

**TO: THE HEARINGS COMMITTEE  
NORTHLAND REGIONAL COUNCIL**

SUBMISSION BY Angelika Kyriak - 7 Richardson Street, Opua

ON AN APPLICATION BY DOUGLAS CRAIG SCHMUCK FOR DOUG'S OPUA BOATYARD

(Amended/ Combined Amalgamated submitted as per letter Doug's Opua Boatyard to NRC 17 November 2017 accompanied with an Assessment of Environment Effects of same date.)

FOR:

1. CAPITAL AND MAINTENANCE DREDGING
2. REPLACEMENT OF A COMMERCIAL WHARF, PONTOON;
3. PLACEMENT OF NEW PROTECTIVE FORESHORE EARTHWORKS;
4. BEACH REHABILITATION  
IN CONJUNCTION WITH OCCUPATION  
PURSUANT TO SEC 1978 OF THE HARBOURS ACT 1950
5. A NEW, MORE COMPREHENSIVE USE OF THE ALL TIDE MARINA STRUCTURES  
IN CONGRUITY WITH THE EXISTING RESOURCE CONSENTS  
AND
6. THE RENEWAL OF ASSOCIATED DISCHARGE CONSENTS THAT WILL EXPIRE ON OR BEFORE 30 MARCH 2036.

*"The slipway is not part of this consent application as it legally stands alone pursuant to s 178 of the Harbours Act 1950. It therefore maintained (sic) and/or reconstructed as a Deemed Coastal Permit in perpetuity. Existing wharf structures have a similar legal status but are in effect being built with greater utilitarian purpose as a marina in conjunction with the old activities."*

*Assessment of Environmental Effects, 17 November 2017 page 7*



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NOTE: underscoring and bold lettering in this submission is added by this submitter for emphasis

## 1. EXECUTIVE SUMMARY

The proposal inherent in the application is intended to provide a fit-for-purpose small private marina and improved boat maintenance facility in the coastal marine area at the same time as the applicant decommissions and removes most of the adjacent boatyard's private land slipways, spurs and cradles. It transfers activities hitherto conducted on private land into the coastal marine area and expands the nature and scale of the activities to be undertaken.

The negative impact of this development is considerable. The first obvious effect is to dramatically reduce present access to and use of the coastal marine area adjacent to the esplanade reserve.

The second, is to introduce boat maintenance directly into the coastal marine area, to be performed on mudcrete grids with a high potential for pollution even though there is no operational need for this to occur.

The third effect is to allow and encourage proliferation of marina development even though provision is made for such development in appropriately zoned or designated area with appropriate land-based facilities.

The proposal is contrary to National and Regional Policy and principles concerning the right of public access to the coastal marine area and the recreational use and enjoyment of both esplanade reserves and the adjacent coastal marine area.

Furthermore:

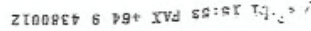
- a) The proposed forty metres of seawall, and the beach rehabilitation are undertakings by a private individual on this important part of the foreshore that are not necessary and not desirable. Even if the seawalls were necessary, the NZ Coastal Policy Statement requires councils to discourage the proposed hard protection structures. In any case, works of this nature on public land should, if necessary, be carried out by the respective authorities in consultation with the community;
- b) The inclusion of a dinghy ramp into an area of exclusive occupation is unwarranted. This structure should be a public facility.

This proposal is far more significant than is evident from the plain wording of the application and the notification of it, both of which are inadequate. It should not be assessed in bite-size pieces. The overall effects are much more than minor.

I ask that consent be declined as set out in Part 16 of my submission

## 2. TABLE OF CURRENT AND RECOMMENDED CONSENTS

CURRENT CONSENTS	RECOMMENDED CONSENTS
“place, use and maintain”	“place, use and <u>OCCUPY</u> space”
<b>Wharf and wharf abutment</b>  Conditions: <i>The wharf shall not be used for permanent mooring of any vessel. For the purpose of this condition "permanent mooring means the use of the wharf for longer than 12 hour in any seven day period or the use for other than repair and maintenance or survey work....</i>  <i>The wharf shall not be used for the cleaning down, or the preparation or painting of vessel hulls</i>	<b>Jetty, including fixed jetty, gangway and piles</b>  <b>Use two berths associated with the jetty facility pontoon as a marina</b>  Conditions: <i>Use the slipway and jetty facility for the purpose of vessel maintenance</i>  <i>Activities on the mudcrete grids shall be limited to ... the cleaning down of vessel hulls using low pressure high volume water; and removal of marine growth (macro-fowling) from propellers, drive shafts etc. and sea chests using hand tools</i>
<b>Access pontoon and walking track security lighting</b>  Conditions: <i>The floating pontoon shall only be used for casual berthing of craft</i>	<b>Pontoon associated services, security lighting signage and hoardings</b>  Conditions: <i>Use two berths associated with the jetty facility pontoon as a marina</i>
<b>Slipway complete with dinghy ramp</b>	<b>Refurbished slipway and dinghy ramp</b>  <b>Use slipway for the purposes of vessel maintenance.</b>
<b>Workboat mooring and dinghy pull</b>	<b>Workboat mooring and dinghy pull</b>
<b>Those parts of a timber and stone seawall and associated reclamation that lie within the coastal marine area</b>	<b>A new seawall and existing seawall (inclusive of existing reclamation associated with an existing seawall)</b>
<b>Occupy an area of seabed associated with the slipway and wharf structure</b>  Conditions <i>This consent applies only to the area defined within the Boundary of Occupation Area shown on Northland Regional Council Plan No. 3231b attached</i> <i>The Consent Holder shall have exclusive occupancy within the Boundary of Occupation Area shown on Northland Regional Council Plan No: 3231except that the Consent Holder shall allow reasonable access to and through this area and reasonable public access to and use of the wharf and pontoon structures</i>	<b>Occupy space in the coastal marine area to the exclusion of others</b> <b>[extending current eastern boundary by 8.8 metres and northern boundary by 8 metres]</b>  Conditions <i>The area of exclusive occupation over which the Consent Holder may exercise control of access and use are limited to the Occupation Area identified in the Total Marine Services Limited Drawing referenced as Northland Regional Council Plan Numbers 4801/2 except that the Consent Holder shall not limit access and reasonable use of the dinghy ramp and access to the intertidal beach on the southern side of the slipway; and the jetty facility and marina by pedestrians during daylight hours by arrangement with the jetty facility and marina management</i>





## 4. REFERENCES

### NZ Coastal Policy Statement

#### Policy 6(1)(i)

*set back development from the coastal marine area... where practicable and reasonable to protect the natural character, open space, public access and amenity values of the coastal environment*

#### Policy 6(2)(b)

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

#### Policy 6(2)(d)

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

#### Policy 18:

*recognise the need for public space **within and adjacent** to the coastal marine area for public use and appreciation **including passive recreation***

*recognise the important role that esplanade reserves can have in contributing to meeting public open space needs.*

#### Objective 4:

*To maintain and enhance public open space and 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** and: maintaining and enhancing public walking access to and along the coastal marine area*

### The Marine and Coastal Area (Takutai Moana) Act 2011

#### s.26 **Rights of access**

##### (1) *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.*

##### (2) *The rights conferred by this section are subject to any authorised prohibitions or restrictions that are imposed under [section 79](#), or by or under any other enactment*

## Regional Policy Statement:

### Policy 5.1.2

*Enable people and communities to provide for their wellbeing through appropriate subdivision, use, and development that ...**Takes into account the values of adjoining and adjacent land ....***

Policy 4.8.1 - *"Demonstrate the need to Occupy Space in the Common Marine and Coastal Area ...."*

*Only consider allowing structures, the use of structures and **other activities** that occupy space in the common marine and coastal area where: **It is not feasible** for the structure, the use or the occupation of space to be undertaken on dry land...*

## Resource Management Act 1991

### s.6 *Matters of national importance*

*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development of natural and physical resources, shall recognise and provide for the following matters of national importance:*

- (d) *the maintenance and enhancement of public access to and along the **coastal marine area**, lakes and rivers*

### s.12 *Restrictions on use of coastal marine area*

- (1) *No person may, in the coastal marine area,—*

- (a) *reclaim or drain any foreshore or seabed; or*
- (b) *erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or*
- (c) *disturb any foreshore or seabed (including by excavating, drilling, or tunnelling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal); or*  
*unless expressly allowed by a national environmental standard, a rule in a regional coastal plan as well as a rule in a proposed regional coastal plan for the same region (if there is one), or a resource consent.*

- (2) *No person may, unless expressly allowed by a national environmental standard, a rule in a regional coastal plan or in any proposed regional coastal plan for the same region, or a resource consent,—*

- (a) *occupy any part of the common marine and coastal area; or*
- (b) *remove any sand, shingle, shell, or other natural material from that area.*

(3) *Without limiting subsection (1), no person may carry out any activity—*

- (a) *in, on, under, or over any coastal marine area; or*
- (b) *in relation to any natural and physical resources contained within any coastal marine area,—*

*in a manner that contravenes a national environmental standard, a rule in a regional coastal plan, or a rule in a proposed regional coastal plan for the same region (if there is one) unless the activity is expressly allowed by a resource consent or allowed by section 20A (certain existing lawful activities allowed).*

## **s. 229 Purposes of esplanade reserves and esplanade strip**

*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.*

## **s. 2 Interpretation**

**occupy** *means the activity of occupying any part of the coastal marine area—*

- (a) *where the occupation is reasonably necessary for another activity; and*
- (b) *where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and*
- (c) *for a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a **physical or legal sense***



## 5. INTRODUCTION

This submission relates to my objection to the proposals relating to the replacement of the wharf pontoon at Walls Bay, Opua, and the activities and structures associated with or ancillary to or in addition to those proposals and any change or replacement of consent or permission which would increase the Boundary of Occupation Area shown on Northland Regional Council Plan No 3231b or would alter in any way Condition 1 and Condition 2 relating to the current boundary of occupation.

## 6. THE PROPOSAL

(Text immediately below in italics is quoted from the AEE 's provided by the applicant)

*I have undertaken the decommissioning and removal of all private land slipway spurs and cradles save one ....cutting instantly 75% of the boatyard's capacity to work...*

*This in fact now controls and otherwise contains all activities of the main slipway to the...reserve; the concrete basin and structures of the turntable on the boatyard proper.*

*This...will allow a considerable reduction in the scale and intensity of the working areas of the site in the future whereby I can redirect all my energies into the greater development of the site as a whole.*

(Ref. AEE 27 September 2017, pp. 1-2.).

The reduction of the activities on the private property ("**boatyard proper**") is offset by a relocation of those activities into the coastal marine area and the *proposal, in effect, will become an integral structural part of the Boatyard's land use consent activities.*

(Ref. AEE, 17 November 2017, page 7).

It is proposed to construct and operate:

*a small private/ commercial marina for the specific use of the vessels moored and/or secured to it in contiguity with current operations associated with vessel maintenance, chartering and the normal conduct of occupation of vessels in a marina environment.*

(Ref. AEE, 30 October at p.6)

*as ...an evolutionary step in the development of the entire site...whilst providing a fit for purpose small marina and improved boat maintenance facility...*

(Ref. AEE, 30 October, at p.8)

*with reasonable structural access... granted to the general public at the sole discretion of the consent holder*

(Ref. AEE 30 October p.7).

Incidentally, it is also proposed to "rehabilitate" the beach for its entire length to the south of the site and the modify the walkway for some 40 metres to the north of it.

The Application seeks consent for more *comprehensive uses of the... structures in congruity with existing resource consents.*

The Proposal is however inconsistent with consents granted 2002 by a Joint FNDC/ NRC decision as amended per Order of the Environment Court dated 31 January 2002.<sup>i</sup>("The Current Consent")

The Current Consent for the placement and use of a "wharf and access pontoon" and to occupy an area of seabed associated with the slipway and wharf structures is subject to the conditions that:

*The public be allowed reasonable access to and through a defined "exclusive occupation area" and shall have access to and use of the wharf and pontoon structures*

*The wharf shall not be used for the cleaning down, or the preparation or painting of the vessel hulls or for permanent mooring of any vessel while the floating pontoon shall be used only for casual berthing of craft.*

The present proposal with respect to those structures, use and occupation represents a radical departure from the Current Consent. Consent is now sought for what has hitherto been and is presently prohibited. It is difficult to find "congruity with existing consents" referenced in the application.

The Planning Report of Mel Donaghy ("PR") comments that:

*the current application is not an opportunity to completely re-litigate authorisation for the already consented structures and activities which expire in 2036.*

I respectfully submit that it is the applicant who seeks to re-litigate the previous consents and in particular the conditions noted above without which I, as a party (along with others, including appellant Department of Conservation) would not have signed the mediation agreement leading to the Current Consent<sup>ii</sup> which, inter alia, permits certain boatyard activities on the esplanade reserve contrary to the purposes of such reserves and to Policy 6(1)(i) of the National Coastal Policy Statement.

## **7. THE PUBLIC NOTICE AND INFORMATION PROVIDED**

As stated in my Submission on Application (Form 13),

- a) the notification of the application in print and on the Internet is confusing and fails to meet the standards of the RMA-91 - meaning of "notification" in that they are neither clear nor concise.<sup>iii</sup>
- b) The Assessment of Environmental Effects is incomplete, and inconsistent with the application.<sup>iv</sup>

By way of endnotes 3 and 4, I explain my submission on these points.

## 8. THE SITE AND RESOURCE MANAGEMENT CONTEXT

### 8.1 The Site:

The "Site" under consideration consists of three separate entities:

The adjacent Esplanade Reserve and (to the north) unformed road -

The Adjacent Coastal Marine Area

Doug's Opuā Boatyard referred to by the applicant as "the boatyard proper"

Establishment of the boatyard activity commenced in about 1965.<sup>v</sup>

### 8.2 Esplanade and Coastal Marine Area

The Site portion in the Coastal Marine Area can presently be defined by the Boundary of Occupation Area shown on NRC Plan No. 3131b. It is proposed to rename and resize the site. Now named "Exclusive Occupation Area", it extends the current Boundary of Occupation Area by 8 metres to the north, 3 metres to the south, and 8.8 metres to the east.

The RMA-91 jurisdiction of territorial authorities ends at mean high water springs, but the jurisdiction of those authorities under the Local Government and other legislation (roading, reserves, etc.) extends to low water springs, giving those authorities jurisdiction to regulate activities on the full foreshore areas. Proposals to include parts of the foreshore in the area of Exclusive Occupation and to construct significant "erosion controls" on the foreshore, for example, must surely involve cooperation and coordination between the FNDC and NRC.

In connection with the Region Policy to take into account the values of adjoining or adjacent land, the PR comments that *the proposal continues to consolidate development to an area adjacent to the Applicant's boatyard*. The area adjacent to the applicant's boatyard is an Esplanade Reserve created for the purpose, among others, of *enabling public access to or along any sea, river, or lake; or to enable public recreational use of the esplanade reserve ...and adjacent sea...*, a value which deserves to be taken into account.

Pivotal among the purposes of esplanades is the recreational use not only of the reserve, but also of the adjacent sea thereby linking that land and the sea with the common purpose of **recreational use**.

This is recognised in Objective 4 of the NZ Coastal Policy Statement (NZCPS) to recognise that the coastal marine area is an area for the public to use and enjoy and to maintain and enhance recreational opportunities *of the coastal environment*

Underlying this is the right of every individual with respect to the common coastal marine area set out in Section 26 of the Marine and Coastal Area (Takutai Moana) Act 2011 (as also in the predecessor Foreshore and Seabed Act) to enter, stay in and engage in recreational activities in the common coastal marine area subject to "authorised prohibitions or restriction under other enactments".

I submit that any proposed restriction of the rights conferred by Section 26, as acknowledged in the RMA-91 and in (among others as below) the NZCPS, should be approached with extreme caution and also with regard to Policy 18 of the NZCPS to recognise the need for public space both within and adjacent to the coastal marine area, recognising also the important role of esplanade reserves. Policy 5.1.2 also recognises the importance of taking into account the values of the adjoining and adjacent land.

Specifically with respect to Policy 18 the PR comments that:

*the jetty facility was constructed expressly for commercial/industrial purposes ...rather than a facility to facilitate access to the CMA for the public.*

That ignores the condition of consent for the construction of the jetty that

*the public be allowed reasonable access to and through a defined "exclusive occupation area" and shall have access to and use of the wharf and pontoon structures.<sup>vi</sup>,*

This is a condition which, I believe was fundamental.

### 8.3 The Boatyard Proper

The Boatyard Proper appears hardly to be a boatyard at all. If severed from the esplanade, it would consist of an A-frame building and part of a turntable and a single cradle. The applicant has indicated his intention to *redirect all [his] energies into the greater development of the site...* but has provided no clue as to the nature of that greater development and, for example, the provision of land based facilities for the marina, the chartering operation and boat maintenance facility.

### 8.4 Natural Character

The PR comments that:

*It has been determined that the level of natural character of the site is not high... the application site and the surrounding landscape display a modified and developed character with existing commercial structures including the Applicant's existing coastal and land based structures, the Opuia Wharf and the existing cluster of moored vessels.*

That determination is open to debate and it is doubtful that the level of natural character can ever be fully determined except judicially by a balancing of opposing views. Viewed from the road, the distant Opuia Wharf and commercial structures associated with it are too remote to detract from the natural character of the site including the coastal marine area. Viewed from the sea, the Opuia Wharf, etc., are not visible at all and do not intrude on the natural character of the site.

The boatyard proper and the building on it are nestled back from the shore in a non-intrusive bush and garden-clad residential area fronting a narrow, curving, tree clad road. The jetty itself, even with the pontoon for charter boat maintenance, does not intrude in what would be considered a natural environment in association with the coast.



Determination of "natural character" as already noted, is difficult. The very lengthy discussing of the opinions of four "experts" in the field by Environment Court in its Decision NZEnvC218 [2015] on an application for resource consent by Waiheke Marinas Limited illustrates the dilemma caused by differences in the perceptions of what adds to or detracts from a natural environment. With respect to the presence of moorings the Court noted that agreement had been reached by the (four) experts concerning the swing moorings as follows:

*The visual values of the swing moorings include:*

- *Their charm and their history as an established part of the bay*
- *How they reinforce the maritime character of the bay*
- *That the moorings exist in their own right, separately from the transport hub of the bay*

## 8.5 The People and Community:

In RMA-91, "Resource Management" means:

*managing the use, development, and protection of natural and physical resources in a way, or at a rate, which **enables people and communities** to provide for their social, economic, and cultural well-being and for their health and safety ....*

The AEE of 17 November 2017 lists the SOCIO ECONOMIC affects as follows

*...the activities will continue to enhance the socio economic wellbeing of the applicant, the public use of the foreshore, and commercial activities associated with recreational boating in the Bay of Islands.*

It was noted in the PR that the scale of the operation at the site will not increase significantly. Given the decommissioning of structures on the boatyard property, it is unlikely that the development of this new wharf will enhance the economic well-being of the community. However, it will detract from its social and cultural well-being.

Opuia is a community with a long and varied and colourful history. From its founding in the 1880's it has re-invented itself to become a notable maritime centre while continuing, as always, to have a vigorous social life and the affection of its residents.

Opuia a complete self-contained residential township, proud of its history, its school and community hall, sustaining a substantial shop and post office and enjoying the recreational opportunities that remain after having foregone much of the seabed and adjacent land to the development of the marina with its locked gates. The long-standing popular fishing activity at the Opuia Wharf will most likely yield to a floating pontoon to accommodate super yachts

The social and cultural environment of the township is enhanced by the visitors from other ports in New Zealand and overseas, it is understandable that the community would look to preserve that area of its township which is its "heart" and traditionally has been accessible and open to it: most particularly the Opuia Basin, and to ensure that the wharf industrial area and marina area serves the purpose of containing commercial and marina activities rather than becoming a justification for the proliferation of those activities into the traditional scenic and recreational areas the township.

## 9. "EXCLUSIVE OCCUPATION AREA"

The application seeks consent the place structures and carry out works in **conjunction with exclusive occupation pursuant to sec 1978 of the Harbours Act 1950.**<sup>1</sup>

However, it is proposed to create an Exclusive Occupation Area in place of the present Boundary of Occupation.

The width of the current Boundary of Occupation area is 15 metres. According to the Planning Report, it is proposed nearly double that width [8 metres to the north and 3 metres to the south] and to lengthen it by 8.8 metres to the east. This was 'confirmed' by the submission of a new plan on 19 April 2018, some little time after the application was notified on 21 December 2017.

A copy of the plan was sent to the submitters without explanation and a request for information as to how the amendments relate to or affect the application met with the response: *"The updated plans "clarify" the extent of the proposed area of exclusive occupation."*

The "clarification" came only in the Report of the Consultant Planner and indicates an increase in the Boundary of Occupation area by at least 75%. The 19 April 2018 plan also shows an increase of the Occupation area to the west (on the northern side of the wharf) to extend (and include?) the proposed "erosion barrier" and that part of the jetty which presently is not within the Boundary of Occupation.

The Current Consent is for the placement, use and maintenance of structures with the

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<sup>1</sup> In November 1988 the Northland Harbour Board resolved to grant a licence for the area of the existing slipway and proposed jetty in Opuia Bay for a term of 14 years subject to: reasonable public access being allowed to the public subject to approval of structural plan under Section 178 of the Harbours Act.



conditions that it applies to the area defined with the Boundary of Occupation Area shown on NRC Plan 3231B and 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 structure.***

The Recommended Consents are to "place use and **occupy** space in the CMA" with the structures augmented with a consent to **occupy** space in the coastal marine area to the exclusion of others on NRC Plan 4801/2 with the condition that:

*The Consent Holder shall not limit access to and reasonable use of:*

- (a) *The dinghy ramp and access on to the intertidal beach on the southern side of the slipway; and,*
- (b) *The jetty facility and marina by the pedestrian public during daylight hours by arrangement with the jetty facility and marina management.*

### **The significance;**

- a) The "Boundary of Occupation" has become "Area of Exclusive Occupation"; and
- b) The Area shown on plan 4801/2 is significantly greater than that of 3231b; and
- c) The consents concerning structures has changed from "**place use and maintain**" to "**place use and occupy space in the CMA**"; and
- d) The condition related to access has been radically altered so as to limit such access the dinghy ramp (which should be a public facility) and to jetty access by "arrangement".

Such radical change resulting from the replacement of consents with new consents was not signalled. Nor is it justified or explicable given that the application was made for a new, more comprehensive use of the all tide marina structures **in congruity with the existing resource consents.**

There is no application pursuant to section 12(2) for an exclusive occupation area, being an innominate activity.

The proposed exclusive occupation area and the conditions attached to it is contrary to the intent of Parliament, to matters of national importance, the purpose of the Resource Management Act and the purpose of Esplanade Reserves.

*Please see Endnotes<sup>vii</sup> for discussion on NRC Policies and Rules concerning "occupation"*

That the activity of occupation to the exclusion of all others is innominate speaks volumes but I hope that consents like this proposed one are rare and the coastal marine area of the Bay of Islands is not "subdivided" into rent-free and rate-free leases to private individuals. Unfortunately, because the activity is innominate my attention was not called to the provision (or lack thereof) relating to the grant of such leases and licences to significant areas of the common coastal marine area; I might well have wanted to submit on that aspect.

One must assume that access to the dinghy ramp, at least, implies access through the "exclusive occupation area" to and from other parts of the coastal marine area, but otherwise

access to any part of the area is prohibited to -- no kayaks, canoes, or swimming or any other recreational enjoyment of this sea adjacent to the esplanade. Short of placing a fence or rope barrier or signage, it's difficult to imagine how members of the public (who might presume rights to use the coastal marine area adjacent to an esplanade reserve) would become aware that they might be given a notice of trespass or served an enforcement order (and the costs of it) under s 314(1)(b) of the Act, a remedy acknowledged in *Hume*:

*Permit holders are protected against inappropriately conflicting use or occupancy of the relevant part of the coastal marine area by their ability to obtain an enforcement order under s 314 of the Act.*

Children casting off from the shore of the esplanade with their paddle canoes will have to be cautioned not to drift into or otherwise enter that exclusive occupation area. Swimmers will need to beware.

There is no congruity with the current consents; most particularly those relating to occupation. The public was misled.

In my opinion, the proposed exclusive occupation area and the terms related to it is repugnant to both the law pertaining to the rights of access and to the national policies associated with it. It is recognised that there may be compelling reasons for exclusion, related to safety issues, but those reasons do not exist in connection with the present application. Access has always been required to be kept available to and through the waters adjacent to the esplanade reserve and to the structures situated in them.

Prima facie, that access is the right of every individual in New Zealand. There must be compelling reasons why every individual in New Zealand would be deprived of that right.

## **10. PLACEMENT OF A COMMERCIAL WHARF ....**

### **10.1 Boat Maintenance Facility.**

Part of the structure is to consist of two mudcrete grids with a Mudcrete Washdown Discharge, three workberths and a Workboat Davit Frame.

The PR expresses the view that:

*an operational need has been established in that the jetty facility and slipway will continue to provide for the maintenance and chartering of boats.... [although] the current proposal does not suggest any intensification to the current authorised boat maintenance and chartering activities occurring at the site.*

The proposal does not suggest intensification of current boat maintenance at the site, if site includes the coastal marine area, the esplanade and the boatyard property, but it certainly suggests intensification of the current permitted activity in the coastal marine area which is the site to which the application and proposed consent relate although there is no functional or operational need for this to occur. The activities hitherto were able to be conducted on the adjacent land and could, but for the development aspirations of the applicant, still be conducted there.

Regional Policy Statement (RPS) Policy 4.8 indicates a requirement to:

*Demonstrate the need to Occupy Space in the Common Marine and Coastal Area ...." and allow only structures and other activities where it is **not feasible** for the structure, the use or the occupation of space to be undertaken on dry land...*

The response to this Policy that:

*the need for the structures has previously been demonstrated by historical applications and the reconstructed jetty will be a replacement structure rather than additional one.*

This is not satisfactory. Historical demonstration does not include the mudcrete grids and activities to be conducted on them nor the marina berths. These are additional structures... not mere replacements.

Regional Policy 4.8 reflects Policy 6 of the NZCPS to:

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

This is acknowledged in the Proposed Regional Plan Section 32 Report which notes that

*this suggests that these types of structures would have to be discretionary, non-complying or prohibited.*

Policy 17.4.3 of the Regional Coastal Plan indicates a requirement

*to consider structures generally appropriate where: there is an operational need to locate the structure within and coastal marine area; and there is no practical alternative location outside the coastal marine area.*

The PR response is that

*The operational needs of the structures has also been established, in that the jetty facility ...will continue to provide for the maintenance and chartering of vessels*

There is and was a **practical alternative location** outside the coastal marine area.

It is obvious from a reading of the proposed conditions relating to the "jetty facility" that the extensive monitoring of compliance will burden the Council and will, in fact, be impossible. Here, I believe, an ounce of prevention is worth far more than the cure.

## 10.2 Boat Chartering

With respect to the "jetty facility", the decision of the Environment Court C146/98 (*A Kyriak and Others v Northland Regional Council*) confirmed the Decision of the NRC to grant a coastal permit to Great Escape Yacht Charters Limited for the:

*use of a floating structure for maintaining and servicing charter yachts alongside an existing jetty and boatyard (called "Doug's Boat Yard").*

The Decision refers to the jetty approved by the Northland Harbour Boat by licence under s 165 of the Act in 1988 subject to the condition (as noted in the Decision of Environment Court) that *reasonable access being allowed to the public.*

That structure is not included in the Current Consent of January 2002 or shown on the plan accompanying that Consent. Presumably that coastal permit is still "live" although it may have been transferred to subsequent operators of the chartering business.

Whether that "floating structure" will also be part of the new "jetty facility" is not clear. However, if the "**existing jetty**" is to be removed and reasonable public access be restricted, the status of the NRC Decision and the Environment Court confirmation of it is questionable.

### 10.3 Marina

According to the application the "jetty facility" will be:

*a small private/commercial marina for the specific use of the vessels moored and/or secured to it in contiguity with current operations associated with vessel maintenance, chartering and the normal conduct of occupation of vessels in a marina environment.*

It is submitted in the PR that the **requirement** for the proposed marina is for:

*the temporary or long-term berthage of vessels used for accommodation while berthed at the facilities.*

This is circular... certainly, long-term berthage might need a marina, but is such berthage required for a "boat maintenance facility"? It was acknowledged by the applicant in the AEE and in the PR that the berths are not necessarily occupied by boats undergoing maintenance and repair.

I note a condition of **the present** consent for the wharf stipulates that:

*The wharf shall not be used for the **permanent mooring** of any vessel. For this purposes of this condition "permanent mooring" means the use of the wharf for longer than 12 hours in any seven day period or for the use for other than repair and maintenance or survey work which, because of their nature, requires a vessel to be located at the wharf for a longer period.*

The Planning Report acknowledges that:

*the two small vessel pontoon berths technically fit the RCP definition of a marina, as they will provide **for the permanent mooring** of vessels and concludes that it is assessed that the marina is an appropriate development and that the associated pontoon will be located adjacent to the existing authorised floating pontoon associated with the existing jetty facility to be removed.*

This addresses only the structure, and not the activity. The "existing authorised floating pontoon" is subject to the condition that it shall only be used for casual berthing of boats. This is to be replaced by a structure for permanent mooring. The label of a structure expressly for the purpose of permanent mooring as a "replacement" of a structure prohibiting permanent mooring is, at the very best, "misleading".

"Marinas" are defined in Planning Documents and this proposed marina development fits that definition. It should be assessed as such particularly in the context of the Proposed Regional Plan and the Strategy Document.

Moorings and Marina Strategy for Northland, July 2014

#### 11.3 Opua

*Create a marina zone around the current marina and proposed marina extension*

*Prior to creating any new...marina zones, there will need to be a detailed analysis of the environmental effects. A new zone would have to be implemented through the Regional Coastal Plan. ...Council will encourage the ongoing use and enhancement of existing facilities*

Having regard for the Proposed Regional Plan, the following applies:

*D.5.13 Marinas - managing the effects of marinas*

*Marinas **must**:*

*provide convenient facilities on-site for the containment, collection, and appropriate disposal of:*

- a) refuse from vessels*
- b) sewage and sullage from vessels*
- c) recyclable material including waste oil*

*provide for shore-based facilities including car parking, public toilets, boat racks, public access*

*take into account any relevant council structure plans, concept plans, strategies, reserve management plans, designations or additional limitations that apply to the adjoining land*

The applicant states on p 2 of the AEE of 30 October that:

*The potable spring water, toilet/trade discharge waste that are connected to the Council sewer, electricity, rubbish, and parking infrastructure are already integral parts of the operation of the Boat Maintenance Facility which are covered by resource/building consents and/or rules pursuant to the Operative District plan for zoning as a commercial site.*

This does not confirm that the present land use consents relating to the "boatyard proper" took into account the additional demands arising from the marina development. Nor does it appear to deal with *sewage and sullage from vessels* nor with *carparking*. Nor has the adequacy or otherwise of the public toilets, boat racks etc. been examined.

The application further states that:

*The issue of disposal of domestic waste from boats is a matter that is now dealt with under the Resource Management (Marine Pollution) Regulations 1998. ... There are no regulations that apply to disposal of domestic waste on proposed activities along this wharf or slipway pursuant to this application.*

Parking is another issue which is not dealt with adequately. The application states:

*The site access is along a well-sealed road on Richardson Street. There is ample parking not only in conjunction with the site, but for the greater public utilisation of the foreshore and mooring area beyond encompassing the Opua Town Basin.*

This is at odds with the PR statement that it:

*...is understood that additional carparking is available on the Applicant's commercially zoned property at the boatyard site.*

As for the need to take into account *any relevant council structure plans, concept plans, strategies, reserve management plans, designations or additional limitations that apply to the adjoining land* it is my submission that among the limitations that apply and should be considered is the fact that the adjoining land is set aside as an Esplanade Reserve and that there is a Reserve Management Plan for the Esplanade Reserve.

If there is to be a distinction between what is "technically" a marina and what is a marina, and waive the policies and rules pertaining to marinas, there is no barrier to proliferation of ad hoc marina development at the end of jetties throughout the Bay of Islands for the temporary or long-term berthing of vessels used for accommodation while berthed at the facilities even if those jetties were originally permitted on the condition that there be no permanent mooring.

## 11. DREDGING AND SOIL DISPOSAL

It is reported that:

*The necessity of the capital dredging for the access channel to the facilities is not entirely understood and effects relating to navigational safety and effects on moorings within the mooring area have not been addressed within the application.*

I believe that there is a greater potential range of effects. So far as I am aware, only an ecological survey has been prepared to assess effects of this dredging.

The AEE of 17 November 2017 addresses HYDROLOGICAL effects in less than four lines indicating that:

*proposed dredging cuts and batter angles have been designed to reduce the effects of sediment deposition and erosion in the area.*

While reduction of any effects is welcome, we do not learn anything about extent of the potential effect and the degree of reduction achieved.

The PR notes that:

*The proposed capital dredging to provide for the working and marina berths and refurbished slipway is considered to be a necessary activity to facilitate the required use of these structures*

I assume that this latter statement refers to the dredging activity for which consent is recommended. However, the approval of even the limited capital dredging pre-supposes that the uses of the structures are required. That is disputed, as discussed above.

It is NRC policy (22.4.1) within the Marine 4 Management Areas to restrict capital dredging except if associated with a marina or port development and in making such exceptions to



integrate where appropriate in accordance with sections 102 and 103 of the Act, any required consent process for associated dredging soil disposal.

Sections 102 and 103 refer to Joint Hearings by Two or Consent Authorities and Combined Hearings of Two or More Applications.

While land-based disposal of spoil is to be to a *dedicated disposal area on land adjacent to the Waikare Inlet*. The site is not identified. Had it been, there might well have been a response from the public. I would assume that this disposal requires a resource consent from the territorial authority.

The PR notes that the Applicant has acknowledged the existence of a small pipi bed in the locale and records his intention to protect the shellfish bed during the proposed dredging operations. It's not for me to question the applicant's "intention" to protect shellfish but there are roads said to be paved with intentions

The Document *Northland Moorings and Marina Strategy for Northland* under part 11.3 "What are we going to do" -- Opuā... states under "Long-Term Vision" that

*Development in the coastal marine area will be complemented with clearly identified navigational channels and land-based facilities without significantly affecting recreational opportunities or environment issues."*

If navigational channels of this magnitude are envisaged for two marina berths, the reduction in available mooring areas could be dramatic.

The Report concludes that:

*the proposed capital dredging of the access channel was found to be inconsistent and/or not demonstrated to be consistent with objectives and policies relating to management of activities within MM4A*

and

*that the proposed beach capital dredging (as far as it relates to the access channel) are not consistent with the overarching intent of the aforementioned relevant objectives and policies of the NZCPS, RPS, RCP and PRP.*

I fully support this position.

## 12. SEAWALL

The Section 32 Analysis Report for the Proposed Regional Plan for Northland (September 2017) notes:

*Although hard protection structures have traditionally been the 'to go' option to manage coastal erosion risk, the New Zealand Coastal Policy Statement 2010...brought in a stricter regime to manage coastal hazards...*

*The 'new' coastal policy statement now requires councils to discourage hard protection structures and to promote the use of alternatives to them, including natural defenses.....*

*The Regional Policy Statement for Northland ... has given effect to coastal hazard provisions within the NZ Coastal Policy Statement by introducing region-wide policies that require councils to give priority to the use of non-structural measures over the use of hard protection measures...*

## 12.1 Existing Seawalls

Consent to the existing seawalls and reclamation situated in the coastal marine area was given in the current consent.

*FNDC. 2)a.xii: Existing wooden and stone retaining walls where these do not otherwise lie in the Coastal Marine Area*

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

That was a retrospective consent; the work is completed and clearly will not have to be removed at the end of the consent period.<sup>viii</sup> I doubt whether, on granting those consents, either the FNDC or the NRC bothered to determine the location of the seawalls in the context of resource management jurisdiction.

The Director of General of Conservation was a party to the appeals against the Joint Decision on the 2001 application and participated in the mediation of what is now the Current Consent. With respect to the dinghy racks and existing wooden and stone retaining walls, the appeal notes:

*The existing dinghy racks and existing wooden and stone retaining walls are structures that are not directly associated with the operation of a commercial slip and are more in the nature of facilities for public use. It would be inappropriate for the use of the dinghy racks to be restricted to the invitees of the applicant. It would be appropriate for the Far North District Council to take over the maintenance of these facilities.*

This is in line with the FNDC administrative jurisdiction and is equally pertinent to the application for the new erosion barrier. The 2002 consent sensibly did not include the rock or timber wall in the boundaries of the exclusive occupation area and there is no reason why they should be included within an exclusive occupation area now.

No explanation is provided why replacement or new consents are required for these existing structures and if so, why the FNDC consent is not correspondingly replaced. I believe Easements over the esplanade reserve to permit the applicant to carry out maintenance on the existing walls were applied for and granted. Will new easements be required over public land in relation to the new wall? Has there been any consultation with FNDC?

## 12.2 New Sea Walls

With respect to the new seawalls, regard should be had for the policy (oft repeated above):

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

No need has been established.

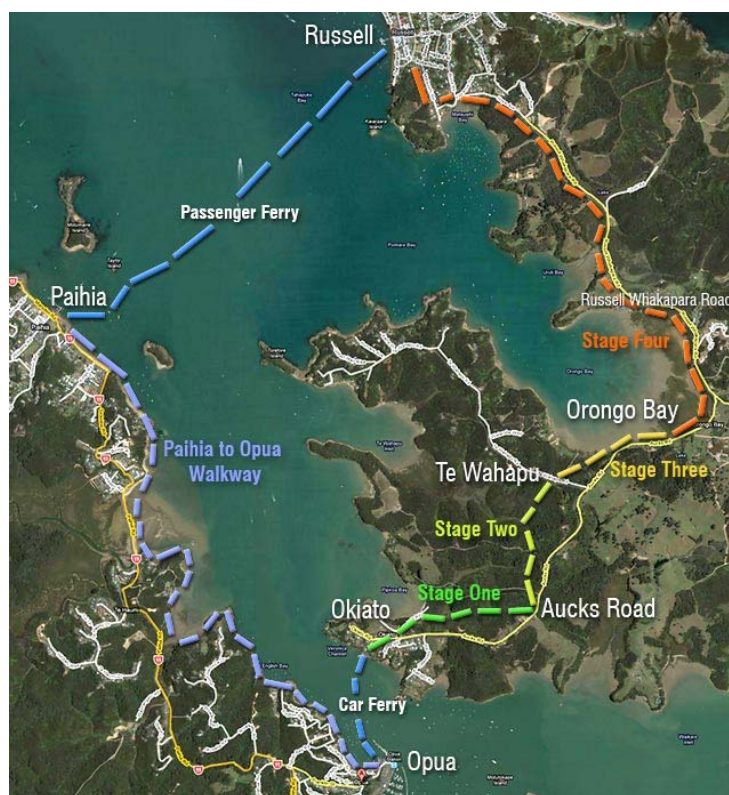
What little information has been provided with respect to the location, construction and the effects, both physical and visual, have not been assessed. The statement is made in the PR that:

*Further undermining to the walkway from potential coastal hazards such as sea surge and wind generated waves will be prevented by the proposed seawall*

This is not supported, so far as I am aware, by any technical expert information.

In term of Policy 6 of the National Coastal Policy Statement this activity does not have a functional need in relation to the application.

The proposed seawall affects would modify a public walkway under the administration of the Far North District Council which has territorial authority to mean low water springs. It is part of the Bay of Islands Full Circle Walkway

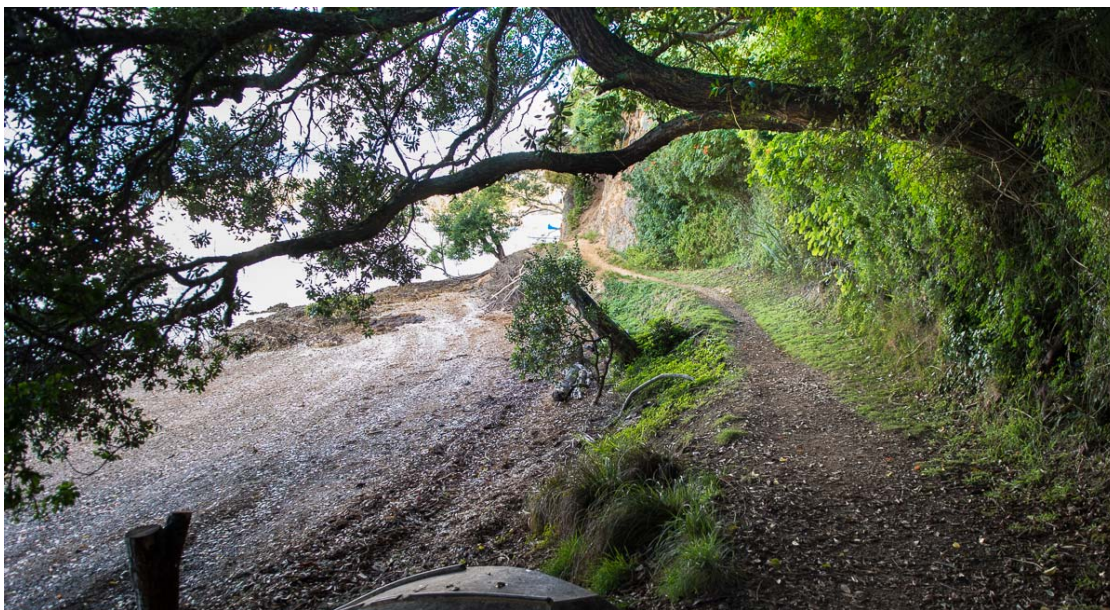


The only information provided by the applicant (upon being prompted for further information) is the small sketch (1/2 page).



With all due respect, this does not meet the standard of information required to support such a extensive modification of the walkway. I don't know what the 1MTR and 2MTR measurements refer to and cannot assess the actual width of the wall to be backfilled with rock and shell.

The suggestion that the 40 or so metres of the walkway which will be modified is already denigrated is rejected.



Further, I reject the suggestion that:

*The proposed design of the seawall will provide a visually cohesive coastal hazard protection structure that is similar to other hard protection structures nearby and*



*reflect the existing relationship between the natural environment and maritime character in the area.*

The proposed utilitarian structure at the site will have significant impact on the natural aspects of the site and adjacent area.



As for the coastline from the sea, the proposed condition that the northern and southern extent of the seawalls be marked with the number **39650** in black lettering to a white background clearly displayed in a manner as to be clearly visible from the sea until 2053 only adds to the utilitarian, unnatural aspect of the structure juxtaposed on a natural curving coastline and its walkway.

And how does this apply?

**AUT.039650.05.01**

Place use and occupy space in the coastal marine area with a new seawall and existing seawalls (inclusive of existing reclamation associated with an existing seawall).

Is the "occupy" element of this consent given under s 12(2)? One must assume so because s 12(1) does not relate to and makes no mention occupancy. Given the definition of common marine and coastal area, the holder of the resource consent occupies the space taken by the seawalls and the airspace above.

Under C.1.1.17 of the Proposed Regional Plan, hard protection structures are a discretionary activity. The Rule covers both s12(1)(b) and s 12(2)(a) – structure and occupation are taken together.

The walls become a virtual fence of unlimited height. A barrier between the esplanade (and/or unformed road) and the sea. The same applies to the existing and proposed new seawalls. In my opinion, the proposed consent is untenable.

The question of the boundary of the coastal marine area was considered at length in *Gisborne District Council v Falkner*, A 82/94, 13 October 1994 (HC).<sup>ix</sup> The court found that given the difficulty of determining the boundary, the practical way of providing for a boundary (in that case) was to use the existing line of the foredune protection works and that the "practical line of mean high water springs as the landward boundary of the coastal marine area was (for the present case) the seaward face of those protection works".

However, it appears that they are considered as lying within the coastal marine area and, NRC will take it upon itself for the duration of the consent to ensure the maintenance of that incongruous structure which will no doubt outlive term of the consent, with or without the number 39650.

### 13. RECLAMATION

The part of the application numbered AUT.039650.05.01 is to place and occupy space with ... existing seawalls (*inclusive of reclamation associated with an existing seawall*). I may be wrong, but it is my understanding that areas reclaimed from the coastal marine area cease being a part of the coastal marine area.

### 14. BEACH REHABILITATION

I note the conclusion in the PR that the proposed beach rehabilitation activity was found to be inconsistent with objectives and policies relating to ecological areas and habitat, cultural values and development in the CMA and welcome the conclusion that the application for resource consent for beach rehabilitation be declined. I fully support that conclusion.

The "beach" is a frail public asset and deserves protection from ambitious plans including the proposed Extension to Authorised Exclusive Occupation Area of the CMA. Like the walkway, this public asset should be administered by the responsible authority and any modification to it be carried out as a public work in consultation with the **community**.

### 15. DISCHARGES

An application has been made to extend the period after which the current discharge consents lapse, presumably under s 125 of the Act. The PR comments:

*that effects regarding the Esplanade Reserve as a result of the Applicant's land based (land use) operations is also a matter that is beyond the jurisdiction of the current application.*



I believe that position is incorrect. Potential discharge of contaminants and odour as a result of those operations must be not only within the NRC jurisdiction but must be a matter to be addressed.

The PR also comments that:

*the recommended discharge conditions have been modified to bring the controls over various discharge activities into line with current council standards and requirements.*

It would appear that therefore the period after which the current consents will not merely be extended, but that new consents will be issued to meet current council standards.

Suggested conditions in relation to Discharge Contaminants To Air From Land is that

*Screens shall be erected around blasting areas during high pressure water blasting to mitigate effects of spray drift.*

A condition to that effect was imposed in January 2002 by the FNDC:

*During the periods when that part of the slipway through the Esplanade Reserve is being used for washing down of boats, the Consent Holder shall erect screens or implement similar measures to effectively contain all contaminants within the washdown perimeter.*

I can say with certainty that during the the 16 years from the date of that consent until September last year, I walked down Richardson Street and up again at least 200 times a year and observed the washing down of boats many, many times. I have never, ever seen screens. This condition relies totally on voluntary compliance. I have not made a complaint because clearly, no monitor officer can stand by on the site and no complaint can be verified.

The applicant in his AEE of 27 September 2017 (in connection with his application for extension of time before his current discharge consents expire) states:

*Although I have done extensive planning and legal groundwork to move forward on my commitments to Council to comply with the current abatement notice, I am at a bit of legal box-canyon to execute that, which needs to be done to meet that ongoing commitment.*

I don't know when the Abatement Notice was issued, or why it has not been enforced. I have no means to measure the contamination resulting from the current activities at the site, but I do know that the situation is far from satisfactory and that there is great risk to permitting the boat maintenance activities including wash-down to be transferred to the coastal marine area. That the esplanade has been contaminated is not, I believe, in doubt. Hopefully the contamination has not reached the adjacent waters. Once the activity occurs also in the adjacent waters, the situation will be very different.

## 16. DECISIONS SOUGHT:

### GRANT CONSENT

**AUT.039650.01.01**  
Modified

Place, use and maintain a jetty and pontoon subject to the condition that:

\* The jetty shall not be used for the permanent mooring of any vessel. For the purposes of this condition "permanent mooring" means the use of the jetty for longer than 12 hours during any seven-day period or the use for other than repairs and maintenance or survey works which because of their nature, requires a vessel to be located on the vessel for a longer period.

\*The jetty shall not be used for the cleaning down, or the preparation or painting of vessel hulls.

\*The pontoon shall only be used for the casual berthing of craft.

### DECLINE CONSENT

**AUT.039650.01.01**

Place, use and occupy space in the coastal marine area with a jetty and marina facility, pontoon and two mudcrete grids.

**AUT.039650.02.01**

Place use and occupy space in the coastal marine area with a refurbished slipway (including turning block and associated cabling).

**AUT.039650.03.01**

Occupy space in the coastal marine area to the exclusion of others.

**AUT.039650.04.01**

Use a slipway and a jetty facility (inclusive of three work berth areas) for the purposes of vessel maintenance... and use two berths associated with the jetty facility pontoon as a marina.

**AUT.039650.05.01**

Place use and occupy space in the coastal marine area with a new seawall and existing reclamation associated with an existing seawall.

**AUT.039650.06.01**

occupy space in the coastal marine area with a dinghy ramp.

**AUT.039650.08.01**

occupy space with a workboat mooring and associated dinghy pull.

**AUT.039650.09.01**

Disturb the land the in coastal marine area during demolition and removal of unwanted structures, and marina facility construction, slipway refurbishment and seawall construction.

**AUT.039650.10.01**

Capital dredging adjacent to a slipway, and jetty and marina facility, to form five all-tide berths, two mudcrete grids and approaches (excluding access channel).

**AUT.039650.11.01**

Maintenance dredging of vessel berths and slipway approaches.

**AUT.039650.12.01**

Discharge of washdown water to the coastal marine area on the mudcrete grids.

**In event that consents are granted, amend conditions as follows:**

These consents apply only to the structures, facilities, and occupation area identified on Northland Regional Council Plan Numbers 3121b.

The area of exclusive occupation, over which the Consent Holder may exercise control of access and use, is limited to the Boundary of Occupation Area Northland Regional Council Plan Numbers 3231b, except that the Consent Holder shall allow reasonable access to and through this area and reasonable public access and use of the wharf and pontoon structures.

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## ENDNOTES

### <sup>i</sup> Endnote 1

*Doug's Opua Boatyard v ET and MC Leeds*, Document Number A1508689.

### <sup>ii</sup> Endnote 2

Memorandum to the Environment Court, 21 December 2002, notes that FNDC and NRC and the "other" parties have drafted an amended set of conditions which all parties could agree upon.... the parties have now reached agreement on the conditions.

### <sup>iii</sup> Endnote 3 – The Application and the Public Notice:

RMA-91 - Section 2AB *Meaning of public notice*

- (1) *If this Act requires a person to give **public notice** of something...*
- (2) *The notice and the short summary of the notice must be worded in a way that is clear and concise*

In the words of the applicant, it is proposed to construct and operate:

*small private/commercial marina for the specific use of the vessels moored and/or secured to it in contiguity with current operations associated with vessel maintenance, chartering and the normal conduct of occupation of vessels in a marina environment.*

(30 October AEE, p.6)

*The proposal is an evolutionary step in the development of the entire site...whilst providing ding a fit for purpose small marina and improved boat maintenance facility...*

(30 October AEE, p.8)

That is clear and concise.

NRC Application Form 9, as printed by the NRC notes under "Description of the Activity"

*Please briefly describe the activities and duration for which Consent(s) are being sought. It is important that you fill this out correctly as the Council cannot grant Consent for any activity you do not apply for.*

This notice reflects the awareness of Council of the case law with respect to jurisdiction.

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PUBLIC NOTICE - "REPLACEMENT":

The Public Notice states that:

*The application seeks early replacement of existing resource consents, for existing activities..and a proposed upgrade of the facilities associated with Doug's Opua Boat Yard in Walls Bay, Opua.*

*Existing consents to be replaced include those for existing coastal structures and their uses various discharges associated with vessel maintenance activities, and management of stormwater dredging and exclusive occupation and use of the coastal marine area.*

The PC Report states that:

Early Replacement Resource Consents

*Early replacement consents have been sought for maintenance dredging, exclusive occupation;*

*and*

*the applicant has confirmed that this application seeks early replacement consents for the existing structures within the CMA shown in Figure 1, including the slipway, a dinghy ramp, a workboat mooring and dinghy pull, and timber and stone seawalls.*

No mention is made in the application of "replacement" of existing resource consents. On the contrary, the application seeks *new, more comprehensive use of those all tide marina structures in congruity with the existing resource consents*

With respect to structures the applicant seeks *resource consent for replacement of a commercial wharf pontoon*. No application is made for replacements of the slipway, a dinghy ramp, a workboat mooring and dinghy pull, and existing timber and stone seawalls.

The slipway is expressly excluded from the application as stated in the AEE of 17 November 2017 stating:

*The slipway is not a part of this consent application as it legally stands alone pursuant to s 178 of the Harbours Act 1950*

Presumably this refers to approval of a plan in 1976 when a licence for a slipway was applied for [a retrospective licence was granted in 1989].

No application has been made for replacement consent for exclusive occupation of the seabed, as that right, as noted in the application, is claimed *pursuant to section 178 of the Harbours Act 1950*.

As noted in the Consultant Planner's Report:

*'replacement' and 'renewal' resource consents are technically regarded as all encompassing 'new resource consents' under the Resource Management Act 1991, the terms have been referred to throughout this report for clarity and reference purposes.*

I disagree strongly with this approach, both for reasons already stated above, but because use of this terminology does not create clarity, but rather, confusion.

While the RMA-91 is not an easy document, the use of terminology not referenced in the Act (and related documents) does not add clarity. It has the opposite effect. The same is to be said for the term "exclusive occupation". As will be discussed below, the Act defines "occupation" but makes no reference to "exclusive occupation."

## NEW RESOURCE CONSENTS

With respect to new resource consents, the public notice states that:

*New resource consents include*  
*demolition and reconstruction of a jetty facility*  
*placement of two mudcrete grids*  
*refurbishment of the slipway*  
*use of two of the jetty facility berths as a marina*  
*a new sea wall*  
*disturbance of the foreshore associated with construction*  
*beach rehabilitation activities*  
*new capital and maintenance dredging to form approaches to the facilities and five all-tide marina berths*

As already indicated above, the slipway is expressly excluded from the application and the applicant gave notice that *the physical make-up of the slipway may change drastically* on page 2 of the AEE dated 27 September 2017.

No public notice is given of the application for *more comprehensive use of those all tide marina structures*. Yet it is the activity which is of greatest significance.

What is to be understood by "jetty facility"? I could find no definition of "jetty" or "wharf" in the Proposed Regional Plan? The dictionary definition and common understanding of jetty is:

*a structure extended into a sea, lake, or river to influence the current or tide or to protect a harbour and a wharf is structure built along or at an angle from the shore of navigable waters so that ships may lie alongside to receive and discharge cargo and passengers.*

It can be understood that another structure might be attached to or located on a jetty or a wharf. But those structures are not a "jetty" or a "wharf" and must surely be distinguished and separately assessed. The application speaks only of replacement of a wharf, pontoon. The public notice advises of the use of two berths associated with the "jetty facility" as a "marina" but does not reference additional berths and does not associate the mudcrete grids with the "jetty facility".

Yet the new "jetty facility" is to be used as a boat maintenance facility including *scrapping or cleaning of hull or fixtures below the water line* as revealed only under the Tab "Further Information" in the application documents made available on the Internet an email of 12 December 2017 from the applicant to the NRC. This activity (among others not disclosed). Perhaps it is intended to be "covered" in the public notice by ambiguous reference to replacement consents for *those existing coastal structures and their uses*.

The applicant refers to *working berths* in the coastal marine area and the establishment of what the applicant calls *all tide marina structures* and *marina development* and (on p. 8 of the AEE of 17 November 2017) to a *fit for purpose small marina and improved boat maintenance facility*.

"Marinas" are specifically and separately provided for in the Proposed Regional Plan, as distinguished from "General Structures" which in the Section 32 Report relating to the new Regional Plan, are distinguished from both Marinas and Hard Protection Structures such as seawalls and in my view, any proposed marina development should be notified and assessed in terms of National and Regional Policy and Rules.

"Boat Maintenance Facilities" with associated *any ancillary scapping or cleaning of hull or fixtures below the water line* [to be] *contained by drop sheets at low tide and removed prior to the ebb* are not, so far as I am aware, specifically provided for in the Proposed Regional Plan.

The Public Notice and the Planning Report do not identify the proposal by its name or reveal the true character of the proposal.

I have belaboured this point, but not without purpose. I am well aware of the public misapprehension that surrounds this proposal and the requirement that public notice must be clear and concise to prevent such misapprehension.

The notification does not meet the requirements of a public notice, specially set out in the Act. This matter was raised with the Planning Department, but ignored. I raise it again here, for your consideration, having regard to applicable case law with respect to jurisdiction<sup>iii</sup>.

The Minute #1 of the Hearings Committee in relation to the provision of updated plans and an ecology report accepts that this information clarifies the location and extent of the activities included in the public notification and that the further information provided prior to the hearing is acceptable as long as it is within the scope of the application as publicly notified.

This raises the issue of the "application as publicly notified". In this instance, the application and the public notification are not the same. What is notified far exceeds what was expressly applied for and includes what was express not applied for (the slipway and exclusive occupation).

In *Pope and Hitchings v Wellington City Council* (1980) 8 NZTPA 3<sup>iii</sup> the applicant had sought resource consent to move the 80 year old Shamrock Hotel from its existing site on

Molesworth Street to a new location on Tinakori Road, a few hundred metres distant in Thorndon, Wellington. In its public notification of the application, the Wellington City Council stated:

*The building is proposed to be converted to three shops and a restaurant on the ground floor; the upper floor is to comprise studio apartments and a restaurant annex ...*

In the course of the appeal hearing before the Planning Tribunal, the appellants raised the jurisdictional point that the application had made no reference to these proposed uses, which were non-permitted ones in the applicable (residential) zone.

The Tribunal held that the Council lacked jurisdiction, on the application, to grant consent to the proposed uses of parts of the building as a restaurant and shops, because the application had not sought that: it only sought permission to move the building. In the course of its decision the Planning Tribunal said:

*But it is fundamental that the application for planning consent define the extent of the consent sought. Neither the council ... nor this Tribunal on appeal, has jurisdiction to grant consent to anything more than is sought in the application ...*

*This is not merely a case of non-compliance with the requirement of the regulations that the application “state fully what is proposed”: it is a matter of the definition of the substance of the application itself ...*

#### iv Endnote 4

### APPLICATIONS – INFORMATION REQUIRED AND REQUISITE ASSESSMENT OF ENVIRONMENTAL EFFECTS

Schedule 4 of the RMA-91 sets out the information required in an application for resource consent.

- *Any information required by this schedule, including an assessment under clause 2(1)(f) or (g), must be specified in sufficient detail to satisfy the purpose for which it is required.*
- *The application must provide a description of the activity:*

Clauses 6 and 7 set out the requirements for information in assessment of environmental effects which accompany a resource consent application. This includes

- *an assessment of the actual or potential effect on the environment of the activity;*
- *if the activity includes the discharge of any contaminant, a description of—the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
- *any effect on those in the neighbourhood and, where relevant, the wider community, including any social, economic, or cultural effects*
- *any physical effect on the locality, including any landscape and visual effects:*



- 
- *any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural value, or other special value, for present or future generations*

The applicant has submitted three reports under the heading ASSESSMENT OF ENVIROMENTAL EFFECTS dated 23 September 2017 (relating to extension of time for the discharge consents) 30 October 2017 and 17 November 2017 with substantial appendices. By my cursory count the combined documentation relating to the applications run into some 180 or more pages including copies of selected previous resource consents and other matters that can be considered matter of history.

What has not been supplied is a full description of the activities to be conducted on the new wharf and proposals for discharge of contaminants, of the construction (including any backfill) of the proposed seawall and the extent and method of "refurbishment" of the foreshore, the effects of the dredging.

The Planning Report acknowledges that there is a lack of detail in the Applicant's assessment of effects, but considers that

*the council has developed a detailed understanding of the operations at the boatyard and the effects generated by it over the course of the consent period and therefor "clarifies" that the council was satisfied (pre-notification) with the level of information available, both in the application and in current and historical consents, to make a thorough assessment of the applications as proposed*

What is under consideration is not the *operation at the boatyard and the effects generated by it over the course of the consent period* nor the *information in historical consents* (matters with which many in Opuia are thoroughly familiar) but the information relating to the structures and activities now proposed and how the present application relates to the indicated greater development of the applicant's own site and the drastic change in the physical make-up of the slipway.

#### EXTENSION TO AUTHORISED EXCLUSIVE OCCUPATION AREA OF THE CMA: "UPDATED PLANS" - 19 APRIL 2018.

The "updated plans" extend the proposed new exclusive occupation area to a distance 8.8 metres east of the current eastern boundary of the authorised occupation area, and additional 8 metres north of the existing northern boundary of the existing occupation an additional 3 metres south to include the area of the workboat mooring and dinghy pull.

The represents a significant additional area of exclusion for which no explanation was offered.

Submitters were advised by the Committee on 30 April that there is no mechanism under the RMA to "stop the clock"... for consideration of this significant change. I submit, as stated in Pope and Hitchings: *It is fundamental that the application for planning consent define the extent of the consent sought* with the reminder that exclusive occupation deprives every individual of right of access to coastal marine area conferred by Parliament.

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The area of exclusive occupation is essentially a rent-free, rate-free piece of real estate contrary to the fundamental principles opposing relating to the seabed and the proposed amendments are a significant departure from the application as made and notified.

#### WITH RESPECT TO ACTIVITIES

In addition to the placement of structures, and occupation of the seabed, there is the application for activities to be conducted in the coastal marine area, the subject matter of s 12(3). The application in the AEE of both 30 October 2017 and 17 November 2017 is for:

*new, more comprehensive uses (plural) of those all tide marina structures in congruity with the existing resource consents that will expire on or before 30 March 2036 (30 October 2017):*

*more comprehensive use (singular) etc (17 November 2017).*

It begs the question (already posed) what those "all tide marina structures" are. But also:

- what are *the more comprehensive uses*, and *what is the more comprehensive use*  
The first implies the ability of identifying and enumerating the uses, the other does not.
- how are the *uses* or the *use* in congruity with existing resource consents?

Anyone wishing to understand this would need to refer to the material attached to the application(s) and to the contents of existing resource consents.

The Notification received in my letterbox lists 17 activities. Most relate to the placement of structures and occupation of seabed (which are the subject of s 12(1) and 12(2). With relation to use they specify:

*use space in the CMA with a refurbished slipway, turning block and associated cabling*

*Use the slipway and jetty facility structures and three work berth areas for purposes of:*

*vessel maintenance and*

*chartering*

*and two berths associated with the jetty facility pontoon as a marina*

*use space in the coastal marine area with a new seawall and existing seawalls (inclusive of existing reclamation associated with the existing seawall)*

No details have been provided about the kind of vessel maintenance that is envisaged on the slipway located in the Coastal Marine Area. No details are provided for use the three work berth areas for vessel maintenance.

A document submitted by the applicant entitled Appendix X states as follows:

*Doug's Opua Boatyard is a fully commercial boat maintenance facility for haul out, storage, brokerage, chartering, marine construction, repair, servicing, victualling, and surveying of all classes of vessels up to 25 metric tons displacement.*

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*The list of marine maintenance activities on new structures are to be amalgamated with the existing consents as follows:*

*Two marina berths associated with all the above including accommodation*

*Three working berths associated with all the above*

*Two mudcrete Grids associated with all the above*

*New wharf operational and security structures associated with all the above*

*In water hull surveying associated with all the above*

*All tide operations associated with a reconstructed slipway and all the above*

Bearing in mind the applicant's statement (AEE 17 November at page 7) that *the slipway is not part of this consent application ....* it appears that for the present purposes *all tide operations associated with a reconstructed slipway* are not activities to be considered by this Hearings Committee. However, the NRC notification indicated this application is for use of the slipway for vessel maintenance.

The list above is not a *list of marine maintenance activities*, it is merely a list of structures to be amalgamated with alleged existing consents (whether relating to the Boatyard proper or the Esplanade or the coastal marine area) for *commercial boat maintenance facility for haul out, storage, brokerage, chartering, marine construction, repair, servicing, victualling, and surveying of all classes of vessels up to 25 metric tons displacement*

The consents department sought clarification of the activities on the wharf and mudcrete grids on 11 December 2017 (apparently it had no concern about maintenance activity on the slipway which the applicant proposes --in future -- to subject to a drastic change in make up).

*If maintenance activities associated with the wharf and mudcrete grids involve discharges to the CMA (e.g. from hull washdown) then there will be requirements for this discharge.*

In response, the applicant wrote, on 12 December 2017:

*As to discharges in the CMA, in particular the mudcrete grids; the issue mainly lie with the control of activities that were implicit with the old discharge consents. It is therefore suggested that any ancillary scapping or cleaning of hull or fixtures below the water line are contained by drop sheets at low tide and removed prior to the ebb. Wiping of slime and minor repairs with no discernable plum would be the norm as well as other containment processes already in use.*

<sup>v</sup> Endnote 5 - History of Consents and Permissions.

With respect to present Land Use Consent Activities of which this proposal is to be an integral part, the applicant makes reference to the *"Stewart House" and boat shed from the late 1800's* as though this were some legitimate precursor to the present boatyard. The applicant further indicates that *by 1967 commercial activities of the boatyard would be conducted on the unformed road that would become esplanade* with implication, again, that this was a legitimate precedent for boatyard activity on the esplanade and some basis for existing use rights (along with adverse possession) which, indeed, he asserted in his appeal to the Environment Court against an FNDC abatement notice requiring to contain

his boatyard activities on his own site. The Environment Court did not dignify the claim for adverse possession and established that with respect to the Esplanade: that the only existing use right was the passage of boats from the sea to the private land.

The establishment of what is loosely called "Doug's Opuā Boatyard" (the Boatyard) was facilitated by various permissions and resource consents (some of which were "retrospective" and commenced with a letter dated 11 May 1966 to the Country Clerk of the Bay of Islands County Council from the new owner of what is now The Boatyard land, stating: "*I intend starting a boatbuilding yard in the vicinity of Opuā.*" The author of the letter expressed a wish to purchase the land (then unformed road) between his property and the sea. In response, the then Country Clerk responded that:

*...as it is the policy of Council to provide for reserves 1 chain wide along the sea-coast this Council is not prepared to waive the requirements in this case.*

In 1971 the then Bay of Islands County Council granted a specified departure consent to permit the construction of the boat building shed and office on the what is now land owned by the applicant, with the condition that all activity be confined to the land which was subject of the application.

In 1976 the Council granted consent for a slipway to cross the unformed road (now esplanade) subject to the condition that the unformed road (esplanade) be kept free of all material, boats or machinery and that at no time would boat repairs or any other work take place on the unformed road. At that time, plans for the slipway in the coastal marine area were submitted to the Northland Harbour Board (acknowledged on 16 June 1976).

In November 1988, the Northland Harbour Board resolved to grant a licence under section 165 of the Harbours Act 1950 for an area for the existing slipway (plans for which were first submitted in 1976) and proposed jetty subject to plan approval under s 178 of the Act and reasonable public access being allowed to the public.

In May 1989 Department of Conservation issued a certificate under s 178 of the Harbours Act 1950 approving the plans (DOC (CM) AK 00120 relating to the resolution of the NBH to grant a license for the jetty and slipway.<sup>v</sup>

In 1994 of The Boatyard was acquired by its present owner who also investigated the potential purchase of the unformed road between his property and the sea and who also was unsuccessful.

In 1998 a coastal permit was granted to *use a floating structure for maintaining and servicing charter yachts alongside an existing jetty...*

In January 2002 the Environment Court issued Consent Order permitting (coastal permit) the placement and use of a wharf, slipway, dinghy ramp, timber and stone seawalls, workboat mooring pull and to use those structures for the purposes associated with the boatyard and to occupy and area of seabed associated with the slipway and wharf structures, and certain discharges. This consent is subject to the conditions that:

*the public be allowed reasonable access to and through the defined occupation area and shall have access to and use of the wharf and pontoon structures*

*The wharf shall not be used for the cleaning down, or the preparation or painting of the vessel hulls or for permanent mooring of any vessel while the floating pontoon shall be used only for casual berthing of craft.*

At the same time, FNDC granted land use consent to the slipway and the activity of washing down boats on an area marked "A" on the esplanade reserve prior to the boats being moved onto the boatyard for repair and maintenance and on a slim area marked "B" on the esplanade reserve for repair and maintenance of boats standing on the southern branch of the slipway. The southern branch of the slipway has since been removed.

This FNDC consent marked the encroachment of boatyard activity (apart from the right of way slipway) onto the esplanade reserve. Granted by Consent Order, it followed mediation proceeds between the two Council and applicant on the one hand and Objectors, including the Department of Conservation, on the other. It was agreed that before activities on the Esplanade Reserve could commence, easements over the reserve in favour of the private boatyard property were required. These were finally granted by the FNDC under delegation from DOC which has consistently refused to grant the necessary easements. The matter has been heard by the Court of Appeal and a decision is pending.

#### <sup>vi</sup> Endnote 6

The original consent for the construction of the jetty issued by the FNDC in December 1988 stipulated that it is not be used *for the cleaning of exterior of boats and be available for the use (free of charge) by the general public at all times.*

The Northland Harbour Board resolved in November 1988 that it resolved to grant a licence for the area of the jetty as shown on the attached plan, subject to *reasonable access being allowed to the public.*

#### <sup>vii</sup> Endnote 7

Council's Policies and Rules pertaining to the very important matter of exclusion of the public from the coastal marine are is not clear. Included in the Category of Structures is the activity to "occupy space for". There is no category in the Regional Coastal Plan in relation to "occupation to the exclusion of others". It is an "innominate" activity. I assume, therefore, there is no policy, not objective and no rule pertaining to the so-called innominate activity.

The PR records as follows:

<b>Structures</b>	Place use and <u>occupy</u> space in the CMA with a reconstructed jetty facility (including fixed jetty, gangway pontoon and piles, associated services, two mudcrete grids, signage and hoardings.	Discretionary activity in accordance with Rule 31.6.3(l) and 31.6.3(o) of the RCP.  Discretionary activity in accordance with Rule C.1.1.16 of the PRP.
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<b>Alteration or extension of authorised structures</b>	Place use and <u>occupy</u> space in the CMA with a refurbished slipway, turning block and associated cabling.	Discretionary activity in accordance with Rule 31.6.3(k) and 31.6.3(l) of the RCP.  Permitted activity in accordance with Rule C.1.1.7 of the PRP.
<b><u>Occupation</u></b>	Occupy space in the CMA associated with a jetty facility and slipway to the exclusion of others.	<u>Innominate activity within the RCP and PRP and is therefore deemed to be a discretionary activity in accordance with section 87B(1)(a) of the RMA.</u>

The category "to place, use and occupy" is apparently a three-in-one consent covering sections 12(1), 12(2) and 12(3). This seems to be reflected in the provisions of the Proposed Regional Plan C.1.1.16 which is intended to cover both relevant provisions of s. 12(1)(b) and 12(2)(a).

In *Hume v Auckland Regional Council* CA262/01 in 2002, Tipping J considered (inter alia) the inter-relationship of those 12(1) and 12(2):

*[11] A significant issue raised by the parties concerns the relationship between subss (1) and (2) of s 12, and whether the Humes should have obtained a permit under s 12(2) as well as a permit under s 12(1)..... We are of the view that the correct approach is assisted by an appreciation that the two subsections are directed at different activities. Subsection (1) is directed at the activities specifically mentioned in its lettered paragraphs..... Subsection (2) is directed at the activities of occupation of part of the coastal marine area and removal of sand and so on.*

*[12] The definition of occupy introduces the concepts of a lease or licence. Hence in our view subs (2) is concerned with questions of tenure..... The subs (1) permit holder acquires permission to do the work involved in creating the structure or otherwise, but an occupation right is also necessary, whether by lease or licence, or by permit..... In effect Parliament has entrusted to Regional Councils the power to grant a permit to occupy [common coastal marine area].*

Presumably the consent to occupy space in the coastal marine area to the exclusion of others is such a consent under s12(2).

Tipping J noted:

*[15] We consider it appropriate when construing the Act and endeavouring to harmonise any provisions which do not have an immediately obvious consistency, to be guided, where appropriate, by matters which Parliament has said are matters of national importance for resource management purposes, ie. for the purpose of promoting the sustainable management of natural and physical resources. In that light s 6(d) serves as a reminder of the fact that the maintenance and enhancement of public access to and along the coastal marine area is a matter of national importance....*

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viii Endnote 8

The Director of General Opposed part of the applications for wharf, etc., leading to what is not the operative consent. With respect to the dinghy racks and existing wooden and stone retaining walls, the submission notes:

*The existing dinghy racks and existing wooden and stone retaining walls are structures that are not directly associated with the operation of a commercial slip and are more in the nature of facilities for public use. It would be inappropriate for the use of the dinghy racks to be restricted to the invitees of the applicant. It would be appropriate for the Far North District Council to take over the maintenance of these facilities.*

ix Endnote 9

*A boundary that is fixed and readily found is more convenient for people. For the protected stretch of Wainui Beach, the practical way of providing such a boundary at present is to use the existing line of the foredune protection works. The works are only fixed in a relative sense, as they are likely to continue to be damaged by erosion from storm waves, but their line is steadier than the precise line of mean high-water springs, which may vary by the fortnight; and at least at present the line of the protective works can readily be found.*

*Bearing in mind the value of having a boundary that can readily be found for the whole of the protected stretch of Wainui Beach, and the weight of evidence that for most of that stretch the precise line of mean high water springs lies to the seaward of the protection works or coincides with the log and rail wall, it is our judgment (applying our combined experience-in surveying and planning practice) that the practical line of mean high water springs as the landward boundary of the coastal marine area is for the present the seaward face of the existing foredune protection works.*