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Decision No. A 011 /2006

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of six appeals under s.120 of the Act

BETWEEN **WHANGAMATA MAORI COMMITTEE**

(RMA 060/97)

THE HAURAKI MAORI TRUST BOARD

(RMA 062/97)

WHANGAMATA MARINA SOCIETY INC

(RMA 068/97)

TE KUPENGA O NGATI HAKO INC

(RMA 074/97)

MINISTER OF CONSERVATION

(RMA 093/97)

Appellants

AND **THE WAIKATO REGIONAL COUNCIL**

Respondent

AND

IN THE MATTER of three further appeals under s.120 of the Act

BETWEEN **HAURAKI MAORI TRUST BOARD**

(RMA 981/98)

WHANGAMATA MARINA SOCIETY INC.

(RMA 982/98)

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

	WHANGAMATA MAORI COMMITTEE
	(RMA 1001/98)
	Appellants
AND	**THE THAMES-COROMANDEL DISTRICT COUNCIL**
	Respondent
AND	
IN THE MATTER	of three further appeals under s.120 of the Act
BETWEEN	**TE KUPENGA O NGATI HAKO INC**
	(ENV A0160/05)
	WHANGAMATA MAORI COMMITTEE
	(ENV A0163/05)
	NGATI WHANAUNGA ENVIRONMENT UNIT
	(ENV A0165/05)
	Appellants
AND	**TE RUNANGA A IWI O NGATI TAMATERA**
	Section 274 Party
AND	**THE THAMES-COROMANDEL DISTRICT COUNCIL**
	Respondent
AND	**WHANGAMATA MARINA SOCIETY INC**
	Applicant

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

BEFORE THE ENVIRONMENT COURT

Principal Environment Judge R J Bollard (presiding)
Deputy Environment Commissioner A H Hackett
Deputy Environment Commissioner I G McIntyre

DECISION ON COSTS APPLICATIONS

[1] As explained at the outset of decision A202/05 (under which a waiver was granted concerning the late lodgement of an application for costs referred to below in paragraph [2]), following the issue of decisions A173/2005 and A175/2005 concerning the Whangamata Marina proposal and off-site trucking activity associated therewith, various applications for costs were lodged. Those applications comprise, firstly, an application by Whangamata Marina Society Inc. (the society), and secondly, by the Thames-Coromandel District Council (TCDC). No costs are sought by the Waikato Regional Council (Environment Waikato). The parties against whom costs are sought are the iwi appellants under each of the proceedings with which the substantive decisions numbered as above are concerned. The costs applications were lodged and served in each instance within the time specified in the substantive decisions.

[2] Thirdly, there is the application for costs that gave rise to the above-mentioned waiver decision. That application is made against the society, Environment Waikato, and TCDC respectively. It is advanced on behalf of those iwi appellants who were parties to the proceedings that led to the Court's final determination (A173/2005) of the main aspects concerning the marina proposal – that decision having followed upon an interim decision delivered in early 2001 (A025/2001). Certain other decisions also bore relevance to the final outcome, as explained in the introductory section of decision A173/2005 (refer paragraphs [1] to [11] thereof).

[3] It will be convenient first to deal with the iwi appellants' claim for costs against Environment Waikato and TCDC.

[4] On considering the merits of the costs application and submissions advanced for awards against the two councils, we find ourselves unpersuaded that orders in favour of the iwi appellants are warranted. Environment Waikato, for its part, has chosen not to seek costs against the iwi appellants on the basis that costs could reasonably lie where they fall.

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[5] Normally costs are not awarded against a council when appearing before this Court as respondent to defend its decision and render general assistance to the Court by providing information and other material available to it as a territorial authority. In this instance, Environment Waikato and TCDC each upheld the society's proposal at first instance by granting the consents sought, and (in the case of Environment Waikato) recommending that the Minister of Conservation grant those consents that were dependent upon the Minister's ultimate sanction.

[6] For reasons given in the 2001 interim decision on appeal, we were not prepared to do likewise at that point. It was apparent, nevertheless, that a range of factors existed in relation to the proposal sufficient to warrant the decision being delivered on an interim basis. Environment Waikato was asked to consider introducing changes to the proposed Regional Council Plan (PRCP) and, in the upshot, a variation of the PRCP was proposed – namely, the Marinas Variation (refer decisions A010/2005 and A174/2005).

[7] Although we found in 2001 that the appeals by the iwi appellants had "revealed substantial planning difficulty" for reasons explained in the interim decision, we also observed that-

> It may be that the current location warrants regional planning endorsement by allowing for the possibility of the establishment of a marina, coupled with a reduced degree of earthworks for disposal of material on the landward side.

[8] The question that arises for present purposes is this. Were the determinations of Environment Waikato and/or TCDC, viewed in conjunction with each body's subsequent role and input in the proceedings before us, such that we should award costs in the iwi appellants' favour? On reflection we think not. In our view, the first instance decision makers approached their task with due seriousness, honestly believing that there were sufficient grounds for arriving at the decisions they did, and without perceiving a need for a variation of the PRCP as raised under our interim decision. Furthermore, we consider that responsible cases were presented on behalf of each Council during the 1999 and 2000 hearing phases that preceded the interim decision.

[9] In weighing the broad merits of the iwi appellants' costs stance in relation to Environment Waikato and TCDC, we remind ourselves of the following comments made at the conclusion of the interim decision (paragraph [47]):

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> For the reasons explained, we can do no more than deliver this decision on an interim basis, so as to afford the applicant and the consent authorities opportunity to consider the implications of the findings reached, including the possibility of introducing changes to the PRCP in particular. We have refrained from making our decision a final one, given the concern we share with the society's prime movers over the very real problem at Whangamata bearing on boating accommodation and harbour traffic; also, given the possibility that marina approval at the location in question could be warranted should appropriate planning changes be proposed and prove merited after due process.

In summary, it was concluded that justification existed for delivering the decision in 2001 on an interim basis, given various factors that had emerged before us over the marina proposal, and the desirability, against that background, of affording Environment Waikato and TCDC the opportunity to consider the overall planning position bearing on the case.

[10] As to each Council's participation in the 2004 and 2005 hearing phases, we consider that the contribution of each through counsel and witnesses who appeared was both of assistance and competently advanced.

[11] In the result, we perceive no sufficient grounds for ordering Environment Waikato or TCDC to pay costs in favour of the iwi appellants after weighing all matters advanced on those appellants' behalf. We so find having reviewed the notable history of the proceedings culminating in decision A173/2005, including the performances of Environment Waikato and TCDC at the first instance stage and as respondent parties in the various hearing phases. We decline the application for a costs order against Environment Waikato and/or TCDC accordingly.

[12] Turning to the claims for costs by the society against the iwi appellants and by the latter against the society, having considered the full submissions and counter submissions advanced on each side, we are satisfied that costs ought reasonably to lie where they fall. Each side has advanced arguments that might be said to warrant costs in one direction or another in relation to various aspects of this lengthy saga with its multiple facets.

[13] For instance, various issues raised on behalf of the iwi appellants may be said to have been unconvincing or to have been inadequately supported by relevant evidence. Issues such as that involving the foreshore and seabed legislation and traffic issues arising under the appeal over the trucking consent are pointed to in particular for the society, and indeed, for TCDC whose costs claim we come to shortly. On the other hand, the iwi appellants raised issues during the course of the

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various hearings that were found to have substance and warrant additional steps and the calling of further evidence. In this regard we point particularly to the "notable difficulty...generated by the society itself" (refer paragraph [9] decision A173/2005) as regards intended fill levels within the landward side of the proposed development. That was an issue properly raised for the iwi appellants at the 1999 and 2000 hearing phases. Another issue, properly raised, concerned the need for the trucking consent. The argument for the iwi appellants in this regard was upheld under the formal ruling given at the conclusion of the 2004 hearing phase (A145/2004).

[14] While at the end of the day the iwi appellants have been unsuccessful in their quest to have the decisions at first instance overturned and/or consents refused, looking at the positions taken on each side over the full gamut of the hearing process before this Court, we conclude with little hesitation that the appropriate outcome as between the society and the iwi appellants, and vice versa, is that costs should lie where they fall.

[15] Turning lastly to the application for costs by TCDC, here again, after careful consideration of the comprehensive submissions advanced by counsel for TCDC and by counsel for the iwi appellants in opposition, we are not persuaded that an order for costs in relation to the landward component of the marina proposal is warranted. At paragraph [44] of the 2001 interim decision we noted:

> On the landward side, the district planning provisions do not contemplate the very extensive earthworks and landform alteration implicit in the proposal. We do not overlook the point made by Mr Berry that there is a policy directed to avoiding land uses or development that adversely affect various natural values of certain named harbours, and that that policy omits to mention Whangamata Harbour. However, that point does not suffice in our view to overcome the difficulty presented by the proposal as to the degree of earthworks proposed.

[16] And at the latter part of paragraph [46] we observed:

> For a project of such major import for the area – and, indeed, the wider Coromandel district (being the second marina should it proceed, the other being at Whitianga) - the planning instruments do not offer the support and encouragement that ought reasonably to be expected for consent purposes. From the regional planning perspective, that is so essentially on account of the ASCV and associated values that apply to the whole upper harbour area. From the district planning perspective, the difficulty arises from the extent of the proposed earthworks, and the notable raising and reshaping of the landform. The new levels would be such that they could not be said to be of natural character in relation to the surrounding area, both as regards the coastal aspect and the existing residential development in the vicinity of the HEDPA.

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[17] Given our findings as above stemming from concerns raised in submissions and evidence for the iwi appellants over the extent of the earthworks (inclusive of the allied issue of public notification (refer paragraphs [10] to [18] of the 2001 decision)), it was necessary for further significant consideration to be applied to the landward aspect. Moreover on the trucking issue, the argument for the iwi appellants was successful as to the need for a further consent to be sought from TCDC.

[18] We do not overlook the contentions advanced for TCDC concerning attendances involved in responding to the foreshore and seabed issue and in defending its position in relation to the trucking consent. Nevertheless, looking at the parts played by the iwi appellants overall, and bearing in mind the way various important issues emerged requiring additional consideration and input, we consider it reasonable that, as with Environment Waikato, the costs incurred by TCDC lie where they fall in relation to "a project of such major import for the area" (refer the quoted extract from the 2001 decision above).

[19] In the final result, we make no costs order for or against any party involved in the proceedings and associated hearings regarding the Whangatama Marina proposal.

DATED at **AUCKLAND** this 27th day of January 2006.

For the Court:

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R J Bollard
Principal Environment Judge

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