

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 081

IN THE MATTER of the Resource Management Act 1991

AND of two appeals under s 120 of the Act

BETWEEN SKP INCORPORATED
(ENV-2017-AKL-000077)

R A WALDEN
(ENV-2017-AKL-000076)

Appellants

AND AUCKLAND COUNCIL

Respondent

AND KENNEDY POINT BOATHARBOUR LTD

Applicant

Court: Principal Environment Judge Newhook
Commissioner ACE Leijnen
Commissioner IA Buchanan

Hearing: at Auckland, 26, 27 & 28 February, 1 & 2 March 2018

Appearances: DA Nolan QC and KRM Littlejohn for Applicant
MC Allan and R Ward for Respondent, Auckland Council
DJ Sadlier for SKP Incorporated
RA Walden for himself
M McCullough for Auckland Transport, s 274
V Morrison-Shaw for Kennedy Point Marina Supporters' Gp, s 274
S Brown for herself, s 274
G Clendon for himself, s 274
M Webb for herself, s 274
D Rout for himself, s 274

Date of Decision: 30 May 2018

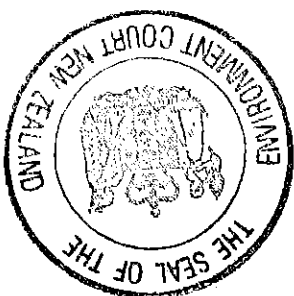
Date of Issue: 30 May 2018

DECISION OF THE ENVIRONMENT COURT



A: Consent is granted subject to conditions which are attached as annexure B.

B: Costs are reserved.



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REASONS

General Introduction

[1] The proposal by Kennedy Point Boatharbour Limited ('the Applicant') is to construct, operate and maintain a 186 (maximum) berth marina and associated facilities in Kennedy Point Bay on Waiheke Island.

[2] Consent was granted by independent hearing commissioners appointed by Auckland Council. Two parties, SKP Inc and Mr RA Walden, have appealed the decision and seek that the application be refused.

[3] The present application was brought subsequent to refusal of consent by this Court to a marina proposal at Matiatia, the other entry point into Waiheke Island, in *Re Waiheke Marinas Limited*.¹

[4] While Matiatia is the principal passenger entry port to Waiheke, Kennedy Point can be described as the principal commercial entry port, handling as it does primarily vehicular ferries and freight.

Key Features of the Proposal

[5] An artist's impression of the proposed marina is attached as **Annexure A** to this decision. It offers a broad and reasonable idea of what consent is sought for.

[6] The key features of the proposal include:

- A marina basin created by two floating attenuators, piled in place, with no requirement for dredging, reclamation or breakwaters.
- Marina piers and associated fingers capable of providing up to 186 berths, all fully reticulated for power and fresh water (desalinated sea water), set back between 75m and 100m from the foreshore and predominantly located in an area of the coastal marine area zoned for moorings.
- New pile moorings and dinghy racks for up to 19 vessels.
- Public pick-up and drop-off berthage and day berthage for up to 30 trailer boats.



- A floating access and carparking pontoon, connected to the land via a hinged gangway and piled wharf structure, access directly from Donald Bruce Road.
- A floating marina office and berth user's facilities and a floating community use building, viewing deck and storage and launching facilities for kayaks and SUPs.
- Public grey and black water pump-out and temporary storage facilities.
- The upgrading of Donald Bruce Road to assist in segregating ferry traffic from other traffic accessing the Kennedy Point Wharf area, and improvements to the Kennedy Point carpark including providing for additional capacity.

The Principal Issues in Contention

[7] The parties supplied the Court with a lengthy and detailed statement of issues, somewhat broadly cast, and not all the subject of expert evidence.

[8] Counsel for the respondent observed² that the issues in contention in the present case were more confined than in the previous *Matiatia* case, because: traffic effects had been largely agreed amongst relevant experts; the present proposal involved floating attenuators rather than large permanent rock breakwaters; and parking in the present case was proposed on a floating deck rather than a reclamation or deck suspended on piles.

[9] The topics of applicable statutory instruments (Auckland Unitary Plan 'AUP', and the legacy Regional Coastal Plan 'RCP'), the overall activity status (non-complying), having been largely agreed, the issues in contention largely boiled down to the following:

- (a) "Gateway" tests under s 104D RMA.
- (b) Effects on the environment (positive and adverse):
 - acoustic matters
 - archaeology
 - traffic/transport
 - navigation/moorings
 - visual/landscape
 - lighting

² At paragraph 8 of their submissions.



- ecology/coastal processes, particularly effects on Little Blue Penguins and other birdlife; terrestrial ecology; antifouling effects; effect on benthic community composition; cumulative effects; need or otherwise for further modelling; whether biological monitoring was required
- Māori cultural effects
- social effects including use of common water space
- planning issues including functional and operational needs
- potential impact on future expansion of the ferry terminal

(c) Matters arising under Part 2 RMA.

(d) Matters for consideration under s 290A RMA.

(e) Should consent be indicated as appropriate, proposed and other possible conditions of consent and mitigation.

The Parties

[10] The Applicant company is owned by a Mr Tony Mair and related interests who have developed other marina projects in New Zealand in recent decades.

[11] Auckland Council as consent authority, for whom the application was determined by experienced independent hearing commissioners.

[12] SKP Incorporated as appellant was a successor to an unincorporated group and did not itself make a submission to the Council. This party is not to be confused with Save Kennedy Point Incorporated which is a different legal entity which did make a submission and joined the appeals under s 274 RMA seeking that the application be declined.

[13] Mr RA Walden made a submission in opposition and his appeal seeks that the application be declined.

[14] Auckland Transport was an original submitter taking a neutral position, raising before the Court only one minor issue for determination.

[15] Kennedy Point Marina Supporters' Group is a s 274 party comprising 150 members, opposing the appeals and supporting the application on account of its members being interested in boating and recreational resources for Waiheke Island.



[16] Royal Forest and Bird Protection Society of New Zealand was not a submitter but joined the SKP Inc appeal under s 274(1)(d) RMA, primarily concerned about potential effects on Little Blue Penguins and their habitat at Kennedy Point; latterly not opposing the application being approved so long as certain conditions are imposed.

[17] Piritahi Marae is a party with an established marae at Blackpool on a Māori reservation for the physical, spiritual and holistic wellbeing of people of all tribes; the marae was not a submitter on the application but joined the SKP Inc appeal under s 274(1)(d) RMA, opposing the application. Its evidence (4 witnesses) was called by counsel for SKP.

[18] Mr Walden's appeal attracted three individual parties in support of his position, under s 274 RMA. The SKP Inc appeal attracted 24 individual s 274 parties supporting it, of whom five exchanged evidence.

A Cautionary Note

[19] The case was notable for enormous quantities of evidence, exhibits and supporting materials. A week of hearing was only just sufficient to cover all matters parties wished to raise, despite members of the Court having pre-read everything of relevance, with care³.

[20] Parties should not expect to read in this decision a recitation of everything they wrote or spoke about. Not only would that produce an unnecessarily long decision, but sadly, there was far too much material presented by some expert witnesses which did not meet the rules about admissibility in s 25 Evidence Act 2006. Reduced to its essentials, s25(1) provides that expert evidence is only admissible if the fact-finder [here, the Court] is likely to obtain substantial help [with evidence and facts of consequence in the proceeding].

[21] As to non-expert evidence, we acknowledge the passion with which many views are held by members of the community. As is acknowledged in many ways in the AUP, community views run in many directions. The way in which we analyse the many views offered in a case like this must be principled and strongly informed or guided by the

³ In fairness, the evidence called by the council was, in the main, succinct and to the point; that called by the applicant commendably so in the face of the range of issues and details advanced by opposition parties. It is also fair to record that Mr Sadlier for SKP maintained a measured and professional approach in his cross-examination given the limitations in the evidence of his own witnesses we identify in many places in this decision.



statutory instruments, here the NZCPS, the RPS and the RCP in the AUP, and the HGI district plan. It would be impossible to record every point made by expert and lay witnesses in a case as involved as this one. Many are subsidiary to core elements of the case that we have focussed on. Others were of little or no importance to determining the outcome of the case.

[22] It might be useful to be reminded of a decision of the High Court in *Rodney District Council v Gould*⁴ about objectives and policies to be considered by the Environment Court [indeed, we would add, any decision-maker under the RMA]. It was held that:⁵

The Environment Court is not obliged to refer in its decision to every objective or policy of a district plan which might be of marginal relevance to its decision ... [and that to try to do so] would be unworkable and serve no useful purpose.

[23] That flavour of that message is not unlike the thrust of s 25(1) of the Evidence Act legislated 2 years later. While the findings in *Gould* are confined to examination of objectives and policies, s25(1) is of analogous practical effect. Relevance, focus, and providing substantial assistance to the decision-maker, must be the order of the day. Regrettably many cases before the Court in recent times have failed to adhere to these principles, and the present case was no exception.

Location and Zoning

[24] The marina is proposed for location in a bay adjacent to Kennedy Point on the south-west coast of Waiheke Island, and adjacent to the more populous western half of the island. The proposal is to be located entirely in the CMA.

Zoning in the Auckland Unitary Plan ('AUP')

[25] It is clear the bulk of the proposed marina would be located in the Coastal – Mooring Zone ('Mooring Zone') under the proposed regional coastal plan component of the AUP. A small eastern portion would be located in the Coastal – General Coastal Marine Zone ('GCMZ'). Nearby is the Coastal – Ferry Terminal Zone that applies to the Kennedy Point Wharf and which provides for reasonable future expansion of the ferry terminal.⁶

⁴ *Rodney District Council v Gould* (2004) 11 ELRNZ 165 (HC) (Cooper J).

⁵ At [32].

⁶ See for instance evidence of Council's planning witness Mr D Wren, Evidence in Chief ('EIC'), paragraph 7.25.



[26] The substance of "overlays" in the AUP do not impinge on the location.

[27] Some little distance from the proposal is an Outstanding Natural Landscape (ONL 82) and a High Natural Character Area (HNC 121) located in respect of the Te Whau Islands across the far side of the Bay. We will discuss the relevance or otherwise of those features later in this decision.

[28] There are some Significant Ecological Areas ('SEAs') some distance away along the coast.

"Legacy" Regional Coastal Plan Zoning

[29] This instrument had not yet been entirely replaced by RCP provisions of the AUP at the time of writing this decision, so although attracting less weight than the AUP provisions, calls for consideration⁷.

[30] In that Plan, the site is found in a General Management Area and a Mooring Management Area ('MMA 67'). The boundary of the latter is not contiguous with the mooring zone in the AUP, but the latter was said more accurately to reflect the location of moorings presently located in the Bay.⁸

Hauraki Gulf Island ('HGI') Plan Zoning

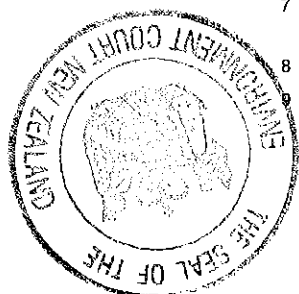
[31] The AUP does not apply to the land mass of Waiheke Island,⁹ because the HGI Plan is a comparatively recent instrument. It is the latter that governs Waiheke Island. Given that a small quantity of work is proposed to take place on land, we note that Auckland Transport's land-based wharf facilities are zoned Commercial 7 (Wharf), beyond which to the north there is land zoned Rural 1 (Landscape Amenity). The coastal fringe is an esplanade reserve which carries Open Space 1 (Ecology and Landscape) zoning. Residential land on Kennedy Point Road overlooking the marina from the west, is zoned Island Residential 2 (Bush Residential).

The Existing and future environments

[32] We have already mentioned the adjoining ferry terminal facilities for the

⁷ Counsel for the council has advised by memorandum dated 22 May that the new RCP has been approved in part by the Minister and will be operative in part from 31 May 2018.

⁸ See for instance evidence of Mr B Goff called by the Council (Maritime Officer) paragraph 3.5. Section 120(2) of the Local Government (Auckland Transitional Provisions) Act 2010.



transhipment of vehicles and bulk freight. There is also a public launching ramp and a dolphin pontoon together with moderately extensive carparking and manoeuvring areas, ramps, reclaimed areas and a large rock breakwater dated from about 2005. The northern edges of Kennedy Point Bay contain a small gravel and sand beach overhung by coastal vegetation, particularly pōhutukawa, and the western edge of the Bay is rocky. Swing moorings are found in the Bay, for which there are extant licenses, and some mooring holders stack their dinghies above the high tide line on the beach. Modest public use appears to be made of the Bay for recreational purposes such as swimming.¹⁰

[33] The council's planning witness Mr Wren provided us with helpful information about a possible future environment and the potential for change by reference to zoning provisions. Residential sites overlooking the Bay are generally between 800 – 1000m² in size, mostly developed for housing at the present time. He considered that there was little opportunity for further subdivision of land zoned rural to the north, but that there could be some further development of built form.¹¹ He noted that the Wharf Zone provides for the construction and relocation of buildings as a permitted activity, along with boat launching ramps and jetties, including boat trailer parks, carparking areas, marine fuelling facilities, passenger transport, public toilets, wharf administration and freight handling activities. He mentioned an unimplemented consent held by Auckland Transport to widen and lengthen the existing boat ramp located between the recreational boat ramp and the main wharf on the western side of the Kennedy Point ferry terminal.¹² Less certain, and not governing the existing environment, is an application by Auckland Transport still being processed, for consent to rebuild the existing wharf structure involving some repaving of the wharf and road and a slightly larger wharf footprint.

The Resource Consents Applied For

[34] The consents needed for the present proposal and applied for, under the legacy Coastal Regional Plan and the AUP are as follows:

- ACRP:C

(a) A marina outside a Marina Management Area (discretionary activity;

¹⁰ We have not sourced the evidence describing these things, because they are relatively uncontroversial, perhaps excepting information about public recreational use of the Bay, a matter we shall come to.

¹¹ D Wren, EIC, paragraph 7.18.

¹² D Wren, EIC, paragraph 7.26.



Rule 23.5.8).

- (b) Structures not part of a marina, e.g. floating pontoon carpark and office, and pile moorings (discretionary activity; Rule 12.5.18).
- (c) Pile moorings within a mooring management area (restricted discretionary activity; Rule 25.5.4).
- (d) Pile moorings outside a mooring management area (discretionary activity; Rule 24.5.5).
- (e) Occupation of the coastal marine area ("CMA") (discretionary activity; Rule 10.5.9).
- (f) Activities in the CMA not otherwise provided for (discretionary activity; Rule 11.5.5).

- AUP

- (g) Construction and disturbance not otherwise provided for (discretionary activity; Rule F 2.19.4(A37)).
- (h) Use and occupation – parking structure (discretionary activity; Rule F 2.19.8(A94)).
- (i) Use and occupation – public facilities (discretionary activity; Rule F 2.19.8(A108)).
- (j) Use and occupation – marina (non-complying activity; Rule F 2.19.8(A112)).
- (k) Vibratory piling (restricted discretionary activity; Rule F 2.19.8(A114)).
- (l) Other structures (discretionary activity; Rule F 2.19.10(A121)).
- (m) Pile moorings within mooring zone (restricted discretionary activity; F 4.4.2 (A5)).

[35] The planning witnesses¹³ agreed, and we have no difficulty finding, that the



¹³

Mr M Arbutnot for SKP Inc; Mr D Wren for Auckland Council; Mr R Blakey for Applicant; Mr C Shearer for Kennedy Point Marina Supporters Group.

proposal overall should be bundled and holistically requires consent as a non-complying activity.

[36] As an aside, but offering useful information in the round, the planners agreed that the works footnoted below are permitted activities as held in the decision appealed from.¹⁴

[37] The planners also considered that lighting proposed on the marina would comply with relevant lighting standards in both the operative district plan and the AUP; this was confirmed in the joint witness statement of the lighting experts.¹⁵ We note however that lighting remained a controversial issue for some parties, and we shall deal with that in due course.

[38] The finding that the application is to be treated holistically as non-complying is consistent with decisions of the High Court in *Tairua Marine Limited v Waikato Regional Council*¹⁶ and the Environment Court in *Waiheke Marinas Limited*, previously cited.

Statutory Framework

[39] Being a non-complying activity application, it must first pass one of the s 104D "gateway tests", that is either its adverse effects must be no more than minor, or it must not be contrary to the objectives and policies of any relevant plan or proposed plan.

[40] Should the proposal pass the s 104D gateway, the usual s 104 matters are to be had regard to:

- (a) any actual or potential effect on the environment of allowing the activity; and
- (b) any relevant provisions of [listed statutory instruments]; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

¹⁴ Earthworks for the proposed access deck in the operative district plan; noise meeting standards set out in the operative district plan and in Chapter 35 of the ACRP:C; works on the road network under the operative district plan; earthworks in the carpark on Donald Bruce Road under the operative district plan; stormwater from the deck and wharf structure to the CMA under the ACRP:C; the proposal is a permitted activity under the Sediment Control provisions of the AUP.

¹⁵ Mr G A Wright called by the Council and Mr J Mckensy called by the Applicant.

¹⁶ *Tairua Marine Limited v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [30] – [35] per Asher J.



[41] Pursuant to s 104B, we may grant or refuse the application, and if granting it, may impose conditions under s 108.

[42] Under s 290A we must have regard to the Council's decision on the application. We have done so; note that it was comprehensive; and consider that it was helpful in our deliberations on evidence we heard which we understand was not greatly different from that presented to the hearing commissioners.

[43] As to Part 2 RMA, there may be relevance of one sort or another from matters deriving from s 5, ss 6(a),(b),(d),(e) and (f) and s 7(b),(c),(d),(f) and (i), and s 8. We will address the current jurisprudential uncertainty about the manner in which the provisions of Part 2 are to be applied to resource consent applications, later in this decision.

[44] Many provisions of the RMA, in particular for present purposes ss 104,104D and 108, were amended by the Resource Legislation Amendment Act 2017. By Schedule 2 to that Amendment Act (amending Schedule 12 of the RMA) the new legislation does not however apply to applications for resource consent lodged before commencement of the amendment where they have not proceeded to the point where further appeal is possible. The present application was lodged and notified the year before the amended legislation was passed.

[45] We have considered as well, in the manner and to the extent required in them, the Hauraki Gulf Marine Park Act 2000 ('HGMPA'), ss 7 and 8 of which are to be treated as a New Zealand Coastal Policy Statement under the RMA.

Gateway test in section 104D RMA

[46] Subsection 1(a) of s 104D requires us to be satisfied that the adverse effects of the activity on the environment ... will be minor. The other available gateway in subsection 1(b) is that the application should not be contrary to the objectives and policies of relevant plans and/or proposed plans.¹⁷

[47] Bearing in mind that the positions of the Applicant and the Council under s 104D(1)(a) are different (with Mr Wren giving his opinion that this limb of the gateway is not met because of some particular more-than-minor effects), it is worth noting a concession by the Council's counsel Mr Allen that the *Cookson Road* decision about an holistic approach is consistent with earlier authority on a predecessor provision to s 104D

¹⁷ We have summarised the somewhat lengthy wording of subsection 1(b).



(s 105(2A)), citing *Stokes v Christchurch City Council*.¹⁸ We appreciate Mr Allan's candid submission that ultimately the assessment will involve conclusions by the Court as to facts and the degree of effect. We find that Mr Wren has been unduly conservative, and prefer the legal analysis offered by his counsel.

[48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "*holistic basis, looking over the entire application and a range of effects*",¹⁹ not individual effects.

[50] The evaluation under subsection 1(b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach. As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.²⁰

[51] We recorded that we have carefully considered all matters relevant to each aspect of the s 104D gateway; our analysis and reasons will appear in subsequent parts of this decision concerning effects on the environment and statutory instruments. Based on those later findings, we record here that our finding is that the proposal passes through both gateways.

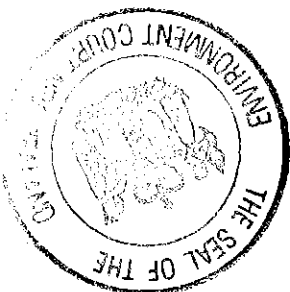
Exercising the discretion under sections 104 and 104B RMA

[52] Before we move to consider matters in contention to be assessed under these sections, it is appropriate to note current jurisprudence concerning the words in s 104(1) "... *subject to Part 2*". Mention must be made of the decision of the High Court in *R J*

¹⁸ *Stokes v Christchurch City Council* [1999] NZRMA 409 at p434.

¹⁹ See for instance *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194 at [46] and subsequent paragraphs.

²⁰ See for instance *Cookson Road Preservation Society* decision; *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [73]– [74]; *Man O' War Station Limited v Auckland City Council* [2010] NZEnvC 248. Guiding this jurisprudence has been the seminal decision of the Court of Appeal, *Dye v Regional Council* [2002] 1 NZLR 337.



Davidson Family Trust v Marlborough District Council,²¹ in which it might be said there was a partial extension of the law laid down by the Supreme Court in the *King Salmon* case,²² to resource consent applications. Very much summarised, the High Court has held, extending the Supreme Court's findings about plan cases, to consent cases, that the formerly well understood "overall judgment approach" to decision-making is rejected, with resort to Part 2 occurring where there might be findings of invalidity, incomplete coverage or uncertainty of meaning within planning documents. The *R J Davidson* decision has been appealed to the Court of Appeal, and heard by that Court; a decision is awaited. We do not think a great deal turns on any dichotomy of approach in this case, because we consider that the same result is reached by either route. Essentially Part 2 will be served either by an overall judgment approach, or because there is no need to have resort to it for the sorts of reasons discussed by the High Court in *R J Davidson*.

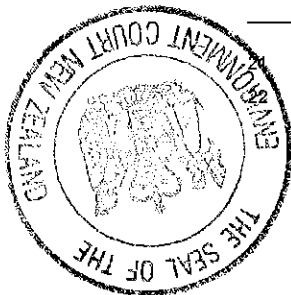
Planning Framework (s 104(1)(b) RMA)

[53] In a previous section of this decision about zoning, we touched on relevant statutory instruments. For completeness, we record here that we have undertaken assessment under s104(1)(b) RMA against:

- (a) The New Zealand Coastal Policy Statement (NZCPS) and its companion legislation HGMPA;
- (b) The AUP, including its RPS; the proposed RCP components (key provisions being in Chapter F of the AUP);
- (c) The legacy operative RCP;
- (d) The HGI Plan, even though no consents are required under it.

AUP – Proposed Regional Coastal Plan

[54] The AUP was made significantly operative in November 2016, however the RCP components require approval from the Minister of Conservation under s 152(3)(b) of the LGATPA 2010 and Clause 18(3) of Schedule 1 of the RMA. Ministerial approval has been sought, and counsel for the council advised by memorandum dated 22 May 2018 that



R J Davidson Family Trust v Marlborough District Council [2017] NZHC at [52].
Environmental Defence Society Inc v The New Zealand King Salmon Company Limited [2014] NZSC 38.

the new RCP will become operative in part on 31 May 2018.

[55] For completeness, we hold that the proposed instrument should be given significant weight, and the operative provisions limited weight, given the former's very advanced status in process terms. It will however be noticed from subsequent sections of this decision that our findings on the evidence support granting of consent under both RCPs, so the weighting issue is largely academic.

[56] A policy shift between the treatment of new marinas in the two RCPs is that in the legacy instrument, they had discretionary activity status, and in the proposed, they are non-complying.

[57] Counsel for the Applicant submitted²³ that the shift in policy was to ensure a thorough and detailed approach to assessment of new marina development proposals,²⁴ and wasn't an indication that new marinas are of themselves inappropriate coastal development. It was their submission that both regional plans expressly contemplate marinas despite the AUP classifying them as non-complying. They submitted that the appropriateness of any new marina development would be a function of its performance against relevant policy provisions, taking into account its potential effects and requiring it to meet relevant statutory tests.

[58] On behalf of the Council Mr Allan approached the issue more conservatively. He noted that the RPS within the AUP does not significantly address marinas, or issues about mooring.²⁵ It does however make provision about development in the coastal environment, requiring demonstration of a functional or operational need for an activity to be in the CMA.

[59] Coming to the RCP (as part of the AUP), Chapter F addresses marinas to some degree, as follows:

- (a) Chapter F 1.2 provides for the development and operation of **existing** marinas in the Coastal – Marinas Zone.
- (b) Chapter F 3 lists **existing** marinas (12 of them).
- (c) Chapter F 2 relating to the General Coastal Marine Zone ("GCMZ")

²³ In paragraph 41 of their opening submissions.

²⁴ This was also the expert evidence of the Applicant's planner Mr R Blakey at paragraphs 5.75 – 5.78.

²⁵ See explanation at p. 13 of section B8 (Coastal Environment).



provides for **new** marinas as non-complying activities.

- (d) The GCMZ activity tables apply to the Coastal – Mooring Zone and other coastal zones, such that a new marina is to be assessed against the detailed objectives and policies of the GCMZ and other applicable objectives and policies, for instance found in Chapters E 15, E 18, E 19, and others.
- (e) Some objectives and policies in Chapter F 2 expressly refer to marinas, one of them, Policy F 2.4.3(6) concerning dredging, referring to the development of marinas **outside** the marina zone:

Require the **development** or redevelopment of **marinas**, wharfs, piers and berths, **outside** of the Coastal – Minor Ports Zone, the Coastal – Defence Zone, the Coastal – Ferry Terminal Zone, **the Coastal – Marina Zone** and the city centre waterfront precincts, to be designed and located to minimise the need for dredging including by assessing whether there are reasonable practicable alternatives to provide for a use or activity which would avoid or reduce the need for dredging. **[emphasis supplied]**

- (f) Mr Allan and his witness Mr Wren noted numerous objectives and policies in Chapter F 2 to guide consenting decisions on new marinas outside the marina zone, covering a broad range of matters, including use, development, occupation and structures in the CMA; and some other Auckland-wide provisions.

[60] We note, (of some relevance to the present proposal in relation to the policy quoted above), that there is no dredging intended.

[61] There is also some relevance to the issue of new marinas being non-complying, from both the GCMZ and the mooring zone expressly providing for the expansion of the existing marinas in those zones by no more than 15% as a discretionary activity.²⁶ Mr Allan submitted that these provisions might counter any suggestion from opposing parties that a mooring zone as such is sacrosanct, we think with justification.

[62] The Environment Court held in its *Matiatia* decision²⁷ that a provision then found in Chapter D of the PAUP, Clause 5.1.13, set a clear preference for assessing new marinas through a plan change process. Such preference is not now found in the AUP,

²⁶

Activity Table F 2.19.8(A113), GCMZ and Activity Table F 4.4.1(A2) in relation to the mooring zone.

²⁷

At [644].



in consequence of which Mr Allan submitted that if a developer elected to take a consenting approach, it must pass a gateway test under s 104D, and would otherwise be subject to thorough assessment of all effects against relevant zones and relevant objectives and policies. We accept that submission.

[63] Mr Allan proceeded to submit that it is important not to treat a non-complying activity status for an activity as a de facto prohibited activity, citing a decision of the Planning Tribunal in *Price v Auckland City Council*.²⁸ We hold to the same effect because the proposition is trite; they are two very different activity types, one capable of attracting consent and the other not.

Policy issues concerning loss of swing moorings

[64] A concern of parties in opposition to the proposal was that it would involve the removal of most of the swing moorings presently in the Bay. Several parties and witnesses spoke of their wish to continue utilising a swing mooring, while individuals amongst the Kennedy Point Marina Supporters Group supported the agglomeration of berths consequent upon building a marina, and preferred the ease of access and security from the elements in a marina.

[65] Mr Allan and Mr Wren drew certain policy matters to our attention concerning this issue. They noted that the legacy RCP had a cap on the number of moorings, but that this has disappeared, not being replicated in the new instrument. They considered that this would pave the way for an increased number of moorings within mooring zones, making for more efficient use of them. They pointed as well to Policy F 4.3(4)(b) encouraging the replacement of swing moorings with bow-to-stern moorings where practicable. Again, an emphasis on efficiency.

[66] As to Chapter 24 of the legacy RCP, Mr Wren said:²⁹

... the Proposal involves the development of a marina that is largely located within a MMA, and while a marina is a different activity to moorings, it occupies the same general location. It accords with the relevant objectives and policies insofar as it will avoid, remedy and mitigate adverse effects (as noted above), will avoid conflicts with other activities, and represents (to a greater degree than moorings themselves) a more efficient use of the CMA.

[67] Mr Wren observed that this theme is carried into Policy F4.3(3) and F4.3(4) in

²⁸ *Price v Auckland City Council* (1996) 2 ELRNZ 443, and 448.

²⁹ D Wren, EIC, paragraph 7.162.



the new RCP.

[68] Mr M N Arbuthnot, planning consultant called by SKP, focussed strongly on Policy F2.16.3(24) in Chapter F2(GCMZ). He considered that the policy had the purpose of ensuring that sufficient provision is made for future demand for moorings in suitable areas. It reads:³⁰

Avoid structures that will limit the ability to moor vessels in the Coastal – Mooring Zone, other than those structures necessary for infrastructure that have a functional or operational need to be located in the Coastal Marine Area and that it cannot practicably be located outside the Coastal – Mooring Zone.

[69] On behalf of the Council Mr Allan submitted that Mr Arbuthnot was reading the policy out of context.

[70] Policy 24 sits in a group starting at Policy 21, which address the ensuring of safe navigation. Mr Allan considered that Policy 24 had the intent of avoiding structures that might limit the ability to moor vessels in the Mooring Zone in navigation safety terms, and was not concerned with future demand for moorings. We agree that the thrust of policies 21 – 24 is as he describes.³¹

[71] The council's maritime witness Mr Goff was clear in his evidence that the marina would not have adverse effects on navigation. This was also the clear position reached in expert conferencing by the three navigation witnesses, Mr N Drake and Mr M Schmack called by the Applicant, and Mr Goff called by the Council.³²

Effects on the Environment

Positive effects on the environment

[72] So long as the application passes through one of the available gateways under s 104D, it is appropriate to have regard to positive effects. It being a finding later in this decision that the gateway is passed (reasons will be recorded), we discuss potential positive effects.

[73] Something of the theme of positive effects was found in the legacy RCP

³⁰ M N Arbuthnot, EIC, paragraph 1.40.

³¹ Mr Allan offered an oral aside that the slightly strange wording of the policy might have arisen because it originally appeared in the Mooring Zone in the PAUP, and during the plan process focus was moved to the GCMZ.

³² Joint witness statement (Navigation Safety and Moorings Management), paragraphs 6 – 15.



concerning marinas, at Clause 23.1 (Introduction):

Marinas generally enhance amenity for boat users through the provision of a wide range of facilities and services, while providing economic opportunities and social facilities for parts of the community. Marinas also concentrate vessels and their associated effects into defined areas and provide for a more efficient use of harbour space, than other methods of securing vessels.

[74] The “efficiency” flavour of this has been carried through in part, if more indirectly, in the policies in the new instrument discussed in the previous section of this decision about moorings.

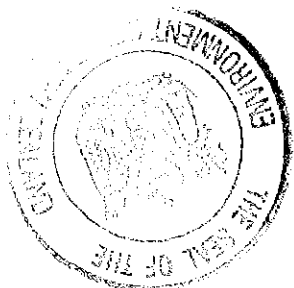
[75] Mr Wren gave evidence about positive effects,³³ supporting various claims by the Applicants’ witnesses and counsel. The Council also called the evidence of Ms J H Woodhouse, a landscape architect, on this score. These witnesses considered that the proposal would provide a range of opportunities for recreational activity, for instance the storing of kayaks and small boats; bicycle racks on the carpark pontoon; public access during daylight hours onto floating marina structures; a building for use by community groups; a small café; public drop-off and pick-up berthage; and provision for short-stay public berthage of between one and 3 days. Mr Wren also considered that such opportunities would enhance public access to the coast consistent with the NZCPS, while promoting the efficient use of occupied space in the CMA, including by requiring that structures be made available for public or multiple use wherever reasonable and practicable.³⁴

[76] The evidence of Mr M Pigneguy of SeaLink Travel New Zealand, ferry operator, discussed in more detail later in this decision, pointed to a potential positive effect of part of the marina structure offering facilities for small passenger ferries to dock without the need for expenditure of public funds on separate infrastructure.

[77] Ms A D Sharma is a scientist specialising in coastal processes, called by the Council. She offered the opinion that the marina’s floating attenuators would reduce coastal erosion, particularly on archaeological resources in the Bay, because they would offer protection of cliffs and coastal edges including the Kennedy Point Reserve; also on private properties located along Kennedy Point Road. The location of archaeological sites was described in the evidence of the council’s archaeology witness Ms R S

³³ D Wren, EIC, paragraph 7.95.

³⁴ Policy 6(2)(e)(i) of the NZCPS.



Ramsay.³⁵

[78] Improvements in roading and pedestrian facility design in the vicinity of the existing wharf and the proposed marina, were put forward by the Applicant, some of them on an **Augier** basis. These included proposals to widen the road carriage way, enhance the vehicular ferry queuing lane, provide a continuous traffic lane from the nearby intersection to the wharf, reinstate a footpath and provide a pedestrian refuge island; and upgrade the Kennedy Point Wharf carpark as recommended by Traffic Design Group Limited.

[79] The Applicant also offered on an **Augier** basis to provide new dinghy racks on the foreshore for storage of dinghies owned by owners of pile moorings. In addition, the Applicant submitted that it would be creating a sheltered swimming and small boat operation area.

[80] Once again on an **Augier** basis, the Applicant offered to establish a Kennedy Point Marina Maritime Trust to tangibly recognise the marina's occupation of public CMA, intended to operate through the management services of the Auckland Communities Foundation utilising funds the Applicant would donate. It anticipates that financial grants would be available for maritime environmental protection, safety and skills training for residents and mana whenua of Waiheke Island, including for equipment; sailing courses in maritime education for Waiheke Island youth and mana whenua; and fees for maritime related study proposals by resident mana whenua of Waiheke Island, or relating to the coastal environment of the Island.³⁶

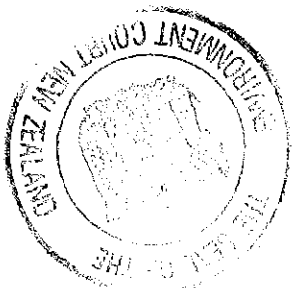
[81] These potential positive effects on the environment were not successfully challenged, and we find that they are present and we can have regard to them, which we do.

Adverse effects on the environment

[82] Understandably, given the cases brought by parties in opposition to the proposal, most of the evidence about effects concerned potential adverse effects. Each of the appellants and s274 parties in opposition brought different angles on these. SKP called most of the expert evidence in opposition. The Appellant Mr Walden (in addition to calling

³⁵ A Sharma, EIC, paragraph 7.5 and R Ramsay, EIC, paragraphs 7.20 and 7.21.

³⁶ Draft conditions 113 and 114. It is noted that funding would be \$5,000 upon establishment and \$20,000 per year, CPI adjusted for 35 years.



one witness) offered lengthy submissions that in places took on the character of evidence (non-expert) or assertions about his views on issues, for instance “unacceptable” threats and risks of various kinds.³⁷ Overall however, his submissions amounted to a wide-ranging review of evidence and submissions by others in opposition. He essentially confirmed such during his delivery, by adopting the submissions of Mr Sadlier for SKP.³⁸

Acoustic effects

[83] Evidence was received from two expert witnesses, Mr C Fitzgerald called by the Applicant and Mr N Hegley called by the Council. Acoustic effects were of considerable concern to some lay witnesses and opposition parties.

[84] The expert witnesses reached an almost complete level of agreement about matters within their respective areas of expertise, concerning construction noise and noises from an operational marina.

[85] Mr Fitzgerald’s construction noise assessment had focussed on piling as likely to generate the highest level of construction noise both in the air and under water. He used a software package “SoundPlan” to offer predictions of airborne piling noise, and considered that this noise would comply with relevant construction noise limits at the nearest dwelling. Predictions of undersea piling noise were carried out using another software package “dBsea”, utilising international criteria concerning generation of anthropogenic sound on marine mammal hearing.

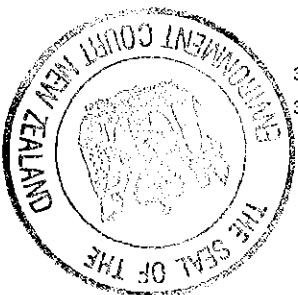
[86] Mr Fitzgerald recommended conditions of consent requiring the preparation of a Construction Noise Management Plan (CNMP) to mitigate airborne and underwater noise emissions, setting performance standards, predicted noise levels, mitigation and management strategies, monitoring, communication consultation and complaints-response procedures. We have considered the relevant draft conditions of consent³⁹ and consider that they suitably define performance standards and thresholds and methods to ensure that they are met.

[87] Mr Fitzgerald and Mr Hegley agreed in conferencing that noise levels from construction operation of the marina are predicted to comply with the relevant

³⁷ R Walden, Legal Submissions, paragraph 30. Of a similar character on other environmental issues, we identify paragraphs 52-54, 56, 57, 87, 88, 94, 95-97, 101, 103, 143 by way of example of many points made throughout.

³⁸ Oral aside as he commenced reading paragraph 27 of his written submissions.

³⁹ Draft conditions 27 to 31 (2 March 2018).



performance standards and that the noise effects would be reasonable. They approved of the conditions of consent that had been imposed by the hearing commissioners.

[88] Unlike Mr Hegley, Mr Fitzgerald did not offer expert evidence on potential effects on Little Blue Penguin, but offered general observations within his knowledge, which we shall return to.

[89] Ms M H Webb, a resident in Kennedy Point Road overlooking the Bay gave evidence (amongst other things) about construction noise for long hours six days a week.⁴⁰ Mr Hegley's response⁴¹ noted that proposed condition 27 would set upper limits for construction noise, and that in practice it would be unlikely that such would be reached for more than a few days, and then only at the closest dwellings; that for the majority of time, construction noise would be well below the proposed limits generally within noise limits for a permitted activity during daytime (50 dB L_{Aeq}). We observe that the residents of Kennedy Point Road are living in an urban area and could face construction noise on new dwellings, extensions, or maintenance, in their environment.

[90] Ms Webb, and another Waiheke resident Mr S K Hood involved with the Waiheke Boating Club, expressed concern about noise from halyards slapping on masts in the marina. Mr Hegley noted that common practice requires halyards to be fastened away from masts. Proposed conditions 93 and 99 specifically require this noise source to be addressed.

[91] Ms Webb expressed concern about berth owners "coming and going, and possible noisy parties on boats in the marina." Mr Hegley considered that such issues would be addressed by marina management, and pointed to proposed conditions 93, 99 and 112 about the requirement to prepare a noise management plan, restrictions on people living on boats, and night-time restrictions on public access.

[92] Ms Webb expressed concern about whether complaints would be properly addressed. Conditions 30(k) and 93 make provision for this both during construction and subsequent operation of the marina; and the Council has a noise control service.

[93] These concerns are adequately addressed by the proposed conditions and are not reasons to decline the application.

⁴⁰ M Webb, EIC, paragraph 30.

⁴¹ N Hegley, EIC, paragraph 4.2.



Effects on ecology

[94] An expert witness conference was held amongst eight witnesses on ecological and coastal process issues, because the two topics are interrelated in part.

[95] As to marine ecology, the experts agreed that the Assessment of Effects on the Environment adequately characterises the existing environment as to marine benthic community, and contaminant levels (copper and zinc in water column and seabed sediments). They agreed that there might be some change in benthic community composition and structure over time due to the marina, and some increase in water column and benthic sediment contaminant levels, primarily copper and zinc and some increase in the settlement of fine sediments. They agreed that wash from vessel propellers might affect benthic communities. There were otherwise quite divergent views about potential effects.

[96] Dr Sivaguru, called by the Council, examined potential ecological effects, particularly inter-tidal habitat loss from the construction of the access wharf for pedestrians and vehicles from Donald Bruce Road. Habitat loss from the construction of the marina (mainly piles) and effects on Little Blue Penguin habitats on existing breakwater and effects on one site close to the existing breakwater.

Effects on Little Blue Penguins

[97] This issue proved one of the more contentious in the hearing. Little Blue Penguins (also called "Little Penguin") are identified as "At Risk – Declining" in the latest edition of the New Zealand threat classification system.

[98] There was agreement that a recent survey had detected seven burrows in the existing breakwater, one near a small pōhutukawa tree, one off the footpath, and one burrow with one large chick very close to the loading ramp of the car ferry.⁴² Effects on these birds were, we were told the subject of considerable discussion at mediation (without of course the detail being reported to us), which at that stage had involved Royal Forest and Bird Protection Society Inc., as well as parties who appeared before us. Conditions of consent were revised and largely agreed at mediation amongst some parties including Forest and Bird which thereafter withdrew.

[99] The issue is one of importance given the requirements of Policy 11 of the NZCPS

⁴² K Sivaguru, EIC, paragraph 7.11.



about indigenous biological diversity including in particular the avoidance of adverse effects of activities on indigenous taxa listed as threatened or at risk in the New Zealand threat classification system lists; a step beyond the requirements of s 6(c) of the Act focussing on habitat, as discussed by this Court in *Pierau v Auckland Council*.⁴³

[100] There was no evidence that known existing penguin burrows would be physically disturbed by the construction of the marina. Draft conditions 24A and 61 have been devised to deal with any scenario where penguins might establish new burrows in the small section of rock wall that will be disturbed (where no nests have been observed to date). The conditions include requirements for consent holder to maintain or enhance penguin nesting, roosting, and moulting habitat after construction. Draft condition 97 is, we were told by the applicant and its witnesses, designed to minimise potential adverse construction effects (noise, lighting, machinery movement, pest predation) on nesting and roosting penguins in the locality; along with regular monitoring.

[101] It was the evidence of Dr Sivaguru that there would be benefits from the presence of the marina creating a low speed environment within 200 metres of shore, lessening risk of vessel strike and propeller injuries.⁴⁴ It was submitted on behalf the council that condition 97(i) would require measures to be included in the Marina Management Plan ("MMP") to ensure that vessels approaching the marina at dawn and dusk would take special care to avoid collisions with penguins, through signage and advice.

[102] Dr M Bird called by SKP has experience working with Little Blue Penguins, particularly on Tiritiri Matangi Island. Amongst many things, he was concerned that there is a variety of habitat in the surrounding coastal margins that would be suitable for nesting and roosting sites for these birds, including on the steep hill slopes on the western side of the Bay, despite there having been no detection of them there to the present time.⁴⁵

[103] Dr Bird gave the opinion that Little Blue Penguin habitat cannot effectively be enhanced, and that they generally return to areas of known burrows or adjacent areas; he considered that they generally only use artificial burrows as a last resort and that there had been limited success in this regard on Tiritiri Matangi Island. He considered that Little Blue Penguin nests cannot be translocated.⁴⁶ He offered a view that the proposed marina infrastructure and vessel activity might prevent nursing parents returning to nestlings,

⁴³ *Pierau v Auckland Council* [2017] NZEnvC 090.

⁴⁴ K Sivaguru, EIC, paragraph 8.32.

⁴⁵ M Bird, EIC, paragraph 6.1.

⁴⁶ M Bird, EIC, paragraph 6.5.



which could lead to abandonment of nests. He was very concerned about vessel and propeller strike.⁴⁷ Dr Bird was particularly pessimistic in his views about potential effects of young fledglings acclimatising; influences on breeding and moulting seasons and abandonment of nests; reliance on high site fidelity year on year; possible disturbance by lighting on communication and courtship behaviour; loss of a parent possibly causing a nest to be abandoned; the need for consistency of natural behaviour; delays to breeding seasons leading to delays in fledging, moulting, and foraging.⁴⁸

[104] We were concerned that Dr Bird's evidence was in the main based on assertion or surmise, and offered very little in the way of empirical information. We record some rather striking examples of this in a later section on other birdlife. Dr Bird seemed relentlessly pessimistic in comparison to the other ecology witnesses, and unaccepting of their suggestions about avoidance of effects through the very thorough iterative approach to drafting conditions of consent. Regrettably he seemed quite unwilling or unable to accept that other witnesses have experience with these birds and might offer sensible points of view and reasonable solutions.

[105] We note that Mr M Poynter, called by the Applicant, acknowledged that he is not a specialist in this species, but he is nevertheless a marine ecologist of long experience, particularly in the Northland and Auckland regions, and has experience with the development of marine infrastructure including marinas in locations where ecological issues need carefully to be taken account of, and often avoided.

[106] Dr Sivaguru considered as a result of her investigations at Kennedy Point, that the penguins appear to prefer artificial habitat provided by the relatively recently constructed breakwater.⁴⁹ She was happy that the proposal avoids the breakwater. She was comfortable with assessment of the extent of proposed disturbance (not near any identified burrows or nests), and the conditions proposed to avoid effects, particularly condition 22, should things change.⁵⁰

[107] As to dogs and other potential predators, we note the practical advice of Dr Sivaguru that considerable attention has been given to this topic in draft conditions of consent, particularly 90(b), 97(g), 97(h) and 118. Dogs being required to be kept under control at all times, and active plans for trapping of pests such as rodents and mustelids,

⁴⁷ M Bird, EIC, paragraph 6.2.

⁴⁸ M Bird, EIC, paragraph 6.2.

⁴⁹ K Sivaguru, EIC, paragraph 7.13.

⁵⁰ K Sivaguru, EIC, paragraph 8.31 and 8.32.



offer considerable promise for protection of the penguins and other bird species in the vicinity. She considered this a positive effect, pointing to proposed condition 118.

[108] In answer to criticism by SKP about draft conditions 24A and 61 involving phrases “as far as is reasonably possible”, and “to the greatest extent practicable” respectively, the applicant submitted that in a practical sense the finding of all active penguin burrows might not be entirely possible despite best endeavours, and the latter is advanced in connection with preparation of the construction works programme component of the Construction Management Plan encouraging onsite construction works outside the penguin breeding season.

[109] For the reasons recorded in this section of our decision, and the later one on other birdlife, we have a distinct preference for the measured evidence of Dr Sivaguru and Mr Poynter over the evidence of Dr Bird which we found unduly alarmist, barely supported by empirical information, incapable of acknowledgement of reasonable contrary views, and generally overstated.

Lighting effects on penguins

[110] Dr Bird offered an opinion while discussing courtship and breeding behaviour of little penguins that “*it is probable that the noise and light emanating from the marina at night would disturb the courtship behaviour of little penguin*”. No detail was offered from observations or other studies. Mr H E Ross, a volunteer and officer with the local branch of the Royal Forest and Bird Protection Society Inc., expressed concern about the potential impact of lighting on little penguins, amongst other effects. Ms S M Fitchett, a party under s 274 also having active involvement with that organisation, has also been involved in monitoring and working for the protection of little penguins on the Island. She observed⁵¹ and expressed a view that penguins are known to be averse to strong light. Neither witness claimed scientific qualifications, but we accept the genuineness of expression of concern.

[111] Mr G A Wright is a consulting engineer specialising in lighting who was called to give evidence by the Council. He noted the concerns we have recorded, and offered advice from his knowledge and experience, including conducting research on possible effects of night-time light on little penguins. He acknowledged it was important to have appropriately designed night-time lighting that minimises spill light intensity to penguins’

⁵¹ S Fitchett, EIC, paragraph 13.



habitats and avoids high intensity horizontal lighting.⁵² He considered that the lighting proposed for the marina would achieve these qualities, as it is to be well baffled and directed downwards to minimise spill.⁵³

[112] Mr Wright offered a practical observation. He noted that penguins inhabiting burrows at Kennedy Point have chosen to inhabit an environment where night-time artificial lighting is present from the ferry terminal and wharf and also nearby residential dwellings.⁵⁴ He also expressed his view that foreshore vegetation, breakwater topography and burrow topography (depending on the nature and location of the burrow) would provide some mitigation of light effects.⁵⁵

[113] Mr Sadler questioned the applicant's lighting engineer witness Mr J K Mckensey about the effect of different light wavelengths on little penguins, and he conceded he was aware of it. No SKP witness exchanged evidence on it. In his answers to other questions, Mr Mckensey confirmed his earlier evidence that the lights proposed would be unobtrusive.⁵⁶ In the end, we rely on the evidence of Mr Wright, who confidently felt that the penguins' acknowledged sensitivity to certain spectra of light, could be addressed satisfactorily as to light levels and directions, through conditions of consent.⁵⁷

[114] We have been provided with no reasoned evidence to support the expressions of concern. We have no basis for doing other than accepting Mr Wright's careful opinions from his research and observations. There is no basis for holding that there is a potential adverse effect on the environment in this regard that is more than minor.

Acoustic effects on penguins and other birds and wildlife

[115] In another brief assertion not backed by reasons, Dr Bird postulated that "*excessive noise or other significant disturbance may cause nursing penguins to abandon nests*".⁵⁸ He also stated, "*Little penguin and other avian species such as oystercatcher and red-billed gull will be affected by noise that is proposed for 10.5 hours*" [during construction].⁵⁹

⁵² G Wright, EIC, paragraph 8.3.

⁵³ G Wright, EIC, paragraph 8.3.

⁵⁴ G Wright, EIC, paragraph 8.5.

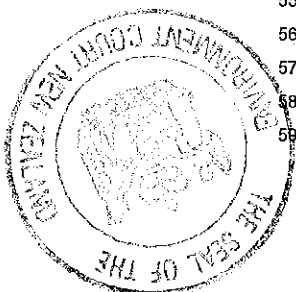
⁵⁵ G Wright, EIC, paragraph 8.5.

⁵⁶ Transcript p. 112

⁵⁷ Transcript pp. 217-8

⁵⁸ M Bird, EIC, paragraph 6.2(a)(v).

⁵⁹ M Bird, EIC, paragraph 6.8.



[116] The Council's acoustic engineering witness Mr Hegley gave evidence that he has studied the effects of noise on wildlife including penguin, by reading scientific publications which he named in his evidence.⁶⁰

[117] It was his view that it is not the noise that generally disturbs penguins, but the association of an activity that goes with the noise. From his own experience, he said he had seen penguins coming to and following a powerful outboard motor and a passenger liner in a remote area with no other manmade noise at all in the area. He was aware that noise from gunshot has little effect on repelling birds at an airport or an orchard unless the noise is reinforced with the actual shooting of the birds.

[118] Mr Hegley noted from the evidence of Dr Sivaguru⁶¹ that burrows are located relatively near the shoreline at Kennedy Point and the existing breakwater amongst other locations, so will be exposed to wave noise. Mr Hegley quantified the likely levels of wave noise (from 300 – 500mm waves) as typically being between 65 and 70 dB L_{Aeq} .

[119] Mr Hegley's views on these and related matters were tested by Mr Sadlier in cross-examination.⁶² Mr Hegley maintained his opinions, added a little more detail, and appropriately conceded that he was unable to answer one question about penguin behaviour and perceptions while accessing burrows when surrounded by human-generated noise. His evidence in chief was not undone in any respect by the questioning.

[120] It appears to us that there exists very little problem for the penguins in the current environment, and we accept Mr Hegley's opinion that with controls on the various anticipated types of noise through conditions of consent, including during construction, adverse effects would be no more than minor.⁶³

[121] Mr Hegley offered the opinion that there would be no adverse effects for other bird species. For instance, Oystercatchers nest just above the high tide level in areas where noise is generated by waves measured at even higher levels 70 – 75 dB L_{Aeq} with a typical sea. He is also aware of locations where Oystercatchers happily feed and rest within two to three metres of a state highway that carries approximately 2,000 vehicles per day and 8% heavy commercial vehicles; there are similar examples for Red-billed gulls where they happily forage for food at landfill amongst heavy landfill machinery and

⁶⁰ N Hegley, EIC, paragraph 4.8.

⁶¹ K Sivaguru, EIC, paragraph 7.11.

⁶² See two un-numbered pages of transcript created from notes taken and agreed by counsel on account of a short breakdown in digital recording at this time of the hearing.

⁶³ N Hegley, EIC, paragraph 4.17.



are difficult to move on.⁶⁴ We have no evidence to doubt this evidence, and accept it.

[122] Another of Dr Bird's assertions was "*noise from vessels and people using marina: noise as a hazard to marine species such as Bottlenose dolphin. Noise can disorientate marine species*".⁶⁵

[123] Mr Hegley gave evidence⁶⁶ that there are numerous examples of dolphins following boats, from high-powered outboard motors to ocean liners, seemingly enjoying the conditions, and that he was not aware of any research demonstrating that there would be adverse effects generated by noise from boats such as those that would be located within the proposed marina.

[124] Considering other types of noise impacting on wildlife, we refer to the joint witness statement of the two acoustic witnesses, Mr Hegley for the Council and Mr Fitzgerald for the Applicant, referring to the proposed conditions of consent about construction noise and observing:⁶⁷

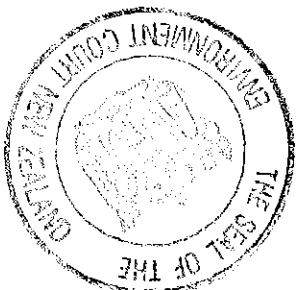
Underwater noise is unlikely to result in physical injury to marine mammals, with the largest potential risk radius of less than 10m for vibratory piling methods. The behavioural response 'zones of influence' threshold are considered the appropriate trigger for management measures, the largest of which extends 1,440m for vibratory piling methods.

[125] There is no aspect of any of the evidence that allows us to do other than find adverse effects on the environment under this head will be anything more than minor.

Other birdlife

[126] Dr Bird's wide-ranging concerns extended to other shore and wading birds. Once again, we felt that his concerns were often overstated and not grounded in empirical studies or in recorded, let alone verified, observations. But one of many examples was his suggestion that "*Kennedy Point is part of the Waiheke Island ecosystem(s) and the wider biome and ecotones of the Hauraki Gulf and Auckland Region*".⁶⁸ He expressed concern that Kennedy Point is in an area of ecological corridors and flyways, and presented a map⁶⁹ as a "*representation of some of these possible corridors...*",⁷⁰ with one

64 N Hegley, EIC, paragraph 4.15.
 65 M Bird, EIC, paragraph 6.15(c).
 66 N Hegley, EIC, paragraph 4.16 and 4.17.
 67 Noise JWS, paragraph 9.
 68 M Bird, EIC, paragraphs 5.1 to 5.3
 69 M Bird, EIC, Figure 1.
 70 M Bird, EIC, paragraph 5.3.



possibly passing over the site of the marina proposal.

[127] The problem with this evidence was confirmed under cross-examination by Mr Littlejohn. The use of the word "*possible*" was confirmed as he hadn't undertaken observations here,⁷¹ but were "indications" coming from some work he did for the council at Hibiscus Coast.⁷² We are driven to observe that Dr Bird's evidence on these things became even more extraordinary when, under further cross examination, he spoke of concerns about birds flying into masts in the marina and the masts preventing them from landing on the beach, before being forced to concede that Kennedy Bay is not the only gravelly beach on Waiheke, and is not identified as an ecological area or as a feeding ground for wading or migratory birds.⁷³

[128] There were unfortunately many other examples of assertion, surmise and lack of empirical evidence in Dr Bird's evidence in chief and answers under questioning. It would be unnecessary and tedious for us to describe them all. The difficulties with much of Dr Bird's evidence and many of his answers to questions included that they were mainly surmise or assertions lacking empirical backing. We were also troubled that his evidence was not backed by holding relevant tertiary qualifications. It was established under cross examination by Mr Littlejohn that Dr Bird's master's and doctorate studies were in branches of ecology other than avifauna, although he said that he had undertaken group studies in avian matters at Massey University, supervised others who had been studying terrestrial bird species on Tiritiri Matangi Island, been a member of a group studying little penguin on that island, but had not published or had any peer reviews undertaken.

[129] We much prefer the evidence of Dr Sivaguru to the effect that the location is not identified as having significant avifauna values, for instance it is not recognised in the AUP as a wading bird site or nesting area. From observation, she considered that there was no evidence of any established nesting population of coastal birds, except for the penguins.⁷⁴ Her evidence strongly matched that of Mr Poynter which we also much preferred over Dr Bird for the same reasons.

[130] To the extent that there might be other such species present, proposed condition 118 about a predator control programme, should offer a positive benefit.

⁷¹ Transcript p. 321, lines 29 to 31.

⁷² Transcript p. 321, lines 13 to 16. We assume he means the western coast of the Hauraki Gulf near Orewa, which we measure on a chart to be over 25 nautical miles away to the northwest.

⁷³ Transcript p. 322, lines 1 to 20.

⁷⁴ K Sivaguru, EIC, paragraphs 8.2 and 8.3.



Terrestrial ecology

[131] Once again we felt that Dr Bird was overstated in his expression of concern, on this occasion to the effect that the full range of the terrestrial taxa had not been identified through detailed survey of reptiles.⁷⁵ Once again we preferred the detailed and sensible response by Dr Sivaguru that the marina is almost entirely located in the CMA; it is not identified in any relevant planning instruments as having significant terrestrial ecological values; and it is adjacent to an existing ferry terminal which presents as a highly modified environment. She considered that there would be unlikely to be any direct effects on terrestrial ecology from the marina, and that surveying the terrestrial environment would be unnecessary.⁷⁶

[132] We feel comfortable in accepting Dr Sivaguru's advice about these things, and find for her evidence accordingly.

Effects on benthic community composition – movement of sediments, and effects from antifouling paints

[133] As a group, these issues attracted a good deal of evidence, but we were frankly left wondering why. We find they are best dealt with by means of a fairly practical short circuit. The extensive evidence about benthic community composition, reductions in current flow from the presence of the marina, fining, movement and settlement of sediment in the marina, and cumulative effects from contaminants discharged from the marina (particularly antifouling paints on boats), can largely be drawn back and resolved by way of draft and further-refined conditions of consent about the use of low-impact antifouling products.

[134] We note a proposed feature for this marina that breaks new ground. Conditions of consent are proposed innovatively to control the nature of antifouling paints and other potential contaminants in the marina. Draft conditions 39 – 45 provide for the creation, and approval by the Council, of a water and sediment quality monitoring programme ('WSQMP'); also, appropriate review provisions concerning water and sediment quality conditions in relation to possible discharges of trace metals and co-biocides from antifouling paints, and accidental discharges of human sewerage from boats. Baseline monitoring is proposed against certain stated objectives, water and sediment quality

⁷⁵ M Bird, EIC, paragraph 4.3.

⁷⁶ K Sivaguru, EIC, paragraph 8.1.

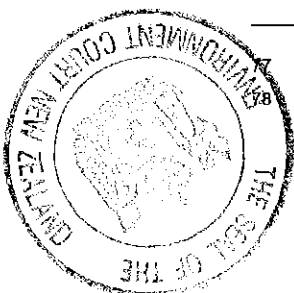


monitoring and sampling; preparation of the document against national and international published guidelines stated in the draft conditions; procedures to be stated for guideline exceedances; implementation; and subsequent monitoring and review.

[135] Of particular note is draft condition 99(c) requiring berth-holders not to use antifouling products incorporating the co-biocide diuron; requiring use of low impact antifouling products such as non-copper, low-copper formulation or low copper release antifouling paints; provision of information and advice to berth holders regarding NZEPA directions about antifouling paints on an ongoing basis; and provision of information and advice to berth holders concerning the use and availability of best practice antifouling paints; supported by provisions for compliance and enforcement.

[136] We were impressed by the sound methodological approach to the issues by the witnesses called by the Council, marine scientist Mr M J Cameron specialising in ecotoxicology and contaminant accumulation in marine invertebrates, Ms A D Sharma a marine scientist specialising in oceanography, and Dr Sivaguru. By reference to their expert knowledge and experience, and the draft conditions of consent, these witnesses offered the opinion that effects from antifouling paints from the present proposal should be no more than minor. Of note, Mr Cameron gave evidence that marinas and mooring areas are at present a direct source of copper and other antifouling contaminants in the marine environment due to the nature of antifouling paints on vessel hulls and marina structures. In particular, copper is found in most antifouling paints in use in New Zealand. Mr Cameron noted existing relatively elevated copper levels in the water column in the Putiki Bay area (which includes Kennedy Point Bay), but that existing copper levels in sediments of the proposed marina footprint are not considerably elevated, and occasional copper in the water column is not settling out substantially in the sediments of the proposed marina footprint.⁷⁷

[137] Mr Cameron noted that the marina is of "porous design" due to the use of floating pontoons rather than solid rock walls and that there will continue to be substantial flushing through the marina and associated dilution and dispersal of contaminants from antifouling paints. He noted however that there would be a concentration of vessels. This caused him strongly to support the restrictions on use of antifouling paints other than those with no or low copper content.⁷⁸



M Cameron, EIC, paragraph 6.3.

M Cameron, EIC, paragraph 6.4 and 6.5.

[138] Dr S T Mead is an environmental scientist, called by SKP, with experience in marine consulting and research, and a background in environmental science, coastal oceanography, numerical modelling, marine ecology and aquaculture.

[139] Despite making some quite important concessions, for instance that the lack of breakwaters would mean that tidal currents in the Bay will not be greatly affected,⁷⁹ he maintained focus on other aspects of design such as wave energy attenuation being likely to change benthic community composition and result in accumulation or increasing levels of contaminated sediment within the marina footprint.

[140] Ms Sharma generally acknowledged the latter point, but considered that due to low existing currents and little predicted change in current speeds within the marina, significant increases in sedimentation would not be expected; and that accumulation of fine material would be anticipated with slow rates of deposition over time.⁸⁰

[141] Dr Sivaguru cited the Tonkin and Taylor (2017) report on borehole data as indicating that the majority of the sub-tidal area of the Bay is muddy and/or sandy, and that the soft sediment community that inhabits it would be tolerant to muddy and sandy sediment and would take an even longer period to show response to the changes in sediment composition.⁸¹

[142] In the joint witness statement on ecology and coastal processes⁸² Mr Cameron, Dr Sivaguru and Mr Poynter agreed that if the proposed conditions about antifouling contaminants are adhered to, and further adapted should monitoring indicate an issue, the risk of adverse effects on benthic composition and structure should be low and acceptable.

[143] We developed a feeling that Dr Mead's concerns were overstated, especially considering his subtle acknowledgement that potential changes in community composition would be likely to be minor, albeit where the impacts of the marina are considered in isolation.⁸³

[144] The latter concession appeared to cause a shift of concern by Dr Mead, to a focus that contaminants discharged from the marina might have adverse cumulative effects

⁷⁹ S T Mead, EIC, paragraph 9.

⁸⁰ A Sharma, EIC, paragraph 7.2 and 8.4.

⁸¹ K Sivaguru, EIC, paragraph 8.25.

⁸² Ecology and Coastal Processes JWS, paragraphs 19(b) and 23(a).

⁸³ S T Mead, EIC, paragraph 31.



beyond the marina. This concern was not shared by the experts engaged by the applicant and the council. Again, we considered that Dr Mead was overstating things because⁸⁴ he accepted that in isolation it is possible to conclude that the proposed marina will have only minor impacts on the life supporting capacity of the Hauraki Gulf (before saying that in addition to other activities “it would add to the burden”).

[145] We thought that Mr Cameron put matters in proper context when he said⁸⁵ that the additional effects of the marina on copper loading and the wider Hauraki Gulf would be relatively minor, given that there are already in excess of 8,000 boats resident in the Gulf. To which we would add our acknowledgement of the proposal for limitations on antifouling paints on boats resident in the marina, to low or no copper bearing products.

[146] Somewhat ironically in the context of these matters, SKP had sought an adjournment prior to the hearing to allow Dr Mead to undertake a modelling exercise concerning potential cumulative effects. The applicant, supported by the council, considered that further modelling was not necessary given the particular proposal about control of composition of antifouling paints. The adjournment application was refused.

[147] The respective positions of these witnesses, particularly what we considered to be the unsatisfactory stance of Dr Mead, showed up under cross examination by Mr Allan. It transpired that he had not read the relevant draft conditions, for instance as exhibited to the EIC of the applicant’s planning witness Mr Blakey, before preparing his evidence. Indeed, he had not read them (at least in any detail) until the day before giving evidence in the appeal hearing.⁸⁶

[148] Dr Mead proceeded to make further major concessions when taken by Mr Allan through relevant draft conditions, agreeing that there are rapid advances now being made away from toxic substances in antifouling paints to the likes of zinc, silicone, and other abrasive substances. Dr Mead conceded that he supported a consent regime in which adaptation to new products in the future could be ensured. He said he “definitely agree[d]” that the approach to removing copper at source was sound.⁸⁷

[149] Through the processes of expert conferencing and mediation, the relevant

⁸⁴ In his EIC, paragraph 36.

⁸⁵ M Cameron, EIC, paragraph 8.2.

⁸⁶ Transcript p. 363, lines 11 to 23.

⁸⁷ Transcript p. 364, lines 5 to 34. The Court raised with parties during the hearing its having made a recent determination by consent on this topic in settling the new Kermadec Islands Regional Coastal Plan prepared by DOC, although the witness was not aware of it.



proposed conditions of consent have been closely tested. Despite being, as described by Mr Allan, "ground-breaking", we ultimately failed to understand Dr Mead's insistence, despite certain concessions on his part, on ignoring the sensible approach proposed by the applicant and the council.

[150] Finally, on this topic, there arose a debate again initiated by Dr Mead suggesting that biological monitoring would be required in the future in relation to benthic ecology. (Comprehensive monitoring is already proposed for sediment and water quality).

[151] We consider that the short answer is supplied by Dr Sivaguru and Mr Cameron in their confident opinions that such monitoring would not be required because direct measurement of the most likely stressor to evoke ecological response (copper) would allow for quicker and more targeted management responses; difficulties of inherently invariable and problematic biological sampling; and the fact that management response to any noted change in ecology would result in the same course of action being taken as one to meet negative results of monitoring contaminants.⁸⁸

Potential effects on archaeological sites

[152] Evidence on this aspect of the case was given by two expert archaeologists, Dr Hans-Dieter Bader for the Applicant, and Ms Rebecca Ramsay for the Council. In expert conferencing they agreed that the prior archaeological assessment by Dr Bader was accurate as to recorded archaeological and historic heritage in the immediate vicinity of the proposal; that works required for construction use and maintenance would not adversely affect them; there would be low likelihood of encountering previously unrecorded archaeological remains during the works for the proposed wharf and access ramp (underneath the existing surface of Donald Bruce Road); that potential effects on currently unrecorded sites can be adequately mitigated by the inclusion of the Applicant's revised conditions 63 – 65 in any consent granted, providing for the effective management of heritage sites in the vicinity during the construction period; and that aspects of marina design may alleviate the impact of coastal erosion of the archaeological resources within the Bay by reducing wave induced erosion on known sites.

[153] SKP called evidence of a member of the Waiheke community specialist in anthropology and linguistics, who is a member of the NZ Archaeological Association, Ms

⁸⁸ M Cameron, EIC, paragraph 8.7 and K Sivaguru, EIC, paragraph 7.6.



A H Charters, and Mr P D Monin an historian also resident on Waiheke Island. Neither witness however purported to give evidence as an expert archaeologist. We acknowledge that Mr Monin is a noted historian on the Island, and Ms Charters claims "some knowledge of NZ Archaeology".⁸⁹

[154] These two witnesses used evidence of recorded archaeological and historic heritage sites within the wider Putiki inlet and further afield, to undertake an exercise that was described by the Council's witness Ms Ramsay to "*frame their argument that the proposed marina will create a disconnect within the archaeological and historical landscape*".⁹⁰ We are concerned that Ms Charters and Mr Monin have endeavoured to stretch matters beyond archaeology and beyond their own fields of expertise, and for this reason prefer the evidence of Dr Bader and Ms Ramsay "sticking to the knitting" to put it somewhat colloquially. While interesting and wide-ranging, the claims by Ms Charters and Mr Monin are in our view adequately summed up by Ms Ramsay when she said "*there is presently not enough archaeological evidence to support the substantive claims and conclusions provided in Ms Charters' and Mr Monin's statements of evidence*".⁹¹ We also have a concern about Ms Charters appearing to assign cultural values to archaeological sites, which we consider is for those who hold mana whenua to do, not archaeological witnesses, or Ms Charters.

[155] We note favourably Ms Charters's acknowledgement that the marina will not physically affect any recorded archaeological sites.⁹²

[156] We reiterate our findings about coastal processes to the effect that attenuation of the wave climate in the Bay is likely to be of benefit to archaeological sites, a positive effect on the environment.

Cultural effects

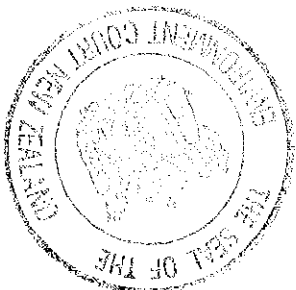
[157] There was an unfortunate division of evidence about Māori cultural effects. The Council called no evidence in this area, submitting simply that persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and

⁸⁹ A Charters, EIC, paragraphs 2 – 6.

⁹⁰ R Ramsay, EIC, paragraph 8.5.

⁹¹ R Ramsay, EIC, paragraph 8.21.

⁹² H Charters, EIC, paragraphs 12 and 13.



findings in relevant case law on these matters. We approve of that approach.

[158] The Applicant, from an early stage of its emerging interest in the proposal, placed what we consider to be appropriate emphasis on gaining an understanding of Māori cultural values, and being guided by them. Of some interest was the involvement of one of its counsel Mr K R M Littlejohn in assisting it in its early preparations and subsequent steps right through to presentation of the case before us.⁹³

[159] On Mr Littlejohn's advice, the Applicant initially contacted representatives of the Ngāti Paoa Iwi who they understood held mana whenua for Waiheke Island. Mr Mair of the Applicant evidently felt a reluctance to advance a proposal without a clear understanding of how local Iwi would receive it.⁹⁴

[160] In addition to its understanding concerning the position of Ngāti Paoa, the Applicant actively sought cultural values assessments from it and other Iwi registered with the Council as having cultural values in the region. In the event, two detailed cultural values assessments were received, one by Ngāti Paoa Iwi Trust, and the other by Ngai Tai Ki Tamaki Tribal Trust. While the summary of the assessments was placed in the assessment of effects on the environment provided to us in the Common Bundle, the full assessments were also exhibited for us.

[161] Both assessments described relevant values held by the two Iwi, and offered a neutral stance on the proposal for the marina in Kennedy Bay.

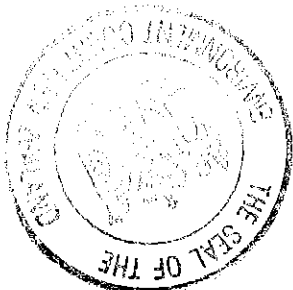
[162] The Applicant called evidence from Morehu Wilson, Rangatira of Ngāti Paoa, authorised to speak on behalf of the Ngāti Paoa Iwi Trust. It is the position of Ngāti Paoa that it is the principal Mana Whenua of Waiheke Island and its surrounding waters.

[163] Mr Wilson's evidence was quite unequivocal as to views of Ngāti Paoa on the project; that is, it supported it subject to the conditions proposed by the Applicant. Five paragraphs of the evidence of Mr Wilson summarise the position of Ngāti Paoa, and we quote them here:⁹⁵

⁹³ Mr Littlejohn adopted the unusual approach of undertaking two roles, one as a witness on these matters, and the other as junior counsel undertaking cross-examination of certain opposition witnesses. We felt some unease at this approach, but did not spend time trying to put our finger on why, because there seemed no overt conflict of interest and no unmanageable consequences for the progress of the hearing.

⁹⁴ K R M Littlejohn, EIC, paragraph 2.1.

⁹⁵ M Wilson, EIC, paragraphs 5.4, 5.6 – 5.9.



- 5.4 Our ancestral connection to Waiheke is well known and documented...
- 5.6 Ngāti Paoa seeks to reclaim responsibility, control over, and the management of resources we traditionally had control over for the preceding thousand years.
- 5.7 This project allows us to do this and ensures that Ngāti Paoa values outlined above will be incorporated into all aspects of the design, development, construction, management and operation of the project on an ongoing basis.
- 5.8 Ngāti Paoa will hold KPBL to the highest standards possible in line with our obligations to uphold Ngāti Paoa values and preserve and protect the area within which the project will be developed.
- 5.9 We believe that the revised design (including breakwaters) preserves the mauri and wairua of Putiki Bay by allowing the waters to flow unimpeded. We will not tolerate uncontrolled waste in the waters of Tikapa Moana and believe the plans for collection and safe disposal of such waste meet our high standards. We will be vigorous in enforcing these standards.

[164] SKP called the evidence of four witnesses from and on behalf of the Piritahi Marae. The witnesses were concerned about, amongst other things, lack of consultation with them, impacts on the wairua and mana of Putiki Bay, breaches of tikanga and impacts on a cultural landscape.

[165] As to lack of consultation, we reiterate there is no duty under the RMA to consult, (but as held in many cases, risk of lack of consultation by an applicant is on it, because it might not discover things that are important to a proposal and its wider interests). Mr Littlejohn responded to this complaint⁹⁶ by acknowledging its correctness. He apologised for any personal slight that might have been felt by members of the marae, but noted the position understood by him on a continuing basis that consultation was undertaken with the party primarily understood to hold mana whenua on Waiheke Island, Ngāti Paoa, and was, on advice from the Council, extended to other mana whenua groups with interests in the wider region (correspondence being sent to no fewer than 17 recognised mana whenua groups). It was Mr Littlejohn's position that it was intended that the wider public consultation process would inform the rest of the community (which would include Piritahi Marae) and provide them with a point of contact if they wished to discuss the project. He noted that despite that, very little contact was made by anyone directly to the Applicant; also that Piritahi Marae did not make a submission on the application when it was notified.

[166] We hesitate to analyse and contrast the very detailed information offered by the marae witnesses and the mana whenua witnesses, and the conflicting conclusions drawn

⁹⁶ K R M Littlejohn, EIC, Paragraph 7.1 – 7.5.



by those two groups. The issues can be quite shortly resolved without undertaking such a complicated exercise.⁹⁷ This is because while some of the members of Piritahi Marae, including witnesses, whakapapa to Ngāti Paoa amongst other Iwi, the policy framework that we must work with, particularly that in the AUP's Regional Policy Statement, Chapter B6 Mana Whenua, definitively addresses the provisions of Part 2 RMA on Māori cultural matters in the Auckland regional context. We think the matter was described well in the final report and decision of the Board of Inquiry into the East-West Link Proposal⁹⁸ where it was recorded:⁹⁹

[T]he RPS identifies Mana Whenua as the specialists in identification of cultural values and effects. [The Board] notes that the Unitary Plan also recognises Mana Whenua as specialists in tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, waahi tapu and other taonga.

[167] We rely on the information and overall stance offered by mana whenua, Ngati Paoa Iwi, so our findings on these issues favour the applicant.

Traffic and transportation effects

[168] This was an area in respect of which concerns were largely resolved amongst the experts by the conclusion of the hearing. No experts were called by opposition parties, so the expert evidence that was considered by us was advanced by the Applicant and the Council, and refined in the conference of traffic and transportation experts to the point of near resolution. Final resolution amongst them was achieved by the final day of the hearing.

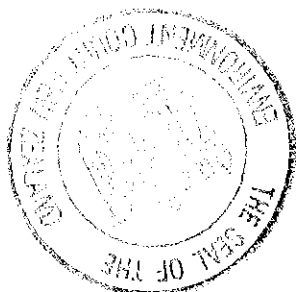
[169] The AEE contained a detailed transportation effects assessment prepared by Traffic Design Group and supported by evidence in chief from its principal, Mr D J McKenzie. Evidence in chief was offered for the Council by Mr A C Mein, another specialist in traffic engineering and transportation planning.

[170] Concerns were expressed by lay witnesses in opposition to the marina, but these

⁹⁷ For the record, we have read the evidence of all witnesses closely, as well as relevant submissions. The relative standing of the two groups as discussed in the paragraphs of this decision on cultural effects was not challenged during the hearing. We note that Mr Sadlier's cross examination of Mr Morehu, recorded in the transcript between pages 185 and 195, was mostly focussed on certain matters largely in common between Ngāti Paoa and the Marae, or designed to clarify matters, or seek information about Ngāti Paoa governance entities. Importantly, it did not challenge matters on which the two groups disagreed. Lack of cross examination by the applicant's counsel of Marae witnesses conveys its reliance on its submissions that have in fact led to our core finding on this topic above.

⁹⁸ See paragraph [408] of that document.

⁹⁹ Citing in particular Policy B6.2.2(1)(e).



were comprehensively answered by the expert witnesses named above.

[171] Evidence was also called by Auckland Transport from Ms S D Radhamani.¹⁰⁰ SKP gained traffic advice from a consultant Mr Colin Macarthur, who participated in the joint witness conferencing, but did not present evidence. He was instrumental in gaining a concession relating to a pedestrian refuge on Donald Bruce Road.

[172] We do not need to cover the transport and transportation issues in great detail, because of the agreements arrived at. It is sufficient to note that the key issues for consideration were:

- access arrangements to and from Donald Bruce Road (location, width, pedestrian priority and signage);
- provision for queuing and loading off Donald Bruce Road (wharf design, one way control design, signage);
- gangway design (gradient, width, separate vehicle and pedestrian access);
- carpark design (vehicle size, number, layout and size of spaces, use of spaces, manoeuvring widths, turning and loading areas, disabled and cycle parking); and
- impacts of marina traffic on wider transport network.

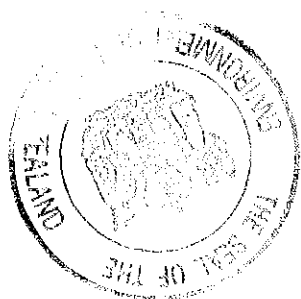
[173] Agreement was reached amongst all experts in expert conferencing, save one relating to the extent of road upgrade works being offered by the Applicant.

[174] As to the unresolved item (later agreed), Ms Radhamani gave evidence that the main effect of the marina on the local road network was the potential effect it might have in traffic circulation on Donald Bruce Road which provides access to the ferry and public boat ramp. At present, there is only one through traffic lane which is occupied by ferry traffic queuing, albeit that this is an existing issue.¹⁰¹ The witness was concerned that peak periods for the marina could coincide with peak ferry times.

[175] The argument came down to the length of roadway along which widening would

¹⁰⁰ AT is an Auckland Council controlled organisation and the road controlling authority for the Auckland region under the Local Government (Auckland Council) Act 2009. Its area of control includes Waiheke Island, where it manages the local road network and the Kennedy Point public carpark which is on road reserve. It also owns and operates the Kennedy Point Wharf and facilities and has an agreement with SeaLink to operate ferry services to and from Kennedy Point.

¹⁰¹ S Radhamani, EIC, paragraph 5.4.



be undertaken pursuant to conditions of consent. Ultimately resolution was achieved by amendment to proposed condition 115(b) removing reference to queue length capacity and replacing it with a requirement that during detailed design, provision be made for a means to prevent overtaking of queued east-bound vehicles.

[176] Mr Mein suggested an amendment to proposed condition 115(d) to provide for a pedestrian refuge in the centre of Donald Bruce Road. A matter that required some further attention, now provided and agreed upon, was a suggestion by Ms Radhamani that the condition be amended to ensure the refuge did not decrease lane widths or interfere with the vehicles entering the existing public carpark.¹⁰²

[177] We find that there are no further items of contention regarding traffic and transport, and all aspects are now at least in neutral territory; some are in fact in the territory of positive effects to the extent that some matters offered on an **Augier** basis by the Applicant that were not needed for mitigation, will improve some existing issues with traffic circulation and pedestrian safety.

Effects on navigation and existing swing moorings

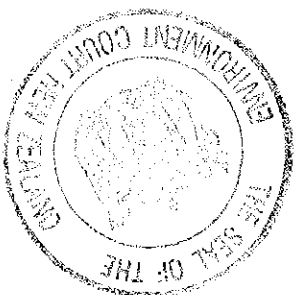
[178] We have already touched on some aspects of this, particularly arising from a consideration of statutory instruments.

[179] Evidence was given by Mr M A Schmack, Director of a marina operating company Orakei Management Limited associated with the Applicant. He is also Mr Mair's son-in-law. He described the facilities proposed for the Kennedy Point Marina in some detail, noting amongst other things that no fuelling facilities are proposed.

[180] The marina if consented is likely to have a staff of four fully trained people to ensure safe and appropriate operation of the marina, and adherence to relevant conditions of consent.

[181] Mr Schmack gave evidence about contact with existing swing mooring holders (all but 7 of the 37), and has discussed with them options of outright purchase of moorings and removal of tackle by the Applicant at its cost; relocation of the mooring to another location at the Applicant's cost; rental of a new pile mooring; or a discounted 12m berth within the marina. To date the Applicant has acquired one mooring; 10 mooring owners have expressed interest in a berth; 15 have expressed interest in a pile mooring; 2 would

¹⁰² S Radhamani, EIC, paragraph 8.1.



like their swing mooring relocated; and 3 are considering their preferred option.¹⁰³

[182] The witness pointed to a proposed condition of consent about the creation of a moorings management plan which would put the onus on the Applicant to demonstrate to relevant Council officials that it had achieved solutions concerning all existing swing moorings before it could proceed with the marina.¹⁰⁴

[183] The Applicant called the evidence of Mr N F Drake a retired ship master and port services manager who is now a marine consultant, and a regular recreational boater.

[184] The Council called the evidence of Mr B Goff previously referred to, a maritime officer in the Harbour Master's Office at the Council. He gave us comprehensive evidence about the existing swing moorings, including mapping and details of the terms of swing mooring licenses. He firmly supported the draft conditions of consent and the decision of the hearing commissioners that directed imposition of them.

[185] These three witnesses provided a joint witness statement on navigation safety and moorings management, and reached full agreement. The agreement made reference to official information about wind and wave conditions, widths of channels and fairways measured against Australian Standard AS3962-2001 Guidelines for Design of Marinas; the presence of an existing rock break water; the likely new reduced width of the entrance to Putiki Bay (approximately 370m, a reduction of 70m); advice from the operators of the SeaLink ferries that they are not concerned with the presence of the marina and its proposed attenuators; that no hazards will be created that vessels would be unable to safely navigate, with the marina to be developed in accordance with the suggested conditions.

[186] The witnesses also agreed with the proposals for moorings management.

[187] Four witnesses in opposition to the marina offered evidence of concerns about navigation safety, Mr G Clendon, Ms R Gibbons, Mr S Hood and Mr R Morton. One of the themes of their evidence was that a marina would limit use of Kennedy Bay as a safe place to sail to, particularly in strong south west wind conditions; also that there would be difficulties in laying yacht race courses.

[188] Mr Drake considered the concerns of these witnesses. From information available

¹⁰³ M A Schmack, EIC, paragraphs 3.1 – 3.6.

¹⁰⁴ M A Schmack, EIC, paragraphs 3.9 and 3.10.



to him, he indicated that only a small number of yachts take part in racing in Waiheke waters, three or four of which come from Kennedy Point, and that races never take place through the existing mooring area, and are timed around ferry movements. He did not consider that the presence of the marina would mean local racing would have to cease.¹⁰⁵

[189] Mr Drake accepted that the location of the proposed marina would preclude vessels entering Kennedy Bay to find shelter or avoid a ferry or other vessels as they navigated through the entrance to Putiki Bay, except into the marina entrance itself. He expressed the view that busy channels such as this are not places for vessels to dwell in, and they should clear the entrance as quickly as possible, if necessary under power.¹⁰⁶

[190] We agree with the expert witnesses on these topics that adverse effects will be minor at worst. Very small numbers of people will potentially be affected; alternative actions and processes are available; and the effects themselves are very small.

Effects on Natural Character, Landscape and Visual Amenity Values

[191] In addition to evidence given by individuals (particularly people in the locality), evidence on these topics was provided by six expert landscape architects. The Applicant called evidence from Ms R Skidmore and Ms R de Lambert who had contributed to the design of the proposed marina and prepared assessments included in the AEE; Ms J Woodhouse and Mr S Brown gave evidence, called by the Council and the s 274 party Kennedy Point Marina Supporters Group respectively. Mr J Hudson and Ms S Peake provided evidence called by SKP.

[192] There was some limited agreement reached in the expert conference, including that appropriate scales for assessing effects of the proposal are three-fold, namely Kennedy Bay, Putiki Bay and Waiheke as a whole;¹⁰⁷ and that the introduction of a marina would result in substantial change to the appearance of Kennedy Point Bay, but the change is not in itself an adverse effect.¹⁰⁸

[193] There was agreement also about the following:

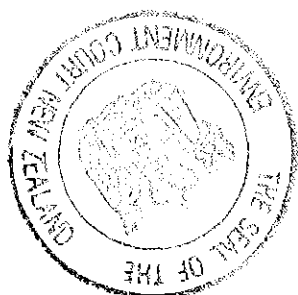
- The plans in Schedule 1 of the Council decision are the relevant plans for the

¹⁰⁵ N F Drake, EIC, paragraph 5.2.

¹⁰⁶ N F Drake, EIC, paragraph 5.3.

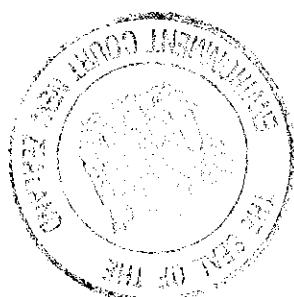
¹⁰⁷ Landscape JWS, paragraph 21.

¹⁰⁸ Landscape JWS, paragraph 16.



assessments.

- Appendix 1 of the Landscape and Visual Effects Assessment by Boffa Miskell (23 February 2017) contains visual simulations which can assist in assessing the landscape and visual effects.
- Paragraphs 193 – 209 of the Council decision offer a summary of the relevant statutory context for landscape, natural character and visual amenity considerations.
- The relevant provisions are s 6(a) and (b) RMA.
- The NZCPS.
- The AUP.
- The ACRP: C.
- Neither the site nor adjacent parts of Kennedy Point are identified as areas of outstanding natural character or as outstanding natural features or landscapes in the AUP.
- The ACRP:C does not identify them as outstanding or of regional significance.
- The Te Whau Bay Islands on the opposite side of the entrance to Putiki Bay are identified as an ONL and an area of High Natural Character (HNC) in the AUP, and the end of Te Whau Peninsula nearby is also identified as having HNC.
- Section 2 of the Boffa Miskell Landscape and Visual Effects Assessment (23 February 2017) contains an accurate description of the proposed marina location and its wider context.
- The relevant landscape context for considering the proposal comprises:
 - an immediate setting comprising Kennedy Point Bay (the Bay immediately south west of the ferry terminal in which the marina is proposed to be located);
 - a larger landscape corresponding to the visual catchment comprising the main reach of Putiki Bay, the enclosing landforms and the entrance to the Bay from Tamaki Straight [sic]; and



- a broad context comprising the entire Putiki Bay catchment, Waiheke Island as a whole, and the relationship of Waiheke Island to the Hauraki Gulf and Auckland.
- Key features in the Kennedy Point Bay context include:
 - 37 swing moorings within the Bay;
 - a gently arching rocky beach that adjoins a manmade rock breakwater to the eastern transitions to a rock ledge beneath the steep pōhutukawa clad escarpment that extends to the south;
 - dwellings along Kennedy Point Road sit at the top of the Southern escarpment enclosing the Bay;
 - a vegetated escarpment extends from the public carpark on Donald Bruce Drive and towards the neighbouring unclaimed Bay;
 - open pastures punctuated by mature pōhutukawa trees at the Kennedy Point Vineyard on the slope to the north to the public carpark;
 - a public green space area located behind the beach (classified as road reserve); and
 - the transport hub of Kennedy Point Ferry terminal.
- Paragraph 2.3.7.1 of the Boffa Miskell report sets out a list of the key characteristics and features at Putiki Bay;
- Groups that comprise the public viewing audience:
 - people on the water within or around Putiki Bay;
 - people on the water entering Putiki Bay from the main Harbour;
 - people using the roads on Te Whau Peninsula;
 - people accessing the Kennedy Point ferry terminal on Kennedy Point Peninsula;
 - people travelling along Ostend Road, particularly between O'Brien



Road and Erua Road;

- carpark and boat ramp at end of Wharf Road;
 - people within the reserve, beach and foreshore area at Kennedy Point Bay;
 - people visiting the Te Whau vineyard (the restaurant is now closed) and the Kennedy Point Vineyard; and
 - people visiting the public reserve at Okoka Bay (Te Whau Peninsula).
- Groups comprising the private viewing audience include:
 - residents of certain properties on the north facing slopes of Te Whau Peninsula;
 - residents of certain properties on the south-eastern side of Kennedy Point Road; and
 - residents of certain properties at the end of the Ostend Peninsula.
 - The introduction of a marina will result in substantial changes in the appearance of Kennedy Point Bay. **Change is not in itself an adverse effect.** [emphasis supplied].

[194] The experts agreed/disagreed on the following issues:¹⁰⁹

(a) Effects on the ONL and HNC:

- The experts JWS B RS SP EY and RdeL agree that there will be less than minor effects on the ONL and HNC areas in and around Putiki Bay;
- JH considers that there will be adverse effects on the ONL in terms of the associated values, although this is not a significant effect;



- JH also considers that there will be a more than minor effect on the identified HNC areas in Putiki Bay.

(b) Scales of landscape consideration:

- The experts agree that there are three scales for consideration of effects:
 - i. Kennedy Bay
 - ii. Putiki Bay
 - iii. Waiheke Island as a whole.

(c) Associated values:

- All experts agree that Waiheke Island is primarily accessed by boat and that Kennedy Point Bay is recognised as a transport hub for the Island and a gateway to and from Waiheke.

[195] The two witnesses for the Applicant found in summary that the proposed marina was appropriate development in this location; Mr Brown's opinion based on his long experience and detailed understanding of the coastal landscapes of Waiheke Island, was that the landscape in and around Kennedy Point Bay is exceptionally well suited for the marina proposal.¹¹⁰

[196] The Applicant's two witnesses also concluded that the proposal would have only minor adverse effects on the landscape and natural character of the environment (considered at the range of three scales); also that it would have a range of effects on the visual amenity values present at Kennedy Bay, from adverse to positive, depending on viewer attitude.

[197] As noted from the joint witness statement, Mr Hudson and Ms Peake variously express contrary views on some of these issues. Mr Hudson and Ms Peake consider that a marina of the type proposed in any location would be inappropriate in respect of the character and values of Waiheke as a whole. The other witnesses disagreed and find it suitable in the proposed location and in the context of the wider Waiheke landscape.

¹¹⁰ S Brown, EIC, paragraph 139.



[198] Mr Hudson and Ms Peake consider that there are significant adverse aesthetic and amenity effects in relation to Kennedy Point Bay, of visual dominance, the formality of the structure, intensity of activity, visual clutter (Ms Peake only) and incongruity of the carpark and buildings on the water.

[199] "Associative values" became a hot topic, with Mr Hudson and Ms Peake considering that there are significant adverse effects with these at all three scales, having regard to relaxed, not busy, informal, peace and quiet qualities of Waiheke; the appreciation of Kennedy Point Bay as a body of open water; recreation appeal of Kennedy Point Bay swimming, sailing and the like; and with Mr Hudson considering the Māori cultural values forming part of such values although he deferred to the marae witnesses to determine those values.

[200] Ms Woodhouse provided a detailed description of the existing landscape values of Kennedy Point Bay, and the broader Putiki Bay, finding high natural and landscape values, but not a pristine or even nearly pristine environment, noting that almost all of it has been modified.¹¹¹ Concerning Kennedy Point Bay, she noted dominant elements that are not natural features; the ferry terminal and its utilitarian structures, swing moorings, and breakwater; although she acknowledged that these features are softened and integrated into the landscape to a significant extent by native and exotic vegetation along the escarpment edge.¹¹²

[201] As to visual and landscape effects of the proposed marina, Ms Woodhouse considered that the wider Putiki Bay landscape, with its varied landform, extensive vegetation cover, and mixed land use, is capable of absorbing development such as the marina.¹¹³ She considered that the nature of effects generated by the proposal would be neutral or benign because it would complement the scale, landform and pattern of the landscape, maintaining existing landscape and visual amenity values; that it would have minimal landscape and visual effects on the environment.¹¹⁴

[202] As to the ONL and HNC areas on the opposite side of Putiki Bay, she considered adverse effects would be avoided.¹¹⁵

¹¹¹ J Woodhouse, EIC, paragraph 28.

¹¹² J Woodhouse, EIC, paragraphs 35 & 37.

¹¹³ J Woodhouse, EIC, paragraphs 13(a) & 137.

¹¹⁴ J Woodhouse, EIC, paragraphs 13(f) & 136.

¹¹⁵ J Woodhouse, EIC, paragraph 13(c).



[203] Ms Woodhouse considered that visual amenity effects on some viewers around Kennedy Point Bay would be moderate to high, but the number of people affected would be limited. She considered that some residents along Kennedy Point Road would see the marina as a minor intrusion into their view if their focus was on the wider Bay or because vegetation helped screen it. She also noted that the nature of effects would vary according to how viewers associate with a marina or perceive a marina, some liking a marina and some not.¹¹⁶

[204] We consider it important to note the variable responses on this visual amenity aspect.

[205] This variability of perception arises commonly in cases like this. Counsel for the Applicant quoted from one such case, a decision of the Environment Court *Schofield v Auckland Council*,¹¹⁷. The Court said (and we agree):¹¹⁸

The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself gives some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activities they undertake there, and the emotions they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in this space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of this objective, it must be able to be tested objectively.

[206] The Courts have consistently held that there is no right to a view,¹¹⁹ but that of course is not the whole story. Impacts on amenity values from particular places must still be assessed.

[207] We accept the submissions of counsel for the applicant and the Council,¹²⁰ to the effect that the variability of responses (including some support and some opposition) can in the overall assessment produce a result in which undue weight should not be given to

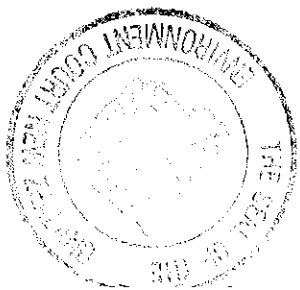
¹¹⁶ J Woodhouse, EIC, paragraphs 136, 13(e) & 63. Also, evidence of local residents G Wake and P Richardson.

¹¹⁷ *Schofield v Auckland Council* [2012] NZEnvC 68.

¹¹⁸ At [51].

¹¹⁹ See for instance *Anderson v East Coast Bays City Council* (1981) 8 NZTPA 35.

¹²⁰ Opening submissions of Applicant, paragraph 106; and submissions on behalf of the Council, paragraph 89.



this effect.

[208] From the perspective of one of the landscape architects, Mr Brown for KPMSG said this:¹²¹

I recognise that the marina would have an adverse effect on some residential views across Putiki Bay. On the other hand, many local residents would be little affected by the marina and, in other cases the marina's encroachment into views would still leave large areas of the wider inlet and Te Whau Peninsula open to viewing – often in a quite panoramic fashion.

[209] We note the variability theme once again, and agree with Mr Brown's conclusion that these effects should not ultimately be determinative of this aspect of the marina application.

[210] As to natural landscape or natural character values, and mindful of the policy considerations in the AUP for instance from Policy F2.16.3(7), and leaving aside that the policy covers many matters in addition dredging and coastal hazards, we find that the proposal is overall not contrary.

[211] We accept that adverse effects on the ONL and HNC areas across Putiki Bay are avoided, and note that even Mr Hudson who was somewhat on his own about this, conceded that such effects would only be in terms of "associative values" and not significant, as we have noted from the landscape JWS.

[212] We agree with the witnesses including Ms Woodhouse and Mr Brown who thought the boundary of these areas around the Te Whau islands to be somewhat arbitrary (distant about 110m from the marina), but with the distance to the islands themselves approximately 400m, which we consider to be the important measure. The mapped boundary should, we consider, be taken as a cautionary signal rather than a mapping of the edge of the feature.

[213] Mr Hudson and Ms Peake placed stress on "associative values", and were concerned that they had received insufficient weight in the AEE and the hearing commissioners' decision. As to the latter we consider that the commissioners did indeed consider them appropriately.¹²²

[214] It was clear to us from the submissions of Mr Sadlier on behalf of SKP that

¹²¹ S Brown, paragraph 137.

¹²² See commissioners' decision, paragraph 231.



associative factors were of high importance to that party; he made an oral aside to that effect when introducing that topic at page 10 of his submissions. These had been identified by Mr Hudson particularly as values shared and recognised, value to tangata whenua, and historical associations, adding mention of the well-known "WESI" factors in analysis of landscape values, and generally accepting otherwise the Applicant's evaluation of biophysical factors.

[215] Mr Hudson and Ms Peake took a view through this lens in saying, in summary, that a particularly incongruous component of the proposal in landscape terms is the floating carpark.

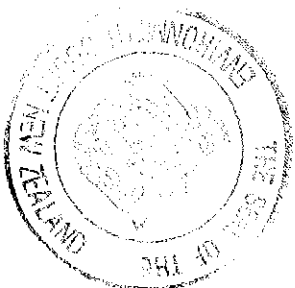
[216] An intriguing aspect of Mr Hudson's evidence was his emphasis on a non-statutory document *Essentially Waiheke (Refresh)*, calling itself a non-statutory "Community Strategic Framework" (2016), albeit that he did acknowledge¹²³ that it would not represent the views of all residents and that individual views on the marina proposal (and future development on Waiheke) do vary across the Waiheke Island community. His analysis of the document is referable to the "Waiheke Island scale",¹²⁴ although he thought some of the values might translate down to the other two scales. He perceived the following values in the document:

- Community-focussed; inclusive.
- Simple, with an emphasis on the "basic" values of life; casual.
- Environmentally responsible.
- Low density; laid-back; slow; informal; "free-range"; "far enough behind to be ached"; no traffic lights on the island.
- Distinct in character – a contrast to urbane Auckland city.
- Diverse; unconventional.
- Creative, with a focus on arts and culture.

[217] Despite conceding that large parts of Waiheke Island have changed in recent years with upscale residential housing, and development focussed on tourism, he

¹²³ J Hudson, EIC, paragraph 91.

¹²⁴ J Hudson, EIC, paragraphs 40 – 42.



nevertheless perceived those “core values” remaining true for the permanent community.

[218] While deferring to Māori witnesses – particularly those from Piritahi Marae, Mr Hudson tended to place significant stress on cultural and historical values coming from their evidence and that of Mr Monin earlier described.¹²⁵

[219] Noting Mr Hudson’s cautious acceptance of the evidence of others about biophysical effects, we were intrigued by his heavy emphasis on these associative matters.

[220] We consider that his needing to rely on the “Essentially Waiheke (Refresh)” document was an indication that he was needing to take some refuge in particular views of some people on Waiheke, in a rather narrow and somewhat unbalanced fashion. We recall the submission on behalf of the Applicant¹²⁶ noting from that document as exhibited, that it collected the views and aspirations of about 600 people associated with the Island (in comparison to a 2013 census record of resident population of 8,238, now probably over 9,000, plus around 3,400 additional second or holiday homes and between half and three quarters of a million visitors per year). We accept their submission that the views relied on by Mr Hudson should be interpreted as being of a relatively small minority. We also accept the submission of counsel that his evidence chose not to recognise or even mention support within part of the community for the marina, or evidence and submissions in support and the letters attached to the case for KPMSG.

[221] As to Māori cultural associations, even leaving aside the essence of our findings preferring mana whenua (Ngāti Paoa) evidence over marae evidence, Mr Hudson inappropriately ignores the former and utilises the latter. Balance is missing. His choice of information is not representative of the Waiheke community at large, and therefore cannot be said truly to be “shared and recognised”. It is not possible to find on any objective basis that, to quote Mr Hudson,¹²⁷ that Waiheke Island is simply not an appropriate place for a marina at all for associative value reasons.

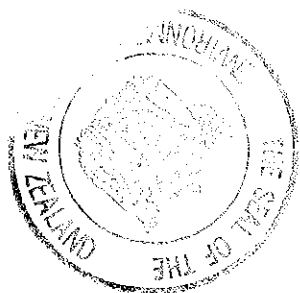
[222] Regrettably there was a similar problem with Mr Hudson’s treatment of community views supporting the marina, where the Court intervened to elicit a direct answer.¹²⁸ Also

¹²⁵ J Hudson, EIC, paragraphs 43 – 50 and 53 – 56. We note an important concession by Mr Hudson under cross examination by Mr Nolan that he deferred to Mana Whenua to state their views about adverse effects: Transcript p. 377, lines 16 to 20.

¹²⁶ Opening submissions for Applicant, paragraph 90.

¹²⁷ J Hudson, EIC, paragraph 24.

¹²⁸ Transcript pp. 379 – 380.



as to the relevance of a complete split, three to two, on the Waiheke Local Board, when considering the proposal.¹²⁹ Mr Hudson also had to concede under cross examination by Ms Morrison-Shaw for the Supporters Group, that his evidence had not expressly assessed any community or recreational benefits, having noted only (in paragraph 70 of his EIC) that *"there has been a suggestion that the new public recreation facilities will offer a degree of community benefit"*.¹³⁰

[223] Something of the same problematic flavour was found in one of the points in appellant Mr Walden's opening submissions. On the totality of the evidence before us, it is simply not a balanced view to assert that the opposition parties represent the "Waiheke ethic" of a heavy environmental emphasis. Waiheke is well-known for divergence of views about the environment and development, a feature of this case and many others.

[224] We accept Mr Wren's views¹³¹ that the Essentially Waiheke document was not created as part of any RMA process; was not subject to formal public submissions and appeals; does not take into consideration significant change that has occurred on Waiheke in recent times or might even seek to "reverse" those changes; and that the aspirations of the document are not reflected in the AUP or the HGI District Plan.

[225] Mr Wren also picked up on the lack of reporting of balanced associative values of the Waiheke community.

[226] Mr Allan submitted that he could not find in the document any specific mention of the importance of boats and boating to the Island's community, an interesting observation concerning a small land mass with a resident population, surrounded by water.¹³²

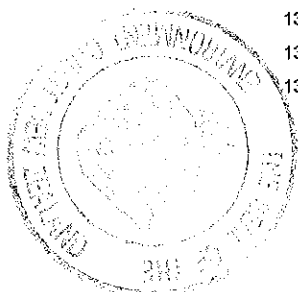
[227] We regret to say that we consider the strong emphasis on associative values in the case for SKP (carried right through to submissions by its counsel), to have been a strained attempt to portray more than minor adverse effects and factors running counter to objectives and policies in statutory instruments including NZCPS and AUP. We much prefer the balanced approach taken by the expert witnesses for the Applicant, the Council and the Supporters Group. The overall outcome concerning natural character, landscape and visual amenity values is that in the round, the proposal is appropriate development in this particular location; will have only minor adverse effects on the landscape and

¹²⁹ Transcript p. 379, lines 4 to 8.

¹³⁰ Transcript p. 398, lines 3 to 24.

¹³¹ D Wren, EIC, paragraph 7.236.

¹³² Opening legal submissions for Auckland Council, paragraph 95.



natural character of the environment; and will have a range of effects, the great majority of them minor, on visual amenity values present in Kennedy Bay and around Putiki Bay, and varying from positive to adverse depending on viewer attitude and visual perception. We consider that analysed in this way, the marina would fit well into the landscape of Kennedy and Putiki Bays, provide a largely positive contribution to the experience and amenities of Waiheke Island, and offer adverse effects that in the round will be no more than minor.

Night lighting

[228] This topic in some ways a subset of the previous one, but because it attracted strong comments and concerns from people in opposition to the marina, particularly those who would overlook it, it is a topic on which the Applicant and the Council introduced expert evidence, and on which we should specifically make findings.

[229] The Applicant called evidence from Mr J K Mckensey, an engineer specialist in lighting and a consultant on the subject to a number of public bodies.

[230] The Council called evidence from Mr G A Wright, an electrical engineer with experience in lighting design including as to exterior lighting for amenity, security and appearance in a wide range of locations, particularly public spaces.

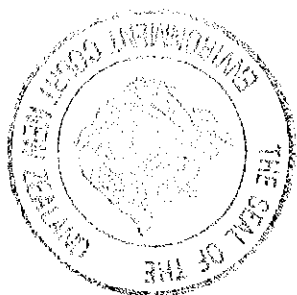
[231] Drawing from their individual statements of evidence in chief, in which they assess potential effects as no more than minor, they met in facilitated expert conference and produced an agreed statement which demonstrated full agreement between them.

[232] As they had in their statements of evidence, the joint witness statement reviewed the details of the proposal and assessed it against provisions of the HGI District Plan, the AUP and the Auckland City Council Bylaw No 13 (Environmental Protection 2008) subsequently titled the Property Maintenance and Nuisance Bylaw 2015.

[233] The witnesses agreed that the lighting for the marina would satisfy all the requirements of the instruments.

[234] In terms of the concerns of elevated neighbours, the witnesses discussed and agreed about matters of spill light, glare, sky glow and general amenity.

[235] As to spill light, having assessed illuminance of neighbouring houses from the existing ferry terminal lighting, the witnesses considered that there would be similar lack of effects, that is no measurable illuminance from the marina lights.



[236] As to glare, the witnesses noted that there is presently very little light from the ferry terminal, and that while the marina lighting would increase the lit area, the proposed lights would be well controlled such that there would be no direct glare sources visible to residents from their houses; hence no measurable effects or noticeable change in effects.

[237] As to sky glow, the witnesses considered that there would technically be an increase in the aura or glow visible above all outdoor installations at night, however as all the light would be directed downwards, the only contribution from the marina would be light reflected off the ground, marina structures and water, and the illuminance at ground level would be modest. They considered that sky glow would be negligible in real terms and less than that being contributed by the light spill from existing residential dwellings, and street and carpark lighting.

[238] As to amenity, the witnesses noted a concern raised by Mr Hudson about light on the surface of the water and structures. The witnesses considered that if surfaces were brightly lit, and were the lit area to form a significant portion of a typical view from a residence, there could potentially be an effect. However, in this instance the degree of intrusiveness would be minimal, given the modest illuminance levels proposed and the typical viewing angles.

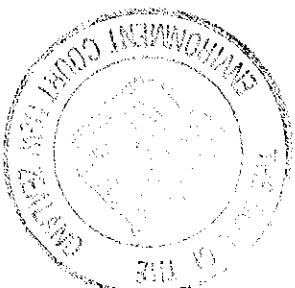
[239] In summary, these witnesses considered that there would be little if any awareness of the lighting installations unless people were specifically looking out to the water and were close enough to the edge of their house or deck to be able to look down and see the marina. Even then, they considered the lighting effects would not be glary or obtrusive. Effects on visitors to the ferry terminal or marina would similarly be minimal. The lighting would cause very little if any loss of visibility of the night sky or other vistas.

[240] The experts agreed that the conditions imposed in the Council decision are reasonable and appropriate and would ensure the lighting effects of the marina on the environment would be less than minor.

[241] We understand the anxiety of some of the witnesses about possible lighting effects, but have no basis at all from the evidence advanced, to do other than hold that these effects are no more than minor.

Social effects, including use of common water space

[242] The Appellant Mr Walden called evidence from sociologist Dr K I B McNeill. She described herself as a sociologist specialising in the community implications of



environmental change, having previously been employed as an academic at both the University of Waikato and University of Auckland. She provided us with an extensive list of her previous academic positions, academic awards, and research and conference papers.

[243] By way of some background to her theses advanced to us, Dr McNeill described in broad terms media descriptions of lifestyle on Waiheke at various times, versus statistical portrayals of the Island's resident community, before giving us her opinion on "subjective deprivation" and "private use of public commons" (water space).

[244] Before considering her opinions on those two areas, we must record that we were troubled by Dr McNeill's apparently very high-level and largely anecdotal description of Waiheke Island and its population. She drew on 2013 Census data about population and income spread, the New Zealand Index of Deprivation 2013 measure of relative levels of socioeconomic deprivation; an article in Vogue magazine in 2017 comparing Waiheke Island with the Hamptons in New York State; reports about Waiheke Island in Condé Nast traveller magazine in 2016 and in Lonely Planet in 2015. She drew on research by others¹³³ allegedly describing progressive gentrification of the Island over the past two decades. She added her own broad description, we are not sure from what research or observations.¹³⁴

[245] Quite apart from our own misgivings about extent and quality of research, there are also significant limitations to how this sort of opinion evidence can be advanced to decision makers under the RMA. Because of these concerns, we will give only two further brief indications of the nature of the evidence. She asserted that the proposed marina development would exacerbate the presence and visibility of socioeconomic disparities on the Island,¹³⁵ and an assumption/assertion that "... *the vast majority of births [sic] will be sold to non-residents of Waiheke Island, introducing a group of people who are visibly more affluent than the vast majority of the local population.*"¹³⁶

[246] We can find no measurable evidence of the assumptions, presumptions and assertions that Dr McNeill employs to describe her potential effects.

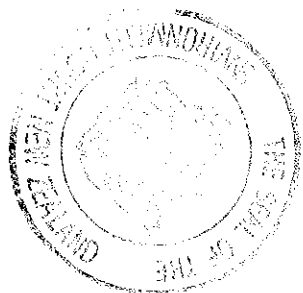
[247] Even if it were to have probative value, the legal problems of entering into such a

¹³³ Smith, N. (1982). Gentrification and uneven development. *Economic Geography* 58(2), 139 – 155.

¹³⁴ The above summary of Dr McNeill's evidence is found at paragraphs 22 – 27 of her EIC.

¹³⁵ K McNeill, EIC, paragraph 16(a).

¹³⁶ K McNeill, EIC, paragraph 30.



domain are well known.

[248] While social effects have been accepted as a valid RMA concern in cases before the Environment Court and Boards of Inquiry¹³⁷ in *Contact Energy Limited v Waikato Regional Council*,¹³⁸ it was held that allegations [of the sort made here by Dr McNeill] should be treated with caution and that there is no place for the Court to be influenced by mere perceptions of risk which are not shown to be well founded.¹³⁹ In the Wiri Men's Prison Board of Inquiry Decision, Judge Harland and Board Members held:¹⁴⁰

... we are only prepared to engage in an assessment of resource management effects that are measurable or otherwise well-founded and which will relate to the location of the proposed men's prison on this site.

[249] We agree also with comments of a similar sort by the Environment Court in *Living in Hope Inc. v Tasman District Council*¹⁴¹ which concerned a proposal to establish a new crematorium, about which local residents gave evidence that they would feel discomfort, depression and sadness with the thought of the activities being conducted in their neighbourhood. The Court said:¹⁴²

We do not consider that discomfort on the part of some individuals to the mere presence alone of a particular facility amounts to an adverse effect on amenity values. If that was the case, any proposal would be vulnerable to the discomforts of its opponents no matter how irrational or ill-founded those discomforts might be.

[250] There can be no basis to find on the evidence before us that the presence of a marina will cause any adverse social effect relevant under the RMA. Neither can we find any basis to distinguish between those who live permanently on the Island and those who might visit it short term or long term and live elsewhere, when it comes to allocation of natural and physical resources.

[251] We have discussed elsewhere in this decision the policy issue of private occupation of public space, and the policy settings found in relevant statutory instruments about that. Marinas are of necessity somewhat exclusive facilities for reasons of safety and security, but the present proposal is actually and positively notable for the extent to

¹³⁷ See for instance the decision of the Board of Inquiry concerning the Wiri Men's Prison, Final Report and Decision September 2011, paragraph 292.

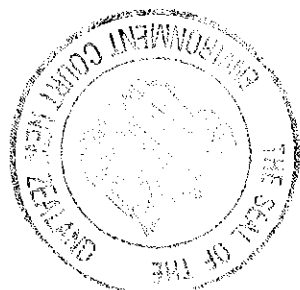
¹³⁸ *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1.

¹³⁹ *Contact Energy* at [254].

¹⁴⁰ Final report and decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011, EPA 0056, at [402].

¹⁴¹ [2011] NZEnvC 157.

¹⁴² At [124].



which it offers public access during hours of daylight and other facilities accessible to the public such as community rooms, a café, and carparking. We consider that the Applicant has found a good balance between the needs of safety and security on the one hand, and public access on a managed basis on the other.

Effects on Future Ferry Terminal Expansion

[252] Several of the Appellants' witnesses expressed concern that the presence of a marina might impact negatively on the ability to expand the existing Kennedy Point Ferry Terminal to allow for increased growth and demand for ferry and freight handling services. They urged this is another reason to refuse consent.

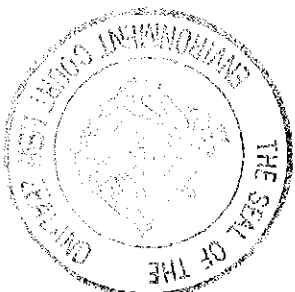
[253] We were told by the applicant, the council, Auckland Transport and the current ferry operator SeaLink Travel New Zealand, that the issue had been comprehensively dealt with upfront after which Auckland Transport and the ferry operator took a relatively neutral stance to the proposal, offering submissions and evidence before us, in which such concerns were effectively discounted. The focus of Auckland Transport in the proceedings was essentially confined to achieving good outcomes in relation to Donald Bruce Road, access to the ferry terminal and boat ramp, vehicle queuing, carpark and roadway upgrades, and pedestrian safety. The focus of Sealink was that if in future it were to contemplate expansion of services using small passenger vessels (similar to those serving Pine Harbour), it could do so from the marina structure as proposed without a public agency needing to create additional facilities; also that the applicant had worked well to assist in alleviation of traffic impacts from its proposal¹⁴³.

[254] In circumstances in which Auckland Transport as operator of the terminal, and the ferry operator, are not expressing concern about possible future constraints, we are unable to make findings advocated for by parties opposing the marina.

Planning Issues

[255] Some planning issues call to be addressed expressly, over and above other planning issues addressed in particular contexts throughout this decision. They are twofold:

- Functional and operational need to be located in the CMA.



¹⁴³ M Pigneguy, EIC paragraphs [11] – [16].

- Part 2 of the RMA.

Functional and operational need to be in the CMA

[256] The planners in their joint witness conferencing had no difficulty in agreeing that there is a functional need for a boat marina to be located in the CMA, as held by this Court in the *Matiatia Marina* decision.¹⁴⁴ A question however arises from the joint witness session, and in our minds, as to whether there is a functional need to locate the floating carparking deck, and multi-use utility building and deck, within the CMA.

[257] Mr Mair gave detailed evidence about his endeavours to find land for parking in the near vicinity of the marina.¹⁴⁵ He was tested in cross examination by Mr Sadlier about distances, topographies, ownership, and control of areas by Auckland Transport,¹⁴⁶ and provided answers which satisfied us that appropriate land was not available anywhere reasonably near and suitable for the purpose.

[258] We were considerably assisted by the angle taken on this issue by Mr Wren, in particular his analysis of the issues against key provisions of the NZCPS, the RPS and the RCP.

[259] As to the NZCPS, Mr Wren identified relevant provisions including Objective 6 and Policy 6(2)(c) and (d).¹⁴⁷

[260] Objective 6 is to "... *enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that ... functionally some uses and developments can only be located on the coast or in the coastal marine area ...*".

[261] The aforementioned parts of Policy 6 are as follows:

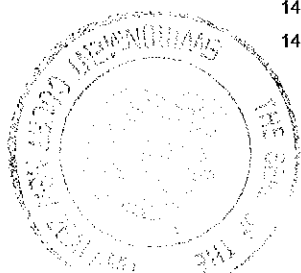
- (c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;
- (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there. [emphasis supplied]

¹⁴⁴ At [597].

¹⁴⁵ A Mair, EIC paragraphs 7.1 – 7.7.

¹⁴⁶ Transcript pp. 34 – 35.

¹⁴⁷ D Wren, EIC, paragraph 7.97 – 7.102.



[262] We accept the opinion of Mr Wren that inclusion of the word "generally" indicates that there is not a complete prohibition on activities that do not have a functional need to locate there.¹⁴⁸

[263] We look now at relevant provisions of the RPS, Objective B 8.3.1(4) and Policy B8.3.2(3). The Objective reads:

... rights to occupy parts of the coastal marine area are generally limited to activities that have a functional need to locate in the coastal marine area, or an operational need making the occupation of the coastal marine area more appropriate than land outside of the coastal marine area.

[264] The wording seems logically to flow from the NZCPS, including use of the word "generally", but adds cautious enabling words about related operational needs.

[265] Mr Allan drew our attention to findings of the Independent Hearing Panel of the then proposed AUP, in its report on topic 008 (Coastal Environment), where it stated:¹⁴⁹

In the Panel's view a clear distinction needs to be made between providing for activities which have a functional need to locate in the coastal marine area, and for other activities (including those which may have an operational need to do so). The Panel has incorporated policy supporting those objectives that have a functional need which require the use of natural and physical resources of the coastal marine area. The Panel has also included a policy to support those activities that have an operational need to locate in the coastal marine area where that activity cannot practicably be located outside of the coastal marine area.

We think the approach taken by the Panel was sound.

[266] As to the RCP, there are Objectives F2.14.2(2), (3), (5) and (6), and Policies F2.14.3(1),(3) concerning use and occupation, and Objective F2.16.2(1) and Policy F2.16.3(1) concerning structures. In F2.14.2(5) and F2.14.3(3) there is reference to allowance for activities where there is no practical land based location.

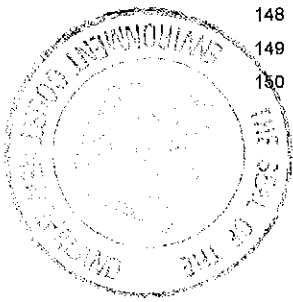
[267] Mr Wren was supportive of the approach taken by the applicant that there is insufficient room within land near the marina to locate sufficient and appropriately positioned carparks on the basis that marina carparks require a location close to the marina itself.¹⁵⁰

[268] The applicant argued that the carpark is so integral in these terms that it attains a functional need to be in the CMA. We think the point is not without merit. We certainly

¹⁴⁸ D Wren, EIC, paragraph 7.97.

¹⁴⁹ At page 8.

¹⁵⁰ D Wren, EIC, paragraph 7.99.



accept the evidence that the applicant searched diligently for land in the vicinity of the marina, and could not locate any for the purpose.

[269] We consider that Mr Wren sensibly acknowledges the practicality that “*a certain number of people accessing their boats will come by car, especially if they are transporting luggage and supplies for longer boat trips*”.¹⁵¹ In the circumstances of this marina and the search for land-based areas which was not successful, we accept that there is at very least an operational need for the marina to have a carpark on a floating deck in the CMA, and arguably a functional need. The solution is also, incidentally, less obtrusive visually than a reclamation or a fixed carpark on piles over the CMA as were amongst the options explored at Matiatia.

[270] We also find it easy to accept Mr Wren’s opinion that a floating office is “*similar to the carpark in that it is required for the marina and can’t be located elsewhere*”.¹⁵² Even more importantly than administration, the provision of security functions from a marina office actually drives the need in the direction of a functional one.

[271] As to the community building, we are prepared to find an operational need, perhaps verging on a functional need, in that offers public benefit providing additional opportunities for the public to interact with the water.

[272] We hold that the proposal for the carpark and the other described facilities, is consistent with Policy 6(2)(d) of the NZCPS and the subsidiary instruments discussed.

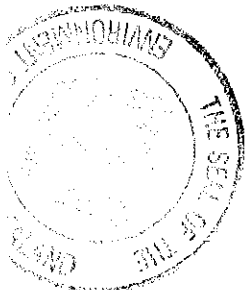
[273] We do not disagree with the findings of the hearing commissioners that it might also be impracticable and unnecessary to separate the components out from being part of the overall marina.

[274] Counsel referred to the *Matiatia Marina* decision, and helpfully compared and contrasted it from their respective perspectives.

[275] As previously mentioned, in *Matiatia*, two of several proposals for a carpark involved a reclamation or a deck supported on piles, substantially in the CMA. The Court held in that case that the carpark and marina office elements had no functional need to locate in the CMA on the evidence before it in that case, which included possible land-

¹⁵¹ D Wren, EIC, paragraph 7.122.

¹⁵² D Wren, EIC, paragraph 7.123.



based options.

[276] We find favour with the approach taken by Mr Allan on behalf of the Council, in which he invites us to distinguish the *Matiatia* findings.¹⁵³ He first submits that the newly “minted” AUP contains specific provisions which give effect to the NZCPS, representing a carefully considered approach to achieve the NZCPS objectives and policies, and articulating when activities that do not have a functional need to be in the CMA can locate their (noting again the word “generally” used in Policy 6 of the NZCPS).

[277] He next submits that the evidence in the present case is clearer as to lack of land based alternatives for carparking than was the case in *Matiatia*, where the applicant had found a reasonably proximate alternative to CMA-based parking during the course of the hearing.

[278] Finally, Mr Allan submitted that the evidence before us was that this applicant’s carparking design solution (a floating deck that rises and falls with the tide) is far superior to the designs offered in *Matiatia* just described. We accept the submission because we have accepted the evidence of Ms Woodhouse and Mr Wren to this effect, noting tidal rise and fall and visual shielding by the breakwater much of the time to the north and by moored boats to the south and east.¹⁵⁴

[279] We confirm that it is appropriate to consider the floating carpark and office and community facilities from a policy point of view, starting as high up the chain as Objective 6 and Policy 6 of the NZCPS. We are therefore able to make findings on the evidence as just indicated. For completeness we stress the low-key, subtle and attractive architectural approach to the design of the buildings on the floating platform, assisting to create adverse effects on the environment that are no more than minor.

Section 290A RMA

[280] We have appreciated being able to consider the decision of the hearing commissioners, quite apart from doing so to meet our statutory duty under s 290A. We have not needed liberally to refer to it in this decision, because the outcome of the appeals is broadly the same overall on topics both panels heard about. The outcome is similar but not identical, because Court processes, particularly expert conferencing, and

¹⁵³ Opening submissions for Auckland Council, paragraph 179.

¹⁵⁴ J Woodhouse, EIC, paragraph 128 and D Wren, EIC, paragraph 7.125.



no doubt some different or additional evidence on some issues, has resulted in changes in emphasis and considerable attention being paid to the draft conditions of consent at several stages, even just after the hearing concluded.

Exercise on the Discretion – Sections 104 and 104B, and Part 2 RMA

[281] We were addressed on these issues by counsel for the larger parties, with some particular focus on how to treat the Part 2 aspect. Mr Sadler on behalf of SKP, and Mr Allan on behalf of the Council addressed the Part 2 aspect quite briefly, and the remaining parties almost not at all. The lead on the issue was effectively taken by Mr Nolan QC for the applicant.

[282] The “fly in the ointment”, so to speak, is how we treat reference to the words “subject to Part 2” in s 104(1), since the decision of the High Court in *R J Davidson Family Trust v Marlborough District Council*¹⁵⁵.

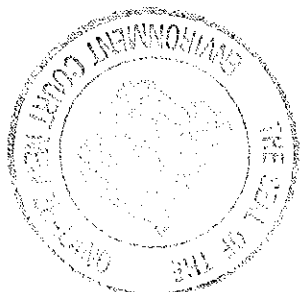
[283] In *R J Davidson*, the High Court identified a partial extension of the decision of the Supreme Court in *King Salmon*¹⁵⁶ to the consideration of resource consent applications. In effect, the High Court rejected a submission that s 104 requires a decision-maker to have broad consideration for matters in Part 2, and rejecting the “overall broad judgment approach” to decision-making on resource consent applications. It further held that the relevant provisions of planning instruments give substance to the principles in Part 2, but resort could be had to Part 2 in circumstances where there is invalidity, incomplete coverage or uncertainty of meaning within those instruments.

[284] The decision has been appealed to the Court of Appeal, and a decision of that Court is awaited. The decision of the High Court is binding on this Court at the present time.

[285] The approach that we must take in light of that, is that we may have recourse to Part 2 when considering the application and all cases advanced to us, under s 104(1), but not subsequently as a separate exercise as had earlier been understood to be the proper approach (“overall broad judgement approach”). We say that a little advisedly however because as was drawn to this Court’s attention and written about in *Pierau v*

¹⁵⁵ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

¹⁵⁶ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.



Auckland Council,¹⁵⁷ it is possible having regard to another decision of the Environment Court *Envirofume Limited v Bay of Plenty Regional Council*,¹⁵⁸ that a rather contrary approach can possibly be spelled out of an earlier decision of the High Court in *New Zealand Transport Agency v Architectural Centre Inc and others*¹⁵⁹ (sometimes known as the “Basin Bridge” decision).

[286] Out of caution, pending hoped-for clarification from the Court of Appeal in *R J Davidson*, we have followed the approach directed by the High Court in *R J Davidson*, but undertaken an alternative exercise using the “overall broad judgment” approach as well.

[287] Approaching the decision-making exercise under s 104, and exercise of the overall discretion under s 104B, we draw on findings that we have made during the course of this decision. We make no apology for not repeating them here (in the interests of avoiding an already lengthy decision becoming even longer).

[288] Our consideration of each of the effects discussed extensively in evidence has been, viewed in the manner that we have held to be appropriate at law, and in light of the relevant proposed conditions of consent, will be minor. Of some importance, we note that the draft conditions of consent have been through a robust iterative process at all stages since the application was launched, and particularly before this Court through the expert conferencing and hearing processes.

[289] We have found that the marina will offer a variety of positive effects for people and communities, in particular providing new access to the CMA for recreational purposes, and also on the physical environment.

[290] We have found that the proposal adequately serves the higher order and regional policy frameworks and specific regional plan objectives and policies.

[291] The proposal therefore passes through both gateways in s 104D.

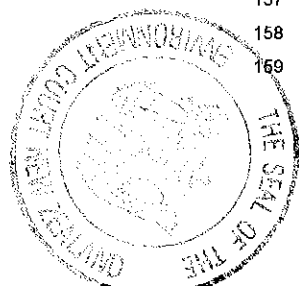
[292] We have also found consistency with the few other relevant documents.

[293] With conditions imposed as finally submitted by the Applicant on 2 March 2018, and as amended in respect of two conditions, 55 and 56 about lighting, on 9 March 2018,

¹⁵⁷ *Pierau v Auckland Council* [2017] NZEnvC 090.

¹⁵⁸ *Envirofume Limited v Bay of Plenty Regional Council* [2017] NZEnvC 012.

¹⁵⁹ *New Zealand Transport Agency v Architectural Centre Inc and others* [2015] NZHC 1991.



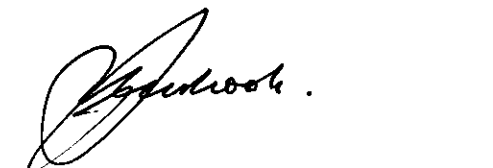
we find the proposal suitable for approval through the s 104(1) appraisal, and are prepared to exercise the overall discretion in favour of it under s 104B, which we do.

[294] We do not find a need to resort to Part 2 on account of any invalidity, incomplete coverage, or uncertainty of meaning within the planning instruments. For completeness, however we record that if viewed through the lens of the overall broad judgment approach, we find that the purpose of the Act in s 5 would be promoted, and that there has been due consideration of all other relevant matters in Part 2 such as to enable consent to be granted, and as a check that consent would provide for or give effect to the Act and all statutory instruments in the hierarchy beneath it. We find that whether or not an overall broad judgment, or an environmental bottom line approach, is taken, the proposal is suitable for consent on the conditions we have referred to, and we do that. In particular in relation to the latter approach, we consider that s 5(2)(a) to (c) are met; that the proposal recognises and provides for the nationally important matters in s6(a),(b),(c),(e) and (f), and has particular regard to s 7(a),(b),(c),(f) and (g). To the extent that s 8 is relevant, we note that the Applicant has undertaken appropriate consultation with tangata whenua, whose participation in the proceeding has been properly enabled, and whose views have been appropriately taken account of.

[295] We attach the conditions of consent as finally submitted on 2 March, modified as to conditions 55 and 56 submitted on 9 March. Consent is granted to the proposal on the basis of them as now finally approved by us. They are attached as **Annexure B**.

[296] Costs are reserved. Any application is to be made within 15 working days of the date of this decision.

For the court:



LJ Newhook

Principal Environment Judge

