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A 25/2001

Decision No. A 25 /01

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **WHANGAMATA GOLF CLUB**

(RMA 46/97)

WHANGAMATA MAORI COMMITTEE

(RMA 60/97)

THE HAURAKI MAORI TRUST BOARD

(RMA 62/97)

WHANGAMATA MARINA SOCIETY INC.

(RMA 68/97)

TE KUPENGA O NGATI HAKO INC.

(RMA 74/97)

MINISTER OF CONSERVATION

(RMA 93/97)

Appellants

AND **THE WAIKATO REGIONAL COUNCIL**

Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

AND

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

BETWEEN **THE HAURAKI MAORI TRUST BOARD**

(RMA 981/98)

WHANGAMATA MARINA SOCIETY INC.

(RMA 982/98)

WHANGAMATA MAORI COMMITTEE

(RMA 1001/98

Appellants

AND **THE THAMES-COROMANDEL DISTRICT 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 4, 5, 6, 7 and 8 October 1999; 16, 17, 18, 19 and 20 October, 13 November 2000

COUNSEL

P J Kapua and G A Cole for appellants in RMA 60, 62 and 74/97, 981/98 and 1001/98

A S Menzies for Whangamata Marina Society Inc., both as appellant in RMA 68/97 and 982/98 and as applicant

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

K G Parker and B A Parham for the Waikato Regional Council
M J Savage, S J Berry and R Randall for the Thames-Coromandel District Council

INTERIM DECISION

NATURE OF PROPOSAL

[1] This case concerns an application to construct and operate a 205-berth marina in the Moanaanuanu Estuary at Whangamata. The proposal involves both seaward and landward components and therefore embraces two parts for resource consent purposes as follows:

[2] Part A: Application was made to the Waikato Regional Council ("Environment Waikato") in November 1995 by Whangamata Marina Society Inc ("the applicant" or "the society"), an incorporated society formed in 1992 for the purpose of investigating, promoting, constructing and operating a marina at Whangamata, for consent to:

1. *Construct a 205-berth marina in the Moanaanuanu Estuary adjacent to the Whangamata Harbour with coastal works including dredging, control structures, pontoons and slipway.*

2. *Discharge seepage water from the marina basin during the period the marina is being constructed to the Moanaanuanu Estuary.*

3. *Discharge drainage water from excavated marina basin sand to the Moanaanuanu Estuary*

4. *Place fill on to a salt marsh for the development of a hardstand and parking area.*

[3] The marina is proposed to occupy approximately 4ha of inter-tidal mudflat. The excavated material is intended for disposal largely on adjacent land owned by the Thames-Coromandel District Council ("TCDC") comprising nearly 4.63ha. Included within that land is about 1ha of tidal salt marsh – an area that proved a focal point of dispute as later discussed.

[4] Construction of two breakwaters 300m and 50m in length is proposed, thus separating the marina basin from the estuary. The main channel to the marina would be 500m in length, stretching from the marina basin to the main harbour channel. Maintenance dredging of the channel to the marina would be undertaken periodically

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

when required. The channel is 15m wide, with a depth at low tide of 1.5m and high tide 3.5m. The depth of the marina basin, once constructed, would be 2m (low tide) and 4m (high tide).

[5] Part B: Application was made in September 1996 by the society to TCDC as follows:

> 1. *To undertake earthworks involving the placing of approximately 180,000 cubic metres of fill taken from the construction of the Whangamata Marina, on several parcels of lands adjacent to the Whangamata Marina site owned by Thames-Coromandel District Council; and*
>
> 2. *To establish marina facilities within the Marina Activities zone (eg a carparking area, a washdown area, hard-stand area, a secure dry boat storage area, boat maintenance area, car and trailer parking, administration office (50m^2) and toilet facilities). Access to the facilities will be from Beach Road.*

[6] 148 car parks are proposed, with trailer parking for up to 32 boats or trailers. A concrete boat launching ramp and travel lift jetty is intended to provide all-tide access to the marina basin and harbour. Refuse containers are to be placed adjacent to the walkways, boat launching ramp, and amenities block, plus an oil disposal tank at the hardstand area. Security lighting is to be provided to the marina, carparks and secure boat areas during hours of darkness – such lighting being directed away from nearby residences to avoid light spill nuisance. Walking access from Beach Road at the northern-eastern end of the site and Hetherington Road at the southern-western end is to be maintained, with the area being laid out in planting to form a buffer between the harbour and the carparking areas and land-based facilities. Such access is to traverse an unformed part of Beach Road that is identified by a designation in TCDC's proposed district plan as "road to be stopped and then zoned Marine Activities Zone".

INTRODUCTORY BACKGROUND MATTERS

[7] The hearing of the appeals occurred in two phases, one in 1999, the other last year. Various matters emerged at the first phase that may conveniently be explained and discussed before passing to consider issues falling for consideration from the combined material presented over the two phases.

[8] At the outset of the 1999 hearing, consent orders were tendered by counsel for the applicant on the society's own appeals, and on the appeals by the Minister of

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Conservation and Whangamata Golf Club. Under those proposed orders the relevant consents granted at first instance would be maintained, subject to amendment of various conditions. The documentation was received *pro tempore,* pending resolution of the remaining appeals by the Maori interest appellants.

[9] Counsel for the society also raised the following matters in his opening. First, it was indicated that the intended fill placement and associated earthworks had been adjusted to 172,000m^3 from 180,000m^3, with some 123,000m^3 being excavated from the proposed marina basin and 49,000m^3 from the channel. It was also advised that the applicant no longer intended to dispose of 19,000m^3 of material on land forming part of the golf course. In short, the revised intention was to place 150,000m^3 of fill on TCDC's land, with the remaining 22,000m^3 of material being disposed of off-site, possibly by arrangement with Environment Waikato for beach enhancement purposes.

NOTIFICATION ISSUE

[10] As the applicant's case proceeded, another matter emerged that was to play a significant part in the delay between the two hearing phases on account of the applicant's desire to reassess its position.

[11] By memorandum dated 23 September 1999, counsel for the Maori interest appellants (hereafter called simply "the appellants") suggested that there was a need "to re-notify the land use consent because the information regarding height levels contained in the notification was incorrect and levels cited of heights of 2 to 4 metres were in fact by the applicant's own assessment likely to be approximately 6.5 metres high".

[12] The case had been set down to proceed in the sitting week commencing 4 October 1999 as a special fixture. Counsel for the applicant and the two Councils opposed the appellants' request for an adjournment at the relatively late stage that Ms Kapua raised the issue – such issue being raised in the context of various other allegations to the effect that the applicant had failed to apply for and obtain additional consents to those actually applied for and granted at first instance. It was asserted for the applicant in response that all appropriate steps had been taken and that that would be demonstrated in the course of the hearing. Given the late timing of the adjournment request and the opposition on behalf of the applicant and

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

respondents, it was directed that the hearing should proceed as scheduled - it being understood that the matters raised by Ms Kapua would be covered and dealt with in the presentation of the parties' cases, along with the many other issues at stake going to the merits.

[13] On the fifth day of the hearing, at a point when it was apparent that the proceedings would have to be adjourned in any event for evidence to be heard at a later date on behalf of the appellants, Ms Kapua elicited the following answers in cross-examination of TCDC's planning witness, Mr A R Matheson:

> *Now when the Thames-Coromandel District Council notified this application it stated that the fill will raise the natural ground level by approximately 2 to 4 metres. Is that correct? ... Yes.*
>
> *In actual fact looking at figure 8, it's likely to be somewhere between say 3 and 6½ metres isn't it? ... Yes.*
>
> *So anybody who read the notification of this application understanding it to be 2 to 4 metres, it's highly possible that there may be some who, at a level of 6 ½ metres may have considered themselves to be adversely affected by this proposal. Would you agree with that? ... There may have been, yes, but even at the advertised lower levels we heard submissions from people to that effect concerned about the height of fill and that matter was considered by the Commissioner. In addition, the requirement of notification is effectively to advertise that the application has been received and that notification was sent to all people adjoining that area and nobody could have known what the actual effects of the application were without actually coming and viewing the AEE and the other information that is part of the application.*
>
> *So the Council sent the notification information that was contained in its notification to persons affected but not the full details of the application ... . That's correct.*
>
> *There's a strong possibility isn't there Mr Matheson, that if you received notification of an application that quite specifically says it will raise the natural ground level by approximately 2 to 4 metres, that you wouldn't perhaps be worried about that, but perhaps 6 ½ metres might be quite a different issue? ... I'll say that without knowing where the high land was to be between the different heights from the public notice, people could not know whether they were affected or not. Their property may adjoin an area that was only raised by 2 metres. The only way you could find out if you were directly affected would be to come and look at the application.*

[14] Accompanying the application to TCDC was a comprehensive assessment of environmental effects (referred to in Mr Matheson's evidence above as "the AEE"). The application contained a brief description of the work entailed in the excavation, placement and removal of dredged material as follows:

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Material will be excavated from proposed marina basin and channel, and deposited on marine activities zone and adjoining TCDC land zoned for high density housing. Surplus material will be transported to golf course and deposited according to the attached golf club proposal.

[15] The part of the public notification relevant for present consideration reads as follows:

APPLICANT: Whangamata Marina Society Incorporated

C/- Opus International Consultants

Private Bag

HAMILTON

TYPE OF CONSENT: Land Use

PROPOSAL AND LOCATION: To undertake earthworks involving the placing of approximately 180,000m^3 of fill taken from the construction of the Whangamata Marina, on land adjacent to the Whangamata Marina site owned by the Thames-Coromandel District Council. This land is bordered by Beach Road, Harbour View Road, Mako Road, Riverview Road, Hetherington Road and Martyn Road. The fill will raise the natural ground level by approximately 2-4m. The fill will be compacted with a grade towards the marina basin so that stormwater runoff during construction will run to settling ponds and drainage bunds. The fill area will be finished with metal and seal where associated marina facilities are to be developed, and topsoiled, grassed and landscaped in all other areas.

To undertake earthworks involving the placing of approximately 19,000m^3 metres of fill taken from the construction of the Whangamata marina, on land forming the Whangamata Golf Course. The deposit of the fill on the golf course will be used to develop the golfing greens at specific sites around the golf course. Some material may be stockpiled before being deposited and regrassed.

To establish marina facilities within the Marine Activities Zone (eg a carparking area, a washdown area, a hard-stand area, a secure dry boat storage area, boat maintenance area, car and trailer parking, administration office (50m^2) and toilet facilities). Access to the facilities will be from Beach Road.

[16] For the purpose of the public notification, the notification needed, in terms of s.93(2)(b) of the Resource Management Act 1991 ("the Act" or "the RMA"), to contain "a description of the application including the location (as it is commonly known) of the proposed activity." In practical terms a reasonably accurate description was required, so that a person reading the notification could decide whether to lodge a submission, or make further enquiry with TCDC before deciding whether to lodge a submission.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[17] The application was served on various persons who were, in TCDC's opinion, likely to be directly affected. In terms of s.93(2)(a) of the Act, the notice served on such persons, (as well as iwi authorities and other persons or authorities that TCDC considered it appropriate to serve), was required to "contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her." Like information also needed to be given to the Minister of Conservation, seeing that the application related to land adjoining a coastal marine area; refer s.93(1)(b). We assume that was done. (The Minister lodged an appeal against the related consents granted by Environment Waikato, which appeal has resulted, as earlier noted, in a proposed consent order being reached as between the Minister, the applicant and respondents.)

[18] In the light of Mr Matheson's evidence, it appeared evident that persons served for the purposes of s.93(2)(a) were informed that the natural ground level was to be raised "by approximately 2-4m". We do not overlook that the word "approximately" was used, thus allowing for the possibility of some variation. But we remember also that the land concerned is within the coastal environment, and that the need for reasonable accuracy was commensurately important.

OTHER MATTERS

[19] It will be recalled (refer paragraph [3]) that part of the fill to be disposed of is intended to be placed on an area of salt marsh, the environmental value of which proved a significant point of contention during the hearing. For the applicant and the respondents it was claimed that the area is materially degraded and compromised, while the appellants questioned the degree of such compromise, the reasons for it, and the viability of restoration and enhancement from ecological and wildlife habitat perspectives.

[20] Consent was granted by Environment Waikato to fill and thus reclaim the salt marsh area, inasmuch as the area lies on the seaward side of Mean High Water Springs ("MHWS"). The area nevertheless falls within zonings for marine activities, both under the transitional and proposed plans of TCDC. In summary, the jurisdiction for activities on the landward side of MHWS lies with TCDC, while the jurisdiction on the seaward side lies with Environment Waikato – but subject to the point that the use of the salt marsh area, in conjunction with other adjacent land

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

consequent upon reclamation of the salt marsh, is open for determination by TCDC (and hence this Court on appeal) pursuant to s.89(2) of the Act.

[21] Another point raised for the Maori interest appellants was that a small triangular area at the corner of Beach Road and Harbour View Road on which fill was to be placed is not held by TCDC but is Crown-owned reserve. Counsel for TCDC and the applicant sought leave to make further inquiry following the first hearing phase. In the upshot the appellants' contention was found to be correct - in consequence of which the applicant resolved to amend its proposal by deducting the reserve land from the intended fill area. A 1.5m high timber crib retaining wall was consequently proposed at the relevant interface so as to maintain the reserve at its existing level.

[22] Another aspect of the case advanced by the appellants was a suggestion that the proposal, if implemented, would seriously affect Whangamata's significant standing as a surfing venue. Evidence was led for the appellants from a witness with extensive experience, both as a surfer and in promoting the sport's local interests. He spoke of the dynamics of the harbour and alleged effect of the proposed marina on the well-known surfing area near the main channel entrance. On cross-examination, it was conceded that in preparing technical parts of the evidence, information supplied by unknown third parties had been cited and relied on. Rebuttal evidence was called in turn for the Society from a person with relevant expertise, in consequence of which we were left with the clear impression that the fears raised by the appellants' witness were overstated and not based on suitably reliable data.

[23] Yet another matter to mention is that Mr Savage, appearing for TCDC at the first hearing phase, indicated that the Council was not necessarily resolved to stop the unformed part of Beach Road as road if the marina should proceed (despite the proposed district plan's indication otherwise) because of a possible preference to keep the road classification in being as a guarantee of future public access. We gathered that TCDC was contemplating (as roading authority under the Local Government Act 1974) granting authority to the applicant to construct and maintain necessary access to and from the marina facilities including the boat launching ramp, while maintaining pedestrian access for the public at large along the foreshore. At the second hearing phase, Mr Berry represented TCDC (Mr Savage being unavailable). He confirmed that TCDC does not propose to stop the road if the

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

marina proceeds, so the plan's indication to the contrary would require to be changed.

FURTHER REFERENCE TO NOTIFICATION ISSUE

[24] We return to the fill level aspect. On perusing the applicant's series of plans at the hearing in 1999, it was apparent that the fill was to be placed in a manner that would incorporate a "high point" of 6.5m that was to be contoured and landscaped. The "excess fill" area appeared to affect between 2000m^2 and 3000m^2 at a position that would be apparent from vantage points off-site. It thus seemed likely that the application to TCDC would need to be re-notified to comply with s.93(2) of the Act.

[25] At a judicial telephone conference shortly after the first hearing phase, counsel were advised of the Court's tentative view on the fill level aspect. Mr Menzies advised that in recognition of the possibility of the Court holding such a view his client wished to explore the question of limiting the fill to 4m, but that further time was need to further check natural ground levels and fill measurement volumes. The presiding Judge noted that there could be a need for a further consent to be applied for in any event, depending on the means and extent of "excess fill" disposal that the applicant proposed to adopt. However, in view of counsel's advice, it was agreed that the Court would refrain from issuing a formal decision on the re-notification issue. Some months subsequently elapsed, culminating in a request by the society that the hearing be resumed. It was stated that the consent application plans had been revised so as to conform with the public notification, thus avoiding any need to renotify.

CONSIDERATION OF DISTRICT PLANNING POSITION AND REVISED PLANS

[26] The area proposed to be filled via the earthworks incorporates that within the Marine Activities zone, plus an area immediately adjacent labelled Housing Extra Density Policy Area ("HEDPA"). Under the transitional district plan, reclamation/filling in the Marine Activities zone and HEDPA is non-complying. Again, under the proposed plan, consent is required to the earthworks within the similarly named zone and policy area brought forward from the transitional plan. Under the updated version of the proposed plan following TCDC's decisions on



submissions, the earthworks are assessable as a discretionary activity. However, at the time that the consent application was lodged, the earthworks were non-complying, so that, in terms of s.88A of the Act, those works still fall to be considered on that basis. We do not overlook that s.88A was inserted by s.18 of the Resource Management Amendment Act 1997 which came into force after the application was lodged with the Council. Even so, the hearing at first instance, (which took place before an independent commissioner, Mr M J Hayman, given the Council's proprietary interest in the application site), did not occur until 30 July 1998, so that under the transitional provisions contained in s.78 of the Amendment Act, with a hearing not having commenced prior to that Act's introduction, s.88A was (and is) applicable.

[27] As to the land-based facilities to be provided within the area zoned Marine Activities, such facilities would comply with relevant standards for permitted activities under the transitional plan. The application as originally lodged with the Council failed to comply with a 12-metre yard requirement separating the administration building from the unformed portion of Beach Road, but by the time of the first instance hearing the location of the building was amended to achieve compliance. Under the proposed plan, given the amendment as mentioned, the facilities are assessable as a controlled activity. Nevertheless, the central factor is the non-complying status of the earthworks. As Mr Matheson observed to us:

> *The earthworks are a pre-requisite to enable the provision of marine orientated land uses to occur.*

[28] In terms of the society's revised plans produced at the second phase hearing, the proposed earthworks remain substantial. They allow for a significant area of raised landscape to be created in relation to the existing residential development surrounding the HEDPA. While the presence of the marina would be expected to offset the visual impact of the raised ground level when viewed from the harbour, the presence of residential buildings atop the filled area would have an additional effect, both in relation to the harbour and the land uses at the lower level and density surrounding. As Mr Matheson pointed out in reporting to TCDC originally on the issue of potential height of buildings within the extra density area:

> *In the event that subdivision has been undertaken, ground level is measured at the level as the result of subdivision. This means that a 10 metre height restriction will apply above the finished subdivision level.*

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[29] The Society's engineering witness, Mr P D Mataga, also touched on the issue in his evidence before us:

> *What may be of more concern to the neighbouring residents is the potential height of the building allowed in the Extra Density Policy Area. This is a matter for the TCDC to address and heights can be restricted at the time of subdivision consent.*

[30] The points that flow from that statement were encapsulated by Mr Matheson in his original assessment:

> *The majority of the site zoned Housing Extra Density Policy Area will be filled, but will have a varied topography because of the space to be provided for the existing perimeter drains and the fill batters. The use of the zone for housing activities will not only be restricted in area (eg set back from edges of fill), but also in terms of limitations to heights of houses. Due to the raised surface level of the ground, the height of buildings will be reduced ... . This is not in keeping with the intention of the zone which specifically provides for higher density housing activities than general housing zones.*

[31] The amended plans indicate a reduced maximum height of 0.5m (that is, from RL17.5m to RL17.0m). The high point or "crown area" is relocated slightly south-westwards. Accepting MHWS as being RL11.0m, the maximum height of the reclamation/filling will be 6m; or, if one strives to adopt a position as favourable to the applicant as possible by assuming a ground or base level of RL11.5m, the maximum height becomes 5.5m. After anxious consideration of the revised plans, both as to the extent of the earthworks for which consent is sought, and the retention of a high point still notably exceeding the 2-4m as notified, we are left with no realistic option but to find that, for the purpose of s.105(2)(a), the adverse effects on the environment will be more than minor. The earthworks to the extent indicated would markedly change the landform. The raised levels would span a significant area of coastal land and create an artificially enhanced prominence by contrast with the surrounding area.

[32] While both the transitional and proposed plans provide for marine activities within that part of the area so zoned, the land is low lying and comprises, as to part, the tidal salt marsh that falls to be considered as part of the coastal marine area. Various "end use" activities are provided for in the zone, but conversion of the landform *to the degree* sought by the applicant is not consonant with the plans' objectives and policies in relation to the coastal environment (emphasis added). In so concluding, we have paid careful regard to the various planning provisions drawn to our attention by the planning witnesses. While we acknowledge that marine activities are recognised by the zoning of that portion of the intended earthworks

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

area that abuts the harbour (and embraces the salt marsh), the planning provisions do not support altering the landform to the extent proposed. The "end uses" are recognised under the zoning, but the extent of the raised contours of the land on which the uses would then occur is not. As to the HEDPA, in allocating the area for the provision of comparatively dense housing, the planning provisions do not contemplate the possibility of the area being notably raised in level, nor the effects of development via such housing on surrounding neighbourhood amenities in that situation.

CONSIDERATION OF COASTAL PLANNING POSITION

[33] The proposed regional coastal plan ("PRCP") specifies the upper Whangamata Harbour as an Area of Significant Conservation Value ("ASCV"). It appears that this classification covers all the area affected by the proposal lying within the coastal marine area, including the saltmarsh; refer ASCV Map 24: Upper Whangamata Harbour and Otahu Estuary. The ASCV is one of some 25 areas within the general Waikato region identified by the Department of Conservation as warranting such status. Significant conservation values identified for the ASCV applicable to the upper Whangamata Harbour are:

> *Site of significance to Hauraki iwi*
> *Extensive eelgrass and mangrove community*
> *Wildlife habitat of high value*
> *Resident and frequenting rare and threatened waders and coastal bird species*
> *Gathering of shellfish.*

[34] Salt marsh generally is classed as a rare and threatened environment by the Department of Conservation. The salt marsh area presently at issue was said to represent some 11% of the total salt marsh area within the harbour – although there was some argument to suggest that the percentage could be as low as 3.6% depending on the basis of classification adopted. Even so, the area warrants careful evaluation over its proposed removal by in-filling.

[35] The appellants contended that the society's proposal should be rejected on account of past in-filling alleged to have been undertaken without lawful authority by TCDC. Mr Berry presented a careful analysis of the background in his submissions in response for TCDC. In response to the allegation of illegality, Mr Berry reiterated submissions advanced by Mr Savage at the first hearing phase as follows (paragraph nos. omitted):

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

The appellants assert that had the filling not occurred, a different environmental baseline would be relevant in the Court's assessment of the proposal.

It is submitted that this point is without real substance. The District Council in December 1988, nearly three years prior to the enactment of the Resource Management Act, was granted a consent by the Minister of Conservation under the Harbours Act to carry out maintenance dredging in a section of the channel in the Whangamata Harbour. Upon receiving that consent, the District Council proceeded to dredge the full length of the authorised channel in the first year. Smaller quantities were taken annually in subsequent years.

While there was no condition, or restriction, relating to dumping of the dredgings, at the time of the original application, the Department of Conservation was advised that it was proposed to dispose of the dredged material in the following places:

(a) Along the beachfront for replenishment purposes;

(b) On reserves where land needed to be built up for playing fields etc; and

(c) On the land the subject of the marina applications.

That Harbours Act approval expired in December last year [1998] and a non-notified resource consent has subsequently been granted, enabling the Council to continue dredging. The new consent requires sediment excavated to be used only for renourishment of the beaches.

The majority of fill in the application site was placed there many years ago, including prior to enactment of the Resource Management Act. Subsequently much of that material has been removed and used in forming the base of the Whangamata Refuse Transfer Station.

The marina site is also in close proximity to the causeway. The establishment of the causeway led to changes in the immediate environment, including the growth of the mangroves which can be seen in the location of the application site. The mangroves in turn have trapped silt, leading to further gradual changes over time. In these circumstances, it is submitted that it would not be correct to measure the present proposal against the physical environment that existed prior to December 1988. It is submitted that the proposal may properly be assessed on the basis of the situation as it now exists.

Further, it is by no means clear how an enforcement order could issue in respect of the filling. The Court in Voullaire v Jones (Decision Number 124/97) concluded that the Resource Management Act was not retrospective in its effect, and that no enforcement order could issue in respect of a reclamation that occurred prior to 1 October 1991. Even if there were jurisdiction, it is by no means clear that adverse effects have resulted from the filling; that action is now needed to avoid or mitigate effects; or that specific action could be carried out to remedy any effects. Added to this is the length of time that has elapsed since the Harbours Act consent was first granted. It is respectfully submitted that these factors also support a view that the applicant is entitled to have its proposal assessed on the basis of site conditions as they now exist.

[36] We accept those submissions, having considered the evidence for the appellants on this branch of the case. While the appellants' planning witness sought

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

to make various comparisons via aerial photographs, the difficulties inherent in that approach became apparent under cross-examination. Plainly a quantity of harbour dredgings was placed on the land by TCDC in the past, but the extent and timing of the works concerned are matters that are far from clear on the evidence available. That factor, along with other matters raised in the submissions of counsel above, combine to persuade us that the circumstances pertaining to the salt marsh should be approached and assessed on the basis of what presently exists.

[37] Evidence was called for the society from Mr G L Don, managing director of the firm known as Bioresearches, and a person duly qualified and possessing considerable practical experience as a consulting biologist. What he had to say, both initially in-chief and in further evidence given in rebuttal to evidence called from Dr R V Grace, a marine biologist called for the appellants, sufficed to convince us that the salt marsh area is significantly compromised, and that the pattern of quality diminution is likely to accelerate as more and more residential activity establishes in the vicinity, particularly within the HEDPA. Thus, with some misgiving we conclude that the preferable course would be to expend a capital sum of the order that the Society proposes ($40,000) to upgrade a proximate salt marsh area pointed to by Mr Don, where conditions are such that the interests of avian wildlife will be better assisted and enhanced than by retaining the remnant salt marsh on the subject site.

FINAL EVALUATION

[38] These appeals have revealed substantial planning difficulty in the circumstances of the case as presented, along with very real concern as to the wider problem affecting the harbour through boating activity and associated effects. We are very mindful of, and readily accept, the points urged in favour of a marina at Whangamata, given the unsatisfactory situation surrounding the layout of pole and swing moorings for the stationing of boats, and the pressure of boat traffic, especially during holiday periods when the visitor population is known to expand to the order of 40,000. As a witness for the appellants candidly put it, Whangamata is a "hot spot".

[39] The appellants' planning witness, in response to questions from the Court, acknowledged the practical problems in coping with the boating demand, and labelled the Court's determination of the present proceedings "very difficult". We

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

agree, having regard to the planning instruments as they presently exist. On the other hand, the wider boating issue is on-going and cannot be ignored – despite an assertion by the Chairman of the Hauraki Maori Trust Board, called for the appellants, that the tangata whenua would be opposed to a marina anywhere within the harbour.

[40] Against the background of the PRCP's general concern to maintain the natural character and attributes of the upper harbour, the appellants have raised strenuous argument concerning perceived potential adverse effects upon kaimoana through modification of the channel by dredging, and consequential restriction of access to shellfish across the deepened channel. We note, however, that access to the shellfish resource would remain available from Moana Point some 400m away, and that TCDC is prepared to consider providing additional carparking there should circumstances so warrant.

[41] Other evidence for the appellants bearing on alleged waahi tapu and other ancestral issues in relation to the coastal area involved in the proposal proved relatively unpersuasive. Answers given under cross-examination were either lacking in consistency or unconvincing when weighed against the analysis advanced for the society by Mr B Mikaere, a former director of the Waitangi Tribunal, and a person qualified in Maori Studies and well-versed in Maori issues generally. These matters, however, (including those in the previous paragraph), would have to be assessed, along with other issues such as the ecology of the area and presence of wildlife, should it be proposed to change the PRCP to afford recognition to the siting of a marina within this portion of the estuary.

[42] As to the benefits of a marina, we find that such a facility would assist in providing an integrated boat mooring system to help meet present and future demand. At the same time, it would be necessary for a rationalisation of current swing/pole moorings to occur, with a noteworthy decrease being achieved as licences expire and/or on transfer to the marina. Comprehensive security and control would be expected in operating the marina, as compared with the relatively uncontrolled and haphazard mooring system within the estuary and main harbour channel presently existing. On that basis, concerns raised by the appellants as to adverse effects on shellfish through oil leakages and sewage disposal from boats would be better met via the comparatively high standards of the marina. The present proposal also involves removal (by agreement) of a slipway operated by Ocean

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Sports Club in Beach Road – a move anticipated to be environmentally beneficial on account of current risks of harbour contamination from anti-fouling agents and the like employed at the slipway.

[43] For present purposes, we find ourselves confronted with a situation whereby, instead of lending readily perceivable support to the proposal, the PRCP fails to do so through its classification of the whole of the upper Whangamata Harbour, including the subject area, as an ASCV, with associated provisions aimed at conserving and protecting the natural character of the area. Those provisions have doubtless been conceived as warranting application to the ASCV overall, but they are without appropriate qualifying criteria or other indicative guidance pointing to the selection of the 4ha coastal marine area in question for a marina project within the ASCV confines. That is somewhat puzzling when one notes that in the 1980s, albeit prior to the RMA, there was provision for a marina at this location, with a demonstrable consistency of planning intent as between the landward and seaward components. We were left without any adequate explanation as to how and why the PRCP has omitted reference to a possible marina, either by way of positive endorsement by way of guiding criteria or other planning method, or by way of explanation of a changed approach to the concept of a marina within this part of the estuary.

[44] 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.

[45] We appreciate that it is the society's wish to dispose of as much material as possible on-site in the absence of a suitable recipient alternative off-site. But given that 60% of the proposed fill material would, according to the applicant's engineering witness, have a beach sand grading, it is certainly questionable that sustainable management of such a resource involves devoting the resource to altering the height and form of this significant area of coastal land, to the extent proposed. One would expect the resource to be usable elsewhere for a worthwhile purpose where it is actually needed, in contrast to what is proposed. Moreover, there needs

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

to be a clear arrangement for disposal of the material requiring removal from the site, so that the effects from that aspect of the proposal can be suitably identified and assessed.

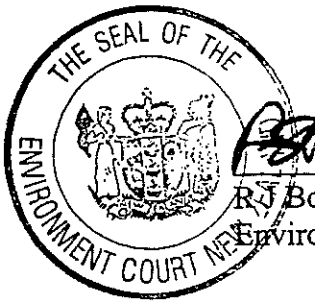
[46] It may be that the current location warrants regional coastal planning endorsement by allowing for the possibility of the establishment of a marina, coupled with a reduced degree of earthworks for disposal of material on the landward side. None of the evidence of possible alternatives within the harbour has led us to conclude that any other location is clearly superior; and no apparent support was discernible for any alternative by the appellants. Yet despite our concern over the wider issue, having regard to the planning instruments as they stand, we are without sufficient mandate to endorse the proposal. 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.

[47] 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.

[48] Costs at this stage are reserved.



DATED at **AUCKLAND** this 19th day of February 2001.



R J Bollard
Environment Judge