BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 066

IN THE MATTER	of an application by Direct Referral under Section 87G of the Resource Management Act 1991 (**RMA**) for resource consents to construct and operate a 160-berth marina at Matiatia Bay, Waiheke Island
BY	WAIHEKE MARINAS LIMITED ("**WML**") (ENV-2014-AKL-000174) Applicant

Hearing at:	at Auckland on 26 March 2015
Court:	Principal Environment Judge LJ Newhook Environment Commissioner R Howie Environment Commissioner ACE Leijnen
Appearances:	R Brabant and J Brabant for WML S Schlaepfer for Auckland Council M Casey QC and K Littlejohn for Direction Matiatia Inc ("**DMI**") B Parkinson for T Greve & K Lewis
Date of Decision:	15 APR 2015

DECISION OF THE ENVIRONMENT COURT ON APPPLICATION BY DMI THAT CHANGES TO THE PROPOSAL BY WML MADE ON 15 DECEMBER 2014 ARE OUT OF SCOPE

DECISION

A. The change to the proposal involving deletion of the carpark and its prospective replacement at tentatively identified optional sites elsewhere, is out of scope of the application as brought and notified. The Court has no jurisdiction to consider this aspect further.

B. WML is to advise the Court and parties within 7 days of the date of this decision, as to how it wishes to proceed in light of Finding A.

C. Costs reserved.

REASONS FOR DECISION

Introduction

[1] In late 2013 WMI applied (under s87G RMA, one of the "direct referral" provisions of the Act) for orders granting resource consents to enable the establishment and operation of a marina facility in Matiatia Bay, Waiheke Island, in accordance with a resource consent application it had lodged with Auckland Council mid-year.

[2] WML's application was thereafter processed by the Court as a matter of priority, through various conferences and the setting of a timetable for preparation for hearing. The substantive hearing commenced on 6 October 2014 and proceeded for nearly three weeks. Towards the end of the hearing WML announced that it intended to seek leave to change the proposal by (in summary) removal of the proposed foreshore carpark.

[3] During the conference in Court that followed, we tentatively suggested to the Applicant on the basis of all the evidence that had been heard, that it might want to think carefully about some aspects of the shape and size of the marina as well. This was expressed strictly to be on the basis that the Court was not seeking to promote compromise, and had not yet come to a view as to whether the marina as originally applied for could be consented to, or should be refused consent, or something in between.

[4] By Memorandum on 3 November 2014 WML advised that it wished to proceed with an amended application, and proposed a timetable. The Court issued a Minute on 4 November approving the timetable.

[5] On 15 December 2014 WML lodged its amended proposal for (in summary) removal of the carpark, repositioning of some infrastructure, reduction in size of the marina and a re-shaping of some its elements. It also lodged amended plans and cross-sections, together with updated "visualisations" and new draft proposed conditions of consent. Counsel for WML detailed the many changes in a supporting Memorandum.

[6] On 30 January 2015 DMI, one of the principal submitters in opposition to the proposal, lodged the present application for an order that the amended proposal was out of scope and therefore beyond the jurisdiction of the Court to consider further. In summary, the grounds for this application were:

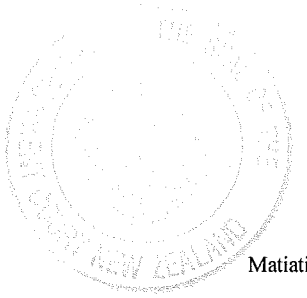
(a) a marina with no provision for berth-holder carparking adjacent to the marina berths is not fairly and reasonably within the scope of WML's application as notified which included provision for such carparking. The amended proposal is substantially different in that respect from the one that was notified;

[DMI expressly recorded that it accepted that amendments proposed to the coastal structures were "probably within scope". We have interpreted that as absence of challenge in that regard]

(b) in particular, the traffic-related aspects or impacts of the amended proposal are different in scale, intensity and character to those caused by the notified application;

(c) the amended application is therefore "out of scope" and beyond the jurisdiction of the Court to consider further.

[7] DMI sought the order in reliance on the Court's general powers in s279(1) RMA, and submitted that WML was unable to amend its application in the manner proposed, and should therefore elect whether it wished to proceed with the application as originally notified, or withdraw it altogether.



The legal issues

[8] The legal tests for determining whether changes to a proposal in a resource consent application are "within scope" or not, are relatively well settled. The starting point is that amendments can usually be made up until the close of a hearing, constrained however by the requirement that they come within the scope defined by the original application. That has been the position since the decision of the Environment Court in ***Darroch v Whangarei District Council.***[1] Beyond such constrained position, a fresh application would need to be brought.

[9] There is considerable authority from many Court decisions, setting the principles for identifying "scope".[2]

[10] We have found particularly helpful a recent statement of the law by another division of the Environment Court in ***HIL Limited v Queenstown-Lakes District Council.***[3] We can do no better than quote the three principles set out in that decision, as follows:

> (1) A change to a notified application is within the jurisdiction of the Court if its ambit is fairly and reasonably within the scope of the original notified application: ***Shell NZ Limited v Porirua City Council***;
>
> (2) Particular factors to be considered include (see ***Atkins v Napier City Council)***;
>
> - scale, intensity and character of the altered activity;
> - the altered scale, intensity and character of the effects or impacts of the proposal;
> - potential prejudice to both parties and the public;
>
> (3) only if an amended application fails the ***Shell New Zealand*** test, might the ***Estate Homes*** approach – summarised in the two previous paragraphs – possibly apply.

[11] Applying these principles, each case will depend on its own facts. That is, the changes to the proposal should be analysed against the original application, and there will necessarily be questions of fact and degree to be considered. A straight

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[1] Decision A018/93
[2] See for instance ***Haslam v Selwyn DC*** (1993) 2 NZRMA 628; ***Mills v Queenstown-Lakes District Council*** [2005] NZRMA 227; ***Coull v Christchurch City Council*** (Environment Court) Decision C077/06; ***Shell NZ Limited v Porirua City Council*** (Court of Appeal) CA 57/05
[3] (2014) ELRNZ 29 at paragraph [42]

reduction in the scale, intensity or character of a proposal will often be found to be within scope.

[12] There is nothing about the provisions enabling direct referral to the Environment Court to mark such cases out as being any different concerning the application of these principles.

[13] There was general agreement at the hearing about the foregoing statements of principle. The dispute that played out before us was about the application of the facts to them. The focus by DMI was on the removal of the carpark, and its replacement by facilities yet to be confirmed. WML proposed a broader examination of elements of the wider proposal. An essential element of the DMI application was that what WML proposed by way of a change was not a straight reduction of scale, intensity or character.

The factual matrix

[14] WML filed three detailed affidavits intended to support its argument that scope would be reduced, and within jurisdiction, with the carpark removed. The affidavits were by Mr PH Wardale, a marina industry consultant who was closely associated with the design of the original proposal and who had subsequently agreed to take a financial interest; Mr DF Mitchell, a transportation engineer who had provided evidence on behalf of WML at the substantive hearing; and Mr M Dunn, a planning consultant who likewise had given evidence in support of the original proposal.

[15] Mr Wardale reminded us that the original proposal involved berth-holder vehicles and service traffic travelling to the foreshore carpark through an area by the main ferry terminal called the "keyhole", an area within which buses and other public transport vehicles drop or collect passengers and loop back to the Matiatia access road. That aspect had been heavily criticised during the substantive hearings and was, he said, one of the reasons for deletion of the carpark.

[16] Mr Wardale offered detailed evidence of new endeavours by himself and WML consultants to meet with property owners in the Matiatia valley to organise alternative carparking for the marina. He offered the opinion that it would not be appropriate to consider options beyond the Matiatia valley, because it was important that parking areas are proximate enough to be acceptable to berth-holders to walk

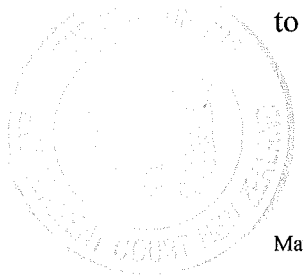
between the marina and the chosen parking areas, and to avoid the need for additional transport assistance such as shuttle vehicles which could create other traffic impacts. We see the logic of that statement.

[17] Working with Mr Dunn and Mr Mitchell, he had identified three options. One involved land owned and designated by Watercare and leased to Auckland Transport, a moderate distance up the Matiatia valley; another a privately owned block (Swordfish Holdings Limited) somewhat closer to the wharf; and thirdly some Council-owned land adjacent to existing public parking areas managed by Auckland Transport, relatively close to the wharf. We will term these the "Watercare", "Swordfish" and "AC" options respectively.

[18] We inferred from this evidence that WML have might have moved beyond an earlier suggestion that the Court be asked to grant consents for the marina, minus carpark, subject to a condition of consent requiring a management plan by which WML would be left to secure land and resource consents to the satisfaction of the Auckland Council before commencing construction of the marina. This change was confirmed by counsel for WML when giving submissions during the hearing of the present application.

[19] Mr Mitchell reminded us of his earlier evidence about parking demand, with his assessment for the previously proposed 160 berth marina being 55 spaces. He indicated that on the basis of the same method of calculation, a 110 berth marina would drive a peak parking demand of 39 spaces. He applied that figure to his assessment of the three options.

[20] First, he noted that each of the options was geographically removed from the "keyhole" area and offered the opinion that they would therefore have no effect on the operation of the "keyhole" area, now or in the future. He considered the berth holders could be prohibited by marina rules from travelling through the "keyhole" area by vehicle. He suggested that berth holders using a private vehicles to access the marina and intended carpark (wherever the latter might be located) would either park on the reserved parking marina areas and walk to the marina, or drop off equipment and/or people in the short term 30 minute public carparking area just outside the keyhole, before taking their vehicle to the reserved marina parking area and returning on foot to their berth.



[21] Mr Mitchell described steps that could be taken to upgrade the present poorly formed parking area on the Watercare land, and offered the view that compared to 94 vehicles that could presently be parked there, 143 spaces could be formed through better engineering and construction. This would offer 49 additional parking spaces, exceeding the peak number of 39 parking spaces that he considered would be necessary for the revised marina proposal.

[22] Interestingly, and with refreshing honesty, Mr Mitchell reminded us of his earlier substantive evidence in which he had offered an opinion that the Watercare area was not included in traffic counts on the basis that it was "too remote from the proposed marina areas". He now told us that he considered the Watercare site appropriate for permanent marina parking, but that due to its location 650 metres from the marina, there would be consequent use of the short term (30 minute) parking area for dropping off people and gear.

[23] As to the Swordfish parking area, Mr Mitchell considered that some berth holders (probably fewer than under the Watercare option) might still choose to park in short term parking areas to make deliveries to their boats.

[24] Mr Mitchell described the AC area as a potential new carpark to the south of the existing parking area currently used by a car rental company, which would offer sufficient area to accommodate 39 spaces. He advised that this area would require ground clearance, earthworks and possibly small retaining walls or battering to provide a realistically consistent grade, and that stormwater measures would also be required. Some numbers of berth holders might still wish to use the short term parking area for drop-off purposes, once again possibly to a lesser extent than with the Watercare option.

[25] Mr Mitchell undertook surveys on two dates in January this year to access current extent of use of the short term (30 minute) parking area. One was conducted on a Saturday and the other on a Wednesday. He said that the results of the surveys showed that demand for short term parking on both week days and weekends varies, but "can typically be around 60 percent of the available parking spaces". He offered an opinion about the potential impact on this area if berth holders were to use it, based on certain assumptions about drop-off and pick-up activity by berth holders. He suggested that his profiling studies demonstrated that there is sufficient parking available in the short term parking area to accommodate demand for parking during the week; that demand during the weekend might technically reach the capacity of the

short term parking spaces; but that there would be no overall effect "because there is ample parking available at the nearby long term parking areas on weekends".

The parties' submissions

[26] Of the parties who appeared, Auckland Council and Auckland Transport signalled their intention to abide the decision of the Court, and offered no detailed submissions.

[27] By arrangement with his senior counsel, Mr Littlejohn addressed the Court on behalf of DMI. He acknowledged that in many cases, a reduction or deletion of a component, reducing the overall scale of a proposal, would cause no problems of scope. He submitted that this would not always however be the case, and was not on this occasion.

[28] Mr Littlejohn submitted that, because of the peculiarities of the amendment, it was not possible to assess any evident relationship between a changed carpark location and the transportation effects. He submitted that on WML's own evidence (Mr Mitchell) there appeared likely to be an entirely different set of relationships, the exact extent and consequence of which could not presently be predicted. He submitted that this was a clear signal that the amendment had gone beyond scope. Putting it another way, he submitted that the necessity for evidence to be called at all at this juncture, in an endeavour to establish the scale of changes of effect from the change in the proposal, meant that the applicant could not credibly submit that there isn't a different application. In making this submission his focus was clearly on the new need for short-term public drop-off carparks to be used where previously there had been none.

[29] Mr Littlejohn was further critical that, despite such concession in the evidence of Mr Mitchell, the true extent of changed effects was not capable of determination until a precise new parking proposal was before the Court, something that WML had not been able to achieve at this juncture.

[30] In answer to the Court as to whether it had a discretion in this matter, Mr Littlejohn conceded that the scope test does admit of evaluations of degree, but he reiterated that based on Mr Mitchell's own evidence, there would be effects that would be different in nature and scale, occurring in a different location and of uncertain extent.

[31] Mr Littlejohn submitted that the attempts by Mr Mitchell to demonstrate that any changed effects would be minor could not be relied upon, not having been tested by cross-examination, and he further submitted that it was relevant that the analysis of effects on short-term parking focussed very much on the current parking situation at Matiatia and took no account of the future.

[32] Mr Littlejohn submitted that effects on the short-term parking areas at Matiatia, not having been an issue connected with the application as originally presented, could potentially attract new parties.

[33] Mr R Brabant submitted on behalf of WML that carparking is ancillary to the principle purpose of a marina in the current application.

[34] He argued that holistic analysis of the changes now proposed should result in a clear finding that effects on the environment would be reduced. He submitted that not only would the new parking solution be of lesser scale and intensity (we assume a reference to 39 spaces in place of 55), but credit should be given for the contentious reclamation proposal having been removed, and access through the keyhole no longer being required. As to changes of activity in the short-term parking area, Mr Brabant relied heavily on the evidence of Mr Mitchell, which he characterised as offering a conservative assessment that there is sufficient capacity for additional use, noting as well that no doubt some of the existing use of such spaces comes from mooring holders presently in the bay.

[35] Tested by the Court, Mr Brabant had to concede that Mr Mitchell's evidence could be seen as an existing snapshot and that account hadn't been taken of possible future growth of activity in Matiatia. Tested as to Mr Mitchell's analysis of potential transportation effects from each of the three options being somewhat speculative, as well as lacking in any future analysis, Mr Brabant was constrained to argue that, if the Court considered that Mr Mitchell's evidence fell short, there are other traffic engineers yet to be heard in the substantive proceeding. He also reiterated that there is a matter of scale involved, the extent of permanent parking being reduced to 39 spaces. He returned to his holistic theme, submitting that no one has disputed WML's proposition that there is a raft of positive outcomes and reduced intensities that will emerge overall.

[36] In the face of questions as to whether the scope issue should properly focus on potential changed adverse transportation effects, and not balance those against new

positive effects, Mr Brabant advanced the interesting proposition that the Court could proceed in the substantive case to determine whether the water-based activities should receive consent, and if the answer was favourable to his client, then WML could, knowing a marina could be built there, and subject to arranging parking on satisfactory terms, get confirmation from berth holders. The transportation effects of the then negotiated parking arrangements would then become the subject of further scrutiny by the Court at another resumed hearing. This approach would be as an alternative to proceeding to hear all traffic engineers on the three new options identified but not yet finalised. Mr Brabant considered that this would "balance the interests of the parties in a positive way".

[37] Tested by the Court as to whether a better and fairer approach to all parties might have been that WML should have negotiated a precise proposal for parking and transportation between last October and now, say by way of a conditional agreement to lease or purchase, Mr Brabant pointed to the affidavit of Mr Wardale. The answer appeared to be some alleged anxiety on the part of certain public authorities not wanting to be seen as actively supporting the marina proposal.

[38] As to the apparent need for some resource consents at each of the three alternative properties, Mr Brabant conceded that one couldn't rule out the possibility of what he termed "*some sort of relatively minor consent for stormwater or earthworks*".

[39] Mr Brabant submitted that in contrast to some of the cases cited, WML was not asking in the present proceedings for resource consent to establish a carpark outside the area referred to in the original application. Of necessity, however, he returned to his theme that while there might be different potential effects on the short-term parking area, this was simply a matter of degree.

[40] In reply, Mr Littlejohn stressed that an essential question was whether we were confronted by a question of effects or a question of scope. He submitted that the Court should not take an holistic approach such as under Part 2 of the Act in connection with substantive proposals, and then weigh or balance matters. He submitted that the focus should be on whether putting a carpark "somewhere else" would change the scale and intensity of transportation related effects. He submitted that the change would have the quality of "changing effects... of shifting them, of making them occur in different locations".

[41] He submitted that to remove the land-based parking and transportation issues from the next stage of the hearing, and consider only whether consent could be given to the marine activities, would not be integrated planning.

[42] Tested by the Court on the proposition that potentially to force the bringing of a completely new application might be unfair to all concerned, Mr Littlejohn assured us that DMI had thought carefully about this aspect, and that there was risk recognised and taken by both major parties. He submitted that, while one could feel sympathy with the applicant being faced with the need to change its parking proposals and not being able to firm up new ones, such was completely irrelevant to the real issue of scope.

Decision

[43] We have deliberated on the detailed matters advanced by WML and DMI, and note first that we have already found that there was general agreement about statements of legal principle and that each case will depend much on its own facts, with the essence of the present case being the application of the facts to the principles.

[44] We find, significantly on the evidence called by WML (Mr Mitchell) that the ambit of the change concerning the carpark is not fairly and reasonably within the scope of the application as originally brought and notified; there will be a change of scale, intensity and character of the changed activity, in particular a shift of same; and that consequently there will be an altered scale, intensity and character of the effects or impacts of the proposal. In making this finding we focus on transportation effects, and hold that the analysis is not to be of the holistic kind argued for by Mr Brabant, giving credit for other activities removed such as the reclamation and access through the "keyhole", and potential reduced effects of those. The scope test is not akin to a consent authority's task under Part 2 of the Act. One telling reason for this is that changed transportation effects might be of interest to some persons not already parties, who might not be the slightest bit interested in, let alone affected by, reduced effects of other kinds say from removal of the reclamation or reduction and re-shaping of the marina.

[45] Mr Brabant argued strongly that the evidence showed that changed effects on the short-term parking area in Matiatia would be no more than minor, but it is not possible for us to make a finding to that effect. Such a proposition is entirely speculative on the untested evidence of Mr Mitchell on the scope question.

[46] We accept Mr Brabant's submission that the present case can be distinguished from others like ***Shell***, on the basis that WML is not presently expressly seeking to expand its activities onto another site. The point, however, ultimately counts against WML because it is not simply abandoning the parking part of the proposal, it is tentatively seeking to move it to a site not yet fully determined, and the effects of which therefore remain speculative while nevertheless likely to be different from the transportation effects studied in connection with the marina proposal as originally notified.

[47] We find that altered effects on the short-term parking areas at Matiatia, whether now or in the future, could logically result in persons other than existing parties seeking (and possibly having the right) to be involved.

[48] In addition, although secondary in importance to the last reason, we hold that it would not be right or fair for parties who have provided extensive evidence about transportation effects of the original proposal, now to have to turn their attentions to potential changed effects from three tentatively identified options that would, as we have found, be different in scale, intensity and character.

[49] Neither do we consider that good practice in the sense of integrated planning would be served by proceeding to consider the water-based activities in isolation, issue an interim indication about that, and if favourable to WML then separately proceed to analyse the transportation ramifications of whatever parking proposal it might then be able to secure and probably have to seek consents for. If that course were to be followed, the whole case would become tortuous and significantly more expensive for all concerned. (As an aside, it is our belief that a feature of direct referral cases is that they should be cogently prepared and capable of being processed by the Court in an efficient and expeditious manner, and by their very nature will lack the benefits of passing through a first instance filter at council level to identify flaws. Those are qualities and risks that applicants for such consents should understand and accept when seeking the benefits of a faster process).

[50] The change to the proposal involving deletion of the carpark and its prospective replacement at tentatively identified optional sites elsewhere is out of scope of the application as originally brought and notified. The Court has no jurisdiction to consider this aspect further.

[51] WML is to advise the Court and parties in writing within 7 days of the date of this decision, as to how it wishes to proceed in light of the last finding.

[52] Costs on this application are reserved.

SIGNED at AUCKLAND this 15th day of April 2015

For the Court

L J Newhook
Principal Environment Judge