BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

UNDER	the Resource Management Act 1991 (the Act)
IN THE MATTER	of appeals pursuant to clause 14 of the First Schedule to the Act
BETWEEN	**NGATI MAKINO HERITAGE TRUST** (ENV-2015-AKL-000140)
	NGATI RANGINUI IWI INCORPORATED SOCIETY (ENV-2015-AKL-000141)
	Appellants
A N D	**BAY OF PLENTY REGIONAL COUNCIL**
	Respondent
A N D	**VARIOUS**
	Section 274 Parties

LEGAL SUBMISSIONS ON BEHALF OF PORT OF TAURANGA LIMITED

6 December 2017

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MAY IT PLEASE THE COURT

Introduction

1. In its Minute and Directions of 4 October 2017, the Court set aside time to hear submissions on the natural heritage and iwi resource management matters stating that:

> [20] The focus of the Court in respect of the natural heritage and iwi resource management matters will be on the final wording to be included in the Plan subject to any outstanding appeals and of course decisions on the marine spatial planning issue.

2. These submissions are presented on behalf of the Port of Tauranga Limited (the **Port**) who is a section 274 party in relation to both of these hearing topics.[1]

3. In terms of the *final wording* to be included in the Plan subject to any outstanding appeals, the Port has confirmed its position in terms of the set of provisions prepared by the Regional Council (both in response to the Court's Directions dated 18 July 2017 and 4 October 2017) as follows:

   (a) In relation to its proposed wording to address the particular matters raised in the Court's interim decision on the iwi resource management (**IRM**) topic, the Port:[2]

      (i) Has no comments on ASCV7;

      (ii) Does not support any amendments to the Structures and Occupation (**SO**) permitted activity rules; and

      (iii) Agrees with the generally applicable cultural assessment criteria to apply to resource consents.

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1 The Port is a section 274 party to both appeals for the iwi resource management topic, and is a section 274 party to the Royal Forest and Bird Protection Society of New Zealand Incorporated appeal for the natural heritage topic.

2 *Ngati Makino Heritage Trust & Another v Bay of Plenty Regional Council* [2017] NZEnvC 072

(b) In relation to the natural heritage provisions the Port has proposed no changes.

4. The focus of these submissions is to address the Court's methodology for including additional permitted activity standards[3] and the Regional Council's proposed wording for addressing this matter through changes to the Structures and Occupation (**SO**) rules.[4]

Position at IRM hearing and the Court's decision

5. Essentially, the changes sought by Ngati Makino Heritage Trust (**Ngati Makino**) to the SO permitted activity rules intended to prohibit permitted activities from ASCVs and areas where an Iwi Management Plan, Hapu Management Plan or Koiora Moana Spatial Plan directs avoidance of activities.

6. The Port's position at the IRM topic hearing was that these changes (and for that matter any changes) to the SO permitted activity rules proposed in the appellant's reply evidence[5] were not indicated in their submission,

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[3] Ibid at [78]:

> We have reached the conclusion that the concerns in this case can be addressed, at least as an interim measure, by retaining the current Plan arrangements for permitted activities, but improving the wording of the standards to require the user to:
> (a) Have investigated, and concluded in a written document;
> (b) Appropriate to the circumstances; and
> (c) Prepared prior to the commencement of the activity;
> (d) That any relevant IMP or HMP has been considered; and
> (e) That the particular cultural significance of the area has been investigated, and
> (f) That they are satisfied that there are no more than minimal impacts upon those values as a whole.

[4] The Regional Council has interpreted the decision to mean that the changes are only to the SO rules, and not all permitted activity rules (ie including the DD and CD permitted activity rules). It is noted that the decision says at [71] that "[a]ctivities within the Port zone, Harbour development zone or Aquaculture activities are not included within this section [of the decision on RCEP implementation] unless specific reference is made to them".

[5] Reply Evidence for Piatarihi Carey Bennett on behalf of Ngati Makino Heritage Trust dated 6 December 2016. There is no discussion of the changes to the SO permitted activity rules in the body of the evidence which are included in a marked-up copy of the entire plan and only briefly referred to at paragraphs [159] and [160], which suggest that the specific changes were only drafted at this stage and the witness noting that she was "not thrilled with [her] efforts".

further submission or appeal. Such changes were therefore outside the scope of the appeal and beyond the jurisdiction of the Court to include.

7. Concerns with the late introduction of this relief (and scope for it) were also raised by the Regional Council whose concern was that no section 32 analysis had been completed,[6] as well as Tauranga City Council who submitted that the appropriate way for those amendments to be sought was through a variation to the plan.[7] To some extent this seems to have been envisaged by the Court, where, in the decision the Court says:[8]

> ...a rule in relation to permitted activities could provide for the relationship of Maori recognised under the plans and policy statements, and the purpose of the Act would be met as a practical short-term outcome to resolving the issues raised in the appeal, which the parties have generally agreed will require a plan change to resolve.

8. While the issue of scope for making changes to the SO permitted activity rules was plainly before the Court, the decision does not specifically address the matter, nor does it refer to (or make any directions pursuant to) section 293 of the Act in respect of the Court directed changes.[9]

9. The decision does refer to scope as a concern when addressing another matter - the landward extension of ASCV7. Initially, Ngati Makino produced a plan in its reply evidence[10] suggesting that the area of interest went many kilometres inland. The Court found that something less was sought, although the evidence was not clear and was not understood to include the residential areas of Maketu or Little Waihi.[11]

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6 Legal submissions for Regional Council at [55].

7 Legal submissions for Tauranga City Council at [8.12].

8 At [81].

9 The Court can make changes outside the scope of the appeal in accordance with section 293 of the Act.

10 At [26] the Court records the concern at the way in which the scope of the ASCV was not addressed until this point.

11 At [50].

10. After commenting earlier that the range of outcomes available is limited to those raised in submissions and narrowed by the terms of the appeals filed,[12] in relation to this relief, the Court specifically found that:

> [50]... We agree that, in jurisdictional terms, such an increase in landward extent would not have been reasonably signalled by the nature of the submission originally filed, or in fact the appeal.
>
> [51] In our view, the inclusion of landward areas to the edge of the coastal environment line would require a further process for a consistent approach to ASCVs. We have concluded that such an intention was not indicated in either the submission or the appeal. ...

11. On its merits, the Port submitted that the changes to Rule SO3 (navigational aids) could effectively nullify the permitted status which, it said, was inappropriate for essential navigational equipment in a busy harbour with a nationally significant port. Similar concerns were raised with similar amendments proposed to other permitted activity rules which apply to the Port.[13]

12. The Court appears to have taken this concern into account to some degree when undertaking an assessment of its proposed amendments under section 32, concluding that:

> [98] In this way the costs and benefits are equitably balanced to enable intervention when required, but still permits less intrusive activities or those having public safety benefits.

13. The Court seemed to be of the view that the additional permitted activity standard would be relatively easily complied with as it would be "self-policing" stating:

> [79] Whilst we realise that this would be self-policing, it would require any user who relies upon permitted activity status to be able to produce documentation, in the event that they are challenged, establishing the matter has been

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12 At [8].

13 Due to the changes only being raised by the appellant in late reply evidence, there was no opportunity for the Port to prepare reply evidence to the reply evidence.

> appropriately investigated. The words 'reasonable in the circumstances' would give an appropriate balancing connection. We accept that this arrangement does not have particular certainty, but could provide a check for potential consequences in the interim, until the Council has promulgated a plan change that can properly integrate with the architecture of the RCEP.

14. In the absence of any discussion about the nature of the appellant's original submissions and the terms of the appeal filed (noting again that the appellant's requests for changes to the SO permitted activity rules first appeared in its reply evidence), the Court nonetheless directed changes to the SO rules on the basis that:[14]

> ... further recognition of ASCV values needs to be undertaken in dealing with permitted activities and other activities and this should be addressed by either standards in respect of permitted activities and by appropriate criteria otherwise.

Law on scope

15. Whata J[15] provides a comprehensive discussion of the approach and principles to the question of scope under the Act in his decision on the Auckland Unitary Plan, deciding that the Independent Hearing Panel's approach:[16]

> ..accords with the longstanding *Countdown* "reasonable and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young in *Clearwater* and Kós J in *Motor Machinists.*

16. The case law on scope essentally boils down to a consideration of whether the amendment was reasonably and fairly raised in the course of submissions and, in this case, on appeal – and this needs to be approached in a realistic workable manner. But it also needs to be done carefully, in order to ensure no natural justice issues arise.

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[14] At [105].

[15] *Albany North Landowners v Auckland City Council* [2016] 138.

[16] At [135].

17. It is submitted that a particular issue for the Court in this case is whether the outcome now proposed is one which was within the forseeable comtemplation of those potentially interested or affected at the various stages of the process.

Analysis of submissions and appeal

18. It is common ground that neither of the appellants' to the IRM topic sought specific changes to the SO permitted activity rules in their original submissions or further submissions (noting that most parts of both parties' submissions are the same or similar).

19. Taking the broader of the two submissions, Ngati Makino, did include the following relief:

(a) In relation to Iwi Resource Management (as a topic heading within the submission):

> Seek to amend objectives, polices, methods and rules to ensure that management of our taonga occurs in a way that provides for our social, cultural and political needs.

(b) In relation to rules (under the 'Activity-based Policies & Rules' topic heading within the submission):

> BOPRC to work with NM to ensure the Plan maximises the potential of the Act, national and regional planning instruments etc in order for NM (and others) to realise the full effect of those provisions.

(c) In relation to Planning Maps for RCEP (as a topic heading within the submission):

> Must work on new objectives, policy, method and rules to ensure the mapping of ASCVs is not a waste of time and money or done to meet expectations of requirements of other planning instruments as a duty rather than a meaningful exercise and effort to protect, preserve, enhance or recognise our (tangata whenua) existence.

20. These last two submission points were not included by Ngati Ranginui in its original submission or adopted in further submissions.

21. Importantly, when it came to the appeal we see greater specificity by Ngati Makino of the relief sought to give effect to the concerns raised in submissions. In particular, in relation to Activity-based Policies & Rules, no changes are sought to the SO permitted activity rules. Rather the relief: [17]

    (a) Seeks to remove limitations on iwi Maori involvement through the prescriptive use of statutory acknowledgements (subparagraph (d)(i));

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[17] See Notice of Appeal dated 15 October 2015 which includes the following section of relief relating specifically to "Activity-based Policies & Rules":

(d) **Activity-based Policies & Rules:**
  (i) Remove provisions in rules or policies that limited the ability of iwi Māori involvement through the prescriptive use of statutory acknowledgments – see Rules HD3, 4, 5 & 6; Rules PZ5, PZ5A, PZ6, PZ8, PZ9, PZ9A for example.
  (ii) Controlled activities must include appropriate standards and terms to allow iwi Māori participation.
  (iii) Restricted discretionary activities must include in the matters of discretion provisions that recognise iwi Māori rights and interests.
  (iv) Require a comprehensive historical cultural assessment as part of any application that involves the establishment of or re-zoning of an ASCV or landscape of historical significance to iwi Māori and where the development proposes large scale earthworks.
  (v) Review all rules and Matters of discretion parts to ensure relevant processes, matters for restricting discretion and linkages to other parts of the Plan and RPS where are consistent and properly cross-referenced.
  (vi) Develop process that shall be promoted for the purposes of section 104 of the RMA for identifying effects and assessing the extent and nature of those effects on the characteristics and/or features, of areas or places that hold special importance to iwi Māori; and
  (vii) Develop a parallel process of cultural monitoring, which requires the cultural health of the identified sites and characteristics to be assessed on an ongoing basis.
  (viii) Develop new policy framework to recognise and provide for iwi Māori recommendations for a Review of Consent Conditions when required; and
  (ix) To require all coastal permits where it is considered there may be future unexpected or uncertain adverse effects on the environment, to include a review condition.

(b) Seeks the inclusion of standards relating to the issue of iwi Maori participation in the express context of controlled activities (subparagraph (d)(ii));

(c) Seeks the inclusion of recognition of iwi rights and interests in the express context of restricted discretionary activities (subparagraph (d)(iii));

(d) Seeks to require a historical cultural assessment in specified circumstances which are unrelated to permitted activities (subparagraph (d)(iv));

(e) Seeks to ensure consistency and proper cross referencing both within the RCEP and with the RPS (subparagraph (d)(v)); and

(f) Seeks to develop a process for identifying and assessing effects on features, areas or places of special importance to iwi when a resource consent application is considered (subparagraph (d)(vi)).

22. The changes to the SO permitted activity rules, whether as proposed by Ngati Makino in reply evidence or by the Court in its decision, cannot be said to fall within this part of the appeal.

23. In relation to the other parts of the appeal notice, it is difficult to identify any form of relief against which the changes now proposed could have been reasonably anticipated or from which the changes logically arise (in a consequential sense).

24. For completeness, the relief sought by Ngati Ranginui in its appeal (as framed by the more limited original submission) unquestionably fails to provide the scope for the changes.[18]

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[18] See Notice of Appeal dated 15 October 2015, which includes the following relief under the three parts of the appeal:

> Development and integration of new innovative planning mechanisms into the RECP that seeks to provide for Ngati Ranginui (and other tangata whenua) aspirations for the appropriate use and development of Te Awanui, balanced against the obligation for resource protection (sustainable management).

Concerns with the amendments

25. While maintaining its position that changes to the SO permitted activity rules are out of scope, the Port has also expressed the view that there is insufficient evidence to support the amendments envisaged by the Court. In particular, it has said that the Court did not have before it:

    (a) Evidence regarding the effects of each of the permitted SO activities sought to be amended and the extent to which any of these activities have potential effects so as to warrant additional permitted activity conditions.

    (b) Evidence regarding how any amendment to the permitted SO rules might give effect to superior statutory planning documents such as the New Zealand Coastal Policy Statement which includes Policy 9 (Ports). This directs (amongst other things) consideration of where, how and when to provide in plans for the efficient and safe operation of ports. Navigational aids are essential to the safe operation of ports.

26. As might be expected, the Port has navigational aids in ASCV 4A (Te Paritaha o te Awanui) and ASCV 6 (Mauao (Mount Maunganui)). Policy PZ 12 recognises that there will be channel markers within Te Paritaha o te Awanui. The significance of these ASCVs to iwi is well known, as is the importance of navigational aids to the operation of a safe port.

27. The amendments suggested by the Court should not be a substitute for a thorough evidential based enquiry as to whether additional standards are appropriate.

The relief sought by Ngati Ranginui is an investigation and confirmation into the lineal and geographic extent of Te Paritaha to be include the area into ASCV 4 and reinstated into Map11b as recommended by the staff recommendations report.

Deletion of Rule HD3, HD4, HD5, HD6, OZ5, PZ5A, PZ8, PZ9 and PZ9A where it limits notification to tangata whenua group or groups with a statutory acknowledgment, protected customary rights or customary marine title.

28. The amendments also do not appear to recognise any distinction between existing and new activities. Arguably, there are implications for all existing activities that rely on the permitted rules in terms of section 20A of the Act[19] which may not have been contemplated and could impact an unknown number of persons who have had no involvement in this process.

29. The Regional Council's proposed wording for the SO rules has endeavoured to address this matter by proposing a provision which applies to, say, 'new' navigational aids. The application of this standard however is not always clear in the Port context. For example, following the recent capital dredging project, existing navigational aids were needed to be moved small distances of up to 20m. It is not clear whether they would be considered new navigational aids.

30. Another example of the uncertain application of this approach is how a "new" recreational event will be defined. For example, does it include longstanding annual events such as the Port of Tauranga Half Ironman and the Round The Mount swim, the next time the event is held, or only new events which have never before been run.

31. In terms of the further wording changes now preferred by the appellants' Ngati Makino, the Port had not understood that this hearing was a further opportunity for the parties to make wording suggestions beyond the matters the Court raised in the IRM decision and made Directions about. However, for the record, Ngati Makino's proposal to introduce further amendments to Rule SO 2 and Rule SO 6, for the reasons already outlined, are out of scope and are opposed.

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[19] If the introduction of a new permitted activity standard is interpreted as a new rule requiring resource consent (which is arguable on a purposive interpretation of that provision), then all existing activities that rely on the permitted rules will need to apply for resource consent if they are unable to meet the new standard.

Conclusion

32. To conclude, during these proceedings the Port has maintained, and continues to maintain, the position that changes to the SO rules are beyond the scope of appeals and do not give the Court the jurisdiction to make. The Port has also expressed the view that there is insufficient evidence to support the amendments envisaged by the Court.

DATED this 6th day of December 2017

Lara Burkhardt
Counsel for Port of Tauranga Limited