreshore licence (if one exists) in this case can only have been authorised under section 165 Harbours Act 1950 ("the HA") which states (relevantly):

> "*(1) The Governor General may from time to time, by order in Council, grant to any public body, either solely or jointly with another public body, the control of an area to which this section applies for a period not exceeding 21 years ...*
>
> *(3) The said public body may, subject to the provisions of sections 176 to 182 of this Act -*
>
> *(a) Erect or licence or permit the erection or continuance, on the area of control which has been granted to it ... of baths, bathhouses, boatsheds, boat building sheds, jetties, slipways, ...*".

It is common ground in this case that the Harbour Board has or did have in 1988, authority to control Opua Basin amongst other areas inside the Bay of Islands. Thus the resolution quoted above was made under the authority of section 165(1). The issue is whether the Board exercising its power under section 165(3) to *"licence or permit"* the erection of a jetty could only do

so under the Board's seal. As in ***Re Lyttelton Marina Limited***[5] we consider the language of section 165(3)(a) is deliberately wide. It gives the power to the Board to *"(a) erect or licence or permit ..."*. Thus if the Board was to erect a jetty itself it needed no authority in writing apart from the existence of section 165(3)(a). If it was to issue a licence then that might be in a deed under seal and if it intended to issue a licence and passed a resolution to that effect, but never did so, then such a resolution is in our view a permission in terms of the word *"permit"* in section 165(3)(a). This interpretation appears to be in accordance with the High Court's decision in ***Whangarei District Council v Northland Regional Council***[6]. Thus Mr Elliot and his subsequent assignee, Mr D Schmuck, had a permission under section 165(3)(a) which is a deemed coastal permit under section 384 of the Act.

21. That analysis is the answer to Mr Kyriak's second point that the resolution was *"subject to"* the issue of a licence under seal. We have some doubts as to whether the words *"subject to"* should be read in a strict contractual sense. They are used in the Board's resolution rather than in a contractual document between the Board and Mr Elliot as third party. The way the resolution should be interpreted in our view is that the Board intended to formalise the arrangement into a licence but since it was clearly acted on subsequently by both parties, including the Harbour Board in granting section 178 approval of the structure, it can be interpreted as a valid permit under the Harbours Act rather than as a licence. We were also given a copy of the plan which went with the Harbour Board resolution and that showed an area of water either side of the jetty given as part of the permit. Thus no

5 Decision C104/98
6 [1996] NZRMA 445

coastal permit to occupy is required by the applicant because its pontoon fits within the deemed coastal permit of Mr Schmuck.

[C] Effects

22. We deal first with the issue of effects. The positive effects of the proposal will be that the applicant will have a convenient workspace on which to service and maintain its trailer yachts. The evidence for Great Escape made it clear that substantial maintenance of the yachts would not be carried out on the site and that is governed by proposed conditions. The daily servicing of the yachts between charters would be completed while they were tied up to the pontoon. In addition if there is minor work required to repair rigging or fittings inside the cabin then that can be carried out in the workshop on the pontoon.

23. As part of our site inspection we viewed the pontoon at a distance. It is moored in Opua Basin. We were also able to examine the cabin structure which is stored in Doug's Boat Yard. While the larger part of the cabin is the proposed office, the workshop and storage cupboard have been well constructed. They are obviously for use and not for show, and in themselves are quite capacious. We were impressed with the standard of workmanship of the cabin which has a suitably nautical appearance. As we have said, the overall structure is, in effect, a working boat with a number of disparate but related uses. We hold that it is not an office, nor a building, nor a houseboat.

24. The adverse effects identified by the appellants were:

- visual effects
- traffic effects

- effects on intertidal flora and fauna
- potential pollution effects

As for visual effects these need to be examined in the context of the Opua Basin as a whole. We recognise that while the Bay of Islands is exceptionally attractive even by New Zealand standards, Opua Basin is one of the most modified parts of the Bay of Islands. The jetty alongside which it is proposed to tie the pontoon is within a few hundred metres of the main Opua wharf. Between the wharf and the jetty is the basin which is full of moored yachts. Other signs of human activity are everywhere. There is a regular ferry service from Opua to Russell (Kororareka) as well as the usual wharf traffic. To the south of the main Opua wharf there are a number of boat building and other commercial activities.

25. Across the waterfront there is a public walkway which is a most attractive feature of the coastline between Opua and Waitangi. On the hillside to the west of the proposal there is an attractive bush covered face with pohutukawas and other species of dominant trees and above that on the ridge tops are houses, including houses of some of the appellants. Many of the houses on the ridge above Doug's Boat Yard will not be able to see the jetty and the pontoon, although we accept that a few will. However they are, in our opinion, at a sufficient distance so that the pontoon and cabin will not protrude unduly into their view. The houses are high enough so that the eye can easily look over the pontoon to the yachts and bay and vista beyond.

26. Looking at the site from the Opua wharf there is a pleasant combination of the natural and commercial in the setting of the jetty, with the slipway and boat building shed behind against the dark green of the pohutukawas on the steep coastal slopes. The near presence of the residences on the ridges

above adds to the overall **developed** feeling of the Opua Basin. The cabin on the pontoon will not protrude unduly, as it is designed, so we were told, to look like the cabin on a ferry. It has portholes and a curved coach roof to create that effect. Other large non-yacht-like structures are in the vicinity including the much larger assymetrical cabins on the ferry.

27. As for the effects of parking, the appellants were concerned that charterers would park their cars on Richardson Street which is a narrow, one lane road without footpaths. That issue has to be looked at in perspective. Mr Dunn said that car parking could be provided for in secured spaces elsewhere and on Mr Schmuck's land. Mr Schmuck has given permission for that. We have to take into account also that Richardson Street is a cul de sac and there are relatively few vehicles passing along it. We were given no figures as to actual vehicle movements. While we accept that there may be some occasional problems with people parking on the road out of ignorance and ignoring any yellow lines in the area we do not consider those effects to be more than minor.

28. We hold on Mr Richard's evidence that there will be insignificant effects on intertidal flora and fauna. We do not overlook that the pontoon may sit on the bottom from time to time, but that does not seem to be of concern.

29. As for sewage disposal the issue of whether the toilets on Mr Schmuck's land can cope with any extra waste resulting from either workers from the pontoon or from emptying of waste containers from boats is probably an issue to be dealt with in relation to the application for discharge permit by Mr Schmuck. We accept the Regional Council's evidence before us that it is not concerned about that matter at this time. The issue of disposal of waste from the boats is a matter that is now dealt with under the Resource

Management (Marine Pollution) Regulations 1998 and we turn to those next.

[D] The Marine Pollution Regulations

30. Under section 104(1)(b) we have to take into account any relevant regulations. Since this case was heard by the NRC the Resource Management (Marine Pollution) Regulations 1998[7] have come into effect. These regulations constitute a nationwide regime for controlling some aspects of marine pollution within the coastal marine area[8]. They do this by virtue of regulation 16 which provides:

> *"No rule may be included in any regional coastal plan, or proposed regional coastal plan, nor any resource consent granted relating to a discharge to which regulations 9, 10, 12, 13, 14 and 15 apply."*

31. It appears that the regulations do not apply to any discharges from the jetty, but do cover discharges from vessels berthed at the pontoon and from the pontoon itself. Thus all discharges might be of washing water used for cleaning the top sides and cockpit and of waste material, although we add that obviously conditions were proposed to deal with those matters. The issue is whether such conditions are within our power to confirm if we are to grant consent bearing in mind that regulation 16 now applies.

32. The reason that the regulations apply is because the pontoon appears, because it is described in the applicant's evidence as a service vessel, and

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7 SI 1998/208 made under section 360(1)(ha) and (2)(hh) and section 15B(3) of the Act

8 Our initial impression is that they are remarkably generous to shipborne polluters. Nor is it immediately obvious how they are compatible with sections 5, 6, 7 and 8 of the Act.

we find that is a correct description, to be a ship within the meaning of the Resource Management Act. Section 2 of that Act states that 'Ship' is defined as in the Maritime Transport Act 1994 and that statute in turn states in its own section 2:

> *"'Ship' means every description of boat or craft used in navigation, whether or not it has any means of propulsion; and includes -*
>
> *(a) a barge, lighter, or other like vessel;*
>
> *(b) a hovercraft ... ;*
>
> *(c) a submarine or other submersible."*

There also seems no doubt that a privately owned yacht or a chartered yacht is a ship for those purposes and thus the applicant's trailer yachts are ships for the purposes of the Marine Pollution Regulations.

33. It appears that regulation 11 which permits the discharge of untreated sewage into the coastal marine area applies. Under regulation 11(1) up until 1 July 2000 sewage may be discharged from a ship in the coastal marine area so long as the discharge is more than 500 metres from a marine farm. In this case the nearest marine farm is over 1 kilometre away. After 1 July 2000 the position changes by virtue of regulation 11(2). Then discharges of untreated sewage will be allowed only if made more than 500 metres seaward from mean highwater springs and in water depths greater than 5 metres. That provision will effectively rule out discharges of untreated sewage from yachts berthed by the applicant's facility and indeed yachts from any anchorage within 500 metres of mean highwater springs around the New Zealand Coast.

34. Regulation 13 (discharge of garbage) prohibits the discharge of plastics, dunnage, lining and packaging materials in the Coastal Marine Area from any ship. Regulation 13(2) does not apply as it allows the discharge of ground up garbage only well out to sea. There is an overlap of condition 6 of the consent and regulation 13(1), in that *"plastics, dunnage, lining and packaging materials"* under regulation 13(1) come within *"rubbish"* under condition 6. However there is no invalidity as a result of the overlap, in that Reg 13 prohibits the discharge of certain forms of garbage, whereas condition 6 is directed at ensuring the disposal of rubbish on land.

35. Regulation 15 states:

> *"Any person may discharge, in the Coastal Marine Area, a contaminant that is incidental to, or derived from, or generated during, the operations in Schedule 4 as the normal operations of a ship or offshore installation".*

Relevant normal ship operations in Schedule 4 include:

> "...
>
> 5. *The cleaning of the ship or offshore installation, except for the exterior of the hull below the loadline or parts of the ship used for carrying cargo."*

Condition 9 of the consent survives the Marine Pollution Regulations coming into force. Boat maintenance that is likely to result in contaminants entering the Coastal Marine Area goes beyond *"normal operations"* in schedule 4.

36. However, conditions 11, 12 and 13 may conflict with discharges under regulation 15 of the Resource Management (Marine Pollution) Regulations. We accept Mr Bell's submission that conditions 11, 12 and 13 should be modified by the insertion in an appropriate place of the following:

> *"Except to the extent that discharges are made from vessels as part of their normal operations in accordance with regulation 15 and Schedule 4 of the Resource Management (Marine Pollution) Regulations 1998, ..."*

The other relevant aspect of Regulation 15 is that because discharges to water from the cleaning down of the vessels is now permitted under the Regulations, they apparently cease to be a matter of concern as a potential effect on the environment.

[E] ***The Statutory Instruments***

37. Consideration of the relevant statutory instruments under section 104(1)(c)-(f) is something of a nightmare in the Northland region at present because there are eight of them. They are:

(1) the NZ Coastal Policy Statement ("the NZCPS");
(2) the proposed Northland Regional Policy Statement ("the RPS");
(3) the deemed Northland Regional Coastal Plan ("the transitional regional coastal plan");
(4) the deemed proposed regional coastal plan;
(5) the NRC's proposed (and revised) Regional Coastal Plan ("the PRCP");
(6) the Far North District Council's transitional district plan ("the TDP");
(7) the Far North District Council's proposed district plan; and

(8) the Northland Regional Council's Planning Scheme ("the NRCPS").

These instruments were all relevant in another case about a (larger) pontoon at Paihia a few kilometres north of the site we are considering: ***Paihia and District Citizens Association Inc v Northland Regional Council***[9]. We respectfully, and gratefully, adopt the general discussion of these instruments in that case. We should mention that Mr Kyriak submitted that there can only be <u>one</u> proposed regional coastal plan under section 370(3). We hold that is not correct. To make the RMA work – especially its transitional provisions – it has to be read flexibly in unusual situations like this: ***Northern Milk Vendors Association v Northern Milk Ltd***[10]. Further, section 64 of the Act expressly contemplates more than one regional coastal plan, albeit not overlapping instruments.

38. We consider each of the statutory instruments in turn:

(1) <u>The New Zealand Coastal Policy Statement</u>

We accept that the NZCPS is the most important instrument in this case[11], and that the most relevant parts of NZCPS – given its overall themes of preservation and conservation of the coastal environment – are those which guide when development may be permitted. For example, we refer to the following policies:

> *"The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places,"*[12]
>
> and

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9 Decision A77/95
10 [1988] 1 NZLR 530
11 See the ***Paihia*** case at p.7
12 NZCPS General Principle 8(2) [p.2]

"... *encouraging appropriate ... use or development in areas where the natural character has already been compromised...* "[13]

(2) Proposed regional policy statement

The ***Paihia*** case has a description of the proposed RPS[14] which we adopt. We accept the evidence of the NRC's witness Mr A G Richards that the Great Escape proposal is consistent with the proposed RPS.

(3) The transitional regional coastal plan

There are no relevant objectives and policies in this plan for the reasons we have already discussed in Part [B] of this decision[15].

(4) Deemed Proposed Regional Coastal Plan

We adopt the analysis in ***Paihia***[16] which holds that, under section 370(3) of the Act, there is a deemed regional coastal plan constituted by (part of) the Bay of Islands District Planning Scheme Second Review. The site is zoned Marine 1C (Marinas/Moorings) under this instrument. In that zone structures ancillary to marine recreation are discretionary (conditional) activities.

Chapter 5 of the plan statement in the deemed proposed regional coastal plan sets out relevant goals, objectives and policies for marine and waterfront development.

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13 NZCPS Policy 1.1.1(a) [p.4]
14 At p.8
15 And see also the ***Paihia District Citizens*** case at pp8-9
16 At pp10-11

"(1) Objective: Development waterfront areas

To preserve or develop marine and waterfront areas, in a manner which achieves a balance between uses and activities that need a waterfront location, while ensuring minimal conflict and adverse effects on the natural qualities and amenity values of the marine environment.

(2) Objective: Public access to the waterfront

To maintain and enhance appropriate access, to, on, and around the Bay of Islands, and along its coastal edge, consistent with the use, enjoyment and protection of the natural environment and with private property rights

....

(5) Objective: Wharves landings and boat launching ramps.

To provide for the construction of wharves, landings and public boat launching ramps in the Bay of Islands consistent with the need and a purpose for the development and the avoidance of navigational hazards and environment damage."[17]

Under what are identified as "planning proposals" which we regard as policies under the RMA the plan states:

" ... the waterfront areas of Russell, Paihia and Opua which are suited to, and are already used for water-related purposes, are viewed by the Council as the most appropriate places to concentrate such uses and developments.

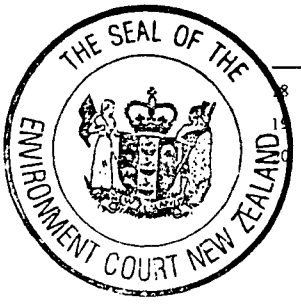
....

> *In accordance with this scheme's policies to concentrate waterfront development, and in recognition of the many competing demands for waterfront space, such development should be designed to minimise the amount of space occupied. This can be achieved in part by providing for multiple, compatible uses of wharf, parking, and storage and other facilities wherever possible. Private structures such as jetties and ramps should whenever possible provide for multiple use so as to avoid a proliferation of such structures around the coastline."*[18]

The zone statement for the Marine 1C Zone[19] does not contain anything to show that the applicant's proposal is contrary to the purpose of the zone, and the applicant's activity is provided for as a discretionary activity as *"structures and buildings ancillary to marine recreation"*. We accept Mr Richard's evidence that the Great Escape proposal generally achieves the purpose of sustainable management of the coastal environment having regard to the discretionary assessment criteria.

(5) Revised Proposed Regional Coastal Plan for Northland

Again we refer to the description of this plan, the PRCP, in the ***Paihia*** case[20]. We note however, that since that case the Council has revised that plan, and we now consider the latest version, dated 5 September 1998. The site is zoned in the Marine 4 (Moorings) Management Area in this instrument. The PRCP recognises the important contribution of coastal recreation to the maintenance of people's health and wellbeing and the region's tourism industry. The most relevant policies are:



[18] Para 5.3.1 (p.28) deemed proposed RCP
[19] Page 179 proposed RCP
[20] At pp 13-15

"(2) In consideration of coastal permit applications, subject to relevant protection policies within this Plan, to provide for new uses and developments within Marine 1, Marine 2 and Marine 4 management areas which maintain or enhance recreational opportunities within the coastal marine area.

(3) In consideration of coastal permit applications within all Marine Management Areas, to ensure that uses and developments which occupy coastal space or utilise coastal resources, do not unnecessarily compromise existing recreational activities.

(4) Within Marine 1, Marine 2 and Marine 4 management areas, to help ensure that the use of recreational vessels and vehicles does not create a public nuisance within the coastal environment, or compromise the health and safety of other users of the coastal marine area."[21]

So there is an encouragement of new development generally in the zone, subject to the constraints in policies (2) and (3).

Section 16 of the PRCP deals with structures[22]. There is a clear objective to provide:

"...for appropriate structures within the coastal marine area while avoiding, remedying, or mitigating the adverse effects of such structures."[23]

[21] Policies 15.4 et ff [p.104]
[22] PRCP Pages 108-118
[23] PRCP Objective 16.3 [p.111]

The relevant policies are:

> *"1. To provide for the continued lawfully established use of existing authorised structures within Northland's coastal marine area, provided that adverse effects are avoided, remedied or mitigated."*[24]
>
> and
>
> *"3. Within all Marine Management areas, to consider structures generally appropriate where:*
>
> *a) there is an operational need to locate the structure within the coastal marine area; and*
>
> *b) there is no practical alternative location outside the coastal marine area; and*
>
> *c) the proposed purpose of the structure cannot be catered for by existing structures within the same locality of the coastal marine area; and*
>
> *d) the structure is of the minimum area necessary for its proposed purpose; and*
>
> *e) any landward development necessary to the proposed purpose of the structure can be accommodated; and*
>
> *f) any adverse effects are avoided, remedied or mitigated."*[25]

The related methods of implementation of these objectives and policies include assessment criteria to allow consideration of landward effects of activity associated with a structure[26] and rules making erection or placement of new buildings and houseboats in Marine 4 Management Areas a non-complying activity[27].

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24 PRCP Policy 16.4(1) [p.111]
25 PRCP Policy 16.4(3) [p.112]
26 Rule 16.5.12
27 Rule 16.5.16

We accept Mr Richards' assessment, which was not shaken in any significant way by cross-examination by the appellants, that the proposal, when measured against the assessment criteria in the PRCP, is consistent with the objectives and policies of the instrument. Even if the 'office' component is considered separately (and we have grave doubts about whether it should be isolated in that way as a separative activity; we think the preferable approach is to treat it as one of the inter-related bundle of activities for which resource consent is sought[28]) and as a non-complying activity we consider that its adverse effects on the particular environment it is to be located in are very minor.

There was some discussion as to the relative weight to be given to transitional and proposed coastal plans. We do not consider there to be any substantive inconsistency between their objectives and policies but in case we are wrong, we assess 'weight' in the following way. First, the provisions of the former Bay of Islands County Council District Scheme 1979 (the transitional regional coastal plan) do not apply below mean high water mark and have no application to this case. They are not "a relevant plan" for the purpose of section 105(2)(b) of RMA. As for the deemed proposed regional coastal plan, it was prepared before the RMA came into force and was made under the Town and Country Planning Act, which has now been repealed.

The provisions of this instrument - the old Bay of Islands County Council District Scheme 1 Review No 2 (so far as it relates to the coastal marine area) - has never been more than a proposed plan; never been adopted by the Regional Council - which has RMA responsibilities within the Coastal

[28] *KB Furniture Ltd v Tauranga District Council* (1993) 2 NZRMA 291 (HC)

Marine Area - and has been superseded by the Regional Council's own proposed regional coastal plan. Accordingly, less weight is to be given to the deemed proposed regional coastal plan. Finally the NRC's PRCP was itself prepared under the RMA. It has undergone a significant amount of preparation under the RMA, with submissions now completed and decisions issued. While it is not known what references will be made to this Court, there is confidence that it is close to its completed state. We hold that it is entitled to greater weight and recognition.

(6) Transitional district plan

Outside the Coastal Marine Area, the adjacent land is in the Residential 1B Zone (Opua Amenity Protection) of the TDP[29]. The zone statement says:

> *"This subzone is applied to extensive areas of Opua in recognition of the particular community character and land development limitations that typify Opua.*
>
> *The provisions of this subzone - although similar in general terms to those of the Residential 1 (General) Zone - modify the range of uses normally permitted in the Residential 1 Zone to either exclude or provide for as conditional uses, those uses associated with more intensive development as being inconsistent with community aspirations and urban land capability".*

We find there is no incompatibility between the proposed pontoon and the activities in the neighbouring zone. The adjacent residential areas adjoins a

[29] See p. 122 of Rules and pp 70 and 73 of district planning maps

mooring area where boating has been part of community activities for many years.

(7) Proposed district plan

The Far North District Council's current proposed district plan has been the subject of public criticism. At the time of the hearing it was currently in force as a proposed plan. Shortly after our hearing the District Council was due to issue a new proposed district plan and when that occurred, the proposed district plan was to be withdrawn. In any event there was no incompatibility between the proposed use of the site by the applicant and the adjacent residential zoning.

(8) Northland Regional Planning Scheme Principal Section

While there is a proposed regional policy statement for Northland, there is not yet a regional coastal plan (it is still at proposed stage). Therefore section 367(1) still applies so that regard is to be had to the Northland regional planning scheme[30]. We respectfully adopt the conclusion in ***Paihia:***

> *"We find that its material contents relating to the natural environment, visual quality, coastal management and harbour management are general in nature and while they are not inconsistent with Part II, they do not add to the considerations provided by the instruments to which we have already had regard pursuant to Section 104(1)."*

30 See the ***Paihia*** decision pages 16-18. Technically this issue arises under section 104(1)(i) rather than an earlier paragraph.

[F] ***Other Matters (Section 104(1)(i))***

39. The appellants submitted that the public right to use the jetty w consistent with the resource consent sought. First, they claime condition 5 of the Bay of Islands County Council ("the County Co planning consent was a bar to consent being granted. Condition 5 consent states:

> *"That the [Doug Schmuck's Boat Yard] jetty be available for us of charge) by the general public at all times."*

In addition the Northland Harbour Board ("the NHB") licence conta condition 1(b) under section 159(a) HA requiring:

> *"Reasonable public access being allowed to the public."*

40. We find that there is no conflict with the NHB condition since we a that reasonable public use of the jetty will in no way be interfered v the Great Escape operations. The County Council condition is at firs more protective of public rights to the jetty. And that approach course, reinforced under the RMA in that the maintenance and enhan of public access to the coastal marine area is a matter of n importance.[31]

However, the County Council condition does have to be looked at context of the fact that the County Council consent is to a consent for its own purposes. Those purposes might include licensing a thir (such as Great Escape) to use the jetty also. Thus we hold that cond

[31] Section 6(d) RMA

of the County Council consent is also subject to an implied qualification that the public access to the jetty must be consistent with reasonable use by a consent holder and its licensees. We also find that the proposed use of the jetty by Great Escape is reasonable and consistent with the condition.

[G] Section 105 Assessment

41. We do not consider the proposal falls to be considered as a non-complying activity, but rather as a discretionary activity. However, since the proposed regional coastal plan is unclear, and in case we are wrong, we consider whether the proposal passes the threshold tests in section 105(2)(b) of the RMA[32]. We hold on the basis of the uncontroverted evidence that the adverse effects of the proposal will be very minor.

42. Turning to the exercise of our discretion under section 105 we find that the purpose of the Act will be met if the resource consent is granted. We do not consider a resource consent to occupy is necessary, but would grant it if it was. We grant consent for the structure for the following reasons: the small scale of the proposal, the care with which the structure has been designed and built, its overall conformability with the relevant objectives and policies of the relevant statutory instruments, and its location close to the main Opua wharf. All these reasons entail that it is appropriate in the coastal marine area even when measured against the matters of national importance in section 6 of the Act.

43. Mrs Kyriak submitted that:

[32] Since the appeals were lodged in 1997, the Resource Management Amendment Act 1997 which came into force in December 1997 and introduced section 105(2A) is not applicable here.

"The public were given notification of the intention to construct a floating structure alongside an existing jetty for the purpose of maintaining and servicing charter trailer yachts. ***That is all.*** *"*

The appellants' concern was that the Opua basin was having its *"first houseboat foisted on* [them] *through the 'back-door'."* If it is any consolation we find that is not so. We find that the applicant's proposed structure is not a sham, it is precisely what was advertised, and no more.

[H] *Outcome*

44. Accordingly the appeals fail. We make the following orders:

(1) Under section 290 of the Act the Council's decision is confirmed, subject to the amendment of conditions in order (2) below.

(2) The conditions of the resource consent are varied as follows:

Each of conditions 11, 12 and 13 have the following introductory words added at their commencement:

"Except to the extent that discharges are made from vessels as part of their normal operations in accordance with regulation 15 and Schedule 4 of the Resource Management (Marine Pollution) Regulations 1998, ..."

(3) Under section 285 of the Act, costs are reserved. Any application is to be made by 15 February 1999, and any reply by 5 March 1999.

DATED at CHRISTCHURCH this 22 day of **December** 1998.

J R Jackson
Environment Judge

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 66/2018
[2019] NZSC 118

BETWEEN	DOUGLAS CRAIG SCHMUCK Appellant
AND	OPUA COASTAL PRESERVATION INCORPORATED First Respondent
	FAR NORTH DISTRICT COUNCIL Second Respondent

Hearing:	9 and 10 July 2019
Court:	Glazebrook, O'Regan, Ellen France, Williams and Arnold JJ
Counsel:	A R Galbraith QC, J A Browne and C H Prendergast for Appellant J D Every-Palmer QC and D F McLachlan for First Respondent J E Hodder QC, J G A Day and S W H Fletcher for Second Respondent
Judgment:	29 October 2019

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The decision of the second respondent as delegate of the Minister of Conservation to consent to the challenged easements referred to at [32] of the Reasons of the Court is reinstated.**

C **Costs are reserved.**

D **Leave is reserved to the parties to apply for consequential orders if required.**

REASONS
(Given by O'Regan J)

Table of Contents

Dispute over use of reserve

[1] This appeal is a continuation of years of controversy about the use by the appellant, Mr Schmuck, of land within an esplanade reserve in Walls Bay, Opua in the Bay of Islands, for his boat repair business operated under the name Doug's Opua Boatyard (the Boatyard).

[2] The appeal is against a decision of the Court of Appeal,[1] which allowed an appeal by Opua Coastal Preservation Incorporated (the Society) against a decision of the High Court.[2] The Court of Appeal quashed a decision of the second respondent, the Far North District Council (the District Council), acting as the delegate of the Minister of Conservation (the Minister), to consent to the grant by the District Council of certain easements over the reserve to Mr Schmuck.

[3] The appeal raises issues about the extent of the power of the administering body of a reserve to grant easements over the reserve under s 48 of the Reserves Act 1977 and the nature of the role of the Minister (or the Minister's delegate) in consenting to the grant of such easements under the same section. It also raises issues about the nature of activities that can be the subject of an easement.[3] In order to provide the necessary context for the discussion of these issues, we first set out the factual background.

Facts

The Boatyard

[4] The Boatyard was established in 1966 and the workshop on the Boatyard land was built in 1972. The land between the Boatyard and the sea was an unformed road. The then owner had planning consent for a slipway to cross the unformed road from

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1 *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 262, [2018] 3 NZLR 538 (Winkelmann, Brown and Gilbert JJ) [CA judgment]. Leave to appeal to this Court was granted, the approved ground being whether the Court of Appeal was correct to allow the appeal: *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 7.

2 *Opua Coastal Preservation Inc v Far North District Council* [2017] NZHC 154 (Fogarty J) [HC judgment].

3 See below at [49]–[54] for a more detailed outline of the issues arising in the appeal.

the sea to the Boatyard, but this was for access only – it did not allow work on boats to be done on the unformed road.

[5] Mr Schmuck purchased the Boatyard in 1994.

[6] There was no direct evidence about the volume of work undertaken at the Boatyard. The management plan issued by the District Council and the Northland Regional Council (the Regional Council) for the Boatyard in 2014 refers to "the limited number of vessels hauled at this site", which indicates the volume is low.

The Society

[7] The Society's statement of claim states that it is a society incorporated under the Incorporated Societies Act 1908 for the purpose of preserving and protecting the Opua coastal area. It was formed in December 2014. The Chairman of the Society, Mr Henry Nissen, deposed that the Society was formed after many individuals expressed interest in being parties to judicial review proceedings that were being contemplated by him and others in respect of the District Council's decisions relating to the Boatyard. He said the Society has a great deal of support in Opua and the wider Bay of Islands community.

The esplanade reserve is created

[8] In 1998, the District Council stopped the unformed road. The consequence of this was that the unformed road land became an esplanade reserve as defined in s 2(1) of the Resource Management Act 1991 (the RMA) for the purposes specified in s 229 of the RMA.[4] We will refer to it as "the reserve". The road was stopped with the intention of granting easements to Mr Schmuck to regularise certain activities and installations on the area that became the reserve.

[4] Local Government Act 1974, s 345(3).

[9] Section 229 of the RMA provides:

> **229 Purposes of esplanade reserves and esplanade strips**
>
> An esplanade reserve or an esplanade strip has 1 or more of the following purposes:
>
> (a) to contribute to the protection of conservation values by, in particular,—
>
> (i) maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or
>
> (ii) maintaining or enhancing water quality; or
>
> (iii) maintaining or enhancing aquatic habitats; or
>
> (iv) protecting the natural values associated with the esplanade reserve or esplanade strip; or
>
> (v) mitigating natural hazards; or
>
> (b) to enable public access to or along any sea, river, or lake; or
>
> (c) to enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values.

The Boatyard and the reserve

[10] The Boatyard is located to the west of the land comprising the reserve. There is a slipway from the sea that runs over the beach and the reserve to a turntable that is located mostly on Boatyard land but partially on reserve land. The turntable allowed for boats to be turned onto a number of slipways in the Boatyard, including one running north/south close to the border between the Boatyard land and the reserve (which meant a person working on a boat on this slipway needed to be on reserve land when accessing one side of the boat). This was known as the southern slipway tramrail.

[11] When boats are dragged up the slipway, they are washed while still on the slipway, that is, on reserve land. They are then moved to the Boatyard land for further

work.[5] But if the boat is too big to fit on the Boatyard land, part of the boat will remain on the reserve side of the turntable while work is carried out on it.[6]

[12] A survey plan showing the slipways and identifying the relevant easement areas is attached as Annexure 1.

1999: Easement decision

[13] In 1999, the District Council decided to grant various easements that would have regularised the activities carried out by Mr Schmuck on the reserve. The decision to grant the easements was made under s 48 of the Reserves Act, which we will discuss in detail later. That section requires the consent of the Minister (or the Minister's delegate) to any such grant. In addition, the Boatyard activity itself required resource consents.

2000: Minister's (partial) consent

[14] In 2000, the Northland Conservator (the Conservator), an employee of the Department of Conservation (DoC) who, at that time, had delegated authority from the Minister to give or withhold consent under s 48 of the Reserves Act, consented to some of the easements granted by the District Council. Consent was granted for the easements allowing boats to pass over the reserve on the slipway to the Boatyard. Consent was refused for easements that would have authorised the repair and maintenance of boats on reserve land. The Conservator considered the latter were not capable of being granted under s 48 of the Reserves Act and were contrary to the purposes of esplanade reserves under s 229 of the RMA. Mr Schmuck did not accept this outcome and the easements were never formalised.

2002: Resource consents

[15] Mr Schmuck sought resource consents to allow him to undertake some activities associated with the Boatyard business on reserve land. In 2002, the

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5 The Court of Appeal said if the only service provided in respect of a boat is cleaning (a boat valet service), the boat would be returned to the water without ever entering the Boatyard: CA judgment, above n 1, at [7]. This is disputed. We revert to this below at [61]–[66].

6 The Court of Appeal said sometimes the whole boat remains on reserve land while it is being worked on: CA judgment, above n 1, at [7]. This is also disputed. See below at [77]–[94].

Environment Court made an order by consent under which the Regional Council and the District Council granted resource consents for certain activities on reserve land. These included the maintenance, repair and washing down of boats on the slipway on reserve land and allowed certain structures to be placed on reserve land. But this did not obviate the need for easements over the reserve to permit these activities to be carried out.

[16] The Director-General of Conservation was a party to the Environment Court proceeding in which the consent order was made.

2004: Easement decision

[17] In 2004, Mr Schmuck made a new application for easements. The District Council agreed to grant some easements but not easements for washing-down, repairing and maintaining boats on the reserve land. Mr Schmuck refused the partial grant. He threatened judicial review on the basis the District Council's decision was both unreasonable and predetermined.

2006: Commissioner's recommendation

[18] In early 2005, Mr Schmuck made a further application for easements. The District Council appointed an Auckland barrister, Mr Alan Dormer, as an independent commissioner (the Commissioner) to hear the application and make a recommendation to the District Council. The Commissioner considered that the District Council had the power to grant the easements sought under s 48(1)(f) of the Reserves Act and recommended that the District Council grant them.

2006: Easement decision

[19] The District Council accepted the Commissioner's recommendation and in 2006 it exercised its power under s 48 of the Reserves Act to grant the easements sought, subject to the Minister's consent as required under s 48. We will call this "the 2006 easement decision". We will revert to this aspect of the case later.

2007: Minister's consent withheld

[20] The Minister's consent to the easements granted by the District Council was not forthcoming, however. In 2007, the Conservator sent Mr Schmuck a draft report from a DoC official that recommended that the Conservator should consent to some of the easements (relating to access and use of the slipway) but refuse consent for others (relating to carrying out work on reserve land and discharging contaminants) on the basis that they were not capable of being authorised under s 48.

[21] Mr Schmuck made submissions to the Conservator and raised the possibility of seeking a declaratory judgment as to whether s 48(1)(f) allowed for the grant of easements of the kind that the Conservator considered to be incapable of authorisation. No declaration was sought and Mr Schmuck embarked on an effort to have provisions inserted into the Reserves and Other Lands Disposal Bill permitting the District Council to grant him the easements sought.[7] The consent process was placed on hold in the meantime. But the proposed legislative amendment foundered and eventually the consent process was reactivated.

2013: Minister's (partial) consent

[22] In 2013, the District Council asked DoC to determine whether to consent to easements granted by the 2006 easement decision. The Conservator was provided with a report by a DoC official, Mr Ashbridge, recommending that the Conservator consent to some of the easements, including for the movement of boats along the slipway, and decline consent to those easements related to the washing-down, repairing and maintaining of boats, and the discharge of contaminants on the basis that they were not capable of being granted under s 48. On 27 August 2013, the Conservator, as the Minister's delegate, adopted that recommendation and issued a decision consenting to the grant by the District Council of some easements, but not those just described. In effect, the Conservator's position remained as it had been in 2007.

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[7] See Reserves and Other Lands Disposal Bill 2008 (237-2), cls 34A–34C; and Reserves and Other Lands Disposal Bill 2008 (237-3).

2013: Delegation of Minister's consent power

[23] Later in 2013, the Minister issued an Instrument of Delegation for Territorial Authorities exercising his power under s 10 of the Reserves Act to delegate to territorial authorities a number of the Minister's powers, functions and duties under the Reserves Act (these were set out in the Instrument in some detail). The delegation applied where the relevant territorial authority was the administering body of a reserve. In the present case, this meant that the Minister's power to consent to any easement granted by the District Council under s 48 could be exercised by the District Council itself.[8]

2014: Environment Court decision

[24] In 2014, the Environment Court made declarations that the land use resource consents obtained by Mr Schmuck in 2002 for the activities contemplated by the easements sought remained valid.[9]

2014: Permission decision

[25] In late 2014, the District Council resolved "as landowner and administering body" to grant "permission" to Mr Schmuck to undertake activities on the reserve land authorised by the resource consents. In effect, this purported to authorise the activities for which Mr Schmuck had sought (and the District Council had agreed to grant) easements, including those for which the Minister's consent had been refused. We will call this "the 2014 permission decision".

2015: Heath J's judgment

[26] Mr Schmuck applied for judicial review of the decision of the Conservator, as the Minister's then delegate, to decline the easements relating to carrying on work on the reserve land. The Minister, DoC and the District Council were parties to this proceeding. The Society was not. There was a preliminary question hearing before

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8 The High Court and Court of Appeal were critical of this delegation: HC judgment, above n 2, at [77]–[79]; and CA judgment, above n 1, at [40]. However, its validity is not challenged in this appeal.

9 *Schmuck v Far North District Council* [2014] NZEnvC 101.

Heath J on the interpretation of s 48(1)(f). He made two important determinations in relation to the issues arising in this appeal.[10]

[27] First, he rejected the proposition that the power to grant easements in s 48(1)(f) was limited to easements required to convey substances over reserve land.[11] He found that, contrary to the position of the Conservator,[12] the easements for washing down, repairing and maintaining boats and the discharge of contaminants were capable of being granted under s 48 and there was jurisdiction for the Minister to consent to the grant of such easements.[13]

[28] Second, in the course of determining the above issue, he addressed the question of whether the grant of the easements give Mr Schmuck illegitimate occupation rights of reserve land. He found that the easements would not give rise to a degree of occupation that would remove the ability to grant the easements.[14]

[29] Heath J quashed the decision of the Conservator to decline consent for some of the easements and remitted the consent decision in respect of those that had been declined to the Minister, or the Minster's delegate, for reconsideration. There was no appeal against Heath J's judgment.

2015: Consent decision

[30] After Heath J's judgment was delivered, there was correspondence between the District Council and DoC about who would make the decision as to whether the Minister's consent should be given to the easements granted under the 2006 easement decision, with each initially requesting the other to make the decision. The effect of the Minister's 2013 delegation was that the decision could be made by either body.[15] DoC advised the District Council by letter that the District Council should make the decision. It said the decision must be considered on its merits with an open mind. It

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10 *Schmuck v Director-General, Department of Conservation* [2015] NZHC 422 [Heath J's judgment].
11 At [22].
12 See above at [20] and [22].
13 At [30].
14 At [28].
15 Section 10(6) of the Reserves Act provides that the delegation of a decision-making power by the Minister does not prevent the Minister from exercising the power.

also noted there is a Treaty of Waitangi claim over the area and advised the District Council that, in exercising the Minister's consent power as delegate of the Minister, it was required to give effect to Treaty principles, pursuant to s 4 of the Conservation Act 1987.

[31] The District Council eventually accepted that it should act on the Minister's delegation and determine whether the Minister's consent should be given to the easements for which consent had been declined by the Conservator in 2013. The District Council received a lengthy report from its in-house counsel, Mr Swanepoel, to inform its consideration of the issues arising in relation to the proposed consent decision. The District Council accepted his recommendation that consent be granted. In 2015, in its capacity as delegate of the Minister, it gave consent to all of the easements granted by the 2006 easement decision. We will call this "the 2015 consent decision".

Easements granted and registered

[32] After the consents were granted, the easements were executed and registered. In each case the dominant tenement was the Boatyard land and the servient tenement was the reserve land. The plan attached to this judgment as Annexure 1 identifies the areas of the reserve referred to in the easement document as areas T, U, V, W, X, Y and Z. The terms of the easements are set out below. The easements that are subject to challenge in this appeal are easements A4, A5, A6 and C. We will call these "the challenged easements". They are highlighted in bold below. The terms of the executed and registered easements are:

> A. An easement over [the land comprised of the areas marked X, Y and Z on the plan (the XYZ area)] to permit the following:
>
> 1. Construction and maintenance of a commercial marine slipway including a turntable and all of its integral parts, fixtures, supporting members, attachments, utilities and non-permeable surfaces.
>
> 2. The movement of boats along the slipway between the dominant tenement and the water.
>
> 3. The construction and maintenance of a concrete wash-down area with associated discharge containment systems to be located above a line 10 m above MHWS.

4. **The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.**

5. **The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.**

6. **The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.**

7. A stormwater and conduit drain.

8. A security light pole.

9. Associated utilities for power and water.

10. Safety signage.

11. A wharf abutment.

12. A concrete dinghy ramp (where this does not otherwise lie within the coastal marine area).

Subject to the following conditions:

1. **That all activities shall be carried out in accordance with any relevant resource consent.**

2. **That in respect of the repair and maintenance of boats, the following shall apply:**

   (a) when boats which by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement, are placed on cradles located entirely within the dominant tenement but protrude into the airspace above [the XYZ area] and/or [the land comprised of the areas marked U and W on the plan (the UW area)], such boats may be repaired or maintained at any time of the year;

   (b) as a small portion of the turntable encroaches onto [the XYZ area], boat cradles that are located on any part of the turntable but that do not otherwise encroach onto [the XYZ area] may utilise the turntable at any and all times of the year, and boats placed on such cradles may be repaired or maintained at any time of the year;

   (c) when boats which by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement, are unable to be placed on cradles located entirely within the

dominant tenement in accordance with clause (a) above, and are not located on the dominant tenement in accordance with clause (b) above, such boats may be placed on cradles located within that part of [the XYZ area] marked X and Y on [the plan], and such boats may be repaired or maintained for an aggregated period of no more than 60 days in any 365 day period commencing on or after the date the easement is registered;

(d) no boat cradles or part thereof may be positioned on any part of [the XYZ area] marked Z on [the plan] other than for the purpose of haulage of a boat;

(e) to enable the Far North District Council to monitor compliance with the 60 day annual usage limit contained in clause (c) above, the boatyard's operator shall continue to keep operational diaries recording the use of the areas marked X and Y on [the plan] for the repair and maintenance of boats, and such diaries shall be made available to the Council's monitoring officers on request.

B. An easement over [the areas marked T, U, W, X, Y and Z on the plan], to permit the following:

Access to and reconstruction of the slipway between the dominant tenement and MHWS and the concreting of that part of the slipway situated above a line 10 metres from MHWS.

Subject to the following conditions:

1. That any earthworks material which is surplus to slipway reconstruction requirements shall be secured within [the XYZ and UW area] and secured so that siltation and erosion does not occur, or be removed from the site.

2. That all activities shall be carried out in accordance with any relevant resource consent.

C. An easement 2 m wide over [the areas marked W and X on the plan], to permit the following:

Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.

Subject to the following conditions:

1. That all activities shall be carried out in accordance with any relevant resource consent.

2. That this easement shall expire after 10 years from the date of registration, subject to a right of renewal every 10 years, provided that in the event of the boatyard

property being redeveloped and alternative access not being provided as part of the redevelopment, any request for renewal will be viewed less favourably.

D. An easement over [the areas marked T, U, V, and Z on the plan], to permit the following:

1. Existing wooden and stone retaining walls (where these do not otherwise lie within the coastal marine area).

E. An easement [over the areas marked T, U, V, W, X, Y and Z on the plan], to permit the following:

1. The discharge of contaminants to air, soil, and water in accordance with any relevant resource consent;

2. The emission of noise in accordance with any relevant resource consent.

AND the following conditions shall apply in respect to the above easements:

1. The grantee shall keep current a public liability insurance policy for a minimum of $1,000,000 (one million dollars).

2. If required by Council the grantee shall make an inducement payment to Council and/or pay an annual rental as may be agreed upon between the parties.

3. The grantee shall surrender the easements to the Council at the Council's request if and when the boatyard ceases to operate, and shall reinstate the area to the satisfaction of the Council.

Relevant context

[33] As mentioned earlier, the Boatyard was granted resource consents by both the District Council and the Regional Council pursuant to a consent order made in the Environment Court in 2002. The resource consent from the District Council authorises certain activities on the reserve land. These include washing down boats prior to their being moved to the Boatyard or on their being returned to the water. Screens are required to be erected to contain contaminants within the wash-down perimeter. Repairs and maintenance are not allowed except to a vessel that is too big to be moved entirely on to the Boatyard land – and then only in area "A", which is part of the XYZ area of the easement. The District Council has the right to review these and other conditions of the resource consent on a regular basis.

[34] The resource consents from the Regional Council complement those from the District Council. One of the conditions of those resource consents is that Mr Schmuck

as consent holder is required to submit a management plan to the Regional Council relating to, among other things, the operation and maintenance of the slipway. The management plan must be reviewed at three yearly intervals.

[35] The Regional Council granted renewed resource consents for the discharge of wash water and contaminants in 2008.

[36] The management plan contemplated by the resource consents was reviewed and updated by the Regional Council and the District Council in 2014.[16] There are nine "factors of management", the relevant one for present purposes being:

> The slipway operations and maintenance of the boat wash-down area "A" [part of the XYZ area] including notice of any repair or maintenance work on vessels in or over-hanging that area, but above 10 meters of the MHWS/CMA; that is unable to be moved entirely within the consent holders [sic] site, by virtue of their length or configuration … .

[37] In the section headed "Procedures for factors of operational management", there is reference to washing and associated activities to clean and strip hull and deck areas "in the preparation of a vessel for maintenance or repair prior to being relocated into the boatyard proper".

[38] There is also a requirement that Mr Schmuck give notice by email to the District Council "as to the proposed duration of any maintenance, repair, and/or haulage … on any given vessel standing on its cradle within or overhanging area "A" that cannot be moved by virtue of its length and configuration entirely within the boatyard site …".

[39] Both parties drew upon the terms of the resource consents and the management plan to support their interpretations of the easements.

Recent developments

[40] Prior to the hearing of the appeal counsel filed a joint memorandum outlining changes that have occurred since the decision of the Court of Appeal was issued. In particular, Mr Schmuck has removed the rails, including the southern slipway tramrail,

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[16] There has since been a further review but this postdates the 2015 consent decision.

which run from the turntable to different parts of the Boatyard as part of a general downsizing of the Boatyard operations. Mr Schmuck is also reconstructing the slipway from the sea to the shed on Boatyard land and in future will need only this central rail running from the shed through the turntable to the water. A diagram filed by the parties showing the rails that have been removed is attached as Annexure 2.

[41] As the southern slipway tramrail has now been removed, the issues related to easement C will be of no practical significance unless Mr Schmuck changes his mind about the removal of the southern slipway tramrail, which we are advised is unlikely. We will, however, set out our views in relation to easement C because it has not been formally removed from the ambit of the appeal.

The present proceedings

[42] The Society's judicial review claim in the High Court challenged two decisions, the 2014 permission decision[17] and the 2015 consent decision.[18] The 2006 easement decision is not under challenge in these proceedings. The High Court quashed the 2014 permission decision and there was no appeal against that aspect of the High Court decision.[19] It is therefore not necessary for us to say anything more about the 2014 permission decision.

[43] In relation to the 2015 consent decision, the Society's judicial review claim related to only part of that decision: the decision to consent to the grant of easements A3, A4, A5, A6, C and E. The Society did not challenge the decision to consent to the other easements, and does not object to the presence of the slipway or the use of the slipway to convey boats from the sea to the Boatyard and vice versa. Nor does it object to the use of the turntable which is partially located on area X of the reserve.

[44] The principal argument for the Society in the High Court was that the 2015 consent decision was invalid in relation to the easements just mentioned because those easements were not capable of being authorised as easements under s 48(1)(f) of the Reserves Act. This argument failed in the High Court.

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17 See above at [25].
18 See above at [31].
19 HC judgment, above n 2, at [34]–[42].

[45] In considering whether those easements were capable of being granted under s 48(1)(f) of the Reserves Act, the Court of Appeal first asked whether the easements could be properly classified as easements at all. If its answer to that was in the negative, that would mean the Minister could not reasonably consent to the granting of the easements. And even if the answer to that were in the affirmative, there still remained the question of whether they were the type of easement provided for in s 48 of the Reserves Act.[20]

[46] The Court of Appeal acknowledged that its consideration of these issues involved revisiting Heath J's judgment in respect of which there had been no appeal and in reliance on which the District Council had acted when making the 2015 consent decision.[21]

[47] The Court of Appeal found that, with some exceptions, the rights conferred pursuant to the easements in question were not capable of a valid grant of easement. As the District Council, acting as the Minister's delegate, had proceeded on the basis that those easements were capable of a valid grant of easement, it had proceeded on an incorrect view of the law and it thus acted under an error of law. So the Court of Appeal quashed the aspects of the 2015 consent decision subject to challenge in the Society's judicial review claim, except in respect of easements A3 and E.[22]

[48] The Court of Appeal also disagreed with Fogarty J's description of the requirements for a Ministerial consent decision under s 48 as being limited to acting as a check on the District Council.[23] The Court of Appeal considered that the Minister's discretion was not constrained in this way.[24]

The issues

[49] The primary issue before us is the scope of the power to grant easements under s 48 of the Reserves Act, which in turn informs the scope of the Minister's power

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20 CA judgment, above n 1, at [53].
21 At [54].
22 At [100]–[101] and [119]. At [119] the Court refers to the 2015 consent decision as "unreasonable … as it was informed by an error of law". Its analysis indicates that it is the error of law which is the foundation of the invalidity not any unreasonableness on the part of the District Council.
23 HC judgment, above n 2, at [82].
24 CA judgment, above n 1, at [110].

under that section to consent to the grant of such easements. This requires a consideration of the terms of s 48(1)(f) and the overall statutory context of the Reserves Act.

[50] In order to determine the primary issue, it is first necessary to address the broader land law issue, namely whether the challenged easements are in fact capable of being easements at all. As indicated above, the Court of Appeal found that for the most part they were not, and this is challenged on further appeal to this Court.

[51] If we determine that the challenged easements were capable of being easements and their grant was within the power in s 48, we then need to address whether the 2015 consent decision of the District Council (as delegate of the Minister) was lawfully made. The High Court considered it was. The Court of Appeal considered it was not, but this was because it considered the challenged easements were not capable of being easements. It did not consider there was any illegality in the 2015 consent decision insofar as it related to easements A3 and E, which it held were capable of being easements.

[52] In addition to the issues already mentioned, the Society raised a number of new issues in this Court. It will be necessary for us to decide whether we can deal with those issues and, if so, how we should do so. The principal argument was that in making the 2015 consent decision, the District Council gave insufficient consideration to Treaty of Waitangi claims over the area that includes the reserve.

[53] As mentioned, the Court of Appeal's consideration of whether the challenged easements were capable of being validly granted under s 48 involved a reconsideration of Heath J's judgment. A question arises as to whether issue estoppel or an analogous form of estoppel applies to Heath J's judgment (having regard to the fact that the Society was not a party to the claim that led to Heath J's judgment).

[54] Finally, there is also a question as to the impact of the fact that the easements (including the challenged easements) were registered. In particular, there is a potential issue as to whether registration of the easements gave Mr Schmuck an indefeasible

interest, such that they could not be defeased by the later decision to quash aspects of the 2015 consent decision.

Are the challenged easements valid?

[55] We deal first with the challenged easements. As mentioned earlier, consent was given for the easements other than those relating to the washing down, repairing and maintaining of boats and the discharge of contaminants in 2013. So the easements under consideration by the Court of Appeal were easements A3, A4, A5, A6 , C and E. The Court of Appeal upheld the 2015 consent decision in relation to easements A3 and E in the decision under appeal. Those still in issue (the challenged easements) are, therefore, easements A4, A5, A6 and C.

[56] For an interest in land to be an easement, it must possess the following three characteristics:[25]

(a) There must be a dominant tenement (the land deriving the benefit of the easement) and a servient tenement (the land over which the easement is exercisable).[26] In this case, the dominant tenement is the Boatyard land and the servient tenement is the reserve.

(b) The right must accommodate (that is, confer a benefit on) the dominant tenement as opposed to a personal benefit on the owner of the dominant tenement.[27]

(c) The right claimed must be capable of being the subject matter of the grant of an easement. This incorporates a number of requirements: that the easement be in sufficiently clear terms; that it is not so precarious

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25 *Re Ellenborough Park* [1956] Ch 131 (CA) at 163. See CA judgment, above n 1, at [56]. The additional requirement referred to in *Re Ellenborough Park* and by the Court of Appeal is that the owners of the dominant and the servient tenements must be different persons. This is no longer a requirement in New Zealand: see Land Transfer Act 2017, s 108(3).

26 However, it is possible to have an easement in gross in New Zealand (that is, an easement in favour of a specified person, rather than specified land): see Property Law Act 2007, s 291. Under that Act and the Land Transfer Act 2017, the terminology used in connection with easements is "burdened land" rather than servient tenement and "benefited land" rather than dominant tenement. As the Court of Appeal and counsel used the traditional terms, we will do the same.

27 This requirement would not apply to an easement in gross.

> that it is liable to be taken away by the servient owner; that it is not so extensive or invasive as to oust the servient owner from the enjoyment and control of the servient tenement; and that it does not impose on the servient owner an obligation to spend money or do anything beyond mere passivity.[28]

[57] It is only the second and third of these that is in issue in this case.

[58] The Court of Appeal found the challenged easements were not capable of being the subject matter of a grant. This was because they were too uncertain in their terms and/or they conferred a benefit on Mr Schmuck (and his Boatyard) personally rather than on the Boatyard land. We will consider each of the easements individually to assess whether the Court of Appeal was right to conclude they were invalid.

[59] Counsel for Mr Schmuck, Mr Galbraith QC, raised the question of the admissibility of extrinsic evidence in relation to the interpretation of the easements, given they are registered documents. He referred to the observation in the reasons of William Young and O'Regan JJ in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* that, generally, such registered documents should be interpreted without regard to extrinsic evidence that is particular to the original parties and not apparent on the face of the register.[29] We do not consider the question arises in the present case. The extrinsic material relied upon is the resource consents (to which the easements are subject) and the management plan (required by the resource consents). These are admissible on the approach set out in *Green Growth*.[30] That is because a reasonable future reader of the easement document could be expected to be aware of them and would recognise them as relevant and the resource consent, which refers to the management plan, is expressly and repeatedly referred to in the easement document.

[60] We now turn to the assessment of the individual easements.

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28 *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, [2019] AC 553 at [58] per Lord Briggs JSC. See also *Registrar-General of New South Wales v Jea Holdings (Aust) Pty Ltd* [2015] NSWCA 74, (2015) 88 NSWLR 321 at [64].

29 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [74]. Glazebrook J agreed with this aspect of their reasons: at [151].

30 At [74(c)].

Easement A4

[61] To recap, easement A4 is an easement over the XYZ area to permit:

> The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.

Condition 1 requires this activity to be carried out in accordance with any relevant resource consent.

[62] The Court of Appeal accepted that a right to wash down a boat on reserve land before it is moved to the dominant tenement might be the subject of a valid easement. But it considered that the easement was broader because it also allowed washing down of boats on reserve land and returning them to the water as part of something like a boat valet service, which would be conducted entirely on the reserve land. It did not consider that the easement as drawn was adequately focused upon support of the dominant tenement to be a valid easement but thought that a more narrowly drawn easement allowing washing down of a boat before it is moved to the dominant tenement might be the subject of a valid grant.[31]

[63] Mr Galbraith said that this interpretation of easement A4 was inconsistent with easement A2, which permits the movement of boats along the slipway between the dominant tenement and the water, but not otherwise. He said when considered in this context, the correct interpretation of easement A4 is that it permits washing down of boats prior to being moved to the dominant tenement for repairs or maintenance, or washing down of boats after they have been repaired or maintained on the dominant tenement and are being returned to the water.[32] He said this interpretation made the scheme of the easements coherent and allowed them to fit together. He said there was nothing in the evidence indicating that Mr Schmuck was conducting a boat valet operation (or contemplating doing so) and the Society did not suggest there was any such operation.

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31 CA judgment, above n 1, at [80]–[81].

32 If easement A6 comes into operation, the repair or maintenance could occur partly or wholly on the dominant tenement.

[64] Mr Galbraith said that this was an unusual case because the parties to the easements, Mr Schmuck and the District Council, were satisfied with the easements and were attempting to uphold them. He argued that the Court of Appeal's unduly narrow interpretation of the easements was wrong in principle, because the Court ought to have been trying to give effect to the easements contended for by the parties if it could. He cited for that proposition the statement of Lord Briggs JSC in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*.[33] In that case Lord Briggs JSC said, after observing that the parties intended to confer a property right in the nature of an easement rather than a personal right: "That being the manifest, common intention, the court should apply the validation principle ("ut res magis valeat quam pereat") to give effect to it, if it properly can."[34] A similar observation was made by Latham LJ in *Jackson v Mulvaney*.[35]

[65] For the Society, Mr Every-Palmer QC supported the Court of Appeal's interpretation. He noted that the wording of easement A4 replicated the wording of the relevant paragraph of the 2002 resource consents. Mr Every-Palmer argued that the observation of Lord Briggs JSC in *Regency Villas* was inapplicable where the servient tenement was a reserve rather than private land. This was because of the public nature of a reserve, which the administering body holds on behalf of the public for the purposes for which the reserve was created (in this case the purposes set out in s 229 of the RMA). We accept that a public reserve is different from private land but we see no reason to take a different approach to interpretation of an easement for that reason, unless the easement conflicts with the statutory purposes of the reserve. We do not consider it does in this case.

[66] We consider the interpretation for which Mr Schmuck contends is an available interpretation and one that better coheres with the scheme of the easement document, especially easement A2. Adopting the approach outlined in *Regency Villas*, we

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33 *Regency Villas*, above n 28.

34 At [25]. The Latin maxim referred to by Lord Briggs JSC translates broadly as "so that the matter may flourish rather than perish". See also, in a different context, the observation of the Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [58]: the Court "will then do its best to give effect to [the parties' intention to enter into a contract] and, if at all possible, to uphold the contract despite any omissions or ambiguities".

35 *Jackson v Mulvaney* [2002] EWCA Civ 1078, [2003] 1 WLR 360 at [23].

interpret easement A2 as allowing the washing down of boats only when they are about to be moved to the Boatyard for repair or maintenance work or are being moved from the Boatyard to the water after such work. In light of that interpretation, there is no doubt the easement supports the dominant tenement, as the Court of Appeal recognised.[36]

Easement A5

[67] Easement A5 is an easement over the XYZ area that permits:

> The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.

Condition 1 requires this to be carried out in accordance with any relevant resource consent.

[68] The Court of Appeal observed that the wording of this easement contemplated the erection of screens but was imprecise as to whether they were fixed to the ground or fixed to the boat cradle. It envisaged it would be the latter but this needed to be stated in the easement. It concluded that the easement as drawn was too uncertain to be valid.[37]

[69] Mr Galbraith said the purpose of the easement was to implement measures to contain contaminants in order to comply with Mr Schmuck's resource consents. The easement is directed to this purpose and should not be invalidated because it does not prescribe the precise nature of the screens or other protective measures. He emphasised the ability of the District Council to monitor the use of screens and the containment of contaminants under the resource consents and the management plan.

[70] The Society argues that if Mr Schmuck's interpretation is accepted, the easement would give Mr Schmuck a discretion to do what he likes to contain the contaminants.[38]

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36 CA judgment, above n 1, at [81].

37 At [82].

38 At the hearing, Mr Every-Palmer suggested photographs of the screen used by Mr Schmuck showed it was outside this confined area. It is not possible for us to determine whether that is right or not. If it is, that might indicate non-compliance with the terms of the easement, but we do not see it as affecting the interpretation of the easement itself.

[71] The requirement that an easement must be capable of reasonably exact description is an aspect of the fourth requirement set out in *Re Ellenborough Park*.[39] If it is so vague or so indeterminate so as to defy precise definition, it cannot rank as an easement.[40] However, the authors of *Gale on Easements* observe that "there appears to be no reported case in which an express grant of a supposed easement has been held to create no easement because the wording of the grant is too vague".[41]

[72] We do not think the easement as drafted is too uncertain to be a valid easement. The purposes of the screens is clear. So too is their required location within the XYZ area given that they must contain contaminants in the concrete wash-down area constructed and maintained under easement A3. This is a confined area. The fact that the purpose of the easement is to allow for measures required by the resource consents to contain contaminants does not seem to us to affect the interpretation of the easement. Nor do we consider it matters whether the screens are attached to the cradle holding the boat being washed down or fixed to the ground. We therefore respectfully disagree with the Court of Appeal's assessment that the easement is too uncertain to be valid.

Easement A6

[73] Easement A6 is an easement over the XYZ area that permits:

> The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.

[74] This easement is subject to condition 1 (requiring it to be carried out in accordance with the relevant resource consent) and also the detailed requirements of condition 2. The Court of Appeal interpreted this easement as permitting not only the repair and maintenance of vessels that are partly on Boatyard land and partly on reserve land, but also vessels that are located entirely within the areas marked X and Y within the reserve.[42]

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39 See above at [56](c).

40 EH Burn and J Cartwright *Cheshire and Burn's Modern Law of Real Property* (18th ed, Oxford University Press, Oxford, 2011) at 640.

41 Jonathan Gaunt and Paul Morgan *Gale on Easements* (20th ed, Sweet & Maxwell, London, 2017) at [1-44].

42 CA judgment, above n 1, at [63(b)] and [67].

[75] The Court of Appeal saw a number of difficulties with the easement given its broad interpretation of the scope of the permission granted. In particular:

(a) The Court considered that the easement did not satisfy the requirement that an easement must confer a real and practical benefit on the dominant tenement.[43] However it considered that, if the easement had been limited to allowing the overhang of boats in the Boatyard onto the reserve, and possibly a right to enter the reserve to work on those boats, this might satisfy that requirement.[44]

(b) The Court concluded that the right granted by the easement, as it interpreted it, was not capable of forming the subject matter of an easement. This was because it undermined the ability of the District Council to exercise meaningful control over the XYZ area. Rather, the rights conferred were so extensive and uncertain that they amounted to joint occupation of area XYZ of the reserve.[45]

[76] As to the first of these concerns, the Court of Appeal referred to *Re Ellenborough Park* as authority for the proposition that a right over land does not amount to an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement.[46] That can be contrasted with a personal benefit to the owner of the land. The Court of Appeal accepted that where a business is well established on a site so that its operation is properly seen as connected to the use of the land (as the Boatyard is in this case), an easement may be validly granted that supports the operation of the business on the land.[47]

[77] Mr Galbraith did not take issue with the Court of Appeal's statement of the law, but queried its application to easement A6, even as interpreted by the Court of Appeal. His principal argument was that the Court of Appeal had interpreted the

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43 At [68] and [78].
44 At [66]–[67].
45 At [77]–[78].
46 At [56(b)] and [64], citing *Re Ellenborough Park*, above n 25.
47 At [65], citing *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389, (2002) 11 BPR 20,605 at [30].

easement to allow for a boat to be entirely located on reserve land while undergoing repairs and maintenance, when, properly interpreted, this was not permitted. Rather, the easement permitted repairs and maintenance to a boat that was located partly on the dominant tenement (the Boatyard land) and partly on reserve land. Once that interpretation was adopted, then even on the Court of Appeal's own analysis, the easement accommodated the dominant tenement, not just the business located on the dominant tenement.

[78] Mr Every-Palmer was also content to adopt the Court of Appeal's view of the law. He emphasised that, while an easement that benefitted a business operated on the dominant tenement may meet this requirement, that could not extend to an activity that is carried on entirely on reserve land, as easement A6 did on the interpretation of the Court of Appeal, which he supported.

[79] We also accept the Court of Appeal's statement of the law.[48] Lord Briggs JSC in *Regency Villas* said that the question of whether an easement accommodates the dominant tenement is a question of fact and depends on whether the right serves the normal use and enjoyment of the dominant tenement.[49]

[80] We consider it is arguable that, even on the Court of Appeal's interpretation, the easement accommodates the dominant tenement because even if the vessel being worked on were located entirely on reserve land, the work would be undertaken as an element of the business operating on the dominant tenement. But we do not need to engage with the legal argument because we accept the interpretation of the easement advanced by Mr Schmuck. We consider that the word "entirely" in easement A6 signals that it is dealing with the situation where the vessel is partly, but not completely, on Boatyard land. This is supported by:

(a) condition 2(a), which also uses the term "entirely" and refers to boats that "protrude into the airspace above" areas of the reserve;

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48 *Re Ellenborough Park* has, since the Court of Appeal's decision, been affirmed by the United Kingdom Supreme Court in *Regency Villas*, above n 28, at [48]–[52] and [81].

49 *Regency Villas*, above n 28, at [43].

(b) condition 2(b), which refers to boats on cradles located on the turntable. The turntable is partly on Boatyard land and partly on reserve land; and

(c) condition 2(c), which refers to boats which "by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement".

[81] The Court of Appeal considered the fact that condition 2(c) allowed for boats to be placed on cradles located within areas X and Y of the XYZ area to be repaired meant that all of the boat would be on the reserve land when under repair.[50] While the language is not as clear as it could be, we consider the repeated references to "entirely within" the Boatyard in easement A6 and conditions 2(a) and (c) signal that the intention is that the easement allows for repairs of boats located partly on Boatyard land and partly on reserve land. It also allows for a cradle or cradles to be located on reserve land, but only where the cradles cannot be located entirely on Boatyard land because of the length or configuration of a particular boat. If there were two or more cradles required for a boat (as the use of the plural "cradles" in condition 2(c) appears to allow for), the easement allows the cradle to be entirely on reserve land, not for the boat to be entirely on reserve land. The boat must be at least partly on Boatyard land.

[82] Mr Galbraith noted that condition 1 required the activities permitted by easement A6 to be carried out in accordance with the resource consent. He argued the resource consent therefore aided interpretation of the easement. He noted that conditions 4 and 9 of the resource consent resolved concerns expressed by the Court of Appeal. Condition 4 provides that no materials, tools or other items are to be placed or left on the reserve except when necessary to haul a boat up the slipway or when repair or maintenance work is carried out on a vessel in area "A", which is a small part of the XYZ area. Condition 9 prohibits any vessel being left on the slipway within the reserve except as permitted under the resource consent. In practice this means a vessel can remain on the slipway only within area A and, given the small size of that area, it cannot be intended a vessel that fits entirely within that area could be left there. This is because a vessel that would fit in area A would clearly fit inside the Boatyard and

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50 CA judgment, above n 1, at [63(b)] and [67]. See also above at [74].

thus would not meet the condition of easement A6 that it can be availed of only when a vessel does not fit inside the Boatyard.

[83] Mr Every-Palmer accepted the resource consent was a legal overlay which could inform one's view as to the realistic uses of the reserve but argued it did not affect the interpretation of the easement.

[84] We consider that the resource consent does assist the interpretation of the easement given condition 1 regulates the operation of the easement. The Court of Appeal interpreted easement E by reference to the resource consent and management plan. We accept Mr Galbraith's submission that this approach was also appropriate in interpreting easement A6.

[85] Once it is accepted that easement A6 permits repair and maintenance work only on boats located partly on Boatyard land and partly on the XYZ area of the reserve, the argument that it does not accommodate the use and enjoyment of the dominant tenement largely falls away. As a matter of fact, it clearly supports the business operated on the dominant tenement by allowing repair and maintenance work to be carried out on vessels that do not fit completely within the boundaries of the Boatyard. That is sufficient connection with the dominant tenement to satisfy the requirement that the easement must confer a real and practical benefit on the dominant tenement.

[86] We turn now to the second concern raised by the Court of Appeal: the rights created were so uncertain and extensive that they effectively allowed Mr Schmuck joint occupation of area XYZ of the reserve.

[87] The Court of Appeal relied on *Copeland v Greenhalf*.[51] That case concerned a claim to an easement by prescription, rather than by grant. Upjohn J rejected the claim, finding the claimed right to park vehicles on the easement land without restriction was too extensive to constitute an easement. We consider *Copeland* is of

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51 *Copeland v Greenhalf* [1952] Ch 488 (Ch).

doubtful authority now. It is, as just noted, a case about a claim based on prescription not grant. It has been criticised and doubted.[52]

[88] The test for whether an easement amounts to joint occupation is usually formulated as whether the proposed easement would leave the servient owner without reasonable use of their land.[53] This is commonly termed the ouster principle. But in *Moncrieff v Jamieson*, Lord Scott doubted the correctness of the ouster principle. He observed that every easement will bar some use of the servient land and that sole use for a limited purpose was not inconsistent with the servient owner's retention of possession and control.[54] While "reasonable use" is traditionally assessed by reference to the servient tenement as a whole, Lord Scott considered the relevant inquiry is the impact upon the land subject to the easement.[55] In Lord Scott's view, the correct test is "whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land".[56]

[89] More recently, in *Regency Villas*, Lord Briggs JSC noted that the extent of the ouster principle was a matter of some controversy, which he did not find necessary to resolve. He later added:[57]

> …the ouster principle rejects as an easement the grant of rights which, on one view, deprive the servient owner of reasonable beneficial use of the servient tenement or, on the other view, deprive the servient owner of lawful possession and control of it.

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52 See *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 at [56] per Lord Scott who questioned whether it could truly be said, as Upjohn J had said in *Copeland*, that the defendant in that case was "claiming the whole beneficial user of the strip of land" subject to the easement. In *Moncrieff*, it was held that a servitude (the Scottish equivalent to an easement) giving access included a right to park vehicles, in contrast to the outcome in *Copeland*. See also Peter Luther "Easements and exclusive possession" (1996) 16 Legal Studies 51; and the report of the Law Commission of England and Wales *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) at [3.207]–[3.211], where the Commission recommended that the ouster principle should be abolished.

53 *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 (Ch) at 1288; and *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 1 WLR 764 at [8]–[9].

54 *Moncrieff*, above n 52, at [54]–[55].

55 At [57].

56 At [59]. Lord Neuberger endorsed the test proposed by Lord Scott. However, he reserved his position given it was not necessary to decide the point: at [143].

57 *Regency Villas*, above n 28, at [61].

[90] For reasons we will come to, we do not think it is necessary to resolve this controversy either.[58]

[91] The Court of Appeal's interpretation of easement A6 led it to conclude that the easement was too broad because the District Council could not be said to retain possession and, subject to the reasonable exercise of the rights in question, control of the reserve. So the rights under easement A6 gave Mr Schmuck at least joint occupation of the reserve.[59] In particular:

(a) there was no limit on the time that boats protruding into the reserve could be worked on under condition 2(a);[60]

(b) there was a limit under condition 2(c) of 60 days per year, but the Court thought this was unclear as to whether it meant 60 working days or 60 multiplied by 24 hours;[61]

(c) the scope of activities required for repair and maintenance work was wide, and there was no limit on who and how many people could enter the reserve to work on the boats protruding into it;[62]

(d) the words "[not] entirely within the dominant tenement" did not make it clear that this was because the relevant boat was too big to fit on the Boatyard land when no other boats were on that land impeding the subject boat or just that the fact other boats were occupying the space on the Boatyard land prevented all of the subject boat fitting on that land;[63]

(e) there were health and safety concerns;[64] and

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58 This was also the view of the Court of Appeal: CA judgment, above n 1, at [60].
59 At [78].
60 At [71].
61 At [63(b)].
62 At [71].
63 At [72].
64 At [75].

(f) there were no limits on what materials could be taken onto the reserve by Mr Schmuck to do repair and maintenance work.[65]

[92] Mr Every-Palmer supported the Court of Appeal's analysis. He pointed to the possibility that the Boatyard operation could become more intensive in the future. If that happened, work on the reserve could increase, the number of employees present on the reserve could increase and greater impediments could be imposed on other users of the reserve as a result. If these possibilities became reality, that would exacerbate the concerns raised by the Court of Appeal.

[93] We consider the concerns raised by the Court of Appeal were overstated:

(a) In relation to (a), we do not consider a time limit is required to make an easement valid. It needs to be remembered the area on which overhanging boats may be repaired is a small part of the reserve.

(b) In relation to (b), we consider the first possible interpretation suggested by the Court of Appeal is the correct interpretation.[66]

(c) In relation to (c), the scope of activities may be wide, but there is a clear limitation that they involve repair and maintenance work on a vessel, only on the part of a vessel overhanging from the Boatyard land and only in a small area of the reserve. We do not see the lack of further detail as invalidating the easement.

(d) In relation to (d), we have concluded above the provision is for boats located partly on Boatyard land and partly on reserve land in accordance with condition 2(c) only.

(e) In relation to (e), we see health and safety concerns as being matters for resolution under the resource consents and management plan and

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65 At [76].

66 The resource consent, which specifies the permitted hours of work on the reserve land (7 am to 8 pm on Monday to Friday, and 8 am to 8 pm on Saturdays, Sundays and public holidays), supports this interpretation.

through general health and safety regulation. We do not think they affect the validity or interpretation of the easement.

(f) In relation to (f), the resource consent, to which the easement is subject, provides the necessary controls.

[94] In summary we are satisfied that on our interpretation of easement A6, it does not deprive the District Council or members of the public of reasonable use of the reserve (the servient tenement). The area affected by the easement is small, the circumstances in which it can be invoked are constrained and there is the 60-day limit that sets an upper boundary to the amount of time allowed for work on boats located partly in the XYZ area of the reserve, which will apply whether or not the Boatyard business expands. Nor do we consider the easement deprives the District Council of possession or control of the easement area for the reasons just given. We consider that easement A6, though not very elegantly drafted, is a valid easement.

Easement C

[95] Easement C is an easement over areas W and X on the plan (a two-metre wide strip) to permit:

> Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.

[96] In addition to the condition requiring compliance with any resource consent, which applies to all the challenged easements, there is a further condition as to term. The easement is for a 10 year term but is subject to renewal. We discuss this in further detail below.

[97] As mentioned earlier, the removal of the southern slipway tramrail makes this easement redundant.[67] But, as it forms part of the appeal and Mr Schmuck pursued in argument his case that the Court of Appeal was wrong to decide that easement C was invalid, we will briefly consider it.

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[67] See above at [41].

[98] The Court of Appeal considered that, as drafted, the scope of this easement meant the District Council did not have the ability to control areas W and X and therefore the easement deprived the District Council of reasonable use of the land.[68] The Court of Appeal's concern was that the easement did not specify the extent of use, the number of persons entering the reserve for the purpose of working on vessels on the southern slipway and the nature of the tasks they would undertake (beyond the requirement for compliance with resource consents). It noted "[a]s an aside" there was uncertainty about the term.[69] We will come back to this.

[99] The Society supported the Court of Appeal's view. It argued that the right given to Mr Schmuck by easement C amounted to joint occupation of the reserve.

[100] Our comments on easement A6 apply equally to this easement. We do not consider the omission of the details highlighted by the Court of Appeal invalidates an otherwise uncontroversial and limited easement, when it is considered in the context of the other easements and the fact that it would involve working on a single vessel at any time. Given that the vessel being worked on would be on the rail in the Boatyard, the easement would be availed of only to work on one side of the vessel. It is hard to see why any concern about numbers of people working at one time arises. The limited area of the easement and the fact that work would be on one vessel at any one time ensures the number of workers located on areas W and X would always be limited. We agree with Mr Galbraith's submission that exhaustively stating limits is not a requirement of a valid easement. That applies even more so in this case where the District Council is also the regulator and so can determine the practical effect of the condition that Mr Schmuck must comply with the resource consent.

[101] We agree with the Court of Appeal that the condition as to term and renewals is not well drafted. However, the Court of Appeal did not suggest this infelicity of expression invalidated the easement and we see no reason to come to a different view.

[102] We are satisfied easement C is a valid easement.

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68 CA judgment, above n 1, at [85].
69 At [86].

Is there power to grant easements for commercial operations on an esplanade reserve?

[103] In the Court of Appeal, the Society argued that s 48(1)(f) did not confer a power to grant easements for private commercial activity to be conducted on a reserve. This was rejected by the Court of Appeal.[70] A similar argument had been rejected by Heath J and by Fogarty J.[71]

[104] The Society gave notice under r 20A of the Supreme Court Rules 2004 supporting the judgment of the Court of Appeal on two other grounds, one of which was that the Court of Appeal had erred in its conclusion about the scope of s 48(1)(f).[72]

[105] Mr Every-Palmer said that, interpreting s 48 from its text in light of its purpose, as required by s 5 of the Interpretation Act 1999, led to a conclusion that s 48(1)(f) did not confer a power to grant easements for private commercial work on a reserve. This inevitably focused on the power of the District Council as grantor of the easements, rather than the District Council as delegate of the Minister in granting consent. As already mentioned, the 2006 easement decision (that is, the District Council's decision to grant the easements) is not under challenge in this appeal. However, the argument was put on the basis that, because the District Council had no power to grant the consents, the Minister could not have the power to consent to their grant.

[106] Section 48 provides as follows:

> **48 Grants of rights of way and other easements**
>
> (1) Subject to subsection (2) and to the Resource Management Act 1991, in the case of reserves vested in an administering body, the administering body, with the consent of the Minister and on such conditions as the Minister thinks fit, may grant rights of way and other easements over any part of the reserve for—
>
> (a) any public purpose; or

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70 At [99].

71 Heath J's judgment, above n 10, at [22]–[27]; and HC judgment, above n 2, at [73].

72 The Society did not, however, cross-appeal against the Court of Appeal's finding that easements A3 and E were valid easements that had been lawfully granted and consented to under s 48(1). In its written submissions, it made it clear this did not indicate it agreed with the Court of Appeal's finding about easements A3 and E and intimated that, if it succeeded in resisting Mr Schmuck's appeal, leave should be granted for it to cross-appeal against the Court of Appeal's decision in relation to easements A3 and E. This was not pursued at the hearing and on our approach to the case it is not a live issue.

(b) providing access to any area included in an agreement, lease, or licence granted under the powers conferred by this Act; or

(c) the distribution or transmission by pipeline of natural or manufactured gas, petroleum, biofuel, or geothermal energy; or

(d) an electrical installation or work, as defined in section 2 of the Electricity Act 1992; or

(e) the provision of water systems; or

(f) providing or facilitating access or the supply of water to or the drainage of any other land not forming part of the reserve or for any other purpose connected with any such land.

(2) Before granting a right of way or an easement under subsection (1) over any part of a reserve vested in it, the administering body shall give public notice in accordance with section 119 specifying the right of way or other easement intended to be granted, and shall give full consideration, in accordance with section 120, to all objections and submissions received in respect of the proposal under that section.

…

[107] Mr Every-Palmer argued that the catch-all phrase "for any other purpose connected with any such land" in s 48(1)(f) needs to be considered in the context of s 48 as a whole and also within the statutory scheme of the Reserves Act.

[108] In relation to s 48, Mr Every-Palmer's argument was that the easements contemplated by s 48 were in two broad categories [73] the facilitation of utility services (s 48(1)(c), (d) and (e)); and access and the provision of basic amenities to other land (s 48(1)(f)). He said a literal interpretation of the catch-all phrase at the end of s 48(1)(f) would override Parliament's intention to limit easements to those two broad categories. Thus, he argued, the phrase "any other purpose" had to be read as "any other *similar* purpose". The "other purpose" referred to in s 48(1)(f) must have a connection with the other powers conferred by that paragraph. He did not suggest this was an application of the ejusdem generis principle, but rather just interpreting the provision in light of its context. He was right to reject the application of the ejusdem generis maxim because there is, in fact, no "genus" in s 48(1)(f) that could limit the general wording at the end of the provision.

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[73] In addition to the provisions for public purpose easements (s 48(1)(a)) and access easements in respect of licences and leases granted under the Reserves Act (s 48(1)(b)).

[109] Mr Every-Palmer also discussed the scheme of the Act, highlighting the specific powers given to administering bodies in relation to different types of reserves and the constraints imposed on those powers. He said that in the absence of a specific provision, commercial activity should not be permitted on a reserve. We do not accept that submission. As the Court of Appeal noted, the restrictions on an administering body's power to enter into leases or licences of reserve land (in ss 61 and 74 of the Reserves Act) do not apply to the grant of easements under s 48.[74] So the fact that the powers to enter into leases and licences are confined to certain specified purposes does not mean the power to grant easements is similarly confined.

[110] Nor do we consider that s 48(1) itself should be interpreted in a manner that imposes a restriction on commercial activities that is simply not mentioned in that subsection. Most of the uses for which easements may be granted under the other paragraphs in s 48(1) to which Mr Every-Palmer referred are themselves commercial uses.[75]

[111] Mr Galbraith pointed out that it would have been simple for Parliament to use the phrase "for any other similar purpose" or "for any like purpose" if that had been its intention. He noted that "for any like purpose" is used elsewhere in the Act.[76] We agree this tends to suggest that the more general wording in s 48(1)(f) means what it says.

[112] Mr Galbraith also highlighted that there were a number of references in the Reserves Act to the carrying on of commercial activity on reserves, which counted against the argument, based on the scheme of the Act, advanced by Mr Every-Palmer. Again, we agree.

[113] We conclude that the Court of Appeal was correct that there is no justification to read down the meaning of the phrase "for any other purpose connected with any

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74 CA judgment, above n 1, at [94].

75 Fuel pipelines, water pipelines and electricity installations, for example.

76 Reserves Act, s 61(2A)(a), s 61(2A)(b) and s 109(3). The first two of these were included in the Act by Reserves Amendment Act 1978, but the words "or any like purposes" appeared in s 109 from the time of enactment of the Reserves Act.

such land" in s 48(1)(f) to exclude easements for commercial activities.[77] We therefore reject the Society's argument on this point.

Was the 2015 consent decision unlawful?

[114] In its r 20A notice, the Society argued that the District Council as delegate of the Minister had acted unlawfully in the 2015 consent decision for four reasons. In its submissions these reasons were revised and reduced to three:

(a) The District Council (as delegate of the Minister) failed to undertake a sufficiently thorough review. A subset of this ground is that the District Council (as delegate of the Minister) did not engage adequately with tangata whenua and Treaty of Waitangi issues relating to the reserve.

(b) The District Council (as delegate of the Minister) failed to identify that the District Council (as grantor) did not undertake appropriate balancing between the purposes of the reserve and the easements.

(c) The District Council (as delegate of the Minister) considered and consented to easements that were materially different from those that had been considered by the Commissioner and the District Council (as grantor).

[115] Mr Every-Palmer accepted that these were matters that had a different focus from the points made in the r 20A notice but asked that the Court consider them, arguing there was no prejudice to the other parties. Counsel for the other parties objected to this, pointing out that the Society's case has changed at each stage of the proceeding.[78] They pointed out that there was no lower court decision on most of these grounds. This meant that this Court would have to address the issues as first and final Court.

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77 CA judgment, above n 1, at [99].
78 A point also noted by the Court of Appeal: at [112].

[116] In his oral submissions, Mr Every-Palmer addressed the Treaty point referred to above on the basis that this was the strongest point and if the Court did not accept his submissions in relation to it, then it would also not be with him on the other points.

The nature of the Minister's consent power under s 48

[117] We are satisfied we should address one aspect of the argument about the thoroughness of review. We had full argument on the role of the Minister (or Minister's delegate) when asked to consent to easements that have been granted by the administering body under s 48. The High Court and Court of Appeal came to different views on this issue. The District Council argued that this point had important precedential value not just for it but for other territorial authorities exercising the Minister's consent power under the Instrument of Delegation.

[118] In the High Court, the Society submitted that the District Council, before reconsidering the Minister's consent decision as required by Heath J's judgment, ought to have re-advertised the application and then considered whether or not to consent with the benefit of any further submissions received in response. Fogarty J rejected this. He said the consent of the Minister was "a check, not a full consideration starting again as it were".[79]

[119] The Court of Appeal did not consider the role was as limited as Fogarty J said it was. It described the task of the Minister or Minister's delegate as "akin to judicial review".[80] It accepted that the Minister was not required to undertake a full merit-based assessment of the proposed easements, but added:[81]

> … we see nothing in the statutory language or scheme of the Reserves Act to suggest that in exercising the discretion to consent or not to consent, the Minister is limited to checking the Council's decision-making processes.

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79 HC judgment, above n 2, at [81]–[82].
80 CA judgment, above n 1, at [41].
81 At [106].

[120] Later, the Court of Appeal acknowledged that it is the body granting the easement that is required to consider objections made under s 48(2) of the Reserves Act. It added:[82]

> We therefore agree with Fogarty J that the same full consideration of objections is not mandatory for the Minister. However we disagree with the Judge that the Minister's consent role is limited to acting as a check on the Council. There is nothing in the statutory scheme that suggests the Minister's discretion is so constrained. To the contrary, it suggests that the Minister remains free to take a different view to Council as to whether an easement should be granted having regard to issues of jurisdiction (as the Minister earlier did in this very matter) and as to the purposes of the Act.

[121] The Court of Appeal's view was that, in exercising the s 48(1) consent discretion, the Minister was required to have regard to legal constraints on the rights that can be conferred under the Reserves Act and the purposes of the Reserves Act. It saw these as mandatory considerations for the Minister.[83]

[122] As mentioned earlier, the Minister delegated his consent function to territorial authorities.[84] In the present case, the delegation meant the District Council effectively wore two hats because it was the administering body of the reserve and also delegate of the Minister. So it had to decide in its former capacity whether to grant the easements and in its latter capacity whether to consent to the grant of the easements. As already noted, in the present case the District Council appointed the Commissioner to undertake the public consultation process required by s 48(2) and acted on his recommendations in granting the easements in the 2006 easement decision.

[123] The delegation was effected under s 10 of the Reserves Act. The relevant provisions of that section are subss (1), (3) and (6), which provide:

> **10 Delegation of Minister's powers**
>
> (1) The Minister may from time to time delegate any of his or her powers and functions under this Act (not being the power to approve any bylaw) to any individual, committee, body, local authority, or organisation, or to any officer or officers of the Department specified by the Minister, either as to matters within his or her jurisdiction

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82 At [110].

83 At [111].

84 Above at [23]. The Instrument of Delegation for Territorial Authorities was signed by the then Minister, Hon Dr Nick Smith MP, on 12 June 2013.

> generally, or in any particular case or matter, or any particular class of cases or matters, or in respect of any reserve or reserves.
>
> …
>
> (3) Subject to any general or special directions given by the Minister, any person, committee, body, local authority, organisation, or officer to which or to whom any powers have been so delegated may exercise those powers in the same manner and with the same effect as if they had been directly conferred on that person, committee, body, local authority, organisation, or officer by this Act and not by delegation.
>
> …
>
> (6) No such delegation shall prevent the exercise by the Minister himself or herself of any of the powers and functions conferred on him or her by this Act.

[124] A letter dated 8 July 2013 from DoC to local authorities accompanying the Instrument of Delegation included the following explanation:

> There is an expectation that local authorities will maintain a distinction between their role as the administering body of a reserve and their role as a delegate of the Minister.
>
> It is important to note that the decision making function, whereby the merits of the proposal are considered, is a fundamental responsibility of the reserve administering body. The Minister is not the decision maker, but has, instead, a supervisory role in ensuring that the necessary statutory processes have been followed; that the administering body has taken the functions and purposes of the Reserves Act into account in respect of the particular classification and purposes of the reserve; that it has considered any objections or submissions from affected parties; and that, on the basis of the evidence, the decision is a reasonable one.

[125] Counsel for the District Council, Mr Hodder QC, argued that the Minister's power under s 48(1) was a supervisory power. The Minister was not obliged to, but was entitled to, undertake a deeper review. He argued the advice given by DoC to territorial authorities, which we have reproduced above, correctly described the task that territorial authorities were required to undertake when exercising the Minister's consent power as the Minister's delegate. He disputed the Court of Appeal's characterisation of the task as "akin to judicial review".

[126] Mr Hodder argued the scheme of s 48 supported his position. The sequence of steps leading to the execution and registration of an easement begins with the request for an easement; the administering body then gives public notice and must consider

the submissions received;[85] the administering body then decides to grant the easement (with conditions if appropriate), subject to the Minister's consent. The Minister or his or her delegate then consents (again, applying conditions if appropriate). Any easement that is granted must comply with the RMA.[86] He emphasised it is the administering body, not the Minister, that is required to engage with the public and which makes the decision as to whether or not the easement should be granted.

[127] This sequence means that by the time the Minister's consent power is engaged, there will have been a full consideration by the administering body of public feedback and RMA issues by the body required by s 48 to do this. In those circumstances, there is no basis for imposing on the Minister any greater role than a supervisory role, ensuring the earlier steps in the sequence have been carried out in accordance with the legislative requirements.

[128] Mr Hodder argued that the analogy with judicial review could be seen as suggesting "inappropriate legalism". He submitted the requirement is better described as the Minister (or Minister's delegate) being sufficiently informed to make a reasonable supervisory decision whether or not to consent and, if so, whether to impose conditions.

[129] Mr Hodder took issue with the Court of Appeal's conclusion that the 2015 consent decision was unreasonable because of an error of law about the validity of the easements and the antecedent finding that the legality of the easements was a mandatory consideration. As we have found the easements were valid, this no longer has practical impact. While we can see some concern about the characterisation of the 2015 consent decision as "unreasonable", we think the Court of Appeal meant no more than that if the Minister consented to the grant of easements that on review by a court were found to be invalid, the fact the administering body had purported to grant them and the Minister had purported to consent to that grant could not "cure" that invalidity.

[130] It is clear that the Minister is entitled to give general or special directions in relation to the delegation under s 10(3) and, once those directions are given, the

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85 Reserves Act, ss 48(2), 119 and 120.
86 Reserves Act, s 48(1).

decision-making power that has been delegated must be exercised subject to those general or special directions. It is notable, therefore, that the letter accompanying the Instrument of Delegation described the delegated role as a supervisory one: ensuring that the necessary statutory processes have been followed; that the functions and purposes of the Reserves Act have been taken into account; that the administering body has considered objections or submissions from affected parties; and that the decision is reasonable. That is what led Fogarty J to describe the role as a "check". We see the terms "check" and "supervisory" as useful shorthand descriptions of the role but neither provides a comprehensive description. We agree with the Court of Appeal that the Minister or the Minister's delegate cannot consent to an invalidly granted easement, and to that extent must have regard to the legal constraints on the rights that can be conferred under the Act. But we do not consider that the Minister is under any obligation in process terms to reconsider the matters taken into account by the administering body in granting the easement, so long as they are within the administering body's powers.

[131] In characterising the Minister's power as supervisory, we are not intending to create any artificial limit on that power. All we are saying is that there is no requirement to re-run the process already undertaken by the administering body of the reserve. However, if the Minister takes a different view of the situation from that taken by the administering body, there is nothing to stop the Minister refusing to consent to a decision that the administering body has made lawfully and which the administering body considers is reasonable. We agree with the Court of Appeal that the Minister is free to take a different view from that of the administering body as grantor. But there is also nothing requiring the Minister to reconsider matters decided by the administering body and the Minister does not act unlawfully if he or she does not do so.

[132] We accept Mr Every-Palmer's submission that the Minister's decision is not a rubber-stamping exercise.[87] But we do not think that undermines our description of the Minister's power above. In the absence of any statutory requirements as to process, it is for the Minister (or Minister's delegate) to determine what is relevant to

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[87] See *Hastings District Council v Minister of Conservation* [2002] NZRMA 529 (HC) at [50(a)].

the decision and the manner and intensity of the inquiry into any such matter (beyond the essentials of checking that the statutory process has been undertaken by the administering body and that the easement was lawfully granted), subject only to challenge on grounds of unreasonableness.[88]

[133] We think Mr Hodder was correct that the concerns the Society has about the challenged easements really relate to other steps in the sequence of decision-making in relation to the easements. The Society's primary concern about public access to the reserve is better directed at the process undertaken by the Commissioner and the decision by the District Council (as the local agency best informed about those issues and accountable to the local people affected by the issue) to grant the easements than at the Minister's consent decision.[89] Its concern about compliance with the RMA is better directed to the resource consent process, which, we understand, the Society has been involved with since the Court of Appeal's decision was delivered.[90]

The process leading to the 2015 consent decision

[134] The Society argues the approach of the District Council to the consent decision was not sufficiently thorough. It is notable that, despite its views as to the nature of the consent power, the Court of Appeal had no concerns about this in relation to the easements it found were capable of being easements, easement A3 and E.

[135] We do not intend to engage further with this point. To a large extent, the Society's case in this context relied on its submission as to the nature of the consent process, which we have rejected. We accept that the point was not pleaded and was not in the r 20A notice, and there would be unfairness to the other parties if we were to decide the point as first and last court. This is compounded by the fact that we would be evaluating the process against the background of our conclusions as to the

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88 *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37 at [35] per Laws LJ for the Court. See also *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]; and *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 at [59].

89 As noted above at [42], the 2006 easement decision is not under challenge in these proceedings.

90 See *Schmuck v Northland Regional Council* [2019] NZEnvC 8; and *Schmuck v Northland Regional Council* [2019] NZEnvC 125.

nature of the process, when the Society's submissions were based on a different understanding of what the process required.

Treaty of Waitangi considerations

[136] Mr Every-Palmer advanced the argument in this Court that the District Council had failed to engage with tangata whenua and failed to give sufficient consideration to the Treaty claims over the area that includes the reserve.[91]

[137] It is difficult for us to discern whether there is substance to this argument. It is significant that the Society is the party advancing the argument, rather that the Treaty claimant. Mr Every-Palmer said there are iwi members involved with the Society but that is quite a different thing from the relevant iwi or hapū (or their representative) being parties to the proceeding. We cannot do the issue justice on the basis of the evidence before us and without allowing the District Council a fair opportunity to respond. We are also reluctant to address the issue in proceedings to which the relevant Treaty claimants are not represented. We do not therefore engage further with this argument.

Other grounds

[138] We see the other grounds of challenge to the 2015 consent decision in the same light. They needed to be advanced and addressed at first instance to be properly considered by this Court.

Issue estoppel

[139] We do not need to address the question of whether issue estoppel or something analogous to it arises in relation to Heath J's judgment. We indicated at the hearing that if it did arise and we agreed to address it, we would seek further submissions. As it transpires, the issue is now moot and we say no more about it.

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[91] A witness for the Society, Ms Marks, gave evidence that there are three Treaty claims on the area that includes the reserve. One of them (Wai 2424) was made by Ms Marks and relates to environmental degradation in Walls Bay.

Indefeasibility of title

[140] The impact of the registration of the easements after they were formalised (following the 2015 consent decision) did not arise in the High Court because that Court upheld their validity. In the Court of Appeal, the issue was potentially live. In the Court's judgment as first issued, the Court noted that "although the easements are registered, the respondents [the District Council, the Minister and Mr Schmuck] do not plead or rely upon indefeasibility of title as relevant to any relief should the Society succeed with its appeal".[92] Subsequently the judgment was recalled and re-issued with the words "plead or" removed.[93] The Court of Appeal reserved leave for the parties to apply for consequential orders if required, in light of the fact that the easements in issue had been registered.[94]

[141] The position before this Court was that Mr Schmuck wished to rely on indefeasibility if his appeal otherwise failed. But neither of the Courts below had addressed the issue. We indicated at the hearing that we would call for further submissions on the issue if the issue arose and we considered it was appropriate to deal with it. As we have found the easements are valid, the issue does not arise.

Result

[142] The appeal is allowed. The decision of the District Council as delegate of the Minister to consent to the challenged easements is reinstated.

Costs

[143] We reserve costs. Both Mr Schmuck and the District Council claimed costs. The Society sought an order that costs lie where they fall in the event that it was unsuccessful in the appeal on the basis that the case concerns a matter of real public interest beyond the interests of the Society, the Society's position had merit and the Society acted reasonably in the conduct of the proceedings. The District Council disputes the last of those. We seek submissions from the parties on that issue and on

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92 CA judgment, above n 1, at [54].

93 *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 510. The Court refused to call for and hear further submissions on indefeasibility as Mr Schmuck sought.

94 CA judgment, above n 1, at [120].

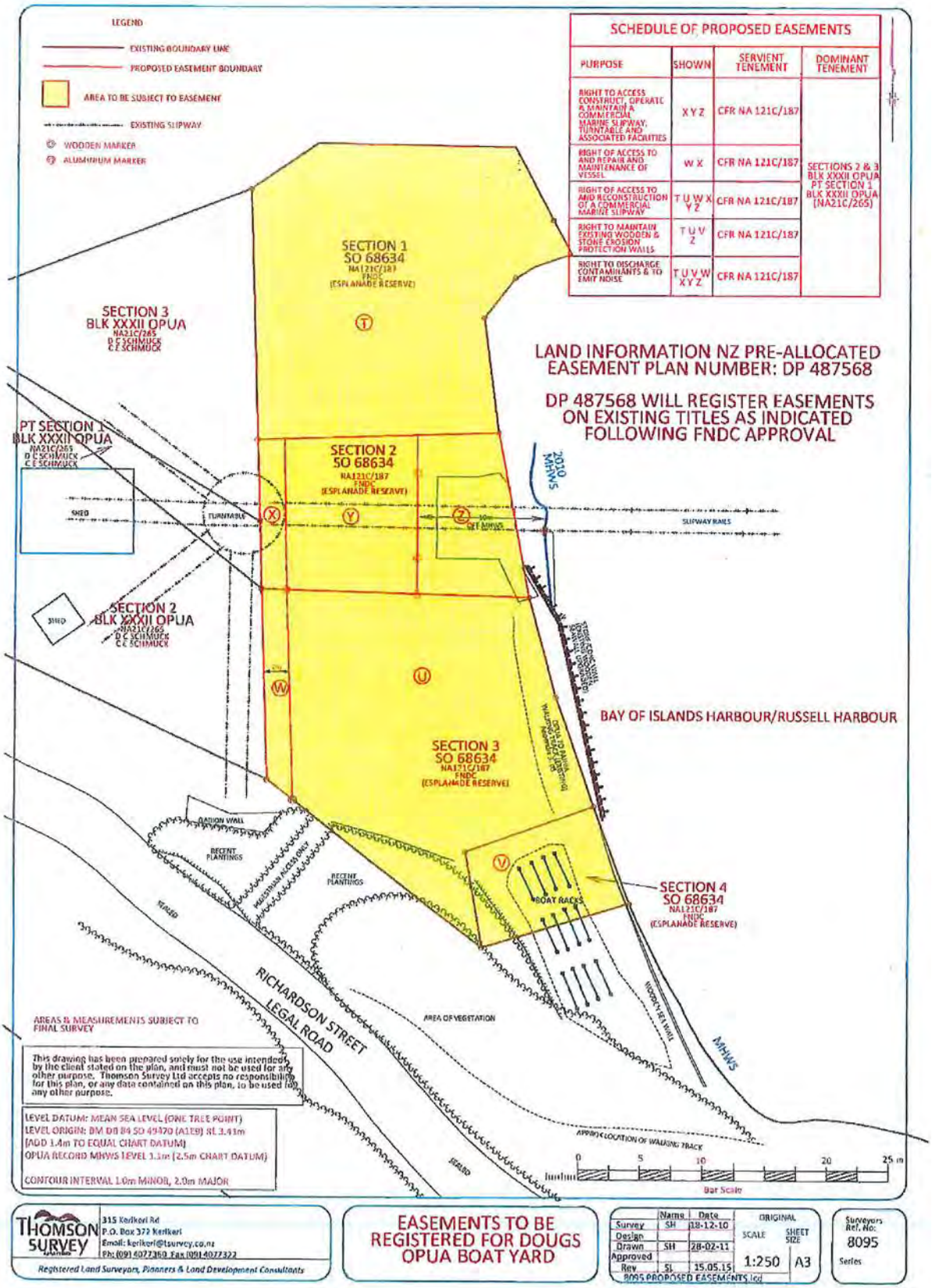
costs generally, both in this Court and the Courts below (unless the parties are able to agree on costs). Submissions from Mr Schmuck and the District Council should be filed and served by 15 November 2019, submissions from the Society by 29 November 2019 and reply submissions from Mr Schmuck and the District Council by 6 December 2019.

Leave reserved

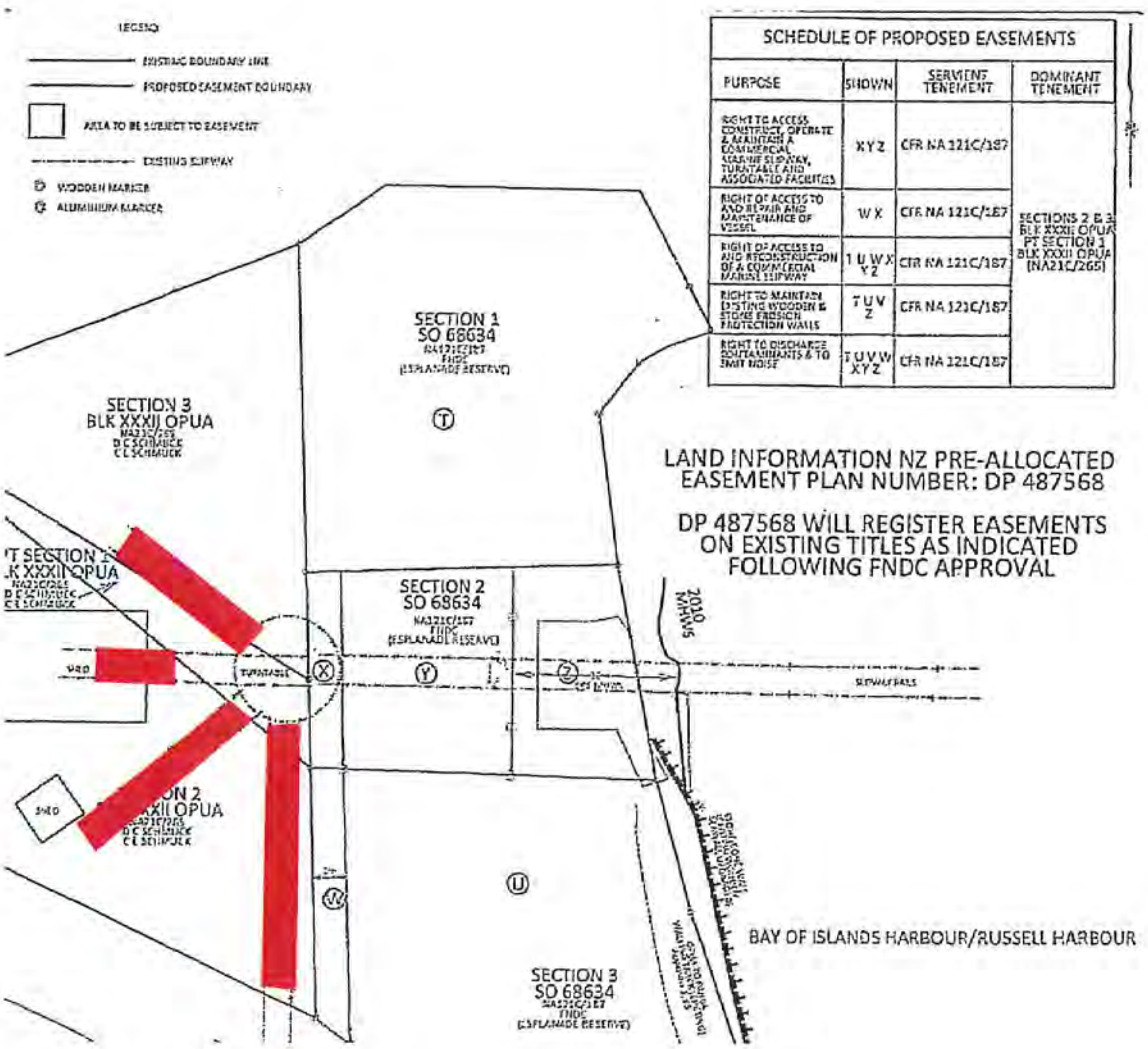
[144] We are unsure as to whether the challenged easements have been removed from the register and, if so, whether any formal steps are required to reinstate them. We reserve leave to the parties to apply for consequential orders if required.

Solicitors:
Henderson Reeves Lawyers, Whangarei for Appellant
Bennion Law, Wellington for First Respondent
Law North Lawyers, Kerikeri for Second Respondent

ANNEXURE 1


LEGEND
EXISTING BOUNDARY LINE
PROPOSED EASEMENT BOUNDARY
AREA TO BE SUBJECT TO EASEMENT
EXISTING SLIPWAY
WOODEN MARKER
ALUMINIUM MARKER
SCHEDULE OF PROPOSED EASEMENTS
PURPOSE | SHOWN | SERVIENT TENEMENT | DOMINANT TENEMENT
RIGHT TO ACCESS CONSTRUCT, OPERATE & MAINTAIN A COMMERCIAL MARINE SLIPWAY, TURNTABLE AND ASSOCIATED FACILITIES | X Y Z | CFR NA 121C/187 | SECTIONS 2 & 3 BLK XXXII OPUA PT SECTION 1 BLK XXXII OPUA (NA21C/265)
RIGHT OF ACCESS TO AND REPAIR AND MAINTENANCE OF VESSEL | W X | CFR NA 121C/187
RIGHT OF ACCESS TO AND RECONSTRUCTION OF A COMMERCIAL MARINE SLIPWAY | T U W X Y Z | CFR NA 121C/187
RIGHT TO MAINTAIN EXISTING WOODEN & STONE EROSION PROTECTION WALLS | T U V Z | CFR NA 121C/187
RIGHT TO DISCHARGE CONTAMINANTS & TO EMIT NOISE | T U V W X Y Z | CFR NA 121C/187
SECTION 1 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
SECTION 3 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
LAND INFORMATION NZ PRE-ALLOCATED EASEMENT PLAN NUMBER: DP 487568
DP 487568 WILL REGISTER EASEMENTS ON EXISTING TITLES AS INDICATED FOLLOWING FNDC APPROVAL
PT SECTION 1 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
SHED
TURNTABLE
2010 MHWS
SLIPWAY RAILS
SECTION 2 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
SECTION 2 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
SECTION 3 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
BAY OF ISLANDS HARBOUR/RUSSELL HARBOUR
RETAINING WALL
RECENT PLANTINGS
PEDESTRIAN ACCESS ONLY
SEALED
BOAT RACKS
SECTION 4 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
RICHARDSON STREET LEGAL ROAD
AREA OF VEGETATION
APPROX LOCATION OF WALKING TRACK
MHWS
AREAS & MEASUREMENTS SUBJECT TO FINAL SURVEY
This drawing has been prepared solely for the use intended by the client stated on the plan, and must not be used for any other purpose. Thomson Survey Ltd accepts no responsibility for this plan, or any data contained on this plan, to be used for any other purpose.
LEVEL DATUM: MEAN SEA LEVEL (ONE TREE POINT)
LEVEL ORIGIN: BM OB 84 SO 49470 (A1E9) RL 3.41m
(ADD 1.4m TO EQUAL CHART DATUM)
OPUA RECORD MHWS LEVEL 1.1m (2.5m CHART DATUM)
CONTOUR INTERVAL 1.0m MINOR, 2.0m MAJOR
0 5 10 20 25 m
Bar Scale
THOMSON SURVEY
315 Kerikeri Rd
P.O. Box 372 Kerikeri
Email: kerikeri@tsurvey.co.nz
Ph: (09) 4077360 Fax (09) 4077322
Registered Land Surveyors, Planners & Land Development Consultants
EASEMENTS TO BE REGISTERED FOR DOUGS OPUA BOAT YARD
Name | Date
Survey SH 18-12-10
Design
Drawn SH 28-02-11
Approved
Rev SL 15.05.15
ORIGINAL
SCALE 1:250
SHEET SIZE A3
8095 PROPOSED EASEMENTS.lcd
Surveyors Ref. No: 8095
Series

ANNEXURE 2


LEGEND
EXISTING BOUNDARY LINE
PROPOSED EASEMENT BOUNDARY
AREA TO BE SUBJECT TO EASEMENT
EXISTING SLIPWAY
WOODEN MARKER
ALUMINIUM MARKER
SCHEDULE OF PROPOSED EASEMENTS
PURPOSE | SHOWN | SERVIENT TENEMENT | DOMINANT TENEMENT
RIGHT TO ACCESS, CONSTRUCT, OPERATE & MAINTAIN A COMMERCIAL MARINE SLIPWAY, TURNTABLE AND ASSOCIATED FACILITIES | X Y Z | CFR NA 121C/187 | SECTIONS 2 & 3 BLK XXXII OPUA PT SECTION 1 BLK XXXII OPUA (NA21C/265)
RIGHT OF ACCESS TO AND REPAIR AND MAINTENANCE OF VESSEL | W X | CFR NA 121C/187
RIGHT OF ACCESS TO AND RECONSTRUCTION OF A COMMERCIAL MARINE SLIPWAY | 1 U W X Y Z | CFR NA 121C/187
RIGHT TO MAINTAIN EXISTING WOODEN & STONE FRENCH PROTECTION WALLS | T U V Z | CFR NA 121C/187
RIGHT TO DISCHARGE CONTAMINANTS & TO EMIT NOISE | T U V W X Y Z | CFR NA 121C/187
SECTION 1 SO 68634
SECTION 3 BLK XXXII OPUA
SECTION 2 SO 68634
SECTION 3 SO 68634
LAND INFORMATION NZ PRE-ALLOCATED EASEMENT PLAN NUMBER: DP 487568
DP 487568 WILL REGISTER EASEMENTS ON EXISTING TITLES AS INDICATED FOLLOWING FNDC APPROVAL
SEAWALL
BAY OF ISLANDS HARBOUR/RUSSELL HARBOUR

Supreme Court of New Zealand
Te Kōti Mana Nui

29 OCTOBER 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

DOUGLAS CRAIG SCHMUCK v OPUA COASTAL PRESERVATION INCORPORATED

(SC 66/2018) [2019] NZSC 118

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Introduction

The appellant, Mr Schmuck, owns a boat repair business, Doug's Opua Boatyard, in Walls Bay, Opua, in the Bay of Islands. The land on which the Boatyard is situated is adjacent to an esplanade reserve. The appeal concerned the validity of easements granted to Mr Schmuck over the reserve. The case raised issues as to the legal requirements for a valid easement, the power of an administering body to grant an easement for a commercial purpose over reserve land and the requirement for the Minister of Conservation (or the Minister's delegate) to consent or withhold consent to such a grant.

Background

The reserve lies between the Boatyard and the sea. A slipway runs across the reserve from the sea to a turntable that is located mostly on Boatyard land but partially on the reserve. The turntable allowed for boats sitting on cradles to be turned onto different tramrails in the Boatyard. This included the southern slipway tramrail, which ran close to the border between the Boatyard and reserve. This meant one side of a boat on this tramrail could only be worked on from the reserve.

For many years, Mr Schmuck endeavoured to obtain easements – a right to use land for a specified purpose – over the reserve under s 48(1)(f) of

the Reserves Act 1977. This allows the administering body of the reserve, with the consent of the Minister of Conservation or their delegate, to grant rights of way and other easements over the reserve "for any other purpose connected with" land not forming part of the reserve. That power is subject to the Resource Management Act 1991 and the administering body must undertake a process of public notice and consideration of submissions relating to the proposal. The administering body of the reserve in Walls Bay is the Far North District Council.

In 2006, the District Council exercised its power under s 48(1)(f) to grant Mr Schmuck the easements sought. However, the Minister's delegate at the time did not consent to all the easements granted by the District Council on the basis they were not capable of being granted under s 48. Mr Schmuck successfully challenged the decision of the Minister's delegate in the High Court. The consent decision was sent back to the Minister or their delegate for reconsideration. By this time, the Minister had delegated the power to consent to easements granted under s 48 to the District Council. In 2015, the District Council consented to all the easements it had granted to Mr Schmuck in 2006.

The Opua Coastal Preservation Society filed proceedings challenging, among other things, the 2015 decision of District Council to consent to the easements. The Society's challenge related to only some of the easements consented to. The Society did not object to the easements allowing Mr Schmuck to maintain and use the beach slipway and turntable.

The Society's claim was dismissed in the High Court. The Society appealed to the Court of Appeal. The Court of Appeal held that four of the easements granted were not capable of being valid easements. Accordingly, the District Council could not consent under s 48(1)(f) and the decision to consent to the grant of those easements was quashed.

Mr Schmuck was granted leave to appeal to the Supreme Court. The appeal raised three primary issues:

(a) whether the easements that the Court of Appeal found to be invalid were capable of being easements at all;
(b) whether easements for commercial operations may be granted under s 48; and
(c) whether the 2015 consent decision was lawfully made.

The Supreme Court's decision

The Supreme Court has unanimously allowed the appeal and reinstated the decision of the District Council as delegate of the Minister to consent to the easements.

In relation to the first issue, the Court interpreted the four easements in issue more narrowly than the Court of Appeal did in order to give effect to

the easements. On the basis of those narrower interpretations, it found that they were capable of being valid easements.

The Court also held that s 48(1)(f) enabled easements to be granted for a private commercial purpose. Section 48(1)(f) refers to the grant of an easement "for any other purpose". There was no reason to interpret this as excluding easements granted for commercial activity.

Finally, the Court held that the decision of the District Council as delegate of the Minister to consent to the easements was validly made. The Minister's consent power is not a rubber-stamping exercise, and the Minister or their delegate is free to take a different view to that of the administering body. But the Minister or their delegate is not necessarily required to reconsider matters decided by the administering body.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2019-488-000075
[2020] NZHC 590

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under ss 299, 300 of the Act
BETWEEN	DOUGLAS CRAIG SCHMUCK Appellant
AND	NORTHLAND REGIONAL COUNCIL Respondent

Hearing: 24 February 2020

Appearances: A Galbraith QC and M Prendergast for the Appellant
G Mathias for the Respondent
R Mark for the Opua Coastal Preservation Inc

Judgment: 20 March 2020

JUDGMENT OF GORDON J

This judgment was delivered by me on Friday, 20 March 2020 at 4 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Henderson Reeves, Whangarei
Thomson Wilson, Whangarei
Counsel: A Galbraith QC, Auckland
R Mark, Kerikeri

[1] The appellant, Douglas Schmuck, owns and operates a small boat yard, Doug's Opua Boat Yard, (the boat yard) which is situated in Walls Bay, Opua, in the Bay of Islands. Part of the boat yard activity has occurred under various consents and permits in the Esplanade Reserve (the Reserve), which is between the boat yard and foreshore, as well as on the boat yard land itself.[1]

[2] In September 2017, in anticipation of the expiry on 30 March 2018 of discharge consents under which the boat yard operated, Mr Schmuck applied to the respondent, the Northland Regional Council (NRC), for their renewal. The following month Mr Schmuck made an unrelated application for structures and activities in the Coastal Marine Area (CMA). The NRC amalgamated the applications and notified them together as one application in December 2017.

[3] The NRC declined the amalgamated application. Mr Schmuck appealed to the Environment Court. During the pre-hearing procedures, Mr Schmuck withdrew the appeal relating to his application for structures and activities in the CMA and proceeded only on the appeal in relation to the discharge consents.

[4] The Environment Court refused the renewal of the discharge consents as they applied to the Reserve on the basis that it lacked jurisdiction to grant renewals (for reasons that I will come to). The Court determined that consents could be granted but effectively confined the operation of the boat yard under the discharge consents to the boat yard land.

[5] Mr Schmuck appeals that decision alleging various errors of law.

Historical context[2]

[6] The boat yard has operated in Walls Bay since around 1966 with the slipway moving to its present location in 1976. Mr Schmuck and his parents bought the boat yard in 1994. At the time of purchase by Mr Schmuck and his parents, boat yard

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1 I will refer to the land owned by Mr Schmuck as the boat yard land.

2 This section is largely drawn from the summary in the submissions of counsel for Mr Schmuck. Counsel for both the NRC and the s 274 party, Opua Coastal Preservation Inc (OPC), agree that the summary is accurate.

activities extended onto what was the abutting unformed Crown Grant Road. At the time, boats were cleaned and maintained on the foreshore. Planning consent allowed for the slipway over the road to be used only to move boats to and from the sea.

[7] Mr Schmuck sought and obtained the agreement of the Minister of Conservation (Minister) and the Far North District Council (FNDC) to allow the FNDC to follow the process required to close the unformed road. Once closed, the road was to vest in the FNDC as a Local Purpose (Esplanade) Reserve. The FNDC was then to notify its intention to grant an easement under s 48 of the Reserves Act 1977 in favour of the boat yard over the reserve to be created, so as to formalise the existing and proposed boat yard activities. The road was formally closed in June 1998 and the record of title for the Local Purpose Reserve which had been created was issued in October 1998.

[8] Easements over the reserve, which replicated the activity authorised by resource consent, were registered in July 2015 after a process characterised by Heath J as "tortuous".[3] A challenge by Opua Coastal Preservation Inc (OCP), a s 274 party in this proceeding, to those easements made its way to the Supreme Court. The Supreme Court reinstated the FNDC decision, as the Minister's delegate, consenting to the easement providing for wash down, repair and maintenance of boats on the Reserve.[4]

The resource consents[5]

[9] By a consent order of the Environment Court dated 31 January 2002 Mr Schmuck has held land use and discharge consents and coastal permits authorising boat yard activities on the boat yard land, on specified parts of the Reserve and into the CMA.

Land use consent

[10] The land use consent issued by the FNDC is open-ended. It has no expiry date. Counsel for both the NRC and OCP accept there is no issue likely to lead to

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3 *Schmuck v Director General, Department of Conservation* [2015] NZHC 422 at [7].

4 *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118, [2019] 1 NZLR 750.

5 This section is also largely drawn from the summary in the submissions of counsel for Mr Schmuck. No issue is taken with that summary by counsel for the NRC or the OCP.

cancellation or surrender of the land use consent. Both counsel further accept that the boat yard has a good compliance record and no enforcement issues arise from either the NRC or the FNDC.

[11] Of relevance to this appeal, the consent provides, subject to conditions, for a commercial marine slipway and associated boat yard facilities and activities on the boat yard land and on Sections 1-4, SO 68634, being all of the Reserve (the number 68634 should be noted as it relevant to the key alleged error of law).

[12] The activities permitted on the Reserve include:

(a) A concrete wash-down area with an associated discharge containment system, as shown on the plan attached to the consent and to be located 10 metres above mean high water springs (MHWS);

(b) To carry out the activity of washing down boats prior to the boats being moved to the boat yard for repairs or maintenance or being returned to the water, provided however that repairs and maintenance may be carried out on the Reserve only in accordance with condition 8.

[13] Condition 8 reads as follows:

> Except as provided herein any repair or maintenance work on vessels shall be undertaken within the Consent Holder's site. Vessels may be washed down within that area of the Esplanade Reserve marked "A" on the attached plan. Any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the Consent Holder's site may be repaired or maintained on that part of the Esplanade Reserve marked "A" on the attached plan. That part of the Esplanade Reserve marked "B" on the attached plan may be used for the purposes of permitting the repair or maintenance of any vessel standing on the southern branch of the slipway marked "C" on the attached plan.

[14] For ease of understanding the areas of authorised activities in the above condition, a copy of the plan referred to as the "attached plan" is annexed to this judgment.

[15] Other conditions of the consent which are relevant to issues on this appeal are:

> 3. That the Discharge Containment System and the Stormwater Containment System shall be located as far as is practicable within the Consent Holder's site with these arrangements being to the satisfaction of the District Council's Resource Consent Manager.
>
> 4. Except as provided in condition 8 that no materials, tools or other items shall be placed or left on the Esplanade Reserve except as may be necessary for the passage of boats on the slipway and only whilst those activities are being carried out.
>
> …
>
> 9. Except as provided in this consent no vessel shall be left on the slipway within the Esplanade Reserve. All relevant safety requirements shall be adhered to at all times. The only permitted closure of the Esplanade Reserve is for safety reasons during vessel haulage. No more of the Esplanade Reserve shall be closed than is absolutely necessary.
>
> …
>
> 13. During periods when that part of the slipway through the Esplanade Reserve area is being used for the washing down of boats, the Consent Holder shall erect screens or implement similar measures to effectively contain all contaminants within the washdown perimeter. Screening shall be arranged at the Consent Holder's expense and to be to the satisfaction of the District Council's Resource Consent Manager.
>
> …
>
> 15. The Consent Holder shall submit a Management Plan to the Far North District Council, for approval, within three months of the date of commencement of these consents. The Management Plan shall cover all aspects of :
>
> (a) The operation and maintenance of the boat washdown area.
>
> (b) Contingency measures for unforeseen or emergency situations. The operation and maintenance of the above systems, for the boatyard operations shall be carried out in accordance with the approved Management Plan.
>
> (c) The need to minimise effects on the public use of the walking track and Esplanade Reserve.

(Emphasis in original omitted).

Coastal permits

[16] The coastal permits issued by the NRC have an expiry date of 2036. Mr Schmuck is permitted to carry out activities associated with the operation of the boat yard including the following: a wharf, wharf abutment and access pontoon; a slipway with dinghy ramp; the parts of a timber and stone sea wall and associated reclamation that are within the CMA; work boat mooring; maintenance dredging of seabed material at the slipway; to use the structures referred to above for the purposes associated with the boat yard; and to occupy an area of seabed associated with the slipway and wharf structures.

Discharge consents

[17] The discharge consents issued by the NRC, held by Mr Schmuck pursuant to the 31 January 2002 consent order, were reviewed and replaced in 2008 for a 10 year period expiring on 30 March 2018.[6] The discharge consents, which by the time of the hearing of appeal, had expired were AUT.007914.10 – 13 and AUT.007914.15. As summarised below, each was for a different activity:

> 10. To discharge treated wash water to the CMA.
>
> 11. To discharge contaminants to air from marine vessel construction, sale, repair, maintenance and associated activities on the boat yard land and Sections 1-4, SO 63634.[7]
>
> 12. To discharge contaminants to air in the CMA from marine vessel construction, sale, repair and maintenance and associated activities.
>
> 13. To discharge contaminants to ground as a result of boat maintenance activities on the boat yard land and Sections 2 and 3, SO 63634.[8]
>
> …
>
> 15. To discharge stormwater to the CMA.

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6 Except for AUT.007914.14 which expired on 30 March 2009.
7 The number 63634 is relevant to the key alleged error of law.
8 The number 63634 is again relevant to the key alleged error of law.

[18] A copy of the discharge consents with the precise wording for each activity is attached to the decision of the Environment Court. A copy is also attached to this judgment.[9]

[19] Mr Schmuck sought a renewal for a term of 18 years to coincide with the expiry date for the coastal permits.

Approach to appeals from the Environment Court

[20] Under s 299 of the Resource Management Act 1991 (RMA) an appeal from a decision of the Environment Court may only be brought on a question of law. Section 299(1) provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[21] The nature of a question of law was considered by the Supreme Court in *Bryson v Three Foot Six Ltd* in the context of a similar provision in the Employment Relations Act 2000 as follows:[10]

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
>
> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". …

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9 The copy of the discharge consents as attached to the Environment Court decision (and now this judgment) was not complete as it did not include all the conditions.

10 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[22] In an appeal under s 299, this Court has said that the Environment Court may have made an error of law if it:[11]

(a) applied a wrong legal test; or

(b) came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

[23] Any error of law found must materially affect the result of the Environment Court's decision before the High Court should grant relief.[12]

[24] I proceed on the basis of the principles set out above.

Errors of law alleged

[25] Mr Schmuck acknowledges that several of his grounds of appeal overlap to some extent. He also says that the Court's decision that it lacked jurisdiction to consider activities on the Reserve materially affected the decision overall.

[26] The alleged errors of law are expressed as follows:

(a) The Environment Court erred in law when, after the hearing and without hearing from the parties on the issue, it declined jurisdiction to consider discharges from the authorised boat yard activities located on the Reserve due to what was obviously a typographical error, but then granted consent limiting the area of the Reserve on which the activities and discharges could occur;

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11 *Countdown Properties (Northlands Ltd) v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
12 At 153.

(b) The Environment Court came to a conclusion which, on the evidence, it could not reasonably have come;

(c) The Environment Court did not have jurisdiction to amend a valid land use consent providing for activities on the Reserve without hearing from the issuing consent authority, FNDC;

(d) The Environment Court focused on irrelevant matters and failed to take into account and/or consider relevant matters;

(e) The Environment Court erred in law in interpreting s 105(1)(c) of the RMA as requiring consideration of alternative locations for the treatment facilities and the repair and maintenance activities.

First alleged error – Breach of natural justice

[27] I consider this alleged error in two parts. First, was there a procedural error, which constituted an error of law, in the Court determining that it had no jurisdiction to renew the discharge consents in respect of the Reserve without first hearing from the parties on that issue?

[28] Second, I will consider whether the Court was correct in law that it did not have jurisdiction to consider the renewal applications as they related to the Reserve. This latter issue did not strictly form part of the errors alleged in the notice of appeal. However, Mr Galbraith QC, appearing for Mr Schmuck, submits it is important for the Court to determine the issue so as to ensure that Mr Schmuck is able to continue operating the boat yard under s 124 of the RMA. That section enables a consent holder to operate under an expired consent until all appeals are determined if the application for renewal is for the same activity. Neither of the other parties took issue with the Court proceeding in this way.

Environment Court decision

[29] The Reserve is comprised in Sections 1-4, SO 68634. As can be seen from [17] above and the copy of the discharge consents attached to this judgment, consents

11 and 13 refer to SO 63634. The Court asked itself what areas were the subject of the application for renewal of consents. It said:

> [15] Given that this was an application for renewal of existing consents, one must assume that it cannot extend or increase the coverage of these consents.
>
> [16] As can be seen from the consent annexed as A, the areas involved are explicitly described by their section numbers or DP numbers. The reason for this is unclear and there is no reference in the consent itself to reliance on the maps attached. In its terms, condition 11 refers to Section 1-4 SO63634 Blk V Russell SD. Condition 13, discharge of contaminants to ground, refers to Sections 2 and 3 SO 63634 Blk V Russell SD.

[30] The Court went on to consider whether the GPS coordinates referred to in the consents gave certainty about included areas. It said:

> [17] In both cases, all of the various sites are referred to by a general reference to a location to coordinates east and north. The exact position of those coordinates varies slightly with some referring to a coordinate 1701470E 6091840N, i.e., discharge to air, whereas discharge to air from marine vessel construction, sale and repair is at or about locations 1701520E 6091850N.
>
> [18] We were not provided with any documents which established the point of these coordinates nor are they annexed to the consent itself. Nor do these appear to be readily available as fixed points or areas with LINZ advising that coordinates cannot be regarded as reliable in terms of *Geodetic Datum 2000 New Zealand*, given they were prepared in 2000. We conclude the GPS coordinates do not clarify the areas included in the consents. In addition, the reference to a general area does not assist in this case.

[31] The Court then asked itself whether it could extend the applications to include the Reserve. It said:

> [21] The legal question for this Court is that given that it was an application for renewal for consent CON20060791410 (10-15), (now excluding 14 which has expired), are we able to extend the application to include the correct identification of the SO number as 68634 rather than that shown in all the resource consents the subject of the renewal application.
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> …
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> [23] We have concluded that this Court is limited to the application that has been appealed before it. That application cannot be extended by an appeal although it can be reduced in scope including area. There is clearly an inference that Sections 1-4 identified on the plan are intended to be a reference to SO 68634. Yet there is no indication in the consent itself that the map is determinative for the purposes of the identity of the land in question. The map does not delineate the areas covered by the consent. Nor can it be said that the

> words *"at or about the GPS coordinates"* establish a different regime for identifying the properties concerned. As we have pointed out, this information does not appear to be readily available, nor can it be regarded as reliable given LINZ's concerns as to land movement in the time since the coordinates were set up in the 2000 data.
>
> …
>
> [26] Having now expired, the application for renewal cannot be said to provide any potential for amendment of the original consent. The applicant can operate under the existing base consent, notwithstanding the expiry, because of the provisions of s124 only. To change the identification of the property would now be a relatively fundamental matter given the way in which both consent and the renewal application were framed.
>
> [27] We recognise that in this we are taking a technical approach, but we are left with little choice given the wording of the Regional Council resource consent and the wording of the application for renewal.
>
> [28] We conclude we are only able to consider the appeal as it relates to the properties identified in the original consent. Given that the description of the land now known as the reserve is incorrect, we cannot properly consider a consent in relation to the wrongly named block of land as it does not appear to be associated with this area at all.
>
> [29] This being the case, we are left to consider the application for discharge consents in relation to the other blocks of land which could be cumulatively described as the Opua Boatyard land. The conclusion is that Opua Boatyard needs to apply for consents in respect of the esplanade reserve land which for whatever reason were not properly included within the original consents.

Discussion

[32] Mr Galbraith says that the discrepancy in the legal description of the Reserve in the resource consents was not a matter referred to or discussed during the hearing. Nor was the issue of the reliability of the GPS co-ordinates. Mr Mathias for the NRC accepts that at no stage in the process was it identified that there was an error with the misdescription of SO Plan 68634 as SO 63634 in the consents. He agrees that this was an issue seemingly only identified by the Court after the hearing.

[33] The parties were therefore not given an opportunity by the Court to address the issue. I agree with Mr Galbraith that a minute to the parties noting the discrepancy and giving the parties the opportunity to address the Court would have enabled the parties, particularly Mr Schmuck, to provide some answers (which I refer to below).

[34] The Court said it was taking a "technical" approach. In my view, it was much more than that. It was a fundamental jurisdictional point, as a result of which the Court did not consider the application for renewal relative to activities on the Reserve.

[35] I refer to judgments of this Court which provide useful assistance on this issue. In *Plain Sense (Taieri Plains Environmental Protection Society) Inc v Dunedin City Council*,[13] Fogarty J considered a submission that the text of s 299 of the RMA should not be read down and could include a procedural error of law. In that context, the Judge referred to his earlier judgment in *Shearing v Southland District Council*.[14] In that case the Environment Court had viewed the site. As a result of doing so, the Court had formed some conclusions on facts at variance with affidavit evidence lodged in the Court which had not been challenged. In *Shearing* Fogarty J said:

> [25] … where the view is relied upon to obtain evidence or to contradict or reject evidence given in Court, great care must be taken to ensure that the process is fair.
>
> …
>
> [27] Inasmuch as the Court gathers information on a view, which is different information from that presented in Court, the Court has to at the very least give serious consideration to reporting that information to the parties before drawing inferences from it.

[36] The High Court concluded in *Shearing* that, at the very least, the Environment Court had failed to take into account relevant factors and had thus fallen into an error of law. While neither *Shearing* nor *Plain Sense* is on all fours with the issue I am presently considering,[15] they are of assistance on the point that the text in s 299(1), "on a question of law", includes a procedural question of law.

[37] The judgment of Heath J in *Te Whare o Te Kaitiaki Ngahere Inc v West Coast Regional Council*[16] is also of assistance. The primary ground of appeal in that case was that the Principal Environment Court Judge erred in law in two ways. The first was by failing to notify the parties of an intention to strike out the proceeding and the

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13 *Plain Sense (Taieri Plains Environmental Protection Society) Inc v Dunedin City Council* HC Dunedin CIV-2006-412-903, 15 May 2007.

14 *Shearing v Southland District Council* HC Invercargill CIV-2005-485-694, 14 November 2005.

15 I will also refer to *Shearing* in the context of a further submission by Mr Galbraith relating to the view of the site taken by the Court in this case.

16 *Te Whare o Te Kaitiaki Ngahere Inc v West Coast Regional Council* [2015] NZHC 2769.

second was by failing to hear from them before determining whether to do so. The issue for the Court was whether the process by which the Judge reached the decision breached the principles of natural justice (as affirmed by s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA)).

[38] After referring to s 299(1) of the RMA, Heath J was similarly satisfied that the natural justice point qualifies as a question of law fit for appeal.[17] Heath J referred to his earlier judgment in *Skelton v Family Court at Hamilton*,[18] where he held that the Family Court Judge had erred in making a publication order without providing an opportunity for the parties to be heard. The Judge had acted in breach of the right to natural justice conferred by s 27(1) of the NZBORA.[19]

[39] In *Te Whare o Te Kaitiaki Ngahere Inc* Heath J observed that if notice had been given to the parties, the Judge would have been told about steps that were being taken to seek special leave to appeal to the Court of Appeal. It was apparent that the Judge regarded the existence or otherwise of an attempt to appeal further against a security for costs orders as an important factor to be considered in the exercise of his discretion to strike out. Heath J continued:

> [21] … In those circumstances, it cannot be said that the strike out order would inevitably have been made. In my view, the failure to give notice to the parties and to afford them the opportunity to be heard on the proposal to strike out the declaration proceedings was a breach of the principles of natural justice and constitutes an error of law.

[40] While in this case there was no Court order made, the Court's decision to decline jurisdiction meant that Mr Schmuck was deprived of his statutory right to have his appeal fully considered and to do so under the protection afforded by s 124 of the RMA.

[41] I record that neither Mr Mathias nor Mr Mark for the OPC sought to persuade the Court otherwise. Mr Mathias simply takes the position that, whether the failure to call for submissions on the issue was or was not an error of law, it was not determinative. He submits that if the other alleged errors of law should fail, such that

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17 At [18].
18 *Skelton v Family Court (No 2)* [2007] 3 NZLR 368 (HC).
19 At [91]-[94], [101] and [105].

the decision given on the merits should stand, the appeal should be dismissed. Mr Mark, for OPC, in a similar vein, while acknowledging the natural justice argument, submits that the Court nevertheless granted consents which permit the activities to all be carried out on the boat yard land.

[42] I do not accept those submissions. This is not simply a process issue. It is a substantive issue. The Court confined its consideration to activities on the boat yard land. It excluded from its consideration activities on the Reserve. It said:

> [33] … as further applications are in any event going to be necessary for the range of additional activities for which consent was originally sought. The use of the reserve for discharge purposes might be revisited at that time. For current purposes we consider we are left with the discharge activities as they relate to the applicant's land itself and proceed to consider those.

[43] Mr Schmuck was deprived of a fundamental right given to him under the NZBORA. The Court failed to hear from him before determining it did not have jurisdiction to consider his appeal as it related to the Reserve. For that reason alone I would allow the appeal. The error had a material effect on the decision.

[44] I turn now to the second part of the first alleged error, namely whether the Court was correct in law in determining that it did not have jurisdiction to consider the applications for discharge consents in respect of the Reserve.

[45] The Court stated:

> [15] Given that this was an application for renewal of existing consents, one must assume that it cannot extend or increase the coverage of these consents.

[46] That is a correct statement of principle if put rather generally (but which applies *after* the discharge consents have been interpreted). More particularly, the Court of Appeal said in *Shell New Zealand Ltd v Porirua City Council*:[20]

> [7] We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an

[20] *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005.

> amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

[47] In this case, the Court simply proceeded on the basis that because the number read SO 63634 rather than SO 68634 (the Reserve), the Reserve was not the land identified in the original consents and therefore Mr Schmuck was, as the Court put it, seeking to "extend or increase the coverage of these consents".

[48] In my view, this was the wrong approach. The Court first needed to decide what the discharge consents meant. The proper approach would have been to first interpret the discharge consents objectively, just as a Court approaches the interpretation of legislation, contracts and Court orders as well as other legal documentation. Had the Court done so, it would not have said, for example:

> [19] While the application did not contain any change of description, it is notable that in the Notice of Appeal … and in the amended appeal … the reference is to SO 68634 (the reserve) and "*being part of the reserve"*… We are able to conclude by the time of filing the appeal it was recognised the reference in the original consent to SO 63634 was not a reference to the reserve.
>
> (emphasis in original)

[49] In my view there was no basis for the Court to reach that conclusion without raising it with counsel for Mr Schmuck.

[50] Had the Court proceeded to interpret the discharge consents on an objective basis, it would have taken into account the following:

(a) A search of SO 63634 would have pointed to the strong likelihood of a typographical error. That plan is drawn by Electricorp and depicts Transmission Lines existing or under construction as at 31 December 1987 in the Riverhead area, which is at a considerable distance from Opua.

(b) The discharge consents were first issued by the NRC as part of a consent order of the Environment Court in 2002 which also included the FNDC land used consent. That land use consent referred to the

application by D C Schmuck "… for the following activities and structures on the Esplanade Reserve (Sec 1, Sec 2, Sec 3 & Sec 4 as shown on SO 68634)." (I have already referred to the activities approved and conditions imposed for that consent in [10] to [15] above).

(c) The plan annexed to the 2002 FNDC land use consent was virtually identical to the plan annexed to the 2002 discharge consents.[21] As already noted they were part of the same consent order. Although the plan annexed to the FNDC consent does not include the SO number (SO 68634), but only identifies Sec 1, Sec 2, Sec 3 and Sec 4, the FNDC consent itself (as noted above) refers to "Sec 1, Sec 2, Sec 3 & Sec 4 as shown on SO 68634" and the FNDC consent refers to "the attached plan".

(d) The discrepancy in the legal description as between the FNDC consent and the NRC discharge consents was not noted by the Environment Court at the time it issued the consent order in 2002.

(e) The NRC notified and reviewed the discharge consents over the period 2006 to 2008. There was no indication that the incorrect legal description was picked up either by the NRC or the submitters at the time.

(f) In February 2019, the FNDC and the NRC approved the most recent review of the Operational Management Plan (the Management Plan) for the boat yard required by the conditions of the various consents held by Mr Schmuck, including both the land use and discharge consents. The Management Plan is a detailed document which sets out requirements for the sustainable management of the boat yard on the boat yard site, the Reserve and the CMA. It is apparent from that document both Councils accepted the rights of Mr Schmuck to carry out his activity on the Reserve under their respective consents.

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[21] Which was the same plan as annexed to the 2008 discharge consents.

[51] The Court said at [20]:

> This led the Court to inspect in more detail the document prepared in 2008 as it related to the land in question. It is notable that the diagram attached to the consent prepared by the Northland Regional Council NTS 3231c shows the SO numbers in respect of all of the sites but not the SO numbers for Sections 1-4. Nor are these delineated in any detail.

[52] While that is the case, not only is that plan annexed to the Management Plan, there is also annexed to the Management Plan a plan prepared by Thomson Survey Ltd (showing more or less the same area) on which both sections 1 and 3 contain the reference SO 68634.

[53] Finally, the OCP and its predecessor have taken a strong stance against the boat yard activities on the Reserve over a lengthy period. The opposition however has been on compliance and enforcement issues. There has never been any doubt that the discharge consents applied to the Reserve as well as to the boat yard land and indeed the appeal in the Environment Court proceeded on that basis.

[54] For his part, Mr Mathias did not take issue with the argument for Mr Schmuck regarding the interpretation of the legal description of the land which is subject to the discharge consents. He accepts that it appears to have been an error on the part of the NRC in the way in which it recorded the legal description in the resource consents. He acknowledges that the correct number appears on the FNDC land use consent and also in the Management Plan. He acknowledges that both Councils were effectively a party to the Management Plan. Mr Mathias also acknowledges that as far as the hearing before the Environment Court was concerned, there was no doubt in the NRC's mind, nor in the approach of the other parties, as to what land was included in the discharge consents. In short, for the NRC, Mr Mathias accepts there was a clear error in the legal description referred to in the discharge consents and that the section numbers were intended to refer to the Reserve.

[55] I consider that the objective analysis I have carried out above establishes that the discharge consents applied to the Reserve. The Court erred in determining otherwise. The error was material. It resulted in the Court approaching its analysis and decision-making by excluding the Reserve from its considerations.

Second alleged breach of natural justice

[56] Mr Galbraith submits that there was an additional fundamental breach of natural justice by the Court. As is apparent from the decision, the Court viewed the subject site. This Court is told that the parties understood that would happen and there was no objection to it. Mr Galbraith's submission was that there was a failure on the part of the Court after viewing the site in developing its own solution, that is a discharge system, because it did not refer this proposal to the parties for comment or to hear from the expert witnesses and Mr Schmuck as to its feasibility. Mr Galbraith says this was a breach of natural justice.

[57] The Court said this:

> [70] When we looked more closely at the turntable area immediately in front of the building, it became clear that this had been modified so that the turntable could no longer move. It now consists of a large concrete dial within a circular hole with some outer concreting which directs water into this hole.
>
> [71] We were unable to see how this operated or filtered wastewater but it appears that it was connected by a pipe to a small sump slightly to the west which appears to have been in this position for many decades. It was covered simply by wooden planks. It did not appear to be large (less than 1 m^3). Given that the turntable is no longer utilised, we were perplexed as to why this system had not been replaced with a more appropriate catchment pit grid system with associated sump storage to enable washdown to occur and the removal of debris.
>
> …
>
> [76] Mr Schmuck indicated that he wished to clean down the hull of the vessel closer to the water before moving the vessel up for more significant repairs and maintenance. The reason for this was very unclear until we examined more closely the circular sump area. Because the old turntable [which is almost completely on the boat yard land] has not been installed with a more relevant catchment grating system, it appears that if hull washdown is sent to the turntable, then the barnacles, seaweed and other items get wedged around the edge of the circular dial with no clear way to clean them out. This could be addressed simply by installing a crosshatch grill but this does not appear to have occurred. It would be completely solved by installing a proper catchment at the top of the slipway and ensuring the washdown was simply directed into that catchment area.
>
> …
>
> [81] … The turntable area outside has been decommissioned from its original purpose and now serves no practical purpose at all except as a makeshift sump. For whatever reason, it has not been replaced with an appropriate sump and grid system which will enable removal of gross solids

> and the treatment of other materials before distribution to a wastewater system.
>
> …
>
> [185] We are satisfied that with a slight extension of say 1.5-2m beyond the applicant's boundary, repairs, maintenance and washdown of vessels could be contained. To that extent, this would require a catch-sheet that would redirect any washdown materials, overspray and the like, back into the site to be caught in the catch-pit and impermeable areas that would be required to be constructed.

[58] Mr Galbraith submits that in circumstances where the solution arrived at by the Court, set out above, was not raised with Mr Schmuck or the expert witnesses during the hearing, natural justice required the Court to do so before making its decision. The Court needed to hear from the expert witnesses and Mr Schmuck as to whether the solution was practicable and feasible.

[59] Mr Mathias acknowledged that whether such a system was feasible was not discussed during the evidence. It was not put to any of the witnesses that a system could be worked from the turntable. Mr Mathias acknowledged that this was a conclusion which might have more properly gone back to the parties for consideration, especially as this was a methodology which confined the containment and discharge system effectively to the boat yard land. He also accepted that the Court's failure to come back to the parties for comment arguably affected the whole decision. There was the issue of how spray would be collected; how particulate would be disposed of; and whether that activity would be feasible in the same area being used for painting and grinding.

[60] I have no doubt that the Court should have referred its "solution" to the parties and their witnesses and to hear further from those witnesses on the workability of the solution and to hear submissions on the issue. *Shearing*, already referred to above,[22] is directly relevant here. Mr Schmuck had conducted his operations over an extended period utilising the Reserve. He called a number of expert witnesses at the hearing in support. The Court needed to tell Mr Schmuck, as the party adversely affected, what conclusion it had reached after its view of the site, to enable him to comment and produce evidence.

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[22] At [35] and [36].

[61] The Court's failure to revert to the parties, especially as the Court was operating from a position that it did not have jurisdiction to renew the discharge consents as they applied to the Reserve, exacerbated the breach of natural justice. The breach arising from the failure to revert to the parties with its 'solution' was material as it resulted, in combination with the first breach, in the Court granting consent on the basis of a discharge system on which the Court had not heard evidence and which confined the boat yard operation to (effectively) the boat yard land.

[62] I also observe there is something of an inconsistency in [185] set out in [57] above where the Court, having said it did not have jurisdiction to consider the application insofar as it applied to the Reserve, nevertheless allowed a protrusion of "say 1.5-2m beyond the applicant's boundary".

[63] Mr Galbraith submits the two breaches of natural justice, namely the failure to hear from the parties on the jurisdictional point and the failure to revert to the parties after the view, are all encompassing. He was content for the appeal to be determined on that basis. I agree with Mr Galbraith that the breaches of natural justice overtake all the remaining alleged errors of law.

Summary

[64] In summary, the errors of law and resulting answers to the questions of law that Mr Schmuck accepted should be addressed are:

(a) The Environment Court erred when, after the hearing and without hearing from the parties on the issue, declined jurisdiction to consider discharge activities located on the Reserve. This failure was a breach of the principles of natural justice;

(b) The Environment Court erred when it determined that the discharge consents did not apply to activities on the Reserve;

(c) The Environment Court further erred when it did not revert to the parties after its view of the site to enable the parties to comment by way

of evidence and/or submission on its solution for a discharge system. This was again a breach of the principles of natural justice.

Result

[65] The appeal is allowed. The decision of the Environment Court is set aside. The matter is remitted to the Environment Court for further consideration and with the following directions:

(a) The discharge consents applied to activities on the Reserve (as well as on the boat yard land);

(b) The evidence will need to be further considered in light of (a); and

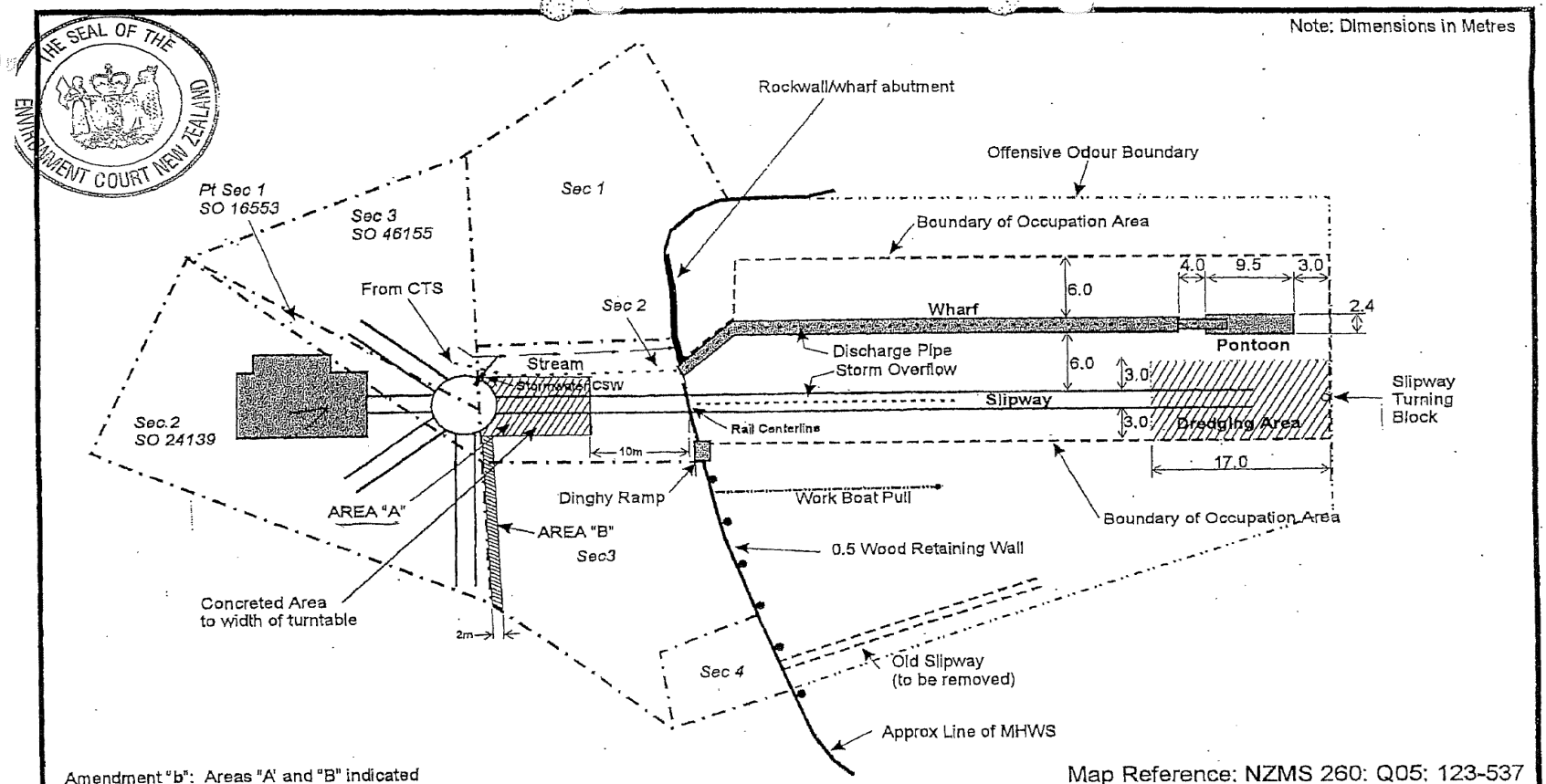
(c) The discharge system proposed by the Court in its decision is one on which the parties may comment and/or produce evidence.

Costs

[66] Costs are reserved. If the parties are able to agree costs a joint memorandum should be filed within 20 working days of the date of this judgment. In the event agreement cannot be reached, Mr Schmuck is to file and serve his submissions within five working days of the date for the joint memorandum and NRC and OCP are to file and serve their memoranda within a further five working days. Memoranda should not exceed five pages (excluding any attachments). I will then determine costs on the papers.

_____

Gordon J



Amendment "b": Areas "A' and "B" indicated
Amendment "a": Washdown area in CMA deleted

Map Reference: NZMS 260: Q05: 123-537

	By	Date
Dwn.	C N Anderson	
App'd		

Amendment		
No.	By	Date
a	C N Anderson	03/01
b	C N Anderson	12/01

RESOURCE CONSENT NLD 99 7914
for
Doug's Opua Boat Yard
Boat Maintenance Facilities - Opua

NORTHLAND REGIONAL COUNCIL

Scale	Plan No.
N.T.S.	3231h

CCC

The following are recently expired consents for Discharges being exercised under section 124 of the Act: AUT.007914.10–13 and AUT.007914.15

CON20060791410
(10-15)

Resource Consent

Pursuant to the Resource Management Act 1991, the Northland Regional Council (hereinafter called "the Council") does hereby grant a Resource Consent to:

DOUG'S OPUA BOATYARD (D C SCHMUCK), 1 RICHARDSON STREET, OPUA 0200

To carry out the following activities associated with the operation of a boatyard at Richardson Street, Opua:

(10) To discharge treated wash water to the coastal marine area at or about location co-ordinates 1701520E 6091850N.

(11) To discharge contaminants to air from marine vessel construction, sale, repair, maintenance and associated activities on Sec 2 SO 24139, Pt Sec 1 SO 16553, Sec 3 SO 46155, Sec 1 – 4 SO 63634, Blk V Russell SD, at or about location co-ordinates 1701470E 6091840N.

(12) To discharge contaminants to air in the coastal marine area from marine vessel construction, sale, repair, maintenance and associated activities at or about location co-ordinates 1701520E 6091850N.

(13) To discharge contaminants to ground as a result of boat maintenance activities on Sec 2 SO 24139, Pt Sec 1 SO 16553, Sec 3 SO 46155, Secs 2 and 3 SO 63634, Blk V Russell SD at or about location co-ordinates 1701470E 6091840N.

(14) To discharge stormwater to an unnamed tributary of the Veronica Channel on Sec 3 SO 46155 Blk V Russell SD at or about location co-ordinates 1701470E 6091840N.

(15) To discharge stormwater to the coastal marine area at or about map reference location co-ordinates 1701520E 6091850N.

Note: All location co-ordinates in this document refer to Geodetic Datum 2000, New Zealand Transverse Mercator Projection.

Subject to the following conditions:

(10) DISCHARGE OF TREATED WASH WATER TO THE COASTAL MARINE AREA

1 The total quantity discharged in the exercise of this consent shall not exceed one cubic metre per day.

2 The boat wash water containment system, and CTS treatment system shall be constructed and be fully operational in general accordance with the details provided in the application, by no later than 31 March 2009.