

NORTHLAND REGIONAL COUNCIL
HEARING OF RESOURCE CONSENT APPLICATION BY

DOUGLAS CRAIG SCHMUCK AND INTERESTING PROJECTS LIMITED

MINUTE #3 OF THE HEARING COMMISSIONER

Introduction

1. I have been appointed by the Northland Regional Council (**NRC**) as an Independent Commissioner to hear and decide the application lodged by Douglas Craig Schmuck and Interesting Projects Limited (**the Applicants**). The Application is referenced as APP.041365.01.01.
2. I previously issued Minute #2 which requested further information from the reporting officer and legal advice from the NRC on two matters, namely 'the existing environment' and proceedings that are currently being considered by the Environment Court.
3. I received an email from the NRC on 28 July 2020 advising that the Applicants have had discussions with NRC staff regarding further research the NRC has recently undertaken as to the status of some of the existing structures within the coastal marine area (CMA) at the subject site. This research suggests the 'jetty' (wharf) and slipway within the CMA are 'deemed coastal permits' under section 384(1) of the Resource Management Act 1991 (RMA) as they were previously authorised under the Harbours Act 1950. I request that the NRC provide the submitters with a copy of the email the NRC sent to me on 28 July 2020, including the attachments.
4. In the NRC's 28 July 2020 email the Applicants asked me, via the NRC, whether, in light of the results of the further research discussed in the previous paragraph, I still had questions of Mr Farrow and whether he needs to prepare the comparison images that I requested in Minute #2. I advised the Applicants, via the NRC, that I would await the NRC's legal advice on the matter before determining whether I had questions of Mr Farrow. I also advised the NRC that the legal advice should be informed by the further research.
5. On 29 July 2020 I received and read the further information from the reporting officer and the NRC's legal advice.
6. Based on the advice I have been provided I have no questions of Mr Farrow and he may be excused from attending the hearing (see further discussion on this later in this Minute).
7. Notwithstanding, I have a number of outstanding questions regarding the relationship between the deemed coastal permits and the coastal permits issued by the Environment Court in 2002 (by Consent Order). I present these questions below as a 'heads up' for the Applicants and Mr Hartstone¹ to consider and prepare for ahead of the hearing.
8. I understand the coastal permits that were granted by the Environment Court in 2002 (by Consent Order) include consents "(01)" and "(02)" which authorise the placement, use, and maintenance of, *inter alia*, a wharf and slipway, respectively. Further, consent "(09)" authorises the occupation of the seabed by the wharf and slipway structures. I also note that the more recent decisions of the Environment and High Courts relating to various matters associated with the boatyard only refer to the 2002 coastal

¹ Mr Hartstone may wish to discuss these questions with NRC staff and/or its legal advisors if he considers this appropriate or necessary.

permits and there appears to be no mention of any 'deemed coastal permits' that might apply to the two structures. I am unsure what the application, which led to the 2002 coastal permits being issued, actually specified or sought in terms of the jetty/wharf and slipway; however, it would appear coastal permits (01), (02), and (03) were granted in 2002 to authorise the existing wharf and slipway structures and their use by Mr Schmuck. Did the granting of the 2002 coastal permits effectively 'replace' and supersede the deemed coastal permits or do the deemed coastal permits create an enduring underlying authorisation for the two structures irrespective of whether any new coastal permits are sought and issued for the two structures? It seems curious to me that the two structures would be authorised by (new) coastal permits issued under the RMA as well as deemed coastal permits under section 384(1) of the RMA.

9. In this case the Application has been lodged on the premise of several of the activities being 'New applications to replace the 2002 and 2008 consents' (refer page 7 of the Application) – the reconstruction of the wharf (and pontoon) and refurbishment of the existing slipway fall under this category according to the Application. That is, for these two structures the Application is essentially a very early application for replacement consents (some 16 years ahead of their expiry). In Minute #2 I stated "*I understand there is case law that deals with the 'existing environment' as it relates to activities which have expiring consents for which new (replacement) consents are being sought; however those are generally where an application is made close to the expiry of the consent (in the order of 6-12 months) and, in such cases, the expiring consented activity is not generally considered as part of the 'existing environment' (but legacy effect can be considered)*". I have recently chaired a number of hearings in which a key consideration was how activities for which replacement consents are being sought form part of 'the existing environment' under section 104(1)(a) of the RMA. At those hearings I was advised by a number of legal counsels that the leading case on the matter was the High Court's decision on *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*² (*Ngāti Rangī*). That case dealt specifically with 're-consenting' of regional council water permits and Collins J agreed that the approach taken by the Environment Court in *Port Gore Marine Farms Limited v Marlborough District Council*³ (*Port Gore*) was the correct approach in terms of whether the activities for which replacement consents are being sought form part of the existing environment under section 104(1)(a) of the RMA – the *Port Gore* case dealt with re-consenting of three marine farms and the Environment Court found (at para 140) that "...we must imagine the environment, for the purposes of section 104(1)(a) of the Act, as if the three marine farms are not actually in it...". Given the context under which the current Application has been made (ie. replacement consents for the two structures in the CMA), is the approach, as confirmed in *Ngāti Rangī*, equally applicable in this case for the two structures in the CMA or not?
10. The answers to the above questions may result in me having questions of Mr Farrow and I may yet still ask him to provide some of the comparison images I requested in Minute #2. I will discuss the logistics and timing of this (if required) at the hearing.

NRC Contact Details

11. If any party wishes to seek further clarification in relation to this Minute or the hearing process please contact Ms Sluys in the first instance, email: alissas@nrc.govt.nz or phone 0800 002 004.

DATED 20 July 2020



² *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

³ *Port Gore Marine Farms Limited v Marlborough District Council* [2012] NZEnvC 72.

Dr Rob Lieffering
Independent Hearing Commissioner