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Decision No. A 010 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references under clause 14 of the First Schedule to the Act

BETWEEN **THE THAMES-COROMANDEL DISTRICT COUNCIL**

(ENV A0075/04)

WHANGAMATA MARINA SOCIETY INC

(ENV A0076/04)

TE KUPENGA O NGATI HAKO INC

(ENV A0078/04)

HAURAKI MAORI TRUST BOARD

(ENV A0085/04)

Referrers

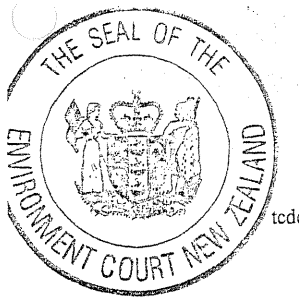
AND **THE WAIKATO REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

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

HEARING at Whangamata on 15, 16, 17, 18 and 19 November 2004



APPEARANCES

Ms J Caldwell and Ms K Hill for the Waikato Regional Council
Mr S Berry and Ms J Vella for the Thames-Coromandel District Council
Mr A S Menzies and Ms J Forret for Whangamata Marina Society Inc
Ms P J Kapua and Ms K I Taurau for Hauraki Maori Trust Board, Te Kupenga O Ngati Hako Inc, Te Runanga O Ngati Puu Inc, Te Runanganui A Iwi O Ngati Tamatera, and Whangamata Maori Committee
Mrs E F Birdsall for Paku Bay Preservation Society Inc and Guardians of Paku Bay Association Inc
Mr B Graeme for the Royal Forest and Bird Protection Society Inc
Mrs G Houghton for Minister of Conservation

INTERIM DECISION

Introduction

[1] Consequent upon this Court's interim decision in *Whangamata Golf Club & Ors v Waikato Regional Council* (A025/2001, 19 February 2001), the Regional Council (Environment Waikato) initiated a variation process to its proposed regional coastal plan "in order to ascertain whether appropriate policy support could be integrated into (the plan) by way of guiding criteria or other planning methods for a proposed marina in Whangamata harbour, and if so how". (Refer p.12 of the Council's decisions on submissions leading to the present appeals.) The process further embraced the issue of how marinas could appropriately be provided for in the coastal marine area (CMA) of the Waikato region as a whole.

[2] Under the proposed variation to the plan as notified, marina zonings were provided, firstly, at Whitianga where a marina presently exists, and secondly, at the location at issue in the interim decision above at Whangamata. A marina zoning was already provided for in the plan as regards a possible marina at Tairua, pursuant to an interim decision and then a final decision of a differently constituted panel of this Court – refer *Pacific Paradise Ltd v Waikato Regional Council* (A86/2002 (interim) and A139/2003 (final)). The Tairua zoning provides for two zoned areas labelled Zone I, where marina structures are provided for as a restricted discretionary activity, and Zone II, where discretionary activity consent is required. Under the two proposed zonings at Whitianga and Whangamata, marinas were to be allowed for on a discretionary activity footing, subject to various qualifying and assessment criteria. Marina poles and pontoons were provided for as a permitted activity on the

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reasoning that once a marina location is determined on due consideration and analysis, the internal layout of poles/pontoons becomes essentially a matter of design by the developer, without the likelihood of environmental effects arising from the design layout itself of more than a minor kind.

[3] In its decisions on the variation delivered in February 2004, the Council decided to delete the zonings at Whangamata and Whitianga because it was "not satisfied that zoning is currently the appropriate planning tool to guide development of marinas in the CMA": (p.12 of the decisions on submissions). The Council went on to state:

> This is because on a regional basis there is:
>
> (a) insufficient information and assessment on what type and where specific use, occupation and development of coastal resources in relation to other values and uses of harbours and estuaries, is appropriate to provide for the social, economic and cultural wellbeing of the Region's people and communities.
>
> (b) insufficient information and assessment of the cumulative effect of use, occupation and development over the estuarine systems of the Region, particularly in relation to shallow harbours, and therefore the need to adopt a precautionary approach to promote the sustainable management of natural and physical resources and provide for matters of national importance.
>
> (c) there is a need for further information and assessment of tangata whenua and community values for Council to site particular uses of the CMA, such as marinas, with confidence.
>
> Council does recognise that marina development is an activity that requires specific policy guidance in the PRCP. Council considers that at this stage, the most appropriate means of providing for sustainable management of the CMA, is to provide guiding policy and assessment criteria by which decisions on consent applications for marinas can be made on a discretionary basis. Council intends to undertake work to address the matters (a), (b) and (c) above through the harbour planning method provided for in this variation, and review of the PRCP.
>
> As well as providing specific policy guidance for marina development, the decisions on the Variation ensure that the purpose of the ASCV (Areas of Special Conservation Value) policy is clarified. The purpose of the ASCVs are to indicate areas where there are identified conservation values which are to be carefully considered in the assessment of a consent application for those areas. The ASCV denote a boundary within which the identified conservation values may be present to a greater or lesser extent. The intent therefore is not to prohibit use and development in the areas, but to ensure that effects on the identified values within these are given careful consideration in any resource consent or policy decision making process.
>
> Therefore in summary Council has decided to:

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(a) Clarify that an ASCV does not necessarily preclude appropriate use, occupation and development of the CMA in that area;

(b) Include criteria which provides guidance for decision making on what circumstances use and occupation of coastal space for a marina is considered appropriate;

(c) Include a rule for use and occupation of space for Marina basins as a discretionary activity in the CMA;

(d) Strengthen the method relating to development of Harbour Plans;

(e) Delete the proposed Marina Zones from this variation; and

(f) Consequential changes arising from this decision.

Council therefore accordingly accepts or rejects submissions which support or oppose respectively this decision.

[4] Another change involved altering the reference to marinas to marina basins, thus underlining the fact that the variation was essentially directed to the question where a marina might appropriately be located. An important statement (reproduced below) was retained, however, explaining the reasons for adopting the specified assessment criteria for discretionary activity consideration of marinas (marina basins), but with necessary modification consequent upon removal of reference to zoning maps for Whitianga and Whangamata. Attention was also drawn via an advice note to other consent requirements.

Principal reasons for Adopting: This rule provides decision making guidance for the location of marina basins and sets standards to manage environmental effects in the marina basin once a marina is established. The extent to which the area is consistent with the criteria of Policy 3.1 relating to the appropriate location of marinas would also be assessed. This rule only applies to use and occupation of space. Therefore rules relating to other effects from the development of a marina such as dredging, discharges, structures etc will also apply. A marina basin which would exclude the public from 10 hectares or 316 metres along the foreshore would be a restricted coastal activity in accordance with Schedule 1 of the NZCPS.

Particular reference should also be made to Policy 4.1.1 Maintaining or enhancing water quality characteristics.

Advice Note: This rule provides for the use of and occupation of coastal space by marina basins. The Policies and Rules in this Plan relating to the activities that occur in the construction, development and operation of the marina, for example but not limited to: structures, dredging, deposition, disturbance and reclamation, must also be considered and the appropriate resource consents obtained. These activities may be permitted, controlled, discretionary, non-complying or restricted coastal activities depending on the size and scale of the activities involved.

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[5] Appeals by the various appellants before us followed. It will be convenient to summarise the parties' basic stances evinced at the hearing. Both the Whangamata Marina Society Inc and the Thames-Coromandel District Council sought restoration of the marina zonings at Whitianga and Whangamata, but without objection to the change of description of marinas to marina basins. In the Marina Society's case, however, controlled activity provision was sought within each zone instead of the discretionary activity provision notified in the proposed variation originally. The District Council went on to suggest that marina basins should be a prohibited activity outside the zones, while the Marina Society was content for discretionary activity provision to apply in that situation.

[6] The planning witness for Environment Waikato, Mr T D Nugent, while opposed to the restoration of the two zones, was nevertheless prepared to endorse the concept of a notation being entered on the appropriate planning map as regards any marina basin once consented to and established – Whitianga being the only example at this point. If that approach were adopted, the plan would contain zoning provision for a marina at Tairua, with a varied method for recognising the facility that exists at Whitianga.

[7] All parties were basically agreed on discretionary activity provisions suggested by Mr Nugent in his evidence, with refinements introduced as the hearing proceeded as representing his updated views, and in turn as representing Environment Waikato's amended stance as confirmed by Ms Caldwell. The essential difference rested upon whether or not the two zonings should be restored, with controlled, discretionary and prohibited activity provisions to be applied in the differing circumstances contended for by the Marina Society on the one hand, or the District Council on the other. The Minister of Conservation, Royal Forest and Bird Protection Society Inc, and two incorporated bodies with interests focussed on the Paku area at Tairua, were all supportive of Environment Waikato's position that discretionary activity provision for marina basins should apply in the CMA throughout the region without any zonings, (save for that at Tairua, inasmuch as it preceded the variation) – subject to compliance with certain standards and terms, and accepting Mr Nugent's additional suggestions by way of refinement.

[8] The Maori interest parties, for their part, were likewise supportive of Environment Waikato's position, subject to some areas of concern bearing on detail as to the wording of certain criteria or policy provisions discussed in evidence adduced from Ms D L Ngamane, a planning witness called on those parties' behalf.

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The Zoning Issue

[9] We turn to consider whether the marina zonings at Whitianga and Whangamata originally proposed under the variation as notified should be reinstated, and if so, whether a planning control framework along lines sought by either the Marina Society or the District Council should be adopted.

[10] Evidence in favour of the two zonings was adduced from Mr D F Sergeant, a resource management consultant called for the Marina Society, and from Mr A R Matheson, a like consultant called for the District Council. As to Environment Waikato's position, planning evidence was adduced (further to that of Mr Nugent) from the Council's Programme Manager-Coastal Policy, Ms R M Wilton – she having played a significant role in the investigative analysis and drafting of the variation. Mr J C Stewart was called by Mrs Houghton for the Minister to give planning evidence in general support of that called for Environment Waikato, and, as noted at paragraph [7], Ms Ngamane was called for the Maori parties.

[11] So this is a case where a range of differing opinion is before us centred on the zoning issue, deriving from experienced professionals with considerable individual backgrounds in the field of coastal planning and issues associated.

[12] On considering the competing views for and against zoning recognition of the existing marina at Whitianga, we find ourselves in agreement with Mr Sergeant, generally for the reasons he outlined in his evidence, coupled with the supporting view of Mr Matheson (leaving aside his urging of prohibited activity status beyond any zoned area).

[13] As Mr Sergeant observed, opportunities for recreation are listed as a matter to be addressed in the Second Schedule of the Resource Management Act 1991 (RMA), Part 1, clause 2(a) as follows:

> Use of the coastal marine area including where appropriate, the protection of conservation values, and the recognition of opportunities for recreation, aquaculture, and other forms of development.

And he went on to say:

> The plan provides for each of these 'uses' of the coastal area, recognising conservation values, aquaculture, mooring areas and, in the current Variation, marinas, associated with boating recreation activities.
>
> The Council has also been a leader in introducing zoning to the coastal area with the introduction of 'zones' for marine farming at Wilsons Bay in the Firth

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> of Thames, even prior to the Government's move to implement Aquaculture Management Areas (AMA) on a nation wide basis. Other examples of 'zoning' in the Waikato coastal area include mooring areas, the Areas of Significant Conservation Values (ASCV) and the proposals for harbour planning.
>
> The zoning of mooring areas was the subject of another variation which is now largely operative. Maps of the region's coastal areas now show specific areas where mooring is provided for and also where it is prohibited. ...ASCV are also shown around the region's coastline and islands denoting the present of wide range of conservation values within what is effectively a protection zoning.

Later he noted:

> Central Government has also added weight recently to a zoning approach in the coastal area with the requirement that marine farming areas (shall be) located within an AMA or otherwise be a prohibited activity. Conservation and protection objectives are also increasingly being met at a national level by the use of 'zoning' or special area techniques through the use of marine reserves. There are now 31 existing or proposed marine reserves around New Zealand" coastline or near off-shore islands.

[14] In summary, Mr Sergeant expressed support of the use of planning techniques involving or akin to zoning where, based on a thorough assessment "an activity or proposed activity has been demonstrated as being generally suitable" as to warrant that area being recognised "in a transparent manner accordingly".

[15] The contrary planning opinion of Mr Nugent and others led to acceptance of the possibility after inquiry by the Court that a notation might be entered upon the relevant planning map as to the existence of the marina at Whitianga. This course was preferred to the "arbitrary confines" of a zone, given the need for a plan change should a proposal be put forward to alter the facility in future at variance with the zone's confines. We nevertheless prefer the view of Mr Sergeant and Mr Matheson on balance, generally for the reasons outlined in their evidence, and consider that the zoning originally proposed under the variation at Whitianga should be restored.

[16] In the event that an alteration to the existing facility should be proposed of such significance as to require a change to the zoning, then that ought reasonably to be the subject of a change, promoted, one would expect, in conjunction with an appropriate consent application. As was pointed out, and we agree, applications to establish marina basins within the region are not likely to be prolific (if not classified as a prohibited activity outside zoned areas as the District Council seeks). Viewed against the Tairua example, a request for a marina zoning based on due investigation and assessment prior to or in conjunction with a consent application is not

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unreasonable in terms of process in our view, given the public interest surrounding marinas and their location.

[17] We turn to the question whether the zoning originally proposed under the variation at Whangamata should be reinstated. In the light of the evidence of Mr Sergeant and Mr Matheson, and the comprehensive s32 analysis undertaken by Environment Waikato, including particularly the advantages and disadvantages of the "zoning" and "no zoning" options, we would endorse reinstatement were it not for an extraordinary obstacle, (with ramifications indeed beyond Whangamata), arising from the Regional Policy Statement (RPS) shortly to be discussed.

[18] In its analysis of the variation as notified, the Regional Council recorded that–

> The zones are shown in maps in Appendix 3 of the Plan. The zones recognise:
>
> - the existing marina at Whitianga and seeks to give it on-going recognition as an appropriate activity in that location.
>
> - a proposed marina at Whangamata for which resource consents have been granted by Environment Waikato and for which Environment Waikato has recommended to the Minister of Conservation that other RCA (restricted coastal activity) consents be granted.
>
> Council acknowledges that there were a range of conflicting interests with respect to the proposed Whangamata marina development, but on balance decided to grant the resource consents. The evidence heard by Council and subsequent Environment Court evidence, draft consent conditions and draft consent orders form a part of the RMA section 32 analysis. This evidence may be viewed at Environment Waikato offices.

[19] The analysis went on to state the following as regards protection of significant vegetation and habitat:

> It is proposed that a change be made to Policy 3.2.1 – Protection of Significant Vegetation and Habitat. This policy relates in part to the protection of Areas of Significant Conservation Value (ASCV). The reason for this change arises from the difficulties expressed in the Environment Court interim decision relating to Whangamata Harbour. Thus this policy change clarifies the intent of ASCV within (the plan) and in particular clarifies that the ASCV are not exclusively protection areas. That is, appropriate use and development can occur within an ASCV provided careful attention is given to avoiding, remedying or mitigating any adverse effects on the conservation values which are identified in an ASCV.

[20] The variation as notified sought to combine the "zoning" and "no zoning" options by applying zonings to existing marina developments "which have

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progressed through a resource consent hearing process ie where there has already been public debate about the location, scale, etc of a marina in a particular harbour". It was not considered to be incumbent upon Environment Waikato to fund research into identifying suitable marina locations around the region. Rather, the variation was designed to "support the decision-making for future marinas", by providing guidance and direction to would-be applicants.

[21] The use and occupation of space for a marina within a zoned area was classified on a discretionary activity footing. In the case of Whitianga that was thought appropriate, "so as to afford Council some discretion to reassess the use and occupation of space of the marina when its current consent for occupation expires". As to Whangamata, the following was stated:

> In the case of the proposed Whangamata Marina the discretionary status is also appropriate on account of the lack of a final decision from the Environment Court on the effects of the proposal based on the evidence heard. Also it does not affect the Minister of Conservation (sic) ability to make a final decision on the RCA consent as would have originally occurred. Thirdly, this rule will have general application and is not limited to the present consent application and appeal. If for any reason the present application is not pursued to finality or a new hearing of that application is directed, it is appropriate and consistent with other provisions in (the Plan) for an application to be considered as a discretionary activity.

[22] We accept that, were it not for the matter shortly to be mentioned, there is a substantial volume of information and material available concerning the proposed marina and its intended location at Whangamata. Following the lengthy and detailed hearings that occurred in 1999/2000, we found in favour of the proposal in various respects and delivered an interim decision to enable perceived statutory planning difficulties to be considered by Environment Waikato and the District Council respectively, thus leading, in turn, to Environment Waikato's promulgation of the variation.

[23] Zoning provision was proposed under the variation for the marina at Whangamata against the background of the interim decision and of Environment Waikato having consented to the marina proposal on the merits at first instance. Both the Regional and District Councils remain firm in their support of the proposal on its merits. And in promoting the variation after due investigation and analysis the Regional Council was of the view, and remains of the view consequent upon its hearing and determination of submissions to the variation, that the variation's provisions were, and are, such as to fully address any "planning problem" that might

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effectively prevent this Court from proceeding to make the interim decision final and upholding the Regional Council's position in favour of the marina proceeding.

[24] Irrespective of the variation, a significant difficulty stands in the way of upholding a zoning for the proposed location of the marina basin at Whangamata, whether the activity be classified within the zone as controlled (as sought by the Marina Society) or discretionary. The difficulty stems from the RPS. Before turning to explain and discuss it, we pause to consider the controlled as opposed to discretionary issue above.

[25] On that aspect, we consider that the appropriate course, both for Whitianga and Whangamata, would be to follow Environment Waikato's position, supported by all others save the Marina Society, of discretionary activity allowance, generally for reasons advanced by Mr Nugent and other supportive planning witnesses. We so hold, given the wide range of inherent issues that marina proposals involve, with the need for the Regional Council to have the ability to grant consent to or reject any particular proposal – whether to establish a marina basin to accommodate a 205-berth marina as sought at Whangamata, or possibly to effect some modification to the marina basin at Whitianga.

Issue Stemming from the Regional Policy Statement

[26] In terms of Whangamata, whether one chooses to adopt an approach along lines originally propounded under the variation, or simply to provide for marina basins without accompanying zonings on a discretionary activity footing, a critical provision in the RPS stands in the way of either course. The regional coastal plan as varied cannot be at odds with the RPS, yet the effect of the RPS where a marina proposal would affect a "wetland habitat for indigenous plant communities and/or indigenous fauna communities" (as would be the case at Whangamata), is to classify any such wetland as an area of significant indigenous vegetation and significant habitat of indigenous fauna, irrespective of the wetland's size and however degraded it may be – refer RPS Appendix 3 clause 6. Clause 6 goes on to incorporate certain exceptions where a wetland as described "has been created and subsequently maintained for or in connection with:

- Waste treatment; or
- Wastewater renovation; or
- Hydroelectric power lakes; or

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- Water storage for irrigation; or
- Water supply storage;

unless in those instances they meet the criteria in *Whaley et al* (1995)".

The criteria in *Whaley et al* are not apparent from the RPS, but as they plainly relate to the bullet-pointed items, nothing turns on that for present purposes.

[27] The qualifying parts of clause 6 concerning wetlands involving waste treatment etc. were introduced in consequence of proceedings pursued by *Mighty River Power Limited* under decision A146/2001 (Judge Newhook presiding). The Court was not asked to address the wider issue regarding the apparent breadth of clause 6 when read literally. Rather, *Mighty River Power Limited*, mindful of the breadth factor, was concerned to ensure that wetlands associated with energy generation would not fall foul of clause 6. It was a matter of concern that any wetland habitat featuring indigenous plant communities and/or indigenous fauna communities was deemed significant for the purpose of the RPS, and thus needed to be treated as such in addressing related policy provisions of the New Zealand Coastal Policy Statement (NZCPS).

[28] The significance of the foregoing problem falls into greater relief, when read in conjunction with the following policy and implementation methods of the RPS headed Regionally Consistent Criteria For Use When Identifying Significant Areas:

> Use a consistent approach throughout the Waikato region when identifying areas of significant indigenous vegetation and significant habitats of indigenous fauna*.
>
> Implementation Methods
>
> 1. When preparing or implementing regional and district plans, assessing resource consent applications and in the consideration of areas to be protected by non-regulatory mechanism; an area of indigenous vegetation or habitat for indigenous fauna is significant if the relevant decision-makers are satisfied, on the basis of all evidence presented, that the area currently meets one or more of the criteria in Appendix 3.
>
> 2. Through liaison with other organisations that are undertaking protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna advocate the use of the criteria in Appendix 3.

By way of a footnote the following is stated:

> Should planted vegetation (exotic or indigenous) be identified as significant habitat for indigenous fauna, recognition of the ongoing reasonable use of the area must be considered when making management decisions.

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[29] We do not regard the footnoted passage as sufficient to rely on as regards the marina basin proposed at Whangamata. The words "the ongoing reasonable use of the area" appear to contemplate some activity within an area that needs to continue rather than the introduction of a major new activity. Be that as it may, we note as well that the footnote refers to "planted vegetation" which rather points to a situation where an area is identified as significant for indigenous fauna consequent upon vegetation having been planted, but allows for the area's continued "reasonable use...when making management decisions". All in all, the footnote in our view fails to assist the Whangamata situation.

[30] Before pronouncing a final outcome in these proceedings, this decision is interim only to afford Environment Waikato an opportunity urgently to consider the foregoing and advise without delay whether it proposes to amend clause 6 of Appendix 3 of the RPS by introducing a change under s.60(2) of the RMA. There appears to us to be no scope in the present proceedings to remedy the difficulty because it is the RPS from whence the difficulty arises. It is disappointing that Environment Waikato did not recognise and dealt with it prior to its manifestation in the present proceedings relating to marinas, including the proposal at Whangamata, under the long-awaited variation to the regional coastal plan. If the answer is yes, these proceedings will be resumed in due course in conjunction with all related proceedings (including any appeal that may arise from a further consent being sought by the Marina Society as to truck movements associated with removal of excavated material pertaining to formation of the marina basin at Whangamata (refer Decision A145/2004)).

[31] If the answer is no, we will proceed to make a final decision on matters as they stand, in which event the chance of the Whangamata marina receiving a favourable endorsement in finally resolving the related resource consent appeals on their merits must be viewed, at least tentatively, as unlikely, given the interpretative linkages between the RPS, the NZCPS and the discretionary activity provisions proposed under the variation. Due to the structure of the wording, we perceive notable difficulty in endorsing a proposal such as the Whangamata marina, seeing that it involves placement of fill on a wetland area that is effectively deemed by the RPS to be significant whatever the circumstances relating to or surrounding that area. In fact, it seems to us that a literal interpretation of the current wording of the relevant provisions of the RPS results in a defacto prohibition of any activity that involves filling in of a wetland as defined. This is so where any such wetland area in the region is involved, save where the wetland falls under one of the specified

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exceptions to clause 6 of Appendix 3. In other words, the significance of the issue goes well beyond the Whangamata marina proposal and is liable to affect a wide range of activities that may impinge on wetland areas covered by clause 6.

[32] On a final note at this point, we are not persuaded that marina basins should be prohibited outside zoned areas as a means of forcing applicants to seek a plan change as urged for the District Council. On the other hand, we are not firmly persuaded that outside zoned areas the activity should be discretionary region-wide. It may be that such a proposal should be non-complying in status (which Mr Matheson appeared to favour failing prohibited activity status), coupled with a policy statement in the plan that if the adverse effects are more than minor, the Regional Council expects that a zoning will be sought to provide for the activity on a discretionary footing, with a consent application being lodged in tandem or in succession. We reserve our decision on this issue.

[33] Costs at this stage are reserved.

DATED at **AUCKLAND** this 25th day of January, 2005.

For the Court:



R J Bollard
Environment Judge