**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2005-485-1490**

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| UNDER | the Resource Management Act 1991 |
| IN THE MATTER OF | an appeal pursuant to section 299 of the Act |
| BETWEEN | TAIRUA MARINE LIMITED AND PACIFIC PARADISE LIMITED<br>Appellants |
| AND | WAIKATO REGIONAL COUNCIL<br>First Respondent |
| AND | THAMES-COROMANDEL DISTRICT COUNCIL<br>Second Respondent |

Hearing: 26, 27, 28 April and 1 May 2006

Appearances: DA Kirkpatrick and KA Palmer for Appellants
J Milne for First Respondent
ND Wright and SE Curran for Second Respondent
ME Casey and BM Stainton for Guardians Group
BH Arthur and EM Jamieson for Director-General of Conservation

Judgment: 29 June 2006

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**JUDGMENT OF ASHER J**

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*This judgment was delivered by me on at am/pm*
*pursuant to Rule 540(4) of the High Court Rules*

……
*Registrar/Deputy Registrar*

……
*Date*

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## Introduction

[1] The appellants appeal the decision and report to the Minister of Conservation of the Environment Court of 1 July 2005. The Court had reported to the Minister of Conservation that it found that the Minister did not have power to grant consent to the activities for which consent was sought. It also found that, to the extent that the activities for which resource consent was sought were not restricted coastal activities, the decisions of the Waikato Regional Council were confirmed.

[2] The appeal was, as required by s 299 of the Resource Management Act 1991 ("RMA"), on questions of law. Ten questions of law were raised, although ultimately these were reduced to seven questions, with questions five to seven not being pursued. The parties agreed that the proceedings were to be heard and decided under the RMA as amended by the 2003 Amendment Act. The Environment Court later delivered a costs decision, awarding costs against the appellant. A separate appeal was lodged against that decision. That appeal was heard consecutively with this appeal and is the subject of a separate judgment.

[3] The essence of the appellants' position in this appeal, is that the Environment Court was in error in that in its decision it effectively disregarded or discounted the specific provisions of the relevant Plan, the Proposed Waikato Regional Coastal Plan ("PWRCP"). That Plan made specific provision for Tairua Marina Zones 1 and 2. The appellants claim that rather than considering the application in terms of those specific provisions relating to a marina, the Environment Court based its decision on the more general provisions of the New Zealand Coastal Policy Statement, the Regional Policy Statement and the general provisions of the PWRCP. It failed to adequately weight the fact that marinas were already contemplated by the PWRCP.

## Background

[4] The appellants are two companies involved in a joint venture to develop a marina at the relevant site. The Waikato Regional Council is the consent authority for activities in the coastal marine area (below mean high water springs) of the

Waikato Region. However, when those activities are restricted coastal activities it is the Minister of Conservation who has the authority of deciding resource consent applications.

[5] The original application was filed on 28 February 2003. There were 14 applications to the Regional Council for coastal permits, to be finally decided by the Minister, and five applications for discharge permits and land use consents. As is usual practice, all the applications both to the Council and the Minister were heard initially by a Joint Hearing Committee. This Committee included one person appointed by the Minister, one by the Thames-Coromandel District Council, and two by the Regional Council.

[6] By a decision delivered on Tuesday, 2 December 2003, the Committee declined the application, and in respect of the restricted coastal activities it recommended that the Minister decline it.

[7] In addition to the parties, two groups of local residents, ("the Guardians Group") and the Director-General for Conservation, were represented both in the Environment Court and this Court.

[8] As is the customary practice, the Environment Court conducted the appeal and inquiry together. The hearing took 21 days, concluding on 13 April 2005. The decision and recommendations of the Environment Court were delivered on 1 July 2005, in a 108-page decision.

**The Decision of the Environment Court**

[9] The Court, after referring to relevant background material, considered that the application had to be decided on the basis of the most stringent status applicable to any part of the activity (para [181]). It held that the non-complying activity status of the proposed dredging required to create the marina was the most stringent status. Because the status of that proposal was non-complying, the Court concluded that the status of the proposal as a whole was that of a non-complying activity (para [182]).

[10] The Court considered the beneficial and adverse effects to the environment in considerable detail over 61 pages. It decided (para [491]) that the proposal would have adverse effects, including adverse effects on the natural coastal environment, the tidal flow and siltation of the harbour, contamination, adverse effects on the ecology of the harbour and its communities and on the marine bird life, considerable adverse effects on the natural character of the coastal environment and the diminishing of the area's contribution to the landscape and visual character of the nearby Paku Hill and the outer harbour. These effects were incompatible with the outstanding landscape. It held that there would be direct physical alterations and consequential physical adverse effects which would affect the amenity values of the locality including recreational boating, swimming and bathing, bird watching and shellfish gathering.

[11] The Court concluded that applying the most stringent status and therefore viewing the proposal as a whole as a non-complying activity, the two conditions necessary under s 104(D)(1) for a consent authority to grant a resource consent were not satisfied. In particular it held that the adverse effects of the activity on the environment would not be minor (paras [496] – [498]), and that the application was for an activity that was contrary to the policies of the Proposed Waikato Regional Coastal Plan (paras [500] – [510]). It followed that in its view the consent authorities (the Minister of Conservation in respect of the restricted coastal activities, and the Court in respect of the other resource consents) did not have power to grant consent to the proposal.

[12] The Court went on to consider what its decision would be on the basis that the consent authorities did have power to grant consent to the proposal. It carried out an "evaluative judgment of the proposal" and concluded that the statutory purpose of promoting a sustainable management of natural and physical resources would be more effectively served by refusing consent than by granting it. It held that even if the consent authorities had power to grant consent, it ought to be refused (paras [499] – [525]).

**The appellants' essential point**

[13] Despite the number of points on appeal, the appellants stated that the essential element, which linked all the points and which was the primary impetus of the appeal, was that the Environment Court was in error in "effectively disregarding or discounting the specific provisions of the Tairua Marina Zones 1 and 2 of the PWRCP for the appeal site." It was asserted that there was a fundamental issue as to the extent to which specific provisions should be overridden by general provisions, and that the Environment Court disregarded the special provisions in favour of the general. It was submitted that on the basis of the Environment Court's reasoning there could never be any marina in the Tairua Marina Zones, and that this was an error of law.

[14] Section 299 of the RMA provides that appeals to this Court from the Environment Court may only be on questions of law. There was no difference between counsel on the approach to be taken in determining what is a question of law. The test was set out in *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145 at 153. The question of law will be whether the Environment Court:

a) applied a wrong legal test; or

b) came to a conclusion without evidence, or one to which, on evidence, it could not reasonably have come; or

c) took into account matters which should not have been taken into account; or

d) failed to take account of matters which it should have taken into account.

[15] It had also well established that relief ought not to be granted unless an error of law materially effects the Environment Court's decision: *Friends & Community of Ngawha Inc. v Minister of Corrections* [2002] NZRMA 401, para [15], citing

*Countdown* and *Royal Forest and Bird v Hapgood* (1987) 12 NZTPA 76, 81-21. It is well established that the Environment Court is the sole decision-maker of the balancing process, that process is an intrical part of the consideration of RMA consents under s 104: *Murphy v Rodney District Council* [2004] 3 NZLR 421, para [11]. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament: *Northland Milk Vendors Association Inc. v Northern Milk Ltd* [1988] 1 NZLR 530, 537, *Countdown Properties*, pgs 153-154.

[16] The Court must be vigilant to resist attempts by litigants disappointed before the Environment Court to use appeals to the High Court as an occasion for revisiting the factual findings and weighing process carried out that is the sole province of the Environment Court, under the guise of the issue being a question of law: *NZ Suncern Construction Limited v Auckland City Council* (1997) NZRMA 419 at 426, Fisher J; *Parkinson v Waimairi District Council* 13 NZTPA 244 at 245; *Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

[17] Ultimately the appellants did not seek to make submissions on the fifth – seventh questions of law. I will, however, because they have been retained in submissions by all parties, continue to refer to the questions of law by their original numbers, and will make no reference to the fifth – seventh points.

**The planning instruments**

[18] The planning instruments referred to by the Environment Court were the New Zealand National Policy Statement, the Waikato Regional Policy Statement, the Transitional Waikato Regional Plan, the Transitional Regional Coastal Plan, and most importantly, the Proposed Waikato Regional Coastal Plan.

[19] Mr Kirkpatrick, for the appellants, emphasised that it was central to the appellants' submission that an incorrect legal approach had been taken by the Environment Court in its consideration of the PWRCP. It should be mentioned that the PWRCP is no longer a proposed plan in relation to the relevant parts, but is now in final form. For the purposes of this appeal, it is accepted that nothing turns on that

distinction. It is this plan's specific provision for Marina Zones 1 and 2 that is emphasised by Mr Kirkpatrick. The PWRCP was amended to include Marina Zones as a consequence of submissions made by the appellants. The decisions whereby this occurred will be referred to later in this judgment.

[20] The section setting out the Tairua Marina Zone 1 and Zone 2 in the PWRCP are at paragraph 16.4.9A. It is provided that the erection placement use of and occupation of space by any structure in the coastal marine area for the purpose of providing marina berthing and mooring facilities within the Tairua Marina Zone 1 is a restricted discretionary activity, provided it complies with the standards and terms stated in the rule. The area of the Tairua Marina Zone 1 is a small area directly adjacent to the existing southern reclamation. The PWRCP at 16.4.9B goes on to establish the Tairua Marina Zone 2, which is a larger area surrounding Zone 1, and where the erection placement use of and occupation of space for the purpose of providing marina berthing and mooring facilities is a discretionary activity, rather than a restricted discretionary activity.

[21] At paragraph 16.6.9A of the PWRCP, a similar exception for marina purposes is made in relation to construction dredging. In the Tairua Marina Zone 1 the removal of sand, shingle, shell or other natural marine material from the coastal marine area for the sole purpose of construction and maintenance dredging of the marina channels and basin within the Tairua Marina Zone is a restricted discretionary activity. In the Tairua Marina Zone 2 such removal is a discretionary activity.

[22] Paragraph 16.6.9A and B provide in relation to both zones that one of the standards and terms that must be complied with in relation to this dredging activity, is:

> The use of the dredged material shall be for replenishment purposes within nominated harbour systems.

Tairua's proposals have not met this requirement.

[23] The Marina Zones were created by an interim decision of a differently constituted Environment Court (A86/2002) and a final decision (A139/2003).

**The first and second questions of law – application of the permitted baseline**

[24] The questions of law, 1 and 2, were as follows:

> (a) Whether the Court erred in failing to give sufficient weight to the provisions of the Tairua Marina Zones in which the proposed marina was proposed to be constructed.
>
> (b) Whether the Court erred in law in making findings of fact that effectively prevent the development of marinas within the Tairua Marina Zones in the manner contemplated by the PWRCP.

[25] The two questions are closely related and, as developed by Mr Kirkpatrick for Tairua in his submissions, turn on the application of the "permitted baseline" concept.

*An holistic approach*

[26] It was established in the evidence before the Environment Court that the preferred disposal method in respect of more than half the total amount that was to be dredged as proposed was contrary to the terms of the PWRCP. It was held by the Court that the proposed construction dredging did not comply by virtue of Rule 16.1.2 of the Plan. This finding has not been challenged.

[27] The Environment Court decided that because the proposed construction dredging was a non-complying activity, because not all the dredged material was used for replenishment within a nominated harbour system as required by the PWRCP, that the most stringent status, the non-complying activity status, should apply to the whole proposal including the discretionary and restricted discretionary activities. Mr Kirkpatrick for the appellants submitted that such an holistic approach was wrong. He submitted that the Commissioners in the original decision had correctly adopted a "component approach" and that the Environment Court made an error of law in applying a single most stringent status to all aspects of the application.

[28] The summary of the Environment Court's reasoning on this topic was as follows:

> [182] We have found that the proposed dredging is a non-complying activity; that the proposed reclamation is a discretionary activity; and that the proposed parking and recreation activities on the reclamation would be discretionary activities. The non-complying activity status of the dredging is the most stringent status, so we hold that the status of the proposal as a whole is a non-complying activity.

[29] This was a significant finding by the Environment Court. The result of it was that the application in all respects would be treated as a non-complying activity, and therefore in all respects would be subject to the restrictions of s 104D of the Act. The consent authority under s 104D can only grant a resource consent for a non-complying activity if it is satisfied that the adverse effects of the activity on the environment would be minor and the application is for an activity that will not be contrary to the objectives and policies of the relevant plans.

[30] It is a longstanding principle that where there is an overlap between two consents, so that the consideration of one may affect the outcome of the other, it will generally be appropriate to treat the application as one requiring overall assessment on the basis of the most restrictive activity: *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 576, *King & Ors v Auckland City Council* (2000) NZRMA 145. However, Mr Kirkpatrick argued that the effects of the disposing of the dredge material did not overlap with matters such as the natural character of the visual and recreational amenity.

[31] The issue of overlap was not directly addressed by the Environment Court. However, there is overlap between the dredging and the other proposed activities. The dredging lies at the heart of the Project. There will be no marina until a very substantial dredging exercise is carried out. The proposed all tide marina will be situated on an area which is totally exposed to the tide at present. Presumably the dredging will be expensive and will have to exceed two metres in depth for large parts. The dredged material is estimated to amount to 142,000 cubic metres. The disposal of those dredged tailings creates an immediate environmental issue.

[32] Mr Kirkpatrick argued that there is not an invariable rule that where an aspect of a proposal requires consent as a non-complying authority, then the whole of the proposal is to be treated for the purposes of the Act as for a non-complying activity. He accepted the rule applied when there is an overlap between the effects of the different aspects of the proposal that require consent in terms of different provisions of the Plan. He submitted that this need not apply where the effects which require consideration of an aspect of the activity which is non-complying, have no overlapping or consequential effects on the other matters which require consideration.

[33] He relied on *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513. In that case there was a proposal to build two 30 metre high apartment blocks and to provide carparking for the apartments on a "stacked basis" in the basements of the two blocks. The buildings themselves were controlled activities, but the stacked parking arrangement was a discretionary activity. Neighbours who were concerned about the visual effects of the blocks, and in particular the effects on their views, argued that the whole of the development should be treated as a discretionary activity. Accordingly, it was argued that they should have been notified.

[34] This argument was rejected in both the High Court and the Court of Appeal (pp 212 and 542). It was held that because the consideration of the parking issue did not affect the outcome of the controlled activity consent of the building as a whole, that an holistic approach was not required. Where the effect of the particular activity was quite distinct from the others there was no need for the non-complying activity to affect the complying activities.

[35] This situation is very different from that in *Body Corporate 97010*. It can be readily seen in that case how issues as to complying parking had no effect on the size, shape and location of the building and on the site, and did not affect the outcome of the controlled activity consent for the building as a whole. In this case the dredged material will have consequential and flow-on effects. Without dredging and the proper disposal of dredged material, the proposed marina cannot possibly proceed. As I have stated, the environmental effects on dredging and disposal of the

dredged material are key issues in the application. There is therefore a need for what is referred to in *Body Corporate 97010* (para [22]) as "an holistic approach".

[36] Two further points should be noted. First, this particular issue does not appear to arise out of the first and second questions of law as they have been expressed. There is no reference to this issue in the Points on Appeal, and it cannot be inferred. Further, there is no suggestion that the Environment Court erred in its legal approach to the issue, and I am by no means clear that the question raised is a question of law. It is rather of the application of facts to the accepted "holistic" approach. That is not a point of law.

*The baseline for assessment*

[37] The concept behind the phrase "permitted baseline" as used in resource management cases, is that the position against which actual and potential effects of proposed activity is judged, is that which has either been lawfully done on the land or could be lawfully done on the land under the relevant planning instruments. The principle has been applied for many years, and was articulated in this way by the Court of Appeal in *Bayley v Manukau City Council* at 576:

> The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. In the present case the starting point is that business activities are permitted.

[38] It has been clarified since, that the comparison must not be to some purely hypothetical possibility that is "fanciful" (*Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473.

[39] In 2003 the Legislature gave the permitted baseline statutory expression (without using the phrase "permitted baseline"), and by the use of the word "may" clarified that it was not mandatory to apply it. Section 104(2) reads:

> When forming an opinion for the purposes of subsection 1(1)(a), a consent authority may disregard an adverse effect on the environment if the plan permits an activity with that effect.

[40] While *Bayley v Manukau City Council* was a case concerning notification, it was made clear in *Smith Chilcott Ltd v Auckland City Council* that the permitted baseline approach is relevant to not only notification matters, but also to the assessment of the merits of a resource consent application. It could apply to substantive issues that arise in s 104D of the RMA.

[41] It is Mr Kirkpatrick's submission that the permitted baseline can and in this case should, expand to the recognition of other activities that are not permitted, in particular restricted discretionary activities and discretionary activities. It is his fundamental criticism of the decision of the Environment Court that it wrongly limited the factors that it considered as part of the baseline to actual permitted activities. The Court stated at para [483]:

> The planners who gave evidence did not bring to our attention any permitted activity in an applicable plan that would have the same effect on the environment as we have found the proposal would. Accordingly, we do not disregard any of those effects.

[42] Mr Kirkpatrick submits that this approach was too narrow. He emphasised that the permitted baseline has been developed through the Courts rather than imposed by any statute, although s 104(2) now specifically refers to it. He submits that s 104(2) does not limit the application of the doctrine. He relies on *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, which indicated that unimplemented resource consents could be regarded as a component of the existing environment (para [36]). It was stated in that case at para [38]:

> Reflecting on the competing contentions in this area has reinforced us in the view that there should be no rigid rule of law either way. That conclusion should relieve consent authorities of the anxieties expressed by counsel while also allowing applicants for consent to seek a factually realistic appraisal. What is permitted as of right by a plan is deemed to be part of the relevant environment. But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law.

[43] In urging a flexible approach he also relied on *Rodney District Council v Eyres Eco-Park Ltd* (High Court Auckland CIV-2005-485-33 13 March 2006 Allan J). It was noted in that case that s 104(2) was not intended to take effect in total substitution for the baseline principle as it had been developed by the Courts

(para [28]). Section 104(2) appears to have as its purpose the introduction of a discretion as to the application of a permitted baseline. It was not clear to that point that the discretion formally existed. The Court did however note that the section did limit:

> … the permitted baseline to the effects of activities permitted by the plan. To that extent it has modified the common law approach …

[44] Against this background Mr Kirkpatrick submitted that the permitted baseline was not a fixed or finite concept. It was his submission, in effect, that the restricted discretionary and discretionary activities referred to in the Marina Zone sections of the plan were to be included in the permitted baseline. While accepting that such a rule might not be applicable in a large zone with a wide range of activities, he submitted that for a limited zone, like the Tairua Marina Zone, those provisions should be taken into account not so much as a "permitted" baseline, but as part of an assessment which was consistent with the purpose of the plan. Given that in his submission the marina was to be considered an appropriate development on this particular location in accordance with the plan, the application had to be considered against this background. He submitted that the adverse effects from the marina development in the zones should have been disregarded under s 104(2) and as a relevant matter under s 104(1)(c). He submitted that the Environment Court erred in not adopting this approach.

[45] I do not accept that restricted discretion or discretionary activities can in any formal way be regarded as part of the permitted baseline. That is because they are not permitted. The concept behind restricted activities is different from that of a permitted activity. Rather than being allowed as of right, they are only allowed on certain terms. Those terms and criteria cannot be regarded as qualified or weakened by the existence of the underlying marina zoning. They must be given their full force and effect. To do otherwise would be to blur the distinction between a permitted activity and a discretionary activity. There can not be a "halfway house" baseline, placing underlying and specific zonings into a category of their own. The time for setting the rules and tests that are to apply, and to create permitted activities that can be considered as part of the baseline, is when the plan is created.

[46] So, in many ways the submission that is made on this point is an attempt to alleviate from the appellant's perspective the difficult requirements of the plan relating to the disposal of dredged material. However, the plan has been enacted, and must be applied. Its consequences cannot be softened by a later general acknowledgement of underlying zoning as part of the baseline, save where that zoning creates a permitted activity.

[47] This approach to the "permitted baseline" concept is consistent with the wording of s 104(2), which refers only to disregarding an adverse activity if the plan "permits" an activity with that effect. I accept that the Resource Management Act is not a code and that s 104(2) should not be seen as necessarily limiting the application of the permitted baseline concept. However, the subsection does confirm the essential limit which is referred to in the leading cases, which is that it is permitted activities and only permitted activities which form part of the baseline, and not other activities of a different category.

[48] Mr Kirkpatrick submitted that it was obvious that the construction of any viable marina was likely to have various adverse effects on the environment as part of the necessary steps of constructing the marina. He submitted that it ignored the purpose of the zone to rely on those effects as a basis for holding that the activity was inappropriate. He asked for a "principled" application of the concept.

[49] I do not accept that a "principled" approach to a permitted baseline concept, requires expansion in the manner sought by Mr Kirkpatrick. The need for the activity to be "permitted" was emphasised by the Court of Appeal in *Arrigato*: paras [31]-[33]. It was noted that the expression "as of right" was used in *Bayley* (p 576) on its own and as part of the phrase "permitted as of right by the plan" (p 577). It was stated that the expression "as of right" on its own was used in the sense of a person being able to do something "without permission": para [31]. It was held that there could be circumstances when it would be appropriate to regard an activity involved in an unimplemented resource consent as being part of a permitted baseline, but equally there might be circumstances where that would not be appropriate: para [35]. However, this flexibility still turned on the permitted baseline relating to "permitted" or "as of right" activities.

[50] I consider that the appellants' submission that a discretionary activity should be taken into account as part of the permitted baseline is contrary to the Court of Appeal's emphasis on "as of right" activities being part of the baseline. If a use is less than a permitted use, it is not a use "as of right". The result of extending the permitted baseline to permitted activities would be the creation of uncertainty. Generally the determination of whether or not a particular proposal is a permitted activity is not particularly complex. Similarly, it is not particularly difficult to generally ascertain and apply the valid conditions of the resource consent. In contrast, where an activity is discretionary a baseline can be difficult if not impossible to discern. There are no standards such as bulk and location set out in the plan for the discretionary activity of a Marina Zone. The PWRCP does not provide guidance to a consent authority as to how to determine the characteristics of a hypothetical (but not fanciful) marina. Any attempt by a consent authority to define such a concept would be the subject of significant debate and litigation. There would be the danger of unpredictability, and lack of consistency.

[51] There is also force in Mr Milne's submission that the appellants did not either, at first instance or on appeal to the Environment Court, put forward any evidence of any alternative marina design which could be evaluated for comparative purposes. There was no notional "base" marina before the Court. The present approach is different from that presented to the Environment Court.

[52] The essence of the concept of a permitted baseline is that there is a firm measure against which to assess and effect. The problem with the appellants' proposed approach is that no evidence was adduced as to what would be a notional standard marina in the circumstances, and it can be readily seen that any submission as to the notional "base" marina would be the subject of endless debate. It was pointed out by Mr Casey for the Guardian Group that it would be indeed possible to have some sort of minimal marina for certain sorts of boats without any dredging at all under the PWRCP, and thus a marina which was a permitted use. If there was to be dredging, the amount of dredging would turn entirely on the size of the marina, and the dimensions of the boats that are to use it. The variables are endless, and it is difficult to see how any principled decision could be reached.

[53] It is also significant that the Environment Court when it issued its final decision relating to the Proposed Regional Coastal Plan and setting up the Marina Zones, expressly held that the zoning provision should allow a marina as a discretionary activity, and not as a permitted or a controlled activity as requested. That decision was not appealed. It cannot in this proceeding be diluted by the use of the baseline concept, to turn a discretionary activity into something closer to a permitted activity.

*Prevention of any marinas*

[54] It was Mr Kirkpatrick's broader submission, not necessarily tied to the "permitted baseline" submission, and more consistent with the second question of law, that the history of the Tairua Marina Zones 1 and 2 pointed to an overwhelming acceptance that a marina should be considered an appropriate development in the particular location, but this has been wrongly ignored by the Environment Court. He submitted that in administrative law terms there had been a failure to consider a relevant matter. He submitted that the adverse effects from the hypothetical development in the zone should have been disregarded under s 104(2), and as a relevant matter under s 104(1)(c). He said the purpose of the Tairua Marina Zones must be given emphasis.

[55] Indeed, the appellants went so far as to contend that because the Environment Court had turned down this particular proposal, it had in effect turned down all possible proposals. It had prevented the development of any marinas within the Tairua Marina Zones in the manner contemplated by the PWRCP. This was the adverse consequence that Mr Kirkpatrick submitted resulted from a failure to include marinas in the permitted baseline. It was submitted that substantial dredged material, breakwaters, adverse effects on water quality, harbour ecology and birds are all affects that are inevitable with a marina. They would potentially equally apply to any marina proposal.

[56] However, the Environment Court did consider the marina zonings and placed weight on them. Its finding was that this particular marina proposal was

inappropriate on the particular site, not that any marina would be inappropriate. It stated specifically at para [521]:

> Although in principle a marina would not be inappropriate development in the Tairua marina zones, the appropriateness of a particular marina proposal has to be judged by the adverse effects it would have on the environment. In our judgment, the proposed marina in this case fails to provide for those matters of national importance identified in s 6, and to that extent it would be inappropriate development in the particular site and the coastal environment.

Although this was part of the evaluative judgment of the proposal there was recognition of the underlying zoning throughout the decision and specific reference to it in paras [82] – [86]. The importance of the plan as a community document of legislative status was recognised by the Court, and its provisions were properly weighted in a substantial section of the Environment Court decision (paras [87]-[109]).

[57] Another marina proposal might comply with the dredging requirement, which has ultimately made the entire proposal non-compliant. There would be compliance if the dredged material was used for replenishment purposes within nominated harbour systems. If that were so the Court's approach could be different. If the dredging and disposal complied, then the use would not be non-complying and would not have to pass through the s 104D gateway.

[58] The excavation and dredging in the proposal involved 142,000 cubic metres and included very substantial breakwaters. A different marina proposal could involve much less dredging, smaller breakwaters, and have different effects. The Environment Court's consideration of adverse effects was particular to the specific proposal. Different conclusions could have been reached if different designs were proposed. Clearly the task of getting approval for much more limited marina design, particularly if it were limited to the Marina Zone 1, would be entirely different, and the chances of success considerably better.

*Conclusion as to first and second questions of law*

[59] For these reasons the first two questions of law are answered in the negative. As to the first question, the Court did not err in failing to give sufficient weight to

the provisions of the Tairua Marina Zones. The second question of law is a leading question which contains an erroneous assumption that the Court made findings of fact that effectively prevented the development of marinas within the Tairua Marina Zones in the manner contemplated by the PWRCP. It did not do so. Further, it did not make any error in law in its findings of fact on this topic.

**Third and fourth questions of law – New Zealand Coastal Policy Statement and adverse effects to the coastal environment**

[60] These errors of law, which were approached together in oral submissions, are as follows:

> (3) Whether the Court applied a wrong legal test in respect of Policy 1.1.1 of the New Zealand Coastal Policy Statement in determining what constitutes compromise of natural character.
>
> (4) Whether the Court applied a wrong legal test in that, having found the natural character of the coastal environment was not compromised as it stands, the adverse effects of the proposed marina were cumulative on existing alterations to the coastal environment.

[61] The New Zealand Coastal Policy Statement ("NZCPS") is a national policy statement adopted by the Government under the RMA. Policy 1.1.1 of that statement provides:

> It is a national priority to preserve the natural character of the coastal environment by:
>
> 1. Encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment.
>
> 2. Taking into account the potential effects of subdivision, use, or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
>
> 3. Avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

[62] The effect of these provisions are summarised in paras [67]-[74] of the Decision. Mr Kirkpatrick submits that these policy provisions are over emphasised

by the Environment Court and wrongly became decisive. Mr Kirkpatrick also emphasised s 6(a) of the RMA which reads:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development
>
> …

He emphasised that this indicates that the environment need not be protected from appropriate use and development.

[63] It was the general thrust of his submissions that the application of Policy 1.1.1 by the Environment Court precluded any new reclamation or marina where there had previously been no human alteration in an area, and that this is incorrect. Mr Kirkpatrick pointed to cases such as *Arrigato Investments Ltd v Auckland Regional Council,* para [69] and *Pigeon Bay Aquaculture v Canterbury Regional Council* [1999] NZRMA 209, para [64] as standing for the proposition that the general provisions do not preclude development in the coastal environment. He referred to *Pigeon Bay Aquaculture* where it was stated that the fact in that case that the natural character of the area was not of very high value compared with pristine landscapes must be appreciated, and that one aspect of the landscape did not exclude all others. He submitted that the Environment Court failed to consider the actual "intervening planning documents", rather than giving weight to the general provisions of the higher policy documents. He repeated that specific provisions of the subordinate documents which allowed for a marina in the PWRCP should be properly given weight, but they were not in this case.

[64] He also relied on the decision of *Wilson v Selwyn District Council* [2005] NZRMA 76, where Fogarty J in the High Court was critical of an approach which treated the provisions of the plan as being able to be disregarded in favour of a more generalised consideration of effects in the context of Part 2 of the Resource

Management Act. It was pointed out in that case at paras [75]-[79] that plans under the RMA have been brought into being by a Part 2 analysis, and that impacts on the environment will be considered in the course of that analysis. It was stated that RMA plans should be approached on the basis that they are already an outcome of a Part 2 analysis. He submitted that the Environment Court was in error in not approaching its consideration of Part 2 in this manner.

[65] The general provisions of Part 2 of the RMA in Policy 1.1.1 of the New Zealand Coastal Policy Statement provide for a balancing exercise between the natural character of a particular site and its proposed use. High intensity development may be appropriate where natural character has been substantially compromised. Equally, where an area is pristine in nature, it may well be that no development is appropriate. Where, as is often the case, the position is at neither extreme, then the decision is a matter of judgment, weighing the various relevant matters. Then, as submitted by Mr Wright on behalf of the Thames-Coromandel District Council, the issue is one of "fact and degree" for the decider of fact, the Environment Court, to determine.

[66] The Environment Court did consider the relevant planning documents, and did so in their context with the New Zealand Coastal Policy Statement in the provisions of Part 2 of the RMA. It was stated at para [67] by the Environment Court:

> The New Zealand Coastal Policy Statement … contains several general policies that are applicable. We need only summarise them, because of the more specific provisions of the proposed Waikato Regional Coastal Plan … which is required to give effect to the New Zealand Coastal Policy Statement.

[67] The Court proceeded in the paragraphs that followed paragraph [67] of its decision, to identify in detail the provisions of the relevant statutory planning documents. Towards the end of its judgment the Court then assessed the proposal against the relevant objectives and policies of the Proposed Waikato Regional Coastal Plan. I do not consider that in any part of its decision did the Environment Court overweight the New Zealand Coastal Policy Statement, or underweight provisions of the PWRCP, or apply the wrong legal test. The Coastal Policy

Statement was clearly something that the Environment Court was entitled to take into account. The weight accorded to it was a matter for the Court.

[68] The Environment Court expressly recognised that there had been some compromise to the natural character of the land. It was stated at para [359]:

> The natural character of the land behind Paku Bay has been compromised to some extent by development. But Paku Bay itself is an area of the coastal environment where the natural character has been compromised to a comparatively small extent. In our judgment it would be inconsistent with the priority of preserving the natural character of the coastal environment to discard the considerable adverse effects that the proposal would have on the natural character of the Bay because of it.

[69] I accept the submission of Ms Arthur for the Director-General of Conservation that the Court did indeed look at the natural character of both Paku Bay and the area surrounding it. It did not conclude that no change had occurred to the natural environment, as submitted by Mr Kirkpatrick. It expressly concluded that there had been some change, although of a limited nature. These findings were open to it on the evidence. The existing activities were not disregarded by the Environment Court. The Court concluded, as it was able to do, that the natural character was not notably compromised. There is no hierarchy as to relevant factors under s 104 of the Act. They do not have to be considered in any particular order. The section gives a consent authority a broad discretion, and it can ascribe the appropriate relative weight to relevant matters as it sees fit. This is the nature of the discretion.

[70] I also accept the submission of the respondents that while put in the form of an allegation of error of law, this submission by Tairua is really more an attack on the decision by the Environment Court on a matter of fact. The stricture of Fisher J in *New Zealand Suncern Construction Ltd v Auckland City Council* at 426 was referred to. The Courts resist attempts by litigants disappointed by Environment Court decisions, to use appeals to the High Court as an occasion for revisiting resource management merits under the guise of questions of law. It is the task of the Environment Court to weight the provisions of the Act, the New Zealand Coastal Policy Statement, and the relevant planning documents, and make decisions in the

light of the evidence and submissions presented to it. They do so as the Court that is expert in giving weight to such material, and make such decisions.

[71] The Court of Appeal stated in *Arrigato* at para [24]:

> Whether a particular proposal is consistent with or contrary to the objectives and policies; in other words, whether it comes within the very limited circumstances contemplated as acceptable, is a matter of assessment on a case-by-case basis. That assessment is the province of the Environment Court. The High Court cannot substitute its own assessment. In this case the Environment Court was satisfied that when all the particular features of Arrigato's proposal were taken into account it was consistent with the relevant objectives and policies. We consider that the Court was entitled to construe them in that way and, on the basis of such consistency, the Court was entitled to conclude that Arrigato's proposal was not contrary to the objectives and policies of change 55.

[72] Mr Kirkpatrick emphasised the reference to New Zealand Coastal Policy Statement in paras [258]-[259] of the Environment Court decision as showing that the Statement had become decisive. I do not consider that to be a fair reading of the decision. While the New Zealand Coastal Policy Statement was emphasised in those particular paragraphs, this is at the conclusion of just one section of the consideration of effects, relating to effects on natural character. This is only one of sixteen different effects that are considered in the course of the judgment.

[73] Mr Kirkpatrick argued that the Environment Court having assessed the natural character of Paku Bay as having been compromised to a comparatively small extent, wrongly used that environment as a base for a finding of adverse cumulative effects. However, there was no inconsistency in the Court finding that the actual and potential effects of the existing physical alterations to the harbour bed should be taken into account when considering the actual and potential effects of the proposed development.

[74] The way points four and five were presented in submissions by the appellant were to bring it back closely to the permitted baseline submission, and an assertion that the Court should have regard to issues of natural character in the context of the PWRCP which stated that marina zoning would be generally appropriate for the location. For the reasons that I have already given, I find that the Environment Court did not ignore the underlying marina zoning.

[75] The Environment Court did not apply wrong legal tests in respect of the NZCPS, or in assessing the natural character of the coastal environment and the adverse effects.

**Eighth question of law – the PWRCP**

[76] The eighth question of law that arises is stated as follows:

> Whether the Court applied a wrong legal test under s 104D(1)(b)(iii) in that it took an unduly restrictive approach in determining that the proposed marina was contrary to the objectives and policies of the PWRCP.

[77] This question of law concerns the second gateway in s 104D of the RMA, arising under s 104D(1)(b)(iii). Resource consent may be granted for a non-complying activity if it is for an activity that will not be contrary to the objectives and policies of the relevant plan or proposed plan. The Environment Court had found that the proposed marina was not contrary to the objectives and policies of the transitional regional coastal plan, but was contrary to the provisions of the PWRCP. The appellants' criticism of this aspect of the Environment Court decision had similarities to its permitted baseline submission. It was submitted that only one activity fell outside the scope of activities provided for by the PWRCP and was non-complying, namely the disposal of construction dredged material. This was because, while construction dredging is a discretionary activity in the PWRCP, it is a term that:

> The use of the dredge material shall be for replenishment purposes with a nominated harbour system.

[78] As has been stated earlier in this judgment, the appellants' proposal did not comply with this requirement. This was because it was proposed to use the dredged material to create a proposed reclamation in Paku Bay for parking and recreation, and for the replenishment of Pauanui Beach, a beach outside the Tairua Harbour.

[79] It was submitted that the Court had proceeded upon the basis that if one aspect of the proposal was non-complying, it was all non-complying. This matter has already been addressed earlier in this judgment. In my view the Court had no

alternative but to regard the whole proposal as non-complying, given that an important and integral aspect of the proposal was non-complying.

[80] It was also suggested by Tairua that the Court should have considered whether some alternative might be available, such as deleting the reclamation or requiring some alternative disposal location for the dredged material. The Court was not obliged itself to work out possible alternatives. It was bound to consider the case as put by the applicant. It was not for the Environment Court to try and find some alternative favourable to Tairua, such as deleting the reclamation from the application, or requiring some alternative disposal location for the dredged material. Plainly it could not do so of its own volition, and in any event such matters would have required further evidence.

[81] Mr Kirkpatrick argued that the phrase in s 104(2) "permits an activity with that effect" does not necessarily equate with the term "permitted activity". If by that submission Mr Kirkpatrick was suggesting that s 104(2) was broadening the concept of the permitted baseline to include activities that are not permitted, I disagree. There is no indication that this was the legislative intention. Rather, the intention was to make it clear that the application of the baseline concept was not mandatory but discretionary.

[82] It was also submitted that the Court erred in its approach as to whether the proposal was contrary to the objectives and policies. It was submitted that there was no consideration of the extent to which findings on adverse effects must be tempered by the fact that there was express provision in the PWRCP for a marina. It was argued that the consideration of adverse effects must be tempered in accordance with *Wilson v Selwyn District Council* by the fact that adverse effects should be regarded as having been already considered in the creation of the PWRCP.

[83] However, the policy in the PWRCP implicitly recognised the potential for conflict between different users of the coastal resources, and one activity should not be allowed to "trump" the other. After all, clause 5.4.2 of the PWRCP specifically required any marina development within the Tairua Marina Zones 1 and 2 "… to reflect the relevant objectives, policies and rules of the Plan and the efficient use and

development of habour space within the CMA." I do not consider that the Environment Court was in error in giving weight to all the provisions of the PWRCP.

[84] Mr Kirkpatrick submitted that inadequate weight was given to the word "contrary" in the decision. He relied on *New Zealand Rail v Marlborough BC* [1994] NZRMA 70, where Greig J concluded at p [80]:

> The *Oxford English Dictionary* in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying.

[85] I do not consider that the Environment Court placed an incorrect meaning on the word "contrary" in s 104D(b). The Court was bound, once it found a non-complying activity, to consider all activities contrary to the objectives and policies of the relevant plan. That is what it did. It did not adopt an overly sensitive approach in applying the word "contrary". It went further than finding that the activities were non-complying. It found that certain activities positively had adverse effects on amenity values and coastal recreation expectations including existing amenity and recreational values such as open space qualities and coastal recreation opportunities. The proposal would have consequential adverse effects on amenity values for the locality for recreational boating, swimming and bathing, bird watching and shellfish gathering: para [509].

[86] These consequences were more than just non-complying. They were repugnant to the particular policies referred to by the Environment Court. These activities were different to and opposite to the objectives and policies of the PWRCP.

[87] The Environment Court was here bound to give full weight to adverse effects. It is not as if it can be fairly said, as it could be in *Wilson v Selwyn District Council*, that these adverse effects had been fully considered in the process of considering the PWRCP. Indeed, there was no evidence that there had been a full consideration of all adverse effects at the earlier stages. A differently constituted Environment Court had in its interim and final decisions established the Marina Zones. It noted in its

interim decision that it was not sufficiently informed about the contents of existing reports on the Harbour and Marina proposals and the range and extent of potential effects, to make the activity status permitted or controlled. In its final decision the Environment Court noted that the marina provisions were in accord with the purpose of the Act, and that the differential was appropriate between Zone 1 and Zone 2, because:

> … rather more is known about the environment and potential effects within Zone 1 than outside it.

Thus there is no support in the interim and final decisions of the Environment Court which set up the two Marina Zones, for the proposition that it was creating some sort of presumptive Marina Zone of the type proposed by Tairua in its submissions. Rather, it seems to have been deliberately leaving the difficult issue of weighing environmental and potential effects to the Court that ultimately considered any resource consent applications. The discretion to allow or refuse such resource consents relating to marinas was effectively reserved to such later hearings. That is the process that took place in the hearings which lead to this appeal.

[88] Moreover, I consider that the evaluation process that the Court carried out in this part of its judgment was essentially a fact-finding process against the backdrop of the PWRCP. That evaluation process did not give rise to a question of law. This part of the submissions does dress up a point of fact as a point of law. It is easy to say that a wrong legal test was applied because an overly restrictive approach was adopted. Any factual finding could be theoretically attacked on the same basis. But in the end, the Court carried out a discretionary exercise, and no error of principle has been identified.

[89] I find that the Environment Court did not apply an incorrect test in considering s 104D(1)(b)(iii).

**Ninth question of law – relevant planning documents**

[90] The ninth question of law is as follows:

> Whether the Court failed to have regard to a relevant consideration in that it failed to assess the proposal against the objectives and policies of the marina's variation to the PWRCP.

[91] At this point the submission corresponds very closely to the second point of law. It was submitted that the Environment Court should have considered the extent to which effects might have been mitigated even if they could not be avoided or remedied.

[92] However, the Environment Court's task was not to find ways of its own by which effects could be mitigated. I accept Mr Milne's submission for the first respondent that it is not for the Court to speculate as to other possible proposals, when the appellants presented no evidence on mitigation in that regard. The Environment Court properly assessed the evidence as to effects. For all the reasons I have previously given, I do not consider that the Environment Court lost sight of the fact that the PWRCP did indeed contemplate marinas.

[93] The Court, despite its earlier conclusion that s 104D could not be used, proceeded to give its decision on the proposal in paras [512]-[525] as if the gateway test had been met. It found that the statutory purpose of promoting the sustainable management of natural and physical resources would be more effectively served by refusing consent than by granting it. Even if the consent authorities had power to grant consent, the Environment Court concluded that it ought to be refused. This was a decision that was entirely open to the Environment Court to make.

[94] Mr Kirkpatrick referred to the Environment Court decision in *Thames-Coromandel v Waikato Regional Council*, A 010/2005, 25 January 2005 and A 174/2005 (final) and *Whangamata Maori Committee v Waikato Regional Council* A 173/2005, 26 October 2005, as relevant to the appeal. I do not consider that that decision, relating to a specific proposal in a different zone, is helpful in determining the questions of law arising in this appeal.

[95] Thus, I do not consider that the Court failed to consider the proposal against the objectives and policies of the marina variation to the PWRCP. I find explicitly that it did do so.

**Tenth question of law – possible redesign**

[96] The appellants had proposed a redesign of the shape of the reclamation and the course of the diversion of the Grahams Stream channel in an effort to mitigate adverse effects. The Environment Court found at para [492] that although accelerated siltation of the harbour-bed would be mitigated to some extent, there would still be physical alterations to the natural coastal environment, cumulative on existing alterations. It found that the consequential potential and adverse effects on the environment, and on amenity values, would be substantially similar. It refused to allow other parties the opportunity to call further evidence on the revised design.

[97] Mr Kirkpatrick argued that the Court having initially stated in its decision that it would not deal with a redesign proposal without giving other parties an opportunity to deal with it, then did proceed to deal with it and reject it. However, the applicants having raised the issue during the hearing cannot complain of it being dealt with robustly by the Court on its merits. Tairua having presented the redesign in the way it did, must accept the Court's decision on that redesign. Any failure to give other parties an opportunity to deal with it did not affect Tairua.

[98] The Court did not err in finding that the proposed redesign of the proposed marina would have adverse effects, and that it did not sufficiently mitigate such effects on the environment. It was fully entitled to reach this conclusion. In the end the substantive criticism of the rejection of the redesign came down to a reiteration of the baseline submissions.

[99] This was the exercise of discretion by the Environment Court. No error of law is disclosed. The proposed redesign did not address many of the adverse effects that had already been referred to by the Court in any event. It was a limited redesign that ignored other adverse effects.

[100] In the end this was also a finding of fact by the Court. It was fully entitled to form the view that the amended proposal was not sufficiently different in terms of adverse effects from the original proposal, and did not make a significant difference in relation to the effects.

**Conclusion**

[101] The fundamental theme of all the points on appeal was that the decision of the Environment Court was inconsistent with and effectively negated the status of the Tairua Marina 1 and 2 Zones. The result, it was submitted, was that there could be no marina in the Tairua Marina Zones.

[102] This fundamental premise is incorrect. A marina proposal might well succeed. However, it has to succeed in terms of the relevant provisions of the PWRCP. Those provisions, or certain selected and inconvenient provisions, cannot be ignored. If the proposal had not had a substantial non-complying aspect in relation to the dredged material, it would not have had to go through the s 104D gateway. It could well have succeeded. Equally, a different proposal with different effects might succeed, even if the overall use remained non-complying. The PWRCP applies to an application in its totality, and cannot be given a sympathetic or artificial interpretation because of some assumed underlying purpose that the existence of marinas should be accepted. The careful rigour that was applied to the application by the Environment Court was appropriate and not in error.

**Result**

[103] The questions of law are answered as follows:

*First question of law: Whether the Court erred in failing to give sufficient weight to the provisions of the Tairua Marina Zones in which the proposed marina was proposed to be constructed*

[104] No. The Court did not fail to give sufficient weight to the provisions of the Tairua Marina Zones in which the proposed marina was to be constructed.

*Second question of law: Whether the Court erred in law in making findings of fact that effectively prevent the development of marinas within the Tairua Marina Zones in the manner contemplated by the PWRCP*

[105] The Court did not make findings of fact that effectively prevent the development of marinas within the Tairua Marina Zones in the manner contemplated by the PWRCP. The question, containing as it does an erroneous assumption, cannot be answered yes or no.

*Third question of law: Whether the Court applied a wrong legal test in respect to Policy 1.1.1 of the New Zealand Coastal Policy Statement in determining what constitutes compromise in national character*

[106] No. The Court did not apply a wrong legal test in respect of Policy 1.1.1 of the New Zealand Coastal Policy Statement.

*Fourth question of law: Whether the Court applied a wrong legal test in that, having found the natural character of the coastal environment was not compromised as it stands, the adverse effects of the proposed marina were cumulative on existing alterations to the coastal environment*

[107] No. The Court did not find that the natural character of the coastal environment was not compromised as it stands. The Court did not apply a wrong legal test and properly considered the adverse effects in relation to the existing coastal environment.

*Eighth question of law: Whether the Court applied a wrong legal test under s 104D(1)(b)(iii) in that it took an unduly restrictive approach in determining that the proposed marina was contrary to the objectives and policies of the PWRCP*

[108] No. The Court did not take an unduly restrictive approach in determining that the proposed marina was contrary to the objectives and policies of the PWRCP and did not apply a wrong test.

*Ninth question of law: Whether the Court failed to have regard to a relevant consideration in that it failed to assess the proposal against the objectives and policies of the marinas variation to the PWRCP*

[109] No. The Court did not fail to assess the proposal against the objectives and policies of the marina's variation to the PWRCP, and in fact expressly did so.

*Tenth question of law: Whether the Court erred in finding, without evidence, that the proposal redesign of the proposed marina would have adverse effects on, or not sufficiently mitigate such effects on the environment*

[110] No. The Court made no error in finding that the proposed redesign would have adverse effects on, or not sufficiently mitigate such effects on the environment, and was fully entitled to form that view.

**Costs**

[111] If the parties are not able to resolve costs issues between them relating to this hearing, I direct that the respondents and the Guardians Group and Director-General of Conservation are to file costs submissions within 14 days, the appellants within a further 14 days, with the respondents and the Guardians Group and Director-General of Conservation having a right of reply within a further 7 days. The parties may apply by way of memoranda to vary this timetable.

**……..**

**Asher J**