

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 218

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Notice of Motion under Section 87G requesting the granting of resource consents to Waiheke Marinas Limited to establish a Marina at Matiatia Bay, Waiheke Island, in the Hauraki Gulf

BY WAIHEKE MARINAS LIMITED (“WML”)
(ENV-2014-AKL-000174)

Applicant

Hearing at: at Auckland in the weeks of 6, 13, 20 and 27 October 2014 and 27 July 2015

Court: Environment Judge LJ Newhook
Environment Commissioner R Howie
Environment Commissioner ACE Leijnen

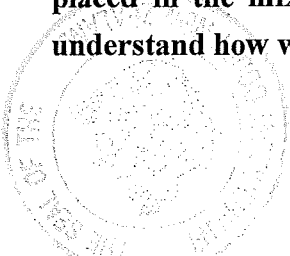
Appearances: R Brabant and J Brabant for the Applicant
M Allan and S Schlaepfer for the Respondent
M Casey QC & K Littlejohn for Direction Matiatia Inc
R Enright for Ngati Paoa Iwi Trust
N McIndoe for Auckland Transport
B Parkinson for Grieve & Lewis

Date of Decision: 17 Dec 2015

DECISION OF ENVIRONMENT COURT

Preface

This case has divided, indeed even polarised, a sizeable portion of the population of Waiheke Island. We are taking the unusual step of writing this preface to the record of our decision. The purpose of the preface is to strongly encourage readers of this decision to take the time to read it right through. It is important that those interested in the case understand that it has involved a basket of highly complex issues, each of which has needed to be weighed by us, and placed in the mix for the purpose of reaching our ultimate overall decision. In order to understand how we have gone about that process, the decision should be read in full.



We say this because we believe that many people interested in the case are inclined to view it through a simple single-issue lens, often based on a personal interest, preference or prejudice. For instance they may strongly favour the granting of consent based on a wish to have a marina berth in Matiatia; or they may strongly favour the granting of consent because they wish to see greater development activity in Matiatia; or they may favour refusal of consent because of potential impact on the landscape and amenity of Matiatia; or they may favour refusal of consent on account of potential effects on Maori cultural values, traffic patterns, or ecosystems. These are just a few examples, but focus on just one issue can lead people to overlook or avoid the big picture.

We think that it would be desirable in the interests of people being fully informed about the outcome and the reasons for it, that they try to move objectively beyond any single-interest lens view, and through this decision seek a rounded understanding of the issues, our reasoning about them, and our overall ultimate weighing and decision-making process.

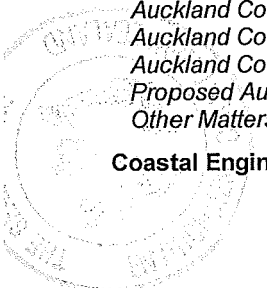
DECISION:

- A. Consent is refused.
- B. Costs are reserved.

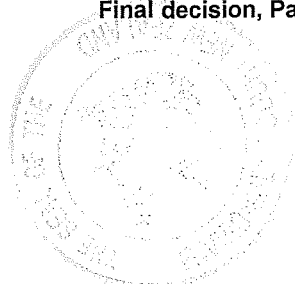
REASONS FOR DECISION

Contents

Preface.....	1
Introduction and Background.....	4
Preliminary issue: Should the applications for consent be bundled, and what is the activity status (or stati)? ..	6
Approach to decision-making.....	8
The Relevant Planning Framework.....	9
<i>New Zealand Coastal Policy Statement (NZCPS)</i>	9
<i>Hauraki Gulf Marine Park Act (HGMPA)</i>	12
<i>Auckland Regional Policy Statement (ARPS)</i>	12
<i>Auckland Council Regional Plan: Coastal (Coastal Plan) (2004)</i>	16
<i>Auckland Council Regional Plan: Air, Land and Water (ALW) (2013)</i>	22
<i>Auckland Council District Plan, Hauraki Gulf Islands Section (District plan) (2013)</i>	22
<i>Proposed Auckland Unitary Plan (PAUP) (notified 30 September 2013)</i>	27
<i>Other Matters (s 104 (1) (c)) RMA</i>	27
Coastal Engineering, Marina Design, and Wave/Wake Assessment Issues	28



Effects on Navigation Safety	29
Landscape and visual issues, natural character, and amenity issues	33
<i>Description of proposal</i>	33
<i>Issues agreed by the Experts in facilitated conference</i>	35
<i>Agreement about the audience and value of the setting for tourism and recreation</i>	38
<i>Agreement about the future environment</i>	38
<i>Agreements and disagreements about landscape and visual effects</i>	39
<i>Agreements and disagreements about potential effects on the marina on recreational and tourism values</i>	40
<i>Disputed opinions</i>	40
<i>Landscape and visual effects</i>	40
<i>Natural Character Effects</i>	48
<i>Amenity Effects</i>	49
<i>Questions in a "hot tub"</i>	51
<i>Effects from the changed proposal</i>	52
<i>Visual effects, the visual catchment and viewing audience</i>	54
<i>Matters covered in questions of the witnesses</i>	63
<i>Discussion and findings on landscape, visual, and related effects</i>	64
Effects on Tourism and Recreation	69
<i>What potential effects (positive or negative) on tourism and recreation might the development of a marina in Matiatia give rise to?</i>	69
<i>Tourism and recreation planning in the Hauraki Gulf</i>	74
<i>Mr. Greenaway questioned</i>	75
<i>Analysis</i>	75
<i>Positive effects of the proposed marina for tourism and recreation</i>	77
<i>Archaeological issues</i>	78
Maori Cultural and historic heritage matters	81
Traffic/Transport	86
<i>What are the effects of marina traffic and activity on the transport gateway at Matiatia?</i>	86
<i>General</i>	86
<i>Parking Demand</i>	87
<i>Trip Generation</i>	88
<i>Traffic Effects</i>	88
<i>Construction Traffic</i>	89
<i>Outcome of traffic issues</i>	90
<i>Acoustic Effects</i>	91
<i>Stormwater effects</i>	92
<i>Night time lighting effects</i>	92
Effects on Coastal Ecology	93
<i>Agreements reached</i>	94
<i>Methodology</i>	94
<i>Ecological Values</i>	94
<i>Marine Bio-security vertebrate and Plant Pest Management</i>	95
<i>The issue of contaminants</i>	95
<i>Legal and Jurisdictional Aspects</i>	108
Statutory analysis and consideration	110
<i>S104D RMA</i>	110
Consideration under s104 RMA	112
<i>Potential effects on the environment</i>	112
<i>Relevant provisions of policy statements and plans</i>	114
<i>Functional requirement to locate in CMA</i>	114
<i>Efficiency of use of the CMA</i>	116
<i>Maintenance and enhancement of public open space qualities</i>	117
<i>Natural character and landscape</i>	118
<i>Maori cultural issues</i>	120
<i>Moorings and Marinas</i>	120
<i>Proposed Auckland unitary plan (PAUP)</i>	121
<i>Hauraki Gulf Marine Park Act 2000 ("HGMPA")</i>	122
Final decision, Part 2 consideration, and exercise of ultimate discretion	123



Introduction and Background

[1] This case is about an application for a set of resource consents to authorise the establishment and operation of a recreational boat mooring marina at Matiatia Bay at the ~~east~~^{we} eastern end of Waiheke Island in the Hauraki Gulf. Matiatia is the main port of entry to the island for passenger ferries. The proposal is to locate the marina in a reasonably significant portion of the north-eastern quadrant of the bay, adjacent to the ferry wharves, boat launching facilities, and the western terminus of Ocean View Road leading from the township of Oneroa.

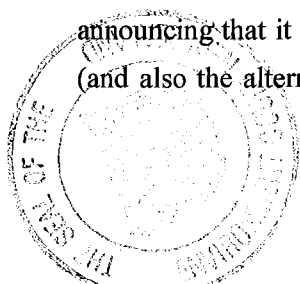
[2] The application lodged with Auckland Council in early 2013 was for 160 vessel berths ranging in size from 10.5m to 20m, complete with two rock breakwaters and access piers. In addition, there were to be pile moorings immediately to the north to accommodate 17 vessels, and a reclamation and beach access boardwalk on the foreshore at the end of Ocean View Road to accommodate 55 carparking spaces and some infrastructure for the marina. A more detailed description of the proposal, and of a subsequent significant modification put forward by the applicant late in the main hearing in 2014, are to be found in the visual and landscape section of this decision.

[3] The proceedings have not been with the Environment Court all that time. In mid-2013 the Applicant requested the Council under s87D to refer the application directly to the Environment Court for a first instance (and only) merits hearing. At the end of that year the Applicant filed a Notice of Motion with the Environment Court under s87G, the Council having earlier indicated that it would support direct referral. The direct referral process thereupon commenced.

[4] In late January 2014 the period for lodging of submissions under s274 concluded, with 310 parties lodging notices. One late notice was received, and lateness waived. That party was Ngati Paoa Iwi Trust.

[5] The hearing ran for a scheduled three weeks, commencing 6 October 2014, after elaborate plans were put in place for management of the case involving an exceptionally large number of parties. These steps included work by two Court-appointed Process Advisors to Submitters, who greatly assisted in smoothing the path process-wise, and who persuaded the majority of parties to coalesce under the banner of Direction Matiatia Inc (“DMI”). A number of electronic innovations were directed by the Court, including the use of the Court’s website for the exchange of evidence amongst parties, and lodgement of evidence and many other documents with the Court.

[6] On the second to last day of the 3-week hearing (Thursday 23 October 2014), the Applicant dropped what the presiding Judge openly described to the parties as “something of a bomb shell”, announcing that it was withdrawing that part of its application seeking consent to reclamation for a carpark (and also the alternative parking deck structure which had been put forward subsequent to the application



A handwritten signature in black ink is located in the top right corner of the page.

being publicly notified). The Applicant proposed that carparking arrangements be instead dealt with by “amendments to the draft conditions of consent”.

[7] That announcement led the proceedings into a tortuous course over many months, commencing with an oral response in Court by the presiding Judge, and the issuing of a formal Minute the following week.

[8] The response by the Court indicated in an open way some concerns held at that time by the Court about the design of the marina, including as to its size.

[9] The Court stressed that it was not seeking compromise, but that its then thinking was that resolution of the case would lie somewhere between a refusal of consent on the one hand, or possible consent to a significantly reduced and re-shaped marina on the other. The Applicant was asked to bear those remarks strongly in mind when considering whether to engage further cost, its own and that of other parties. The Applicant was directed by 3 November 2014 to advise the Court and parties in writing whether it wished to proceed with an amended application, and if so, of its proposals for timetable.

[10] The Applicant indicated at that date that it wished to proceed with an amended application, and on 15 December 2014, it lodged details illustrating removal of the carpark, a repositioning of some infrastructure, reduction in size of the marina to 112 berths, and re-shaping of some of the marina elements. It also added some new visualisations to meet criticisms by the Court of earlier shortcomings about selection of viewpoints. It lodged new draft proposed conditions of consent.

[11] On 30 January 2015, WMI brought an application for an Order that the amended proposal was out of scope and therefore beyond the jurisdiction of the Court to consider further. Following the conclusion of a timetable for preparation for a hearing of that interlocutory application, and a hearing conducted on 26 March 2015, the Court released a Decision on 15 April 2015,¹ declaring that the proposal to delete the carpark and replace it at tentatively identified alternative sites elsewhere, was out of scope of the application as originally brought and notified. The Court held that it had no jurisdiction to consider that aspect further.

[12] The Applicant subsequently announced that it would resort to proposing a carpark on the foreshore, providing 39 spaces (reduced from the originally proposed 55, commensurate with the reduction in size of the marina from 160 berths to 112); and that the carpark would be on a deck structure over the CMA in line with the alternative that it had put forward after public notification of the larger marina with parking reclamation.

[13] After detailed preparation for a further hearing, including exchange of evidence amongst the parties, the Court conducted a final hearing in the last week of July this year. It also then conducted a further

¹ Decision number [2015] NZEnvC 066

detailed site inspection. The release of this decision has been delayed longer than the Court would prefer, the cause being other pre-arranged commitments of the members of this division that would not have interrupted progress had the case proceeded as originally timetabled. The delay was anticipated and signalled to the parties on the last day of the July hearing.

[14] Some activities for which consent was previously required were said by the Applicant now to be redundant, with the applications for them consequently withdrawn. New revised draft conditions of consent were lodged. A notable change, given the abandonment of the reclamation, was that the co-relative dredging would no longer be required.

[15] Other key changes were the removal of the marina from the ferry access lane in the bay, a curving of the breakwaters, and a reduction in the overall footprint of the marina, in particular drawing elements of it away from the foreshore north of the existing wharf. Other changes will be discussed at relevant stages of this Decision.

Preliminary issue: Should the applications for consent be bundled, and what is the activity status (or stati)? Is the addition to the application of a parking deck option a permissible change?

[16] The substantive application was first lodged with the Council on 18 March 2013, at which time two elements of the proposal were of non-complying status, namely the need for a coastal permit for reclamation, and a land use consent to enable a boardwalk, landing and earthworks within the Coastal Protection Yard on an historic reserve.

[17] The applicant argued that those two features of the proposal had been withdrawn, and that if the application was to be considered on a fully bundled basis (as agreed by the planners in their expert witness conference statement), the overall activity status for the proposal would be discretionary.

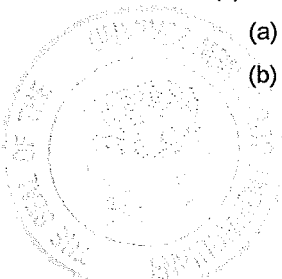
[18] The proposed Auckland Unitary Plan was promulgated on 30 September 2013, and introduced an activity status for marinas of “non-complying”, but counsel for the applicant argued that the discretionary activity status was saved by the provisions of s88A, the non-complying activity aspects in place the date of lodgement having been withdrawn.

[19] That provision is as follows:

88A Description of type of activity to remain the same

(1) Subsection (1A) applies if—

- (a) an application for a resource consent has been made under section 88 or 145; and
- (b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, is altered after the application was first lodged as a result of—



- (i) a proposed plan being notified; or
 - (ii) a decision being made under clause 10(1) of Schedule 1; or
 - (iii) otherwise.
- (1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.
- (2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104(1)(b).

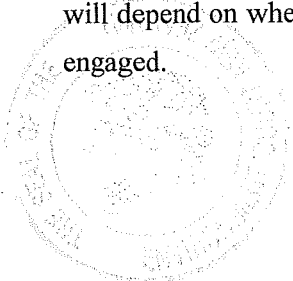
[20] The question that we have to deal with is about timing. This is because the proposal for a raised deck structure (as opposed to the originally-proposed reclamation) was introduced by the applicant not only a significant time after the application was lodged, but also after the promulgation of the PAUP.

[21] First, as to bundling, we consider that the agreement of the planners is correct. Mr MJ Dunn, a consultant planner called by the Applicant, appeared to resile from that agreement in his supplementary evidence (paragraph [26]), recording that because the then-non-complying reclamation was withdrawn, bundling would no longer be a consideration because there was only one consent now required (a coastal permit) rather than three (a coastal permit, land use consent, and stormwater diversion and discharge).

[22] As pointed out however by Auckland Council's counsel Mr Allan, marina structures are clearly non-complying activities under the PAUP. Mr Allan noted that presumably Mr Dunn was relying on s88A being applicable in order to make this statement, but instead of there being "one consent" as Mr Dunn termed it, there are various elements and activities with varying activity status, with, for instance, the (discretionary) deck structure providing access to the (non-complying) marina structures; and one cannot happen without the other. We agree with the logic of that submission.

[23] Counsel did not greatly differ about the purpose of s88A in their final submissions. Mr Brabant submitted that the purpose is to protect the status of activities as they were when an application was first lodged, from a change in activity status where a proposed plan has been notified, and he placed emphasis on the heading of the section "**Description of type of activities to remain the same.**" Mr Brabant did concede orally while delivering his submissions on the point, that none of the cases referred to by the several counsel were strictly on point, but he nevertheless submitted that the circumstances of the changes fitted within the policy thrust of s88A.

[24] Mr Allan submitted that the basic intent behind s88A is to benefit an applicant in circumstances where a stricter activity status is imposed by a new instrument. For ourselves, we would term it a "shield" against such a change. We agree with him that the question of whether or not the benefit (shield) is available will depend on whether or not the precise conditions stated in s88A(1) are met, such that subsection (1A) is engaged.



[25] Previous decisions on s88A appear to have been somewhat limited and general in their expression. For instance, the Environment Court held in *Mapara Valley Preservation Society Inc v Taupo District Council*:²

The effect of section 88A(1A) is that the activity classification is frozen to the class it was when the application was first lodged with the Council...

[26] More recently, the High Court observed in *MacPherson v Napier City Council*:³

Section 88A saves applications from the effect of changes to a District Plan that become effective after an application has been lodged. However what is saved is the application either as it was first lodged, or as it "was treated as being for at the time it was first lodged."

[27] The proposal as first lodged was for a non-complying activity overall based on the bundling that we hold to be appropriate in the circumstances of this case.

[28] We consider that it would be beyond the thrust of s88A to allow an applicant to supplant the scheme as originally lodged with the Council with a revised proposal, so as to retrospectively take advantage of the saving provision. The non-complying activity status of the bundled proposal comes about on two accounts, first that the activity status of the proposal when first lodged was non-complying, a position that pertained when the PAUP was first notified, so there was no "downgrading" of activity status when the PAUP deemed marinas to be non-complying activities. S88A being structured as it is, the shield simply does not operate in those circumstances. Changes subsequently made to an application cannot have retrospective effect and engage the protection at that later time. The die is cast.

[29] We hold that the activity status of the marina is non-complying, which will engage the provisions of s104D RMA.

Approach to decision-making

[30] We will now proceed with the substance of our decision. Some sections of it are lengthy, because an enormous amount of evidence and material was placed before us. The sections on the provisions of statutory instruments and effects on the environment are particularly long. We record at this stage that different parts of those are to be utilised in different ways later in the decision, for instance the use we make of some of them under s104D RMA is quite different to the later analysis under s104, with the approach to be taken under Part 2 RMA, different again. We have found it easier and more efficient to record all relevant matters regarding statutory instruments and concerning effects on the environment, before approaching those decision-making tasks towards the end of the decision. This approach has been driven by the sheer volume of material we have had to consider.

² Decision Number A82/09, at paragraph [28]

³ [2013] NZHC 2518, at paragraph [47]

The Relevant Planning Framework

[31] A significant number of planning instruments are relevant to the assessment of this proposal. The modified marina is generally concentrated below MHWS within the CMA, touching land in a small way above MHWS. Consenting issues therefore mainly arise out of regional planning instruments, but district provisions arise also, in ways we shall discuss. Notably, the coastal environment is the subject of an updated **New Zealand Coastal Policy Statement (2010)** which is the foundation for certain features of regional (coastal) and district plans. It is particularly relevant to this proposal, and will be our starting point. Indeed Mr D F Serjeant (consultant planner called by DMI) referred to the NZCPS as being the *seminal* policy document for this application, an opinion we accept. By s104(1)(b)(iv) RMA, a consent authority (including this Court) must, subject to Part 2 RMA, have regard to relevant provisions of the NZCPS amongst other instruments described.

[32] We have not attempted to address every slightly relevant provision of every instrument in this decision – that is simply not practical, but we have certainly considered them all⁴. We have drawn out the more salient provisions as the foundation for our reasoning for conclusions reached in this area.

New Zealand Coastal Policy Statement (NZCPS)

[33] This instrument sets the policy thrust and context for the more detailed planning instruments which follow. It is important to have a clear understanding of it. We summarise here what we consider to be key issues arising out of the relevant policy directives of this document, except for Treaty of Waitangi and Maori cultural aspects which are dealt with in their entirety in a later section of this decision.

[34] There is an emphasis on maintenance and enhancement of the natural environment, particularly in Objective 1. This is important when we consider the impact upon natural features of Matiatia including water quality and integrity, form, functioning and resilience of the coastal environment. Maintenance and enhancement of biodiversity is also a consideration in this environment.

[35] In Objective 2 there are preservation imperatives concerning natural character and natural features of the landscape through identification and protection where development and use would be inappropriate. The area the subject of this proposal is not one of those identified areas. However, there is an obligation amongst other things to recognise:

- The elements and features that contribute to natural character and landscape, visual qualities or amenity;
- Items of culture and heritage in the coastal marina area or on the coast;
- Physical resources and built facilities including infrastructure that have modified the coastal environment

⁴ This approach was approved by the High Court in *Rodney District Council v Gould* 11 ELRNZ 165; [2006] NZRMA 217 at para [32] (Cooper J)

Objective 2 also encourages restoration of the coastal environment.

[36] We observe that the finer grained lower order planning instruments embrace the maintenance of the natural character and landscape qualities, and amenities of Matiatia as an important consideration of development. Also in this particular part of Matiatia there is an existing coastal historic reserve together with the ferry wharf and related facilities, the latter having modified the coastal environment.

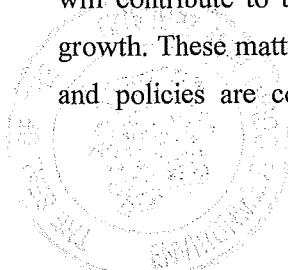
[37] Objective 4 is to maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by amongst other things, recognising that the coastal marine area is an extensive area of public open space for the public to use and enjoy. This objective is also designed to maintain and enhance public walking access along the coastal marine area. We need to consider how the marina might facilitate and/or detract from the recreational enjoyment of the coastal environment.

[38] Objective 6 is an enabling one concerning social, economic and cultural wellbeing, and health and safety of people and communities, drawing from Section 5 of the RMA. Policy 6 notes that activities in the coastal environment include infrastructure, including transport activities that are important to the social, economic and cultural wellbeing of people and communities. Consideration is required of the rate at which built development and associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment. This could be important when we consider the wharf and transport hub at Matiatia. A marina too, can provide for social and economic wellbeing.

[39] Policy 4 calls for provision of integrated management of natural and physical resources in the coastal environment and activities that affect the coastal environment, which requires :

- ...
- (a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:
 - (i) the local authority boundary between the coastal marine area and land;
 - (ii) local authority boundaries within the coastal environment, both within the coastal marine area and on land;
-
- (c) particular consideration of situations where:
 - (i) subdivision, use, or development and its effects above or below the line of mean high water springs will require, or is likely to result in, associated use or development that crosses the line of mean high water springs; or
 - (ii) public use and enjoyment of public space in the coastal environment is affected, or is likely to be affected; or...

[40] Policy 6(c) encourages consolidation of existing coastal settlements and urban areas, where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth. These matters are important when the relationship of the coastal and land based planning strategies and policies are considered in the context of Matiatia, and its role on Waiheke island. Of particular



significance is the role this place plays as the main passenger service between Waiheke and the Auckland CBD for both commuters and tourists.

[41] Policy 6 (amongst other provisions) also requires regard to be had to:

- Where and how built development on land should be controlled so that it does not compromise activities of regional importance that have a functional need to locate and operate in the CMA. The position of the marina as it relates to the land for access and ancillary features as well as its placement relative to the Ferry Terminal and wharves are matters which we must consider. We need to examine whether this raises issues of potential conflict and compromise to the foreseeable operation of the Ferry Terminal;
- Where development that maintains the character of the existing built environment should be encouraged, and where development resulting in a change in character would be acceptable. This could be relevant to the perception of the bay from various public viewpoints, including the ferries and various public walking tracks which make their way to the two headlands which frame the entrance to the bay;
- How adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable, apply controls or conditions to avoid those effects;⁵
- A set back is required for development from the coastal marine area where practicable and reasonable, to protect the natural character, open space, public access, and amenity values of the coastal environment;
- Where appropriate, buffer areas and sites of significant indigenous biological diversity, or historic heritage value. This could have particular relevance to Matietie Historic Reserve;
- The recognition that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment and making provision for involvement in decision making and in exercising kaitiakitanga.

[42] Policy 6(2) raises particularly relevant matters. There are activities that have a functional need to be located in the CMA and a marina is a typical example. In contrast there are other activities that might not have a functional need to be in the CMA and as such generally should not be located there. Efficient use of occupied space is to be promoted, which requires structures where practicable to be made available for public use.

⁵ NZCPS 2010 Policy 6(h)

[43] Mr M J Dunn, the planning consultant called by the applicant, appropriately made reference to policies concerning biodiversity, harmful aquatic organisms, and enhancement of water quality and management of discharges to the coastal environment. Further and perhaps more significantly in this case, he referred us to policies 13, 14, and 15, which address the preservation of natural character, its restoration, and protection of natural features and landscapes and seascapes of the coastal environment from inappropriate subdivision, use and development. We note that the headlands of Matiatia and other parts of the embayment have been identified as having regionally significant landscape qualities. Thus while not identified as being of ONL value where the avoidance of adverse effects would apply, the lesser “avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects of activities” is relevant.⁶

Hauraki Gulf Marine Park Act (HGMPA)

[44] This legislation addresses integration of the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments. Regional policies and plans and district plans must not conflict with sections 7 and 8 of the HGMPA. These provisions must be treated as a New Zealand Coastal Policy Statement for the coastal environment of the Hauraki Gulf but, if there is a conflict between the NZCPS and the HGMPA the NZCPS prevails. We address the HGMPA in greater detail later in this decision.

[45] We note the imperatives set out in sections 8(a) to (d) for protection and where appropriate enhancement for the life supporting capacity and natural, historic and physical resources including historic associations and spiritual relationships etc. Subsections (e) and (f) refer to maintenance and enhancement of these resources for their contribution to social and economic well-being and their contribution to the recreation and enjoyment of people and communities.

Auckland Regional Policy Statement (ARPS)

[46] We have the belief that the ARPS is consistent with the NZCPS and the HGMPA on the matters we have to consider, and heard no evidence or submissions to the contrary.

[47] Chapter 3 of the ARPS deals with matters of significance to Iwi. The objectives reflect the higher order documents seeking to sustain the mauri of natural and physical resources in ways which enable provision for social, economic and cultural wellbeing of Maori. They include the engagement of Tangata Whenua in RMA processes and importantly for present purposes, afford appropriate priority to the relationship of Tangata Whenua and their culture and traditions with their ancestral taonga when this conflicts with other values⁷.

⁶ NZCPS 2010 Policy 15

⁷ ARPS Chapter 3, Objective 3.3-2

[48] The policies and methods which follow seek to identify and give protection as appropriate through use of plan identification of waahi tapu and other taonga both at regional and district level, with both site-specific and area approaches to identifying special significance. There is an ongoing management relationship anticipated which is to be inclusive and collaborative. Applicants are encouraged to consult the appropriate Tangata Whenua groups prior to submitting their applications for resource consent⁸.

[49] While there is no express duty to consult, given the history of Waiheke Island, an inclusive approach to planned development where sensitivities to matters of Iwi significance should be obvious (such as in this coastal location), and consultation will often usefully inform a proposal. However, this is a matter of process rather than a determinative issue. We note that Ngati Paoa Iwi Trust did not seek to pursue their concerns regarding inadequacies of consultation. Their representatives and other individuals (including an expert for WML), ensured evidence addressing issues of significance to Iwi was provided to the court.

[50] Interestingly, Mr Dunn turned to Chapter 6 Heritage for guidance on cultural matters as well as natural heritage and landscapes⁹. However, we find that both Chapter 3 and Chapter 6 are relevant as identified by other planning witnesses. Chapter 6 focuses on Auckland's heritage both natural and cultural more generally, inclusive of Maori culture. Both chapters draw from s6 (e) and s7 (a) and Section 8 RMA. However, Chapter 6 is broader and addresses (relevantly) s6(a),(b),(c),(d),(f),s7(c),(d),(f),(g). Protection afforded to Outstanding Natural Landscapes and Outstanding Natural Features is provided through this chapter, with such resources identified by mapping (Series 2a and 3a and their related appendices). The location of the marina proposal is not subject to such identification. However, this chapter also refers to Amenity Landscapes and these are referenced in Objective 6.3 - relevant extracts being as follows:

- (1) To preserve or protect a diverse and representative range of the Auckland Region's heritage resources.
- (2) To maintain, enhance or provide public access to the Region's heritage resources consistent with their ownership and maintenance of their heritage value.
- (3) To protect and restore ecosystems and other heritage resources, whose heritage value and/or viability is threatened.
- (4)
- (5) To maintain the overall quality and diversity of character and sense of place of the landscapes of the Auckland Region.
- (6)
- (7)
- (8)
- (9) To manage heritage resources in an integrated way to ensure their contribution to the variety of heritage values is protected and enhanced.

[51] Policies pertaining to such amenity landscapes (6.4.22-2) and the identification of landscape values on the islands and coastline within the Hauraki Gulf (6.4.22-7), direct the maintenance and where practicable enhancement of these values. The question then arises as to what are the relevant elements, processes and patterns in Matiatia? As we understand the ARPS, we are to look to the Regional Coastal Plan and the district plan for the detail.

⁸ ARPS Chapter 3, 3.4.8 Methods 11

⁹ Dunn EIC Page 87 Para 341

[52] The Hauraki Gulf is identified in Appendix B of the ARPS as a Significant Heritage Area (reference 169), as a resource of both regional and national importance. Objective 6.3-9 and Policy 6.4.1-3 and particularly 6.4.1-3(i) and (ii) seek to preserve or protect such features. We set out the relevant extract of Policy 6.4.1-3 below

- (3) The subdivision of land, and use and development of natural and physical resources shall be controlled in such a manner that:
- (i) the values of heritage resources of international, national or regional significance are preserved or protected from significant adverse effects.
 - (ii) where preservation or protection and avoidance of significant adverse effects on the values of such significant heritage resources is not practicably achievable, such significant adverse effects shall be remedied, or mitigated.
 - (iii) In the context of this Policy, significant adverse effects would include:
 - the destruction of or significant reduction in the educational, scientific or amenity value of a significant heritage resource, or of that heritage feature's contribution to significant natural character and landscape values;
 - a significant reduction in the value of the historical, cultural and spiritual association with significant heritage resources which are held by Tangata Whenua and the wider community
 - a significant reduction in the value of significant heritage resources in their wider historical, cultural, and landscape contexts

[our emphasis]

[53] As a resource of national importance, the question of practical achievability of preservation or protection from significant adverse effects is important to our decision as it is only in circumstances where such practical achievability is not available that we may look to remedy or mitigate from same.

[54] Chapter 7 of the ARPS deals with the Coastal Environment and there are overlaps with other chapters including Chapter 6 and 8 (Water Quality). Mr Serjeant considered Chapter 7 as particularly relevant as in his opinion it encapsulates many of the other chapters. We agree with him but there are nuances and specific matters raised in the other chapters which assist in defining how we should consider this proposal. They are important to understanding the direction we must take when we examine the lower order plans. Regional and District plans must give effect to the ARPS¹⁰.

[55] Objective 7.3-11 seeks to recognise as a matter of national significance the interrelationship between the Hauraki Gulf, its island and its catchments, by providing for the protection, and where appropriate enhancement of those resources, features, characteristics and associations in accordance with s8 of the Hauraki Gulf Marine Park Act 2000.

[56] While objectives in Chapter 7 address the preservation of the natural character of the coastal environment and seek to protect it from inappropriate use and development, they also seek to enable appropriate development, including appropriate port and other industrial and commercial activities. We see a

¹⁰ RMA s67(3)(c) and s75(3)(c)

marina as a commercial use supported by the objective; also other aspects of this chapter about enabling a range of recreational opportunities to be undertaken in the coastal environment¹¹.

[57] The coastal environment carries a very broad definition as set out in the ARPS and includes amongst other things, any site, building, place or area of cultural heritage value adjacent to or connected with the CMA which derives its heritage value from its coastal location¹². Relevant here is the Matietie Historic Reserve of pre-European importance linking Moke Moke Pa with the beach¹³ and various archaeological sites¹⁴ which were identified in evidence. There is also the historic red woolshed which derives its location from its connection to the sea for access and the protected nature of the northern part of the bay, much in the same way as relied upon for waka access in earlier times¹⁵.

[58] Specifically policies relating to subdivision, use and development are found at 7.4.10 which observe the diverse range of values in this environment which need to be recognised and the need to enable people and communities to provide for their social, economic, cultural wellbeing in appropriate areas. Sub policy 2 sets out that in assessing proposals particular regard must be had to (relevantly):

- (i) natural character is preserved and protected in accordance with Policies 7.4.4-1 (i), (ii) and (iii), and 7.4.4-2;
- (ii) public access is maintained or enhanced in accordance with Policies 7.4.13-1, 2 and 3;
- (iii) amenity values are maintained or enhanced as far as practicable;
- (iv) public open space is maintained or enhanced as far as practicable;
- (v) there is a functional need for use and development within the CMA;
- (vi) efficient use is made of the natural and physical resources of the coastal environment;
- (vii) activities are of a scale, design and location that maintain or enhance landscape values in the area, including seascapes and landforms;
- (viii) there are no significant adverse effects of activities on the CMA, or on adjacent land, including effects across the MHWS boundary;
- (ix) adverse effects are avoided, remedied or mitigated in Areas of Special Value in accordance with policies in 7.4.7.

[59] Mr Dunn took us specifically to sub policy 2-(vii) as being particularly relevant here. We agree with that, although we question his conclusion based on the impacts of the proposal. However, as can be seen this is not the only policy topic identified here and there is no weighting attributed as between them.

[60] We also find that sub policies 8 and 9 are relevant. Mr Dunn did not rely on them, but we took from Mr Pryor's evidence that he considered that there should be a reliance on sub policy 8 bearing in mind the counter-balance offered in sub policy 9 as we set out here:

¹¹ ARPS Objectives Chapter 7, 7.3

¹² ARPS Chapter 7 Policy 7.4.1

¹³ Pemberton EIC pages 4 – 5 paras 22-26

¹⁴ Waiheke Marinas Ltd Additional Figures October 2014 Appendix 1

¹⁵ Wilson EIC unnumbered: page 3, para 4 and page 9, para 3 and Supplementary Statement page 4 para 17

- (8) Appropriate subdivision, use and development shall be encouraged to locate in areas where the natural character has already been compromised, thereby avoiding sprawling or sporadic subdivision, use and development in the coastal environment.
- (9) Notwithstanding Policy 7.4.10-8, regard shall be had to the protection of those elements of remaining natural character which continue to exist in areas where human modifications or activities predominate.

[Our emphasis]

[61] With regard to water quality (Chapter 8) we note that the overall objective is to maintain water quality in coastal waters and to enhance it where it has degraded particularly in the case of harbours, for purposes such as aquatic ecosystems, recreation, fishing and shell fish gathering, cultural and aesthetic purposes. In open coastal waters including parts of the Hauraki Gulf (undefined) there is an expectation for water quality to be maintained in its natural state¹⁶. There is a relatively high threshold, and the evidence detailing recreational pursuits and the aesthetic value of Matiatia as a gateway to Waiheke may be germane to the implementation of these directives.

[62] By way of a preliminary view, we conclude that the relevant objectives and policies of the ARPS are aligned in a direction at the very least to maintain and enhance the qualities of the natural environment, and that Matiatia is part of a heritage resource of regional and national value and that may require special consideration of preservation and protection in landscape and heritage terms.

Auckland Council Regional Plan: Coastal (Coastal Plan) (2004)

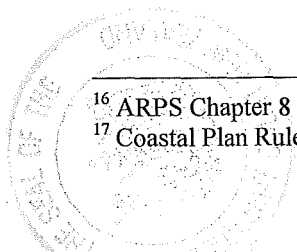
[63] In the Coastal Plan one finds more detail as to how the above directives are to be achieved. Many of its parts are specifically relevant.

[64] The area in which the Marina is proposed is identified as General Management Area and Mooring Management Area. In these areas Marinas are Discretionary Activities as is the occupation of the area. Included would be exclusive occupation of the marina piers and associated berthing spaces, the floating marina office, and restrictions on public access to the access piers and primary rock breakwater footpath during night-time hours¹⁷. The term Marina is defined (relevantly) as:

Marina A comprehensively designed facility primarily for the accommodation of boats, comprising berths, pontoons and piers, and any associated reclamations and breakwaters. A marina may also include land based areas for car parking and associated facilities and servicing. Established marinas are identified as Marina Management Areas on the plan maps.

¹⁶ ARPS Chapter 8 Objective 8.4-(i) and (ii)

¹⁷ Coastal Plan Rules 23.5.8 and 10.5.9



[65] The proposed pile moorings outside the defined Mooring Management Area are Discretionary, and Restricted Discretionary within it¹⁸. The parking deck is managed under the Structures Chapter (12) of the Plan as it is not covered by the definition of Marina. The parking deck is also a Discretionary Activity.

[66] As originally lodged the proposal incorporated a reclamation (non complying activity) and dredging (discretionary activity). These activities were no longer part of the proposal by the time the hearing concluded, so we do not consider provisions relative to them.

[67] We have decided on the activity status overall in an earlier part of this decision. It is non-complying, overall.

[68] This Plan is structured with the objectives and policies discussed in Part 3 Values, Chapters 2-9 (in particular we note Chapter 4 Landscape and Chapter 9 Subdivision Use and Development). More detailed provisions setting out the rules are contained (relevantly) in Part 10 General (particularly occupation), 11 Activities, 12 Structures, and 23 Marinas.

[69] In this Plan the headlands of Matiatia and relevantly the northern side of the embayment up to the sandy beach are identified as Regionally Significant Landscape (Rating 5)¹⁹. Appendix E Landscape Values and Assessment provides guidance to these provisions. The following explanation is provided for Regionally Significant Landscapes:

Regionally Significant Landscapes are highly valued, but often for elements or features within them, rather than the whole. Alternatively, they may be landscapes which are highly valued and which are also unable to accommodate change without significant degradation of their character. Within such landscapes, development has to be managed to ensure that the key elements which contribute to landscape value are not degraded or disturbed. However the focus is upon integration and a marriage of existing and new use and development, rather than preservation.

[70] An explanation of the landscape methodology and assessment and Landscape Value Ratings is set out in Appendix E. Landscape ratings are set under the following primary headings with criteria attributed to each. In the case of Waiheke Island, this evaluation relies on work undertaken in 1994 and encapsulated in a report "Waiheke Island Coastal Landscape Assessment" prepared by LA4 Architects. Mr Dunn discussed these provisions in his evidence in chief and concluded that while there were no rules directly related to this notation, the regionally significant notations are tied to some Plan policies²⁰. The Planning Joint Witness Statement does not address Part 4 of the Coastal Plan at all. This situation may be explained by Ms Bremner's comments in her s87F report as follows:

Matiatia headlands - Regionally Significant Landscape (Rating 5)
611. The ARC: P identifies those areas that are of regional significance and depending on the notation, this informs how the objectives, policies and rules of the plan are applied.

¹⁸ Coastal Plan Rules 24.5.4 and 24.5.5

¹⁹ Auckland Regional Plan: Coastal Maps Waiheke Island West Map Series 1 – Sheet 41


²⁰ Dunn EIC Page 16 Paras 51-54

612. In this case, the coastal edges around the headlands at the entrance to Matiatia Bay are identified as being Regionally Significant Landscapes. Appendix E to the ARP:C explains that these are derived from a landscape assessment of Waiheke undertaken in 1994.

613. This classification has not been carried through into the recent Proposed Change 8 to the ARPS, nor do the expert landscape architects for the applicant or the Council regard the area as currently exhibiting outstanding or high natural character. Taking this advice, no further consideration of this matter under the ARP:C is considered necessary. In any case I note the findings of Mr Pryor, supported by Mr Brown, that the proposal is appropriate from a natural character perspective. The main natural elements will not be diminished by the proposal, and that natural patterns and processes will also be largely unaffected in Mr Pryor's view.

[71] We have carefully examined the amended and now operative chapter of the ARPS and find that it clearly directs regional and district plans to address regionally significant amenity landscapes while it concentrates its effort on ONLs. This seems entirely appropriate given the hierarchy of the documents and we find that the Regionally Significant Landscape provisions of the Coastal Plan are highly relevant to our consideration. It seems that the landscape architects adopted their own different methodologies as amongst themselves in undertaking their assessments, and the relevance of the Coastal Plan provisions appears to have been largely ignored²¹.

[72] We find that we must consider the headlands and edges of Matiatia embayment marked in the Coastal Plan as Regionally Significant Landscape. The proposed marina immediately adjoins the northern portion of this landscape. We have inserted a portion of the relevant coastal planning map to illustrate the point²².

Extract from map	Relevant legend
	<ul style="list-style-type: none"> Mooring Management Area (see Schedule 5) Regionally Significant Landscape (Rating 5) General Management Area

[73] Bearing that in mind we turn to the objectives and policies and how they might be applied. Relevant are Objective 4.3.2 and Policies 4.4.2, 4.4.3 and .4 and the assessment guidance provided at 4.4.5. and 4.4.6. We set out the 2 latter policies here:

4.4.5 In assessing the effects of subdivision, use and development, including cumulative effects in the coastal marine area on landscape values, particular regard shall be had to:



- (a) ensuring where practicable that it is of a scale, location and design which encourages its integration with the type and intensity of development in the adjacent areas of the coastal marine area and with the pattern of subdivision, use, and development above Mean High Water Springs;
- (b) maintaining and where practicable enhancing visual links between the coastal marine area and adjacent land;
- (c) maintaining and where practicable, enhancing appropriate vegetation patterns and in particular, areas of indigenous vegetation both within the coastal marine area and on land;
- (d) maintaining as far as practicable natural variations in the topography of the foreshore;
- (e) maintaining the topography of the seabed in areas which are significant representative examples of sub-tidal landforms of the Auckland Region, or which are visually significant geological features;
- (f) ensuring structures are designed and constructed in a manner consistent with Chapter 12: Policy 12.4.3.
- (g) the contribution of existing structures and activities to the landscape character of the coastal environment.

4.4.6 In assessing the effects of subdivision, use and development in the coastal marine area, regard shall be had to other relevant landscape matters such as design guidelines prepared for land above Mean High Water Springs.

[74] We understand from this guidance that the contextual relationship is important to achieving an appropriate fit and this includes what might take place on the adjacent land.

[75] We consider now the Use and Development Part (Four) of the Plan where as we have indicated, Chapter 10 addresses relevantly – occupation of the CMA. As set out in this chapter the CMA is a finite resource and needs to be utilised in an efficient way. How space is allocated and for what purposes is important²³. Policy 10.4.3 encourages subdivision and use and development in areas which have already been highly modified by human activities or where development already exists unless location elsewhere would better avoid, remedy, or mitigate significant adverse effects. Policy 10.4.5 provides specific guidance which we find helpful:

10.4.5 Any proposal for subdivision, use and development shall be located, designed, constructed or placed to:

- (a) complement as far as practicable the character of the environment in which it is located; and
- (b) avoid as far as practicable, remedy or mitigate adverse effects on ecological and physical processes beyond those which are already occurring in the immediate and surrounding area, including any area above Mean High Water Springs; and
- (c) where practicable, be consistent with relevant resource management strategies of adjoining territorial authorities.

[76] Thus the integration of land-based development and occupation, development and use of the CMA is important to our consideration as well as noting that the marina should complement the character of the environment.

[77] Policy 10.4.10 directs that occupation is to be considered inappropriate unless it is reasonably necessary for the proper functioning of an activity. We agree with Ms Bremner that a marina of necessity requires occupation [of the CMA], however this policy also requires that adverse effects arising from space

²³ ARP:C Chapter 10 Issue 10.2.2

to be occupied be avoided where practicable, remedied or mitigated, having regard to loss of public access to and along the coastal marine area.

[78] We also note the policy concerning navigational safety which by the end of the hearing we found not to be a key issue as the footprint of the marina had been removed from the ferry access channel.

[79] Chapter 12 concerns structures. We find that the parking deck falls to be considered under this chapter, and, considered by reference to the definition of marina, the office building to be located on the water would also, although there was no evidence presented on the point. (We don't understand it to have a functional need to be within the CMA; it could be nearby on land)

[80] We consider that the policies concerning structures in the CMA are quite restrictive. There is a requirement for there to be no reasonable or practicable alternative²⁴. Sub paragraphs under Policy 12.4.1 are particularly relevant. Ms Bremner noted the policy preference for activities to have a functional need to locate in the CMA and confirmed as she put it "the tension remains in policy terms"²⁵. We discuss this shortly.

[81] Structures are also to be assessed against the Values chapters of the Plan (3 – 9). Particularly relevant here will be Landscape, Natural Features and Coastal Matters of Significance to Maori as well as Public Access.

[82] Chapter 23 specifically addresses marinas. It sets out the issues around their provision which are complex as they generally have a significant water and landward component²⁶ and a wide range of environmental effects as they usually result in a significant modification of the coastal environment²⁷. The objective is to concentrate marina activities in a Marina Management Area and provide for intensification in those locations. New marinas outside of these areas are Discretionary Activities and efficient use of the CMA is encouraged as well as integrated management and assessment of marina development across the administrative boundary of MHWS.

[83] Breakwaters shall be the minimum size necessary to fulfil the function of a breakwater²⁸. Specifically Policy 23.4.10 is relevant :

23.4.10 Any marina development shall be of a scale and design (including building materials), and be so located, as to avoid, as far as practicable, remedy, or mitigate adverse effects on the coastal environment, particularly on the following:

- (a) natural character; and
- (b) significant landscape elements and features; and

²⁴ ARP:C Chapter 12 Policy 12.4.1

²⁵ Bremner Supplementary Statement Dated 6 July 2015 Para 23

²⁶ ARP:C Chapter 23 Issue 23.2.3

²⁷ ARP:C Chapter 23 Issue 23.2.2

²⁸ ARP:C Chapter 23 Policy 12.3.

- (c) the visual and aesthetic quality and continuity of the surrounding environment; and
- (d) areas and features of cultural and heritage value; and
- (e) amenity values, including those of the surrounding environment; and
- (f) areas of value to Tangata Whenua, and in particular tauranga ika, tauranga waka, taonga raranga, mahinga mataitai, wahi tapu, and areas of the coastal marine area immediately adjacent to marae and papakainga housing; and
- (g) natural coastal processes, and in particular any increase in natural erosion or deposition; and
- (h) the values and functioning of natural habitats and ecosystems; and
- (i) Navigation and safety.

[84] As to ancillary facilities there is reference under “Other Methods” (clause 23.6) to how land-based marina facilities might be approached by Territorial Authorities in recognition that marinas usually have a significant land component. This provision directs that assessment to the provisions of Policy 23.4.5, which seems to imply that land-based facilities would cater for rubbish and discharge collection as well as refuelling, although we do not see a direction that this is the only option. Specifically Policy 23.4.11 addresses facilities ancillary to a marina and is as follows:

23.4.11 Provision shall be made for adequate and convenient facilities ancillary to, or associated with marina development where this is practicable, and will enhance the efficiency of the marina and public enjoyment while avoiding, remedying or mitigating adverse effects on the environment.

[85] Further we note that the relevant provisions of Part III: Values, Chapters 3 to 9 must be considered in the assessment of any proposal to establish a marina in the coastal marine area. As we have said, marinas (except in Coastal Protection Areas 1 and 2) are to be considered as Discretionary Activities but this provision carries the following note²⁹:

In assessing these activities Chapter 12: Structures applies to that part of the proposal outside a Marina Management Area.

This will entail the entire marina in this case, as it is not within a Marina Management Area. We refer to the definition of a Structure in the Coastal Plan:

Structure

Any building, equipment, device or other facility made by people and which is fixed to land, including land covered by water and the air space above land); and includes any raft.

For purposes of this Plan structures include wharves, jetties, seawalls, buildings, or other structures built on wharves, jetties, ramps; pipelines, cables and transmission lines laid on, over (including the air space above) or under the foreshore or seabed. NB: moorings and signs are not structures for the purposes of the Plan.

[86] Leaving aside breakwaters, we are to give specific consideration to chapter 12 as recorded above in relation to the pontoons and other floating and permanent structures which make up the marina proposal.

[87] Finally we refer to moorings (Chapter 24) because some additional moorings are proposed outside the identified Moorings Management Area. The objectives seek to concentrate moorings into defined locations and avoid as far as practical conflicts between moorings and other activities in the CMA³⁰.

²⁹ ARP:C Part 4 Chapter 23 Rules Clause 23.5.8

³⁰ ARP:C Part 4 Chapter 24 Objectives 24.3

Efficient use is also to be made of the CMA. The requirement for a fully discretionary consent for a mooring outside of a defined moorings management area is seen as discouragement of them. There are Policy directives to the location set out at Policy 24.4.3 and 24.4.4 which we will not repeat here as this aspect of the proposal is considered to be a minor feature in relation to the modified proposal, involving a reduction in mooring provisions and further out from the foreshore.

Auckland Council Regional Plan: Air, Land and Water (ALW) (2013)

While provisions of this Plan featured in stormwater discharge aspects of the application as originally lodged, the reduced deck proposal largely resolved it. However, the applicant and Council agreed draft conditions of consent which would see stormwater appropriately managed.

Auckland Council District Plan, Hauraki Gulf Islands Section (District plan) (2013)

[88] The relevance of the District Plan comes into play concerning the cross boundary integration between the proposed marina activities in the CMA and its necessary relationship with the land. We understand there to be some (minimal) consenting issues relating to the landward (above MHWS) attachment of the access pier and some filling work pertaining to the alterations to the adjacent road. The actual consenting issues are very minor indeed and we do not see them as germane to our decision. The key issue here is the relationship of planning policy across the CMA boundary so that we can ensure integrated management is achieved as directed by the higher order statutory documents we have referred. Hence, while we now proceed to discuss numbers of provisions of this plan (and a predecessor plan), we do so not with a mind to s104(1)(b), but to s104(1)(c) (“other relevant matters”), for reasons which should become clear as we proceed through them.

[89] In this respect three references in the District Plan were drawn to our attention, the Matiatia (Gateway) Land Unit (10a.18), and the Land Units which make up the land seen as one enters Matiatia from the sea being:

- el: Open space 1 (ecology and landscape) covers Moke Moke and the historic reserve around the northern part of the bay and the northern face of the southern arm of the bay (excluding Te Whetumatarau Point).
- wl: Rural 2 (Western Landscape) the remaining hinterland

[90] Matiatia (Gateway) Land Unit is further subdivided into the Transport Area which makes up the road and portion of the land immediately landward of the wharf, a Wetland Area which relates to the stream generally to the southern edge of the adjoining valley, and the area between these two features contained by the northern edge of Ocean View Road, a Mixed Use Area. Mr D J Scott a landscape architect called by DMI, and specialising in landscape planning, with a long association with planning and development on Waiheke, set out a detailed history of the development of the regime that he believed is now embedded in this District Plan. We found the materials he discussed in evidence to be relevant to our enquiry.

[91] The introduction to the Gateway Land Unit PART 10A.18.1, refers to its characteristics which we set out here as they assist in providing landward and cross-boundary context for the proposed marina development:

This land unit is applied at Matiatia, which is a harbour at the western end of Waiheke.

Matiatia is characterised by:

- High visual amenity due to its coastal location and surrounding headlands and hill slopes, many of which are revegetating.
- Its 'gateway' function which results from the wharf and ferry building located at the northern end of the beach. The wharf and ferry building act as the main transport terminal for passenger ferry services to and from Waiheke.
- Passenger transport services (buses and taxis) located to the rear of the ferry building.
- Ocean View Road, which is located on the northern side of the valley and is used by high numbers of people moving in and out of the area at times of ferry departure and arrival.
- A large area on the valley floor (approximately 5ha) which is mostly used for car parking but also contains the Harbourmaster building and a variety of smaller activities.
- The storage and car parking activities located on the privately owned site on the northern side of Ocean View Road.
- An esplanade reserve located adjacent to the Matiatia Bay foreshore that is used for public recreation.
- A regenerating wetland (approximately 4ha) located on the valley floor to the side and rear of the large flat area. The wetland flows out to Matiatia Bay.

The existing development on the valley floor at Matiatia is not befitting its location at the 'gateway' to the island, particularly because of the expansive car parking, ad hoc appearance of the existing buildings and the lack of activities and services for ferry passengers. It is intended that the land will be comprehensively redeveloped to create a safe and efficient transport network and a mixed use development that will serve both residents and visitors to the island.

Overall, Matiatia has some notable assets such as its ferry terminal, coastal landscape and the regenerating wetland. However, in order to create a truly effective and attractive 'gateway' to Waiheke, a comprehensive redevelopment of the land on the valley floor needs to be undertaken.

[92] The first listed objective for this land unit is to develop a safe and efficient transport network while maintaining the landscape character of Matiatia. The related policies set out a range of directives as to how that will be achieved including car parking to be integrated with development in the Mixed Use Area and for the relocation of Ocean Road. Specifically, and of some importance here, Policy 10a.18.3.1-6 requires that medium to large scale car parking areas and car parking buildings are not located adjoining the esplanade reserve nor are highly visible to those arriving at Matiatia, in order to avoid adverse effects on the landscape character of Matiatia.

[93] When we consider that policy and others requiring areas of open space for public use both within and adjoining the esplanade reserve at Matiatia foreshore to be provided within future development, as well as policy ensuring built development is designed such that it will not have adverse effects on the landscape character of Matiatia, we understand that there is sensitivity to enabling car parking at the water's edge; effectively that it is discouraged³¹.

³¹ ACDP-HGI Part 10a Policy 10a.18.3.1-6 and 10a.18.3.2-4

[94] While car parking is amongst a number of transport-related activities contemplated in the Transport Area, it is noted that it is recorded as being located immediately behind the wharf and ferry building, and makes specific provision for passenger transport (buses, taxis and other multiple occupancy vehicles) and wharf activities. It is a confined area. Policy 10a.18.3.1-1 explains the identification of a specific area for the safe and efficient operation of wharf-associated activities and passenger transport so that these activities have priority over single occupancy vehicles. We understand from the objective and policies relevant to this land unit, that the Transport Area has a public transport focus ahead of car parking. The latter is instead anticipated in the nearby Mixed Use area provided it is sensitively designed and located.

[95] We received evidence on the scale and intensity of development which might take place within the Mixed Use Area but we place little weight on those things for the assessment we have to make because buildings there require a resource consent (Restricted Discretionary Activity). While there are height controls (8m generally and 13m high, 3 storey sloping roof in the southern sector of the Mixed Use Area beneath the cliff), there are significant open space requirements and activity constraints which further make analysis difficult. We have noted elsewhere that the graphic presentations put forward for this area were unhelpful as the assumptions made in their development were unclear, as was any certainty of future development in that form.

[96] We have found it more pertinent to assess the potential landscape impact having regard to the objectives, policies and rules which we discuss here. For instance, questioning of Mr Scott by Mr Brabant about certain commercial, recreational, and service related activities being permitted activities³² were brought into context and could be seen as less likely to govern outcomes when Mr Casey elicited from Mr Scott in re-examination that the buildings they would be located in needed resource consent as mentioned above³³ and in answer to the Court would be the subject of detailed examination pursuant to assessment criteria including as to matters of landscaping, open space, building form and materials, building location and the like, all with emphasis on the gateway function of Matiatia, openness, experiences for people arriving at Matiatia, coastal landscape, and many other related matters.³⁴

[97] Finally in relation to the broader hinterland making up the elevated land from the headland back to the bay identified as Rural 2 (Western Landscape) we were advised that where development has been permitted it has been conditioned upon compensatory planting, pursuant to a regime in existence for many years which now manifests itself in the strongly regenerating growth around the bay. Mr Scott set this out in a series of images attached to his EIC (particularly his Exhibits 6 and 7). Thus there has been a gradual change from pasture to spaced-out development with extensive planting. This is relevant to the policy context of the marina in terms of integrated management of the coastal environment.

³² Transcript pp 1319 to 1323.

³³ Transcript p 1343.

³⁴ Transcript p 1340.

[98] Mr Scott explained that the Operative District Plan is quite light on substance concerning the Matiatia surrounds from the headlands back to the base of the bay, because it records that such areas have already been “*largely developed to capacity.*” Within Part 10a.20 Land Unit – Rural 2 (Western Landscape) the Resource Management Strategy in 10a.20.6 is:

As the land at Owhanake, Church Bay, Park Point and Te Whau is largely developed to capacity, the focus of the resource management strategy for these areas is to provide for the continued operation of rural-residential activities and maintain the natural character and landscape values of the land unit.

[99] Mr Scott told us that the reason for the paucity of provisions relating to this land unit, was that development and the required extensive re-vegetation had been undertaken pursuant to provisions in the previous plan, the 1996 Auckland City District Plan – Hauraki Gulf Islands Section, wherein the resource management strategy for the relevant Land Unit 22 was provided in Part 6.22.2 as follows:

To secure the continuation of the predominantly open rural landscape character in recognition of the important visual and cultural role the Land Unit plays in terms of an appreciation of Waiheke Island. This strategy recognises that Matiatia is the major gateway to Waiheke Island and that a dramatic change in character of the land to the north and south of Matiatia (contained within the Land Unit), particularly a change to a predominantly urban form, would be incompatible with the overall resource management strategy for the Hauraki Gulf Islands...

[100] It is unusual to explain provisions in an operative plan by reference to provisions in an earlier instrument now replaced, however we found the information pertinent and accurate in the sense that 1996 strategy appears very much to have been carried into effect.

[101] It was Mr Scott’s advice to us that the current and recent historical planning history had produced a situation in which, in this Land Unit, permanently protected conservation and covenanted vegetated areas comprised over 75% of the landscape catchment, principally being associated with the dominant landscape character along each side of Matiatia Bay that he described as a natural and cultural landscape. He said that this underpinned the importance of the bay as the gateway to Waiheke Island which, supported by many parts of the District Plan, now offers a diverse range of economic, community and land-based ventures, particularly wineries, cafes, visitor accommodation, art and sculpture tours, festivals and social events.³⁵

[102] Mr Scott opined that it would be “reductionist” to identify buildings (dwellings) and other human artefacts (wharves, carparks, and other minor public service structures and existing moorings) in this landscape as representing and signifying “modification” that justifies further intensive development.³⁶

[103] The purpose of Mr Scott’s evidence was to offer strategic background for the more detailed landscape analysis undertaken by another landscape architect witness called by DMI, Ms B Gilbert. Nevertheless he took matters further and supported her analysis in a number of respects concerning the marina and proposed carpark deck, offering brief reasons. In connection with the carpark for instance, he said:

³⁵ DJ Scott EIC Para 73

³⁶ DJ Scott EIC Para 74

At a specific level the design of the carpark deck/reclamation and the public accessway together with the connection to the coast/beach is, in my opinion, an awkward and ungainly structure. In my opinion it is insensitive to the detailed form, composition and relationships of the rock outcrops, beach and feature Pohutakawa. It appears that there is an absence of design-led analysis towards a more integrated option and solution.

[104] Mr Scott placed stress on the introductory description of the Matiatia Land Unit in paragraph 10a.18.1, that we have previously set out.

[105] We note as well Objective 10a.18.3.1:

To develop a safe and efficient transport network while maintaining the landscape character of Matiatia.

This is supported by policies about maintaining transport and related infrastructure, and avoidance of adverse effects on the landscape character of Matiatia, with express encouragement for carparking areas and buildings and other transport infrastructure to be contained within the mixed use development area, which is mapped as being largely within the valley east of the wharf, and not on the foreshore. We do note however that the “transport area”, being another of the three activity areas in the Land Unit, does provide by way of permitted activity for certain transport related activities and “carparking” (including “drop off and pick up areas”). This is mapped in the District Plan as the relatively small “keyhole” area on the landward side of the wharf, discussed in some detail in the section of this decision dealing with traffic and transport issues.

[106] In this respect Mr Scott quite properly drew our attention to Rule 10a.18.6.10 “setback from Mean High Water Springs”:

Carparking areas and carparking buildings (except those for disabled users and short term and drop off spaces) must not be located within 100m of MHWS. (Not applicable to public carparking areas existing as at September 2006).

An explanation is offered for the rule, that it protects the landscape character and general amenity of Matiatia Bay from the adverse effects of medium to large at-grade carparking areas and carparking building in addition to assisting with traffic management.

[107] Mr Scott offered the opinion that in light of these provisions, it would be inappropriate [in an immediately adjoining space in the CMA below MHWS] to promote the parking of cars out over the surface waters of the bay.

[108] We shall examine these matters in more details in the section of this decision on Visual and Landscape matters, but because he relied on the District Plan provisions that we have just been discussing, and others, we record here the way in which Mr Scott tied these matters together, in one of several respects:³⁷

³⁷ DJ Scott EIC Para 109, to which we noted that he added, under cross-examination, maritime aspects in addition to the land, people and land use activities described in his EIC

Waiheke Island and Matiatia is predominantly a cultural landscape, and as always, the cultural expression of landscape character inextricably and inherently sits at the intersection of the natural attributes of the land and people and their land use activities; and therefore it is ultimately very beautiful, unique, and constantly maturing. And in my view the currency of the memorable time-depth relationships reinforces and elevates the need to protect and preserve the Cultural Landscape character of Matiatia.

Proposed Auckland Unitary Plan (PAUP) (notified 30 September 2013)

[109] The proposed marina is a non-complying activity under that plan. The applicant indicated that those provisions have been objected to, but resolution of such matters is some time away. We observe that the general scheme of the PAUP concerning the waters of the Hauraki Gulf is not significantly different from the Coastal Plan. There would appear however, as noted by Mr Dunn, to be greater precision around what activities might be placed in the CMA and what activities might be accommodated on the land.³⁸ The PAUP generally does not include the islands of the Hauraki Gulf in the terrestrial sense.

[110] However, it does include identification of areas of Historic Heritage (Site or Place of value to Mana Whenua Overlay) in particular covering the northern bay and Moke Moke which would accord with the evidence we heard on historical, cultural and archaeological matters³⁹. Mr Dunn attached the relevant PAUP provision to his EIC and we particularly note the provision set out at Section 5.2 Sites - Places of Value to Mana Whenua where in the Overlay Description it is said that their significance has not been assessed in detail. Evidence was presented to us which confirms listed archaeological sites as well as others. As we understand Mr Dunn's evidence, the rules seem to focus on earthworks associated with such sites. The sole Objective of this overlay provision is:

The tangible and intangible values of sites and places of value to Mana Whenua are protected and enhance.

This provision is already covered by a number of relevant statutory instruments not least of all the NZCPS.

[111] Based on the uncertainty around the provisions of the PAUP we cannot give them much weight at this time for the purposes of s104 consideration; remembering that objectives and policies in it are nevertheless to be brought to account in our s104D analysis without weight being assigned.

Other Matters (s 104 (1) (c)) RMA

[112] There were a number of additional relevant documents identified in the planning evidence which we list here:

- Matiatia Directional Plan 2008
- Matiatia Transportation Plan 2009

³⁸ Dunn EIC Page 39 Paras 141-146

³⁹ WML image book March 2013, Figure 78

- Auckland Transport Plan 2009
- Auckland Regional Land Transport Strategy 2010
- Auckland Regional Public Transport Plan 2010
- Hauraki Gulf State of the Environment Report
- Auckland Plan 2012
- Essentially Waiheke
- Marine and Coastal Area (Takutai Moana) Act 2011
- Bylaws applying to signs and lighting

[113] Mr Dunn provided a summary of most of these documents, and others were addressed by Ms Bremner. While they provide some useful background and understanding of local concerns amongst many things, we received a significant amount of evidence about local issues drawn from statutory instruments, a more important source. Such issues included tourism, the place of Waiheke in that industry and importantly concerns about transportation matters at Matiatia. In terms of making our decision we should focus significantly more on the RMA regulatory documents and we have done so with a full understanding of the broad scope of issues which sit behind them. We touch on aspects of some of the non-statutory documents in places in this decision, but otherwise we simply record that we have had regard to them and their relevance as appropriate, bearing in mind their provenance, date, and relevance to the matters we have to consider.

Coastal Engineering, Marina Design, and Wave/Wake Assessment Issues

[114] Few issues arose concerning these topics, apart from a consequential one that bore significantly on landscape and visual issues which we come to in a separate section of this decision.

[115] Four witnesses called by the applicant, and one by the council, participated in expert conferencing by exchange of emails. This means of conferencing was no doubt seen as appropriate because the issues were relatively straightforward.

[116] The participants were Mr. R Reinen-Hamill, a coastal engineer engaged by the Auckland Council; Mr. J Leman, a marine engineer; Mr. P Treloar, a coastal engineer; Dr S Thiebaut, a physical oceanographer; and Mr. B Black, a civil-geotechnical engineer; the last four witnesses being called by the applicant.

[117] The witnesses acknowledged and agreed that wave assessments had been based on site measurements and industry standard numerical models for wave height and direction, and that the design criteria had been based on the best available published standards.

[118] It was agreed that the applicant had provided a reasonable level of information regarding the existing environment and potential effects on coastal processes, including coastal engineering works.

[119] It was agreed that the proposed breakwater on the western boundary of the marina would shelter most of the transverse wake arriving from the west and south-west sectors. Part of the boat wakes energy from the south and south-west sectors were still expected to penetrate through the southern boundary of the marina under the floating attenuator, due to their wavelength, but spectral wave heights less than 0.1m should be achieved along the boundary.

[120] The witnesses considered that the proposed reclamation or piled deck structure for the car park, would have less than minor effects in relation to the physical coastal environment.

[121] They approved the draft consent conditions as extant at the time of their meeting in August last year, to the extent relevant to their topic.

Effects on Navigation Safety

[122] The expert witnesses concerning this topic were Mr. J Dilley, a harbour master and marine consultant called by the applicant, Mr. C Moss, a deputy harbour master for Auckland Council, called by a council, and Mr. N Drake, a maritime consultant, called by DMI.

[123] We have considered all evidence given by these gentlemen, including answers given under questioning, but note that significant progress was made towards agreement amongst themselves, in expert conferencing in August 2014.

[124] In addition to the joint witness statement produced by the experts, we have considered lay evidence called on behalf of DMI, particularly from Ms J Johannesson, and Messrs Brough, Judd, Knuckey, and Anderson. The evidence of Mr. Brough played quite a pivotal role in the shape and positioning of the marina being changed in late 2014.

[125] The three experts usefully set out some matters of context in their joint witness statement. We quote them directly:

- a. The Auckland Regional Plan: Coastal, provides two Mooring Management Areas (MMA) within Matiatia Bay. These are the areas in which the placement of a mooring is a permitted activity. There are some moorings lying outside these areas. Were these moorings in place at the time the Plan became operative they were deemed as lawfully permitted activities. The experts were unaware of which moorings were in place at that time.
- b. Where a mooring has been placed outside the MMA following the Plan becoming operative resource consent would have been required.
- c. An attached map provided a view of the MMAs proposed in proposed Auckland Unitary Plan.

- d. Both maps identify two separate MMAs, one in the north of Matiatia Bay and one in the south. Only the MMA in the north would be affected by the proposed marina.
- e. An attached map provided a view of the prohibited anchorage area for Matiatia Bay based on the Auckland Regional Council Navigation Safety By-law 2008.

[126] The experts considered matters raised by some submitters concerning the manoeuvring of ferries at the wharf. They agreed that with the proposed marina in place, the manoeuvring area of the wharf would be within international guidelines for vessels currently using the wharf. They therefore said they saw no navigational safety issues that could not be addressed by the ferry companies' operational procedures set under the Maritime Transport Act 1999 and Maritime Rules.

[127] Within the wording of that last agreement, we noted the word "currently", and will return to that issue below.

[128] The experts agreed that despite future increases in the number of vessels in part of the bay near the entrance to the proposed marina, there would not be likely to be a significant navigational safety issue.

[129] There is fairly significant recreational use of kayaks in the bay because of the presence of a rental business. There are some safety issues presently, and there would be others should the marina be established, but the experts considered such effects should be dealt with as part of a safety management plan for operation of the marina.

[130] The experts set out a detailed section of their joint witness statement dealing with intended intrusion of the marina into the mapped Prohibited Anchorage Area established by the bylaw. A map attached to their statement showed that the marina would reduce the width of the Area from 135m to 75m.

[131] We will keep the description of our consideration of that issue brief, because the reduced proposal introduced by the applicant in late 2014 removed the encroachment. The experts felt that there was no navigation safety issue, although they acknowledged the potential for "congestion" on the part of the manoeuvring ferries and recreational craft in the ferry access lane to the west of the wharf. They also tentatively acknowledged that in the future vessel numbers could increase, along with vessel size, and that issue of manoeuvrability, competency of vessel masters, vessel numbers, and prevailing weather in sea conditions along with time table pressures, could "determine the likelihood and consequences of an incident". Mr. Drake, who holds shipping and launch competency qualifications and has long relevant maritime experience had said in his evidence in chief⁴⁰ "*the presence of a marina close to the north of the manoeuvring area for ferries will not make a master's job any easier and will present an added risk when these vessels are attempting to carry out a safe manoeuvre in such conditions*" [referencing statements by other DMI witnesses about having observed ferries in considerable difficulty manoeuvring in the approach channel during stormy weather].

⁴⁰ Drake EIC para 23

[132] This aspect of the joint witness statement concluded with the statement that “*as vessel numbers increase in the future, the likelihood of an incident occurring would also increase*”.

[133] Mr. A P Brough, a retired seaman and ferry skipper called by DMI, had skippered various of the Waiheke ferries up to and including some of the more recent large high-powered ones, from 1981 to 2011. He spoke particularly about adverse weather conditions making it challenging to berth on the wharf. He referred to this being a particularly tricky manoeuvre for the bigger catamarans as the wind could quickly push them out of position. Moored boats to the south had to be avoided, and having clear water space is very important to undertake this manoeuvre with safety. Engine breakdowns were not unknown and can exacerbate things. He expressed considerable misgivings about a marina encroaching into the ferry access lane. He wrote about busy periods amounting to “organised chaos”, and was concerned at the potential for more problems in the future, particularly if the marina was established as then illustrated.

[134] Mr. Brough’s evidence was supported by lay observations by Ms Johannesson, Mr. Judd, Mr. Knuckey, and Mr. Anderson.

[135] As we already recorded in this decision, when the applicant announced the removal of the car park from the proposal, we responded by indicating to the parties some other tentative concerns that we held at that time. The intended encroachment was one of them, but has since been removed in the changed proposal.

[136] In their joint witness statement, the experts agreed that the area proposed to be occupied by the marina currently provides good shelter from northerly winds and is conveniently located for access to the shore. They agreed there would be a reduction on the available space for anchoring in Matiatia if the marina proceeded, but indicated that there were a number of suitable anchorages within close proximity to Matiatia offering equivalent shelter. They did not specify what those were. They acknowledged that submitters had indicated that the number of vessels anchoring within the proposed area during periods of bad weather particularly when community events were occurring, could increase, although they had no empirical information about current numbers. They recorded that it was considered not best practice for vessels to anchor amongst moorings.

[137] The experts indicated that the marina might provide an alternative sheltered location for vessels during adverse weather, along with other parts of the bay. They could not quantify the specific effects of reduced available anchorage as circumstances could be variable.

[138] Mr. P Judd, a resident of the island for 15 years, a professional skipper and director of a sailing charter business out of Matiatia, gave evidence on behalf of DMI. He spoke of congestion around the inner part of the bay, with ferry sailings growing in number (and ferries increasing in size), coupled with increasing number of recreational vessels, paddle boarders, kayakers, and swimmers. He spoke of

considerable congestion around the wharves, particularly Piers 3 and 4, for passenger drop-offs, fuelling, and the like. He observed that two new ferry services had commenced while the marina application had been on foot, one of them operating seven days a week.

[139] He concluded that it was his experience that the wharf facilities at Matiatia are already overcrowded and getting busier through normal tourist growth. He believed that the considerable additional boating traffic from a marina development would require access for fuel, and for passage in and out of the existing narrow ferry transit lane, which would compound existing congestion. [The latter aspect will have been eased with the shifting of the marina footprint].

[140] The other DMI witnesses mentioned, spoke of similar matters as either ferry passengers, or in the case of Mr. Anderson, as a former manager of the wharf complex. Mr. Knuckey spoke of difficulties in manoeuvring a sailing craft without an engine when docking at the wharf, particularly in windy conditions.

[141] The evidence is clearly that Matiatia has become a very busy place in recent years, and is getting busier. The numbers of ferry operators have recently increased, and numbers of residents and tourists continue steadily to increase. While the major safety issues may be significantly resolved by the marina having been removed from the ferry lane, there are clear concerns on the part of a number of parties and witnesses about present levels of congestion and some potential for “incidents”, with concerns that these might worsen over time. The experts who gave evidence about this topic told us (in the context of the reduced proposal) that effects on the environment would be no more than minor.

[142] A final aspect of navigation and safety relates to the presence of kayakers, paddle boards, and other small recreational craft in the bay. Several witnesses gave evidence about the potential for people operating such craft and wanting to travel from the south beach to the north, to be hindered by the presence of the proposed marina.

[143] It is clear from the evidence that there already are issues with kayakers endeavouring to pass beneath wharves, and travel between the two wharves, thus bringing them into areas where ferries and charter boats operate.

[144] The reduction in footprint of the marina would make the passage to the north beach for such craft a little easier than would have the first proposal, but we doubt that the overall situation would change greatly when a comparison is made with what happens now. Once again, concerns about overall congestion in the future might have more relevance for the operation of the small craft, than do navigation safety issues.

[145] Finally on this topic there was some debate whether the applicant would be able to obtain certain parts of the water space it desires, from some existing permitted mooring holders. That is a matter we cannot and do not need to resolve for the purposes of a present application. Should resource consent be forthcoming, the applicant would need to take the existing licensing situation as it finds it. If it were to need

to vary the shape or configuration of the marina (if consented), that would possibly require another application under the RMA of one sort or another.

Landscape and visual issues, natural character, and amenity issues

Description of proposal

[146] To get an understanding of the flow of the evidence, it is necessary to start with a description of the original proposal, before recording the way in which it was modified in late 2014.

[147] The proposal originally involved the construction of a 160 berth marina in the north eastern portion of Matiatia Bay near the existing wharf and ferry terminal. Elements included:

- Primary armour rock breakwater approximately 130m long with piled end panels for additional wave protection, with pedestrian footpath accessing a viewing platform of the southern end;
- Secondary armour rock breakwater approximately 75m long to the north west of the primary breakwater;
- 4m wide southern access pier (acting also as a wave attenuator);
- 4 x 2m wide internal piers (A-D) with 1m wide finger jetties;
- 160 piles (ranging between 250 mm and 600 mm diameter);
- Low level security lighting;
- Navigation markers;
- 20 pile moorings to the north of the marina to accommodate 17 craft;
- A reclamation area from the foreshore in the CMA to accommodate 55 cars, described in the application as lodged (or alternatively as subsequently recommended by the applicant, a piled deck with car parking, landscaping, and public amenity areas, also to accommodate 55 cars;
- A timber viewing deck;
- A timber walkway from the reclamation to access the development of conservation reserve and foreshore;
- A floating marina office with dinghy ricks;

[148] A significant element of the proposal was the two breakwaters which were to be constructed of rock from a quarry on the Coromandel Peninsula, and similar to the rock used in a breakwater at the Kennedy Point ferry landing, said to resemble the colours and textures of Waiheke rock so is to assist “in blending it into the surrounding coastal setting”⁴¹.

⁴¹ EIC of Mr R J Pryor, 29 April 2014, paragraph 12

[149] The extent of visibility of the breakwaters will of course vary with tidal fluctuation, witnesses for the applicant recording that at mean high water springs approximately 1.6m of breakwater would be visible above mean high water, and 4.2m at mean low water springs.

[150] The design of other elements of the marina was provided by Mr Pryor and other witnesses for the applicant.

[151] As already indicated, in late 2014 the proposal became the subject of a moderately substantial reduction, once again described in various supplementary statements of evidence offered on behalf of the applicant. The main changes were described succinctly in the supplementary evidence of Mr J M Leman, consulting engineer called by the applicant, and for convenience we will focus on his description of the changes. We also **attach** as **Annexure "A"**, a plan lodged in December 2014 showing the changes (mainly reductions in scale shown in red). We further **attach** as **Annexure "B"** an aerial photo with "reduced marina overlay" lodged on the same date.

[152] The number of marina berths was now proposed to be reduced from 160 to 112.

[153] All 4 piers were to be shortened, with pier D being shortened at the southern end and curved to accommodate a new shape proposed for the primary breakwater.

[154] 6 pile moorings were removed. The total area of water space occupied by the marina and pile moorings would be reduced by 22.4%.

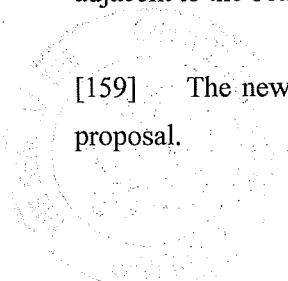
[155] The primary and secondary breakwaters were changed from being straight, to curved. This was intended to provide a "more visually sympathetic outcome" and reduction in potential wave reflection next to the marina entrance.

[156] The position of the primary breakwater was changed to remove it from the current ferry channel cordon. This entailed a shortening in length at the southern end.

[157] The reduction in area occupied by the primary breakwater was said to be 12.3%.

[158] The proposed provision for car parking on the foreshore in the CMA involved a reduction from 55 to 39 spaces. These would be provided on a piled suspended deck. The use of a deck would eliminate the need for reclamation in this area on the rocky foreshore; and consequently also the need for dredging adjacent to the beach, the product of which had been intended to create the reclamation.

[159] The new car park footprint was said to entail 59% area reduction from the previous reclamation proposal.



[160] With the reduction of the length of Pier A, and restriction of its shore-side berths to shallow draft (for catamaran or powerboat vessels only), the need for dredging was eliminated.

[161] A fresh study of ferry wake and storm wave climates was undertaken consequent upon the changed shaped and extent of breakwaters, deletion of reclamation, and reduction of marina pier lengths. The parameters for maxima of ferry wake waves and a wind wave within the marina (of less than 0.15 m, and 0.3m, respectively) was confirmed. Fresh computer modelling was undertaken, partly with a view to seeing whether the secondary breakwater could be eliminated, but it was said by Mr Leman still to be required.

[162] Fresh detailed drawings were lodged, along with new visual simulations modelling the reduced proposal, and also modelling it from some viewpoints that the Court had indicated had been notable by their omission during the first hearing.

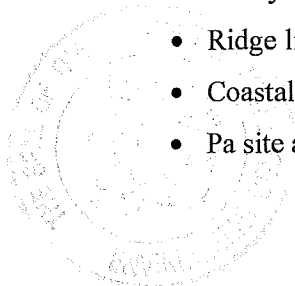
[163] Mr P H Wardale, a consultant working in the marina industry who had had considerable involvement with the proposal since 2011 (and who agreed to take up a financial interest in 2013) gave supplementary evidence that other benefits that would flow from the reduction in scale of the proposal, would include lack of a need for barged deliveries, reduction in truck deliveries from 250 to around 80, and reduction in construction time.

Issues agreed by the Experts in facilitated conference

[164] In August 2014, ahead of the first (main) hearing, the landscape and visual experts attended a conference facilitated by an Environment Commissioner. The landscape witnesses were Mr R Pryor for the applicant, Mr S Brown for Auckland Council, Ms B Gilbert for DMI, and Mr D Scott for DMI. Also included were Mr R Greenaway, an expert in recreational tourism called by DMI, and, perhaps surprisingly, Mr Wardale, a principal of the applicant company.

[165] The experts first of all listed matters agreed amongst them as landscape elements that needed to be taken account of. They were:

- Underlying land form surrounding the Bay;
- Headlands;
- Sea surface;
- Coastal terraces;
- Vegetation including heritage trees, Pohutukawa, olive groves and pasture;
- Rocky foreshore;
- Ridge lines;
- Coastal backdrop slopes;
- Pa site at bay entrance;



- The land/sea interface;
- Regenerating slopes;
- Wharves associated with the transport hub;
- Ferry building;
- Wool shed;
- Stony beach;
- Rural/residential housing;
- Service building associated with transport activities;
- Walkways and tracks;
- Boats on moorings and transiting through;
- Ferries moored and transiting through;
- Kayaking centre; and
- Boat haul-out area.

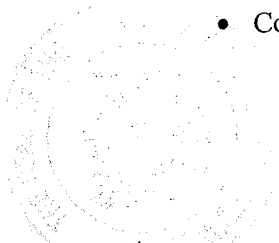
[166] The experts agreed that the natural character values of the bay (in its entirety) are not high or outstanding.

[167] The experts nevertheless agreed that there were elements of the landscape that have higher natural character values, including:

- Rocky headlands and shoals;
- The mouth of the bay;
- The water area of the outer bay;
- Bird life and other marine wild life;
- Mature Pohutukawa scattered throughout the bay;
- The land and sea interface.

[168] The experts agreed that there were elements of the landscape that reduce the bay's natural character values [overall], including:

- The wharf and ferry terminal building;
- The multiple car parking areas;
- Prominent houses;
- The bare nature of the foreshore between the main car park and the beach; and
- Commercial vessels, vehicles and human activity.



[169] The experts agreed that moored vessels affect the natural character values of the water surface of the bay, without agreeing on the degree of that effect.

[170] The experts agreed that there are notable cultural (modified/man-made) landscape elements and patterns which influence the character and aesthetic qualities of the bay, including:

- The pattern of residential development;
- The related patterns of re-vegetation, open space, olive groves and other rural-residential land uses;
- The concentration of infrastructure, vehicles and commercial activities around the transport hub;
- Pattern of walkways around the bay;
- Pattern of moored boats;
- Kayaks and other small boats pulled up on the shoreline;
- The haul-out facility; and
- Wool shed.

[171] The experts agreed the memorability values of Matiatia Bay including:

- It's function as the main gateway to Waiheke Island, linked to the character and aesthetic qualities of the bay;
- The experience in sequence of arrival and departure (including the sense of enclosure) as one enters the bay, and the reverse as well as one departs;

[172] The experts agreed that Matiatia Bay is the main transport hub and gateway to Waiheke Island, and these are fundamental to the character of the bay.

[173] The experts agreed that the developed and natural recreation assets which contribute to the tourism and recreation values of the Bay include:

- Walkways and tracks, including their association with events;
- Shelter offered for boaties, both via moorings and others using the Hauraki Gulf generally;
- Wharfs and associated infrastructure which support marine recreation, and tourism and recreation on the island generally;
- Kayak hire centre;
- Foreshore and open spaces and landscape features identified in paragraph 1;
- Permanent art installation ("Rocky Bay Store" [which members of the court understand might since have been removed]); and

- Viewing-sites on Nick Johnstone Drive and Delamore Drive.

[174] Experts agreed that the key elements which assisted the visual absorption capacity (the ability for landscape to visually absorb or integrate new development) of the bay included:

- Enclosed and contained configuration of the bay meaning effects within the bay are easily contained, although the scale of the bay reduces its visual absorption capacity;
- Maturing vegetation patterns - both natural and planted – which reinforce the sense of enclosure by constraining views for example from specific locations on Nick Johnstone Drive and Delamore Drive;
- Vegetation generally, which has an effect on the sense of enclosure, and more-so as the vegetation matures;
- Man-made elements, like moored vessels, transport centre and residential development, which also contribute to the bay's visual absorption capacity, although the experts' views varied on the degree to which these affect visual absorption capacity.

[175] The experts agreed that the visual values of the swing moorings included:

- Their charm and their history as an established part of the bay;
- How they reinforce the maritime characteristics of the bay;
- That the moorings exist in their own right, separately from the transport hub of the bay; and
- That they do not dominate the bay and are visually permeable.

Agreement about the audience and value of the setting for tourism and recreation

[176] The experts agreed that the ferry experience offered the most important visual experience of the bay.

[177] The experts noted that some submitters had stated the viewing points on Nick Johnstone Drive (at the Rocky Bay store sculpture) and at Delamore Drive are important locations for viewing the bay and the gulf; they did not agree about the significance of the views from these viewing points.

Agreement about the future environment

[178] The experts agreed that the operative district plan 2013 promotes change in a significant area in the bay as defined in Figure 10a.1 (Matiatia) in the plan. They agreed that this plan will result in more buildings, other structures and activities in the future, but that this will not necessarily have an adverse effect on landscape values of the bay, and could potentially enhance them.

[179] The experts agreed that the surrounding rural-residential area will remain largely as is (although we consider that Mr Scott and Ms Gilbert subsequently resiled from that agreement because they considered that the vegetation regenerating on the slopes on both sides of the bay will continue to mature, thereby also lessening the strength of presence of the dwellings). This disagreement indeed had started to emerge in the next statement by the experts, which was that the cultural landscape values of the bay will be enhanced over time due to the maturing of native vegetation; but they nevertheless had differences about its influence on the nature character values.

Agreements and disagreements about landscape and visual effects

(It is important to note that the discussions of the experts in their conference concerned the marina as originally proposed (160 berths, with 55 space car park). As noted earlier in this decision, the proposal of the subject of a moderately substantial reduction in scale, and a change in location and shape of some elements, in late 2014).

[180] The experts agreed that the majority of mitigation which could address any landscape and visual effects of the marina would have to be built into the fundamental design and location of the marina.

[181] The experts discussed different assessment methodologies applied by each of them, and considered that the differences amongst them were not important in relation to their findings. (We were unsure about this agreement as Ms Gilbert seemed to remain sceptical of Mr Pryor's ratings system during the hearing).

[182] The experts agreed that their differences and assessment findings stemmed from their different interpretation of the existing character and values found within Matiatia Bay, and the degree to which the proposed marina would be absorbed or integrated by its surrounds. The following was the summary of their respective findings as summarised by them in the record of the conference:

- (a) Mr Pryor's findings on the visual, landscape, amenity, and natural character effects are that they are acceptable overall. He considered that the effects of the proposal were acceptable due to its scale, and the location, and design, while taking into account the established maritime environment;
- (b) Mr Brown generally agreed with Mr Pryor about visual, landscape, amenity, and natural character effects. However, he had a higher impact rating for amenity effects (the aesthetic coherence, sense of place, natural qualities, and perceived recreational values) in relation to those residents living closer to the proposed marina and users of the beach/reserve next to it. Overall he considered the marina proposal to be acceptable;
- (c) Ms Gilbert agreed with Mr Pryor's assessment of visual effects from the main wharf, but disagreed in relation to his assessment from his other 11 view points. She disagreed with Mr Pryor's

assessment in relation to the landscape values and found adverse effects with respect to some aspects of the Bay's natural character. Overall she considered the marina proposal unacceptable; and

- (d) Mr Scott assessed the proposal from a strategic perspective and did not consider landscape, natural character and visual effects in detail. However, he found that the proposed marina was in conflict with the overall strategic landscape planning intent of the operative 2013 district plan (an aspect of the case that we have discussed earlier in this decision).

Agreements and disagreements about potential effects of the marina on recreational and tourism values

[183] This was the area of principal participation by Mr Wardale and Mr Greenaway. They agreed that marinas can contribute positively to recreational and tourism experiences, for instance supporting boating activities and providing recreational visitor settings and attracting visiting craft. It was agreed that access to the primary breakwater would provide a new local recreation opportunity.

[184] Mr Wardale and Mr Greenaway reached an agreement about a boardwalk that was proposed to connect the reclamation/car park with the Matietie Historic Reserve to the north. [The Court notes that that walkway was removed from the proposal when re-designed in late 2014].

[185] Mr Wardale and Mr Greenaway did not agree about the degree to which the marina would support or adversely affect recreation and tourism in the Bay and on Waiheke Island generally. This topic is something of an adjunct to the usual topics in cases involving landscape and visual issues, but is logically related to them, and will be considered in a succeeding section of this decision.

Disputed opinions

Landscape and visual effects

[186] Ms Gilbert commenced her evidence in chief with a thoughtful and quite detailed approach to understanding landscape and visual effects, by offering her consideration of landscape and visual values of the existing environment and potential changes. She offered information about biogeographical elements, patterns and processes; and the associative or relationship contributions and the perceptual aspects. In this she drew from the NZILA Best Practice Note (Landscape Assessment and Sustainable Management) 2010. She carefully explained her methodology as having been drawn from the decisions of the Environment Court, *Upper Clutha Tracks*⁴² and *Lammermoor*⁴³. She acknowledged that there can often be a degree of

⁴² Decision number [2010] NZENVC 432

⁴³ Decision number C103/2009

overlap between numbers of the descriptors, for instance memorability and the aesthetic values influencing perceptual values.

[187] Ms Gilbert was concerned that Mr Pryor had not adequately addressed landscape values in Matiatia Bay, in particular past present and likely future (permitted or consented) activities in the area; memorability of the area; and values to Tangata Whenua. She was also concerned that he paid little regard to the positive contribution of the existing swing moorings and vessels to aesthetic values in the bay. As to the first of those matters, she was concerned that Mr Pryor had omitted reference to the evolution of the surroundings in the Bay in which native vegetation was re-generating, changing the slopes from degraded pasture to an extensive and contiguous private and public space network. She was critical that Mr Brown failed to acknowledge these values, dismissing them as a “vener of naturalness”. Importantly, we thought, Ms Gilbert considered that in future the re-generating bush cover would enhance the aesthetic and natural character values in the Bay and potentially screen or filter views of many of the large-scale residences currently visible around the bay. She made express mention of plan provisions, particularly from the operative district plan, covered in more detail by Mr Scott, in suggesting these outcomes.

[188] As to the second aspect, memorability, Ms Gilbert was concerned that Mr Pryor had made no mention of this. We shared her concerns, particularly after hearing cross examination of Mr Pryor, where for instance he acknowledged that he had not expressly addressed memorability in his evidence-in-chief, but instead had “taken it into account”.⁴⁴ This was one of a number of answers under cross examination where we found him to be rather unhelpful.⁴⁵

[189] She considered the landscape to be highly memorable, particularly on account of the role of the Bay as the main gateway to the island, in combination with its biogeographical, aesthetic and perceptual qualities. In this, she referred to the evidence of Mr Greenaway and Mr Scott.

[190] The biogeographical or natural science aspects of the Bay that she identified as contributing to its memorability, included the dramatic rocky headlands, the classic horseshoe-type arrangement of the bay, re-generating bush-clad slopes and ridges, the rocky foreshore, and the dynamic waters.

[191] Ms Gilbert identified the aesthetic qualities of the Bay as including the highly attractive arrangements of coastal cliffs, rocky shoreline, small stretches of sandy beach and their overall interplay with sea; the attractive arrangement of bush and exotic plantings serving to reinforce the landform pattern in places and integrate buildings in places, the charming character of the existing swing moorings, the pleasing symmetry of the bay with the transport hub and built development at its base, and distinctive contrast

⁴⁴ Pryor, x-x Casey, transcript p339

⁴⁵ There were a number of instances where the transcript records Mr Pryor as not directly answering questions put to him by Mr Casey, for instance at pp 325, 326, 340 and 350.

between the transport development hub and the otherwise relatively low key and informal character of the Bay.

[192] The perceptual aspects contributing to memorability, she said, related to the formalised viewing area out over the bay from vantage points and the formed walking tracks around both sides of the bay with their significance and popularity described by Mr Greenaway.

[193] Drawing on the evidence of Maori witnesses, Ms Gilbert opined that the Bay is highly valued by Tangata Whenua, not only because of historic burials and its alleged Waahi Tapu status, but also its safe harbour and Aramoana roles over the years. She discerned a strong sense of Kaitiakitanga.

[194] Ms Gilbert offered considerable detail about all of these features, continuing to criticise Mr Pryor and Mr Brown for significant failure to acknowledge them, also their suggestion about the presence of two landscape characters, one in an outer part of the bay, and the other inner. She did not accept such distinction, stressing instead a continuum of experience for ferry passengers arriving or departing by boat. She noted in particular a relatively high degree of consistency in the character of both sides of Matiatia Bay, with the contrast focused at the centre of the base of the bay around the transport hub and some residences sitting above the foreshore.

[195] Ms Gilbert concluded her value analysis, offering the opinion that the Matiatia Bay landscape rates towards the higher end of the spectrum as a “cultural” or “amenity” landscape, being a consequence of its high shared and recognised values, values to Tangata Whenua, memorability values, and aesthetic and perceptual values.

[196] We noted in contrast that Mr Pryor in his evidence in chief was inclined to move directly from a description of the site and surrounding environment, to an evaluation of visual effects, via a brief discussion of “visual sensitivity”, which he said was influenced by a number of factors including visibility of the proposal, the nature and extent of viewing audience, the visual qualities of the proposal, and the ability to integrate any change within the landscape setting where applicable. His analysis of the viewing audience (principally residents, visitors, people on ferries and other vessels coming and going in the bay, and recreational users of the water and the coastal tracks) was relatively uncontroversial. What we found somewhat more controversial was his choice of viewpoints, a subject we shall come to.

[197] While we acknowledge that Mr Brown’s material amounted, as he said, to peer review of Mr Pryor’s application report and evidence in chief, (whereby Mr Brown’s role was understandably quite limited⁴⁶), we felt that his approach resulted in a shortcoming that his analysis lacked the methodological depth of Ms Gilbert and Mr Scott. Indeed Mr Brown acknowledged under cross examination by Mr Casey that he hadn’t gone as far as he normally would, for instance undertaking an assessment of individual

⁴⁶ All of which material we have considered

viewpoints and looking at specific effects in relation to all of those.⁴⁷ This resulted in us feeling somewhat uneasy about some aspects of his evidence, particularly his having divided the bay into two parts, outer and inner. (While he said that the demarcation was not abrupt, he considered that it was sufficiently pervasive as to affect the appearance of the bay in its entirety). His mapping of the alleged effect, reinforced by our site inspections, did not in our view bear out his theory⁴⁸. We also felt some scepticism about his claim that the re-generating bush around the bay has created a “veneer of naturalness”; preferring as we did Mr Scott’s evidence of the quite continuous nature of the cover, and his and Ms Gilbert’s opinion that the cover would continue to mature, neither of which was adequately discussed by Mr Brown.

[198] This issue arose in particular under cross examination of Mr Brown by Mr Casey. Mr Brown very fairly conceded that “not everybody” had his sense of appreciation of when planting is man-made and when it occurs naturally. A little intriguingly, he then ventured that his concern was that there had been a “trade-off” of development for planting. We considered that this further observation was equally off point.⁴⁹ He proceeded however to offer the proper concession that the planting would mature over time and become more natural; also that it would help to screen or at least moderate the appearance of the houses.⁵⁰ (A matter pressed by Mr Scott, including when under cross examination by Mr Brabant⁵¹).

[199] The upshot of the comparison we have just recorded as between the approaches taken by Mr Pryor and Mr Brown on the one hand, Mr Scott and Ms Gilbert on the other, was that we were concerned that the former might have started from an inadequate foundation in embarking on their consideration of landscape and visual effects, possibly also concerning natural character and amenity affects. Because of some acknowledged methodological differences amongst these witnesses (albeit apparently agreed by them in their expert conference not to be important), we felt it necessary to look to see whether Messrs Pryor and Brown recovered from this apparent lack of depth through the remaining sections of their evidence in which they analysed the varying potential effects. We ultimately concluded that they did not.

Landscape and visual effects

[200] Mr Pryor selected five public viewpoints as follows:

- Viewpoint 1; Matiatia Bay entrance;
- Viewpoint 2; North western slopes;
- Viewpoint 3; Coastal walkway to Owahanake Bay;
- Viewpoint 4; Foreshore adjoining Matietie Historic Reserve;

⁴⁷ Transcript p505

⁴⁸ CS Brown, EIC, para 12

⁴⁹ Transcript p506-7.

⁵⁰ Transcript p508.

⁵¹ Transcript p1327.

- Viewpoint 5; Northern slopes;
- Viewpoint 6; Ferry terminal forth;
- Viewpoint 7; Coastal walkway to Church Bay.

[201] Photographs were taken, and visual simulations prepared from the seven viewpoints at both high and low tides, from which detailed assessment analysis was said to have been carried out using a visual effects matrix or score sheet. Mr Pryor set out in an appendix the key factors contained in that matrix, divided into the topics of sensitivity of the view and site to change, and intrusion and qualitative change. Within the former was an analysis of visual quality, visual absorption capacity, and perceptual factors. Within the latter there was analysis of intrusion/contrast, aesthetic characteristics, assessment of levels of intrusion and qualitative change, and finally an overall visual effects rating.

[202] Mr Pryor adopted a five-point scale to rate effects, based he said on a scale provided in the NZILA Best Practice Note 2010, they being “very high, high, moderate, low, and very low”. A description of each was set out in his evidence, but we were concerned that he was forced to concede under cross examination that his detailed descriptions were his own construct, and not that of the Practice Note⁵².

[203] In each of the seven instances, there was brief discussion of the nature of the viewing audience, visual absorption capacity, with a strong focus on physical or visual effects that tended to lack the more detailed under-pinning factors identified by Ms Gilbert. In two viewpoints from the north-western corner of Matiatia, visual landscape effects were assessed to be potentially moderate. In two more, (the foreshore of the historic reserve at the eastern end of the bay, and the northern slopes), the effects were assessed to be potentially “low-moderate”. All others were assessed to be “low”.

[204] Mr Pryor conducted similar assessments from five residences, with the majority being “low”, one “low to moderate”, one “moderate”, and one “very low”.

[205] Mr Brown’s brief assessment combined landscape with natural character effects. He offered a consideration of the relationship of the proposed marina to the wharf, residential development and nearby commercial activities, and swing moorings, in line with his theorem about dividing the bay into two parts, inner and outer.

[206] Mr Brown offered some careful concessions, for instance that the landscape character of “the inner bay”, and some of the appeal of Matiatia Bay as a whole might be adversely effected, but said that these would be counter-balanced against what he considered a reality that such values are already affected by swing moorings, the ferry terminal, the nearby commercial premises and roading network around the periphery of the bay. He thought that the landscape character of the bay would be altered but not

⁵² Pryor, x-x Casey transcript p 324.

significantly degraded, and would be incremental or additive rather than “new”, such that the effects would be of a low to moderate order. He did not offer detailed analysis from the several viewpoints.

[207] Ms Gilbert offered, we thought logically, an assessment first of the visual or more physical aspects of the potential effects, followed by landscape effects, informed as they are by changes to perceptual values and associative values in the landscape including adverse effects on memorability aesthetic values, shared recognised values, and values of the landscape to Tangata Whenua. This graduated approach to the subjects at hand assisted our understanding of the issues.

[208] As to visual effects, and based on her opinion that Matiatia Bay is a high value “cultural” or “amenity” landscape, she considered that the visual qualities of the bay would be of particular significance and worthy of careful consideration.

[209] Ms Gilbert considered that the marina would introduce an appreciable change to the character of the outlook currently enjoyed from almost all of the viewpoints assessed in Mr Pryor’s evidence. She posed what she called the critical question as to whether the change would detract from the character and quality of the existing outlook.

[210] Ms Gilbert accepted the views of Mr Pryor and Mr Brown that for some viewing audiences, a marina would form an interesting and attractive part of a coastal environment and would contribute positively or neutrally to the outlook, whereas for others the marina was likely to read as a relatively urban and regimented form that would be overly “private” in character like a “car park on the water” (albeit for boats).

[211] Ms Gilbert offered her visual effects methodology of way of appendix, with descriptors for the visual effects writing of “very high”, “high”, “moderate”, “low”, and “very low or negligible”. She stressed that the visual effects ratings “moderate” or higher, would signal an effect that was considered to be more than minor. She was concerned that Mr Pryor’s rating system made it difficult to determine at what point the effects became more than minor. She noted that his description of “moderate” offered advice that there could be adverse impact which could potentially be mitigated or remedied. As to this, Ms Gilbert opined that the reality is that for a development that is predominantly on the water, with a form that is largely dictated by engineering constraints and potentially dominated in future by structures that would be beyond the control of the applicant (that is, boats berthed in the marina) there was little that could be achieved in terms of mitigation or remediation of visual effects. Common mitigation tools found on land like planting, are not generally available for development in a seascape context⁵³.

⁵³ Mr Pryor conceded under cross examination by Mr Casey that his involvement with marine projects had largely predated 1990, and his work had mainly been terrestrial since then.

[212] In her following discussion of the viewpoints chosen by Mr Pryor, Ms Gilbert expressed concern about utilitarian-looking breakwaters, massing of structures and vessels, low tide impacts (for instance breakwaters standing 4.2m high above MLWS). She was concerned that the proposal would be in contrast with the simple geometry or symmetry of the bay with the transport hub at its centre, flanked by diffuse and informal arrangements of boats on swing moorings; with the proposal reducing the ability to appreciate the pattern and shape of the curved shoreline, the bush, pasture, olive-clad slopes interspersed with dwellings, and marked visual contrast at the hub. She was inclined to accept that in some views the marina would be seen within the context of the existing wharf, ferry terminal and moored vessels, with some degree of visual compatibility. However that was as between the marina and the wharf/ferry terminal, but not in such a way as to complement the swing mooring component. In other views she remained concerned about massing of vessels, significant numbers of piers, piles and breakwater structures as being regimented, intensive and visually cluttered. In some views she was concerned about significant reduction in the expansive open water that would be seen in the north-eastern portion of the bay, heading to the impression of intensification.

[213] Each of the landscape witnesses was cross examined or questioned by the Court on the theme of the arrangement of the existing swing moorings being variously “placid”, “pleasant”, “scattered”, and “soft”, in contrast to the marina being more regimented. For instance Mr Pryor answered the Court that he accepted those descriptions.⁵⁴ Mr Brown in answer to Mr Casey agreed that the existing moorings were not a blight, but instead were part of a reasonably attractive maritime environment... “*they fit in there very well*”.⁵⁵ Mr Brown accepted from the Court that they offer a placid view of scattered boats on the sea surface.⁵⁶

[214] As to Ms Gilbert’s evidence about the existing environment comprising simple geometry or symmetry in the bay with the transport hub at the centre, Mr Brown offered answers under cross examination by Mr Casey that essentially agreed. He acknowledged that the “ferry terminal is a focal point...on an axis as you come into the bay...in the very centre of the bay...framed by both sides of the bay...really contrasts with the other elements within the bay so it naturally draws peoples’ attention”. He acknowledged that it gives the experience of entering the bay a certain symmetry.⁵⁷

[215] Ms Gilbert was critical of an opinion of Mr Pryor that marinas are an integral component of coastal environments where ferry terminals are located, such as at Half Moon Bay, Bayswater, Gulf Harbour, and West Park. She noted that those locations have a distinct urban context on the mainland, in contrast to the gateway function performed by Matiatia on Waiheke Island.

[216] On the theme of whether marinas are inherently “urban” in nature, Mr Scott said in answer to a question from Mr Brabant about the Matiatia Mixed Use Zone, that in contrast to the latter, he considered they were. Questioned about that in the context of various upper North Island marinas, Mr Scott stuck to his

⁵⁴ Transcript p366.

⁵⁵ Transcript p521.

⁵⁶ Transcript p535.

⁵⁷ Transcript p517.

theory until offering a hesitant concession about Tutukaka with its “coastal village” not being an urban marina.⁵⁸ Having picked up on that answer, Ms Gilbert answered Mr Brabant by opining that Tutukaka as a coastal village ...with the combination of the built form there and the marina...does read as urban.⁵⁹ A few questions further on, Ms Gilbert became a little more hesitant about that, but returned to the Matiatia situation where she didn’t see a “fit” working well.⁶⁰

[217] Our analysis of these passages of evidence is that it is not important as to whether a marina appears “urban”, but instead the question should be as to whether, to hark back to Ms Gilbert’s evidence-in-chief, there should be a concern about utilitarian structures, massing of structures and vessels, and low tide impacts; also as to whether there would be a “fit” that worked well.

[218] Sticking to generalities at this juncture, before individual analysis of effects at viewpoints (because it is more relevant to undertake latter exercise in relation to the reduced proposal) we note that most of Ms Gilbert’s assessments of visual effects rated moderate to high, or simply high, often depending on the relevant viewing distance involved (for instance moderate from ferries out in the bay through to high closer in).

[219] Ms Gilbert considered that Mr Pryor had missed two important viewpoints, one from the south side of the bay at the so called Rocky Bay Store sculpture, and the other from an informal viewing point on Delamore Drive in the north-east corner of the bay from where much of the existing transport hub and infrastructure are obscured by landform and vegetation, but the marina would be visible and present high visual effects.

[220] Again sticking with general principles before turning to detailed assessments from individual viewpoints, we considered Ms Gilbert’s assessment of the potential landscape effects. Bearing in mind her opinion about high memorability and aesthetic values in the Matiatia landscape, she organised her analysis in terms of five topics; gateway, aesthetic, perceptual, biogeographical, and sense of place. She considered that the proposal would adversely impact on all of them, while acknowledging an advantage, subsequently removed, a proposal to create physical access (by boardwalk) to the historic reserve and start of the Owhanake walkway.

[221] As to the biogeographical components of the Bay, memorability and aesthetic values, Ms Gilbert said her comments could be confined to the impact of the reclamation on the pattern and character of the rocky foreshore and the impact of the marina generally on the open waters of the bay, with a particular concern about the engineered character of the breakwaters and relatively close proximity to the rocky coastline, especially at low tide. She perceived a significant obstruction to the open flowing waters of the

⁵⁸ Transcript p 1337.

⁵⁹ Transcript p1359.

⁶⁰ Transcript p1360.

Bay that is presently unobstructed (swing moorings and vessels not having that effect, in contrast). She was concerned about effects in relation to sense of place, agreeing with Mr Scott. She considered that the marina would read as a significant expansion of the human footprint out into a part of the bay that currently reads predominantly as undeveloped. She considered that this would present an erosion of the distinctive non-urban and relatively low key gateway character of Matiatia that forms an important component in establishing the “getting away from it all” character intrinsic to the island’s identity as a whole.

[222] The parties will recall that at the time the applicant signalled a reduction in the scale of the proposal, the Court responded in terms that will have indicated to all parties that these sorts of concerns had registered in some reasonably significant measure with the members of the Court⁶¹.

Natural Character Effects

[223] To some extent we commence discussion of this topic by picking up on our earlier discussion of the evidence of Mr Scott concerning planning instruments.

[224] Rather disappointingly, Mr Pryor’s evidence again intended to focus unduly on the physical. He told us that Matiatia Bay contains a number of natural elements, patterns, and processes, notably the vegetated and pastoral land form, coastal cliffs, vegetation and open waters, but he said these were counterbalanced by the modified environment of the ferry terminal, wharves, roading, commercial activities and extensive car parking areas.

[225] He also said that while the upper bush covered hillsides could be seen from most locations, the buildings and structures around them make the “human imprint” on the landscape very “evident”. No concession was offered in his evidence-in-chief concerning the future growth of the relatively young native vegetation.

[226] Mr Pryor considered that overall Matiatia Bay has a highly modified character, particularly at the eastern end of the bay in the vicinity of the proposed marina, and including also the boats on swing moorings. He pointed to the extended operational hours of the wharf in modern times, associated with high levels of public transport activity. He considered that the key natural elements present in the area would not be diminished, and that existing natural patterns and natural processes currently evident would be largely unaffected.

[227] Mr Pryor considered the natural character and amenity values of the north-eastern end of the bay had already been compromised to a degree by the ferry terminal, wharves and slip way, and overall the marina would have low adverse effects on the natural character values of the Matiatia Bay environment.

⁶¹ Refer to the description of the response of the Court to those matters on the second to last day of the hearing in 2014

[228] We have already reported Mr Brown's extremely brief mention of natural character effects combined as it was with landscape effects and lacking in much specificity. It is important however to record his fair and proper concessions on the subject when cross examined by Mr Casey. While maintaining that the area in the vicinity of the wharves does not exhibit high natural character, he answered a question about potential effects in the north-east quadrant of the bay (the area of water and shoreline north of the wharves) in the following terms: *I don't think there's any doubt that that quadrant of the bay will be appreciably changed by the marina, there's no question of that...* On being asked about effects on a viewer coming through the bay and getting closer, and as to whether the marina would obscure the view behind, Mr Brown properly acknowledged that there was no question it would be affected.⁶²

[229] Ms Gilbert offered the opinion that the 2010 New Zealand Coastal Policy Statement, Policy 13 (2), provides a helpful starting point concerning natural character effects, and offered the constructive suggestion that she agreed with Mr Pryor and Mr Brown from a landscape architectural perspective on that score. The Bay does not rank as having high or outstanding natural character. Drawing however on her evidence about visual effects, particularly in relation to memorability and aesthetic values, she was concerned about potential effects on scenic aspects of natural character, with the marina presenting an increased human foot print out into the bay and altering the perception of modification in the bay. Once again she acknowledged that we are concerned here with a cultural or amenity landscape, which she maintained is of high value. She expressed concern about the nature and scale of the change coupled with the inability of a marina to provide meaningful mitigation, which meant that that level of natural character would inevitably be reduced in consequence of the development.

[230] Once again, the remarks offered by the Court at the time the applicant announced the removal of the car park will indicate that some of Ms Gilbert's concerns had registered. The important part of our analysis will therefore be as to whether the subsequent reduction in placement, scale and shape of some elements of the marina, serve to adequately lessen the adverse impacts which we had tentatively in mind by the end of the 2014 hearing.

Amenity Effects

[231] There are some aspects of this topic which can be seen to overlap with the other kinds of effects that we have been discussing. Indeed, Ms Gilbert's evidence in chief tended not to separate the topic out.

[232] Mr Pryor described landscape amenity as "a natural physical quality and character of an area (landscape that contributes to peoples' appreciation, pleasantness, aesthetic coherence, and cultural and recreational attributes)". He analysed the extent to which the amenity values or particular landscape would be affected as depending on four elements: aesthetic coherence – how well the development fits into the surrounding environment, dominance and scale, loss of privacy – loss of outlook – loss of sunlight – daylight, qualitative experience – appreciation of the environment.

⁶² Transcript p520.

[233] As to aesthetic coherence, Mr Pryor opined that the approach should be to see how well a development would fit into the surrounding environment. He said marinas are an integral component of coastal environments with wharves (citing several mainland Auckland marinas). He referred to the closeness of activities within the transport hub, and opined that the future development in the mixed use zone in the valley would further change the aesthetic coherence of the current environment.

[234] As to dominance and scale, Mr Pryor said that the marina would be inserted into a part of the bay already occupied by two areas of boats on swing moorings; that the marina would increase the size and scale [of such activities] and be more formalised and regimented, but he did not consider it would dominate the bay. He insisted that the surrounding land form and coastal edge and sea surface would remain the dominant natural features of the bay.

[235] He foresaw no loss of privacy, outlook, sunlight or daylight.

[236] As to qualitative experience, he considered Matiatia Bay to be a dynamic maritime environment characterised by the continuous passage of vessels of many types, and by vehicles within the land-based part of the transport hub. He considered that the marina would not adversely impact on the perceived ambience of the bay.

[237] As to experiential attributes, Mr Pryor's focus remained primarily on the transport activities, particularly towards the north-eastern end of the bay. He foresaw some increase in activity from the marina, but considered that the experiential values of the bay would not be adversely affected.

[238] Mr Pryor perceived principally positive effects on recreational amenity, particularly for public access out into the bay for viewing, and access along a walkway to the north [subsequently removed from the proposal].

[239] Once again Mr Brown's evidence was somewhat brief, although he did of course refer us to his earlier peer review report.

[240] Mr Brown considered that nearby residents would be the persons most affected by the proposal in terms of potential visual incursion and the related loss of aesthetic coherence, sense of place and amenity value. He acknowledged that they would receive significant change to the content and nature of their views, particularly from the properties closest to the marina where the immediate foreground would be dominated and natural flows of water reduced.

[241] He acknowledged as well that the proposal would have a significant impact on public use and enjoyment of the small beach-front and water area inshore of the application site and the proposed berths, to the point of being somewhat hemmed in, and in the loss of visual access to the central and outer reaches of

the bay. More positively, he said that the marina would enhance public perception of Matiatia as the main gateway to the island. From other places around the bay, the marina would be a much less dominant component of the maritime landscape.

[242] Somehow, Mr Brown tied all of these matters together to offer the brief opinion that the amenity effects in relation to most of Matiatia Bay will be “at most modest”. He did however go on to acknowledge that nearby residents and people on the beach would experience effects on amenity ranging from moderate to high, and that this was a point of difference between himself and Mr Pryor.

Questions in a “hot tub”

[243] Towards the end of the three week hearing in October last year, and having pre-read all the evidence and heard considerable questioning of witnesses and submissions from most parties, the Court was forming some impressions, at least in relation to landscape and related matters. We felt that some efficiencies might be gained if all four landscape witnesses were to be sworn in together in what is colloquially known as a “hot-tub”.

[244] The Court was grateful to receive some combined wisdom on a number of points, although we subsequently inferred that the progress made by that means led to the “bombshell” on the second to the last day of the hearing when the applicant rang the changes.

[245] The Court gained particular assistance with the extent and effects of the proposed marina in viewpoints from the vicinity of the north eastern corner of the bay, Viewpoints 4 and 5, which had been troubling the majority of the witnesses and were troubling the Court.

[246] The Court was also able to explore the thinking of the witnesses concerning some views that it had considered might be important but which had not been modelled, for instance further out to the west along the track around the southern side of the bay.

[247] The witnesses were also able to assist the Court concerning views from the private residence of Mr and Mrs Alexander above the south east quadrant of the bay, which the Court had visited.

[248] The Court next expressed concerns about potential views from the north side of the existing wharves looking broadly north east into the head of the bay, through to west towards the headland on which the Moke Moke Pa is found.

[249] Finally as to viewpoints, the Court gained some assistance from the witnesses concerning likely views from passengers on ferries entering Matiatia, or departing, travelling between the headlands and the wharf. The Court considered that these experiences had not been adequately modelled in graphic materials.

[250] The Court raised one final issue with the witnesses, as to whether piles in the marina if consented, would be less intrusive in the landscape if sleeved in black polyethylene, or left simply as treated timber posts.

[251] The answers by the witnesses on some of these issues were tentative, but helpful. The true benefits from conducting the session were to emerge later when new viewpoints were selected to meet the requests of the Court, and graphically modelled and discussed in supplementary statements of evidence.

Effects from the changed proposal

[252] We have already described the changes that were ultimately made, by which (in summary) the marina was reduced in size, the breakwaters became curved, and the car park “returned” in the form of a deck on piles over the CMA.

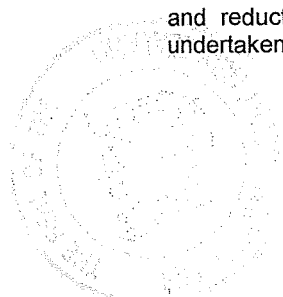
[253] The applicant filed a number of statements of supplementary evidence in late June 2015, concerning that for which it finally sought consent. There was some emphasis in those statements on comparing the first proposal with the new, and identifying visual and related “improvements”. We consider that the inquiry should not be so much about reductions in adverse impacts, as about analysis of effects on the environment from the new proposal in the existing and future environment. To be fair, both approaches were taken; this was not a case of an irrelevant approach being taken to the entire exclusion of the relevant.

[254] Civil engineering aspects, including provision of services, was described by chartered professional engineer Mr S M James. Mr J M Leman consulting engineer previously mentioned, filed a statement of evidence concerning the reduction in area and number of marina berths; change in shape of breakwaters, reduction in southern extent of primary breakwater; replacement of the reclamation with a smaller suspended car park deck; deletion of dredging; and review of wave protection outcomes in light of the changes.

[255] In light of the earlier extent of the evidence and questioning about visual, landscape, and related effects of the breakwaters, we have carefully checked the record to ascertain whether the proposed rock breakwaters necessarily require to be of that material and in that form, or could be replaced by something less visually intrusive, for instance floating breakwaters.

[256] Our interest in this topic was heightened by reading 2 paragraphs in the new supplementary statement by Mr Leman as follows:

23. With changes to the layout such as shape and extent of breakwaters, deletion of the reclamation and reduction of marina pier lengths, a review of the ferry wake and storm wave climate was undertaken.



24. Of particular interest was to confirm that the relocation of the southern end of the primary breakwater would not significantly increase the ferry wake wave height within the marina berths area and to assess if there was the opportunity to delete the secondary breakwater due the significant reduction in the lengths and northern extent of marina piers A, B, and C.

In subsequent discussion in his statement, it was Mr Leman's advice to us that the secondary breakwater would still be required, consequent upon fresh wave modelling that he had commissioned from specialists.

[257] We recalled that Mr Leman had earlier told us in his evidence in chief⁶³ that satisfactory wave protection would require either fixed-panel or rock breakwaters to give protection from the south westerly direction, with the rock breakwater option being chosen because of adverse visual impacts from fixed-panel breakwaters and problems with a high degree of reflected wave energy back into the bay from the latter.

[258] During the renewed hearing in July this year the Judge asked Mr Leman questions about a comparison between rock breakwaters, and floating breakwaters such as had failed and broken up in the Lyttleton marina in 1999. Mr Leman assured the Court that floating breakwaters would not have any relevance to the present proposal⁶⁴.

[259] Mr Wardale lodged supplementary evidence describing the changes to the proposal, in the terms previously described.

[260] Evidence about landscape, visual and related matters flowing from the changes, was filed by Mr Pryor.

[261] Mr Pryor noted that the key visual changes were that the breakwaters had been reduced in length and curved to soften their appearance, reducing their "engineered" characteristics and to "replicate the more organic and natural shapes within Matiatia Bay". He suggested that the reduction in size of the marina would result in a more significant separation between the berthed vessels and the coastal edge and foreshore; that it had reduced the length of the piers and pulled them away from the foreshore which had retained the more open nature of the inner bay and beach adjoining the Matietie Historic Reserve; and reduced the spread of built development across the bay when viewed from the beach and foreshore adjoining the reserve. He considered that the parking deck with timber decking had been designed in keeping with the form and scale of the adjoining wharves, and was physically separated from the rocky foreshore. He believed that the vehicles would be screened from view for those accessing the foreshore adjoining the reserve. He described design features and materials to be employed in and on the deck. He said that planting would be kept to a minimum in keeping with the wharf characteristics.

[262] As to the breakwaters, Mr Pryor said that there would be construction with rocks that were less uniform in size, "more in keeping with the natural foreshore and rocky coastline characteristics". He said

⁶³ Leman, EIC para 82 - 85

⁶⁴ Transcript July 2015, P 92

that the proposed floating office design had been revised within the envelope of the previously proposed structure, to achieve a more “architectural form”.

Visual effects, the visual catchment and viewing audience

[263] Mr Pryor had now added four new public viewpoints, one from the ferry in mid-bay looking towards the head of the bay, two from the northern wharf (essentially a split of one broad view into two visualisations), and from a seat on the southern public walkway, looking north-eastwards across the waters of the bay to the wharf, proposed marina, and northern slopes.

[264] **Viewpoint 1** (attached as Annexure “C”) was from a ferry mid-bay, somewhat closer to the proposed marina than previously modelled and assessed. There would be what he described as “relatively high numbers of people” in this audience. We consider that Mr Pryor was inappropriately downplaying the size of this audience. In the context of the numbers of ferry sailings on many days of the year, and the increasing size of ferries and numbers of passengers, it is obvious that this audience is very large, and it is common knowledge that it is growing strongly.

[265] Mr Pryor considered that the amended design had reduced the length of the main breakwater and curved it to appear “more characteristic of the rocky embayments and the surroundings”. He considered that the reduced size of the marina resulted in a more significant separation between the vessels and coastal edge and beach. He reiterated his view that the parking deck would have similar visual characteristics to those of the existing wharves.

[266] He considered the landscape and visual effects would be moderate in the context of the surrounding coastal environment due to the close proximity of the viewer to the marina, taking account of the modified characteristics of the transport hub being highly visible with the ferry terminal, wharves, and car parking area. He considered that the marina would not appear incongruous in this view.

[267] **Viewpoint 3** was a perspective taken from the north-western slopes above the bay from a private viewing location looking east, not from a dwelling but from an olive grove. Mr Pryor perceived similar benefits to those he identified with Viewpoint 1, and considered that landscape and visual effects would be moderate.

[268] **Viewpoint 4** (photograph of existing low tide scene together with visual simulation adding the marina and pile moorings, attached as Annexure “D”⁶⁵) was once again from the foreshore adjoining the Matietie Historic Reserve. He considered that the reduction in size of the marina (we infer particularly

⁶⁵ We stress that the reproduction of this exhibit is at A4 size, whereas it was intended to be used at A1, A2, or A3 sizes. Objects in the A4 version appear quite diminutive, perhaps even inoffensive in terms of adverse effects. The original sized exhibits show a very different picture.

concerning the inshore Pier A) would introduce a significant separation between vessels and the coastal edge, offering a more open nature in the inner bay and beach area and reducing the spread of development across the bay. He offered similar comments concerning the main breakwater and parking deck.

[269] Mr Pryor considered the reduction in vessel density to be noticeable from this viewpoint, and that the landscaping and visual effects would be low to moderate from the foreshore.

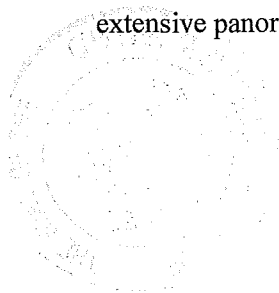
[270] **Viewpoint 5** was once again from the northern slopes above the beach. Mr Pryor noted again the dominance of the existing wharves and ferry terminal; that the viewing audience is restricted because the property is a private one; and that visibility of the proposed development would not constitute an adverse effect in itself despite the high level of visibility. He noted similar benefits from reduction in size of the marina and the parking deck proposal. He considered that the visual effects would be moderate.

[271] **Viewpoints 8 and 9** comprise the (split) view from the northern wharf, and were created as a result of a request from the Court. Viewpoint 8 essentially looks west and viewpoint 9 north and north east. Viewpoint 9 is **attached** as **Annexure “E”**.

[272] In these viewpoints, Mr Pryor felt obliged to mention matters not directly visible [because they are behind the viewer], the ferry terminal and wharf structures which he described as being in close proximity. He acknowledged that piles, piers, and moored vessels would be highly visible in the line of sight but considered that in the context of the proximity of the ferry terminal and wharves, the marina would not appear out of place; indeed that it would be an appropriate use and activity in this location. He considered that the landscape and visual effects would be moderate. Concerning viewpoint 9, he did not mention vehicles that would be present on the deck, confining his commentary to boat berthage, freight unloading, vehicle movements, Coastguard activities and public recreational use in and around the existing structures. He again stressed the presence of the immediately adjoining wharf, ferry terminal and bus terminal with very high levels of activity throughout the day and evening.

[273] **Viewpoint 10** was taken from the Alexander residence above the south-east quadrant of the bay, looking in a north-westerly direction. Mr Pryor called it a distant viewpoint, and expressed the opinion that the view extends across the bay towards the northern and eastern slopes and beyond to the Hauraki Gulf Islands. He noted that the ferry terminal wharves were clearly visible built elements in the foreground. He claimed similar benefits from the reductions to the proposal.

[274] Mr Pryor acknowledged that there would be a change in view, but stated that marinas “are an integral part of the coastal landscape”, and in context of the surrounding environment and wider and extensive panoramic views, the visual and landscape effects would be low.



[275] The new **Viewpoint 11** was from the seat on the south side walkway previously mentioned. Mr Pryor considered that the view was expansive and elevated, extending across Matiatia Bay towards the ferry terminal and wharves, and the northern-eastern slopes, and out the Hauraki Gulf and islands. He acknowledged that there was a high level of landscape amenity due to elevation and panorama of the views. He considered that visual sensitivity here was moderate, and that the viewing audience being at an elevated angle would largely comprise of recreational users of the walkway who he said could be anticipated to have relatively high expectation for visual amenity in this coastal area. He considered that this would be tempered however by the relatively high capacity for the view to accommodate change as a result of existing development, activity and modification to the coastal edge.

[276] Mr Pryor considered that the marina would comprise only a small portion of this view and would be seen to be tucked into the base of the northern slopes in an area of the bay already modified. He repeated the claim that marinas are an integral component of coastal landscapes. He considered that the landscape and visual effects from this viewpoint would be low.

[277] Mr Scott considered that the applicant had made only minor modifications from the point of view of structure and scale. He considered that it remained a “formalised structure” in a bay that is dominated currently by overt and distinguishable natural form. He considered that the curved breakwaters were a “minor and irrelevant proposition”; that they help, but are not substantive improvements in design and spatial terms. And they would not make the marina fit into the bay by making it appear as a more natural feature.

[278] Mr Scott considered that the proposed structure would still divide the bay and present a structural form that would be identical to the original scale of intervention. He considered that the southern access pier and primary and secondary breakwaters collectively would dominate the northern horseshoe bay formation. He considered that while there was a reduced number of marina berths, the density of the parked boats in a tight and ordered pattern would exacerbate the character intrusion and changes the overall current symmetry of the Matiatia Bay.

[279] Mr Scott acknowledged that the shortened pier would provide some “breathing space” to the foreshore historic reserve and immediate coastal edge and beach area, however he considered it insufficient to reduce the permanent adverse effects in this critical entry gateway location.

[280] Concerning the amended car park design, while potentially reading as an extension of the wharf, it would also have the effect of spreading and intensifying development in the northern horseshoe portion of the bay and be physically and visually disruptive. He expressly mentioned that cars on the deck would introduce an inappropriate new element in the landscape context of the bay.

[281] He considered that the fundamental adverse landscape and spatial effect of the marina was generated from its location and form; but it was not about scale. He objected to Mr Pryor’s constant

reference to the existing modified characteristics of Matiatia (wharves, ferry terminal, and car parking) as reasoning to justify the marina being located here. He considered that the entry gateway experience rested on the existing natural form and cultural context of the bay and the associated functional service character that existing structures appropriately characterise. He continued to hold the view that the proposed marina is of a different form, and scale that introduces a more urban format to the entry experience, and would add a large and incongruous element to the bay.

[282] Ms Gilbert also filed supplementary evidence. Her concerns about Mr Pryor's earlier description and evaluation of the existing landscape remained. Despite the changes to the proposal, it remained her opinion that the visual and landscape effects of the proposal would be more than minor.

[283] Ms Gilbert raised the slightly intriguing point that despite Mr Pryor in supplementary evidence stating in general terms that the reductions would further reduce the landscape and visual effects in the marina and parking deck, his individual assessments of levels of effect remained consistent. Her own opinion was that the actual reduction in visual effects between the original and amended marina proposals were slight at best.

[284] Concerning **Viewpoint 1** from the ferry, Ms Gilbert acknowledged that there could now be a greater appreciation of the depth and shape of the north-eastern part of the bay for this audience, however there would still be the impression of development sprawling from the ferry terminal across the north side of the bay, disturbing both legibility of the gateway experience and the existing pleasing and simple geometry and symmetry of the bay inclusive of the diffused and informal arrangement of boats on swing moorings. She continued essentially to perceive an "extension" of the existing wharf structure, from this viewpoint.

[285] Ms Gilbert thought that the curved breakwater and varying-sized rocks in them would read as a more sympathetic engineered form in the outlook, but they would still be different from the rocky shoreline, which does not contain stylised curvilinear rock forms. The breakwaters would still read as entirely artificial, manmade, and a relatively large scale engineered built element to an open and undeveloped part of the bay. She rightly pointed out that the viewpoint had only been modelled at high tide, which is something we were concerned about. She believed that there would be considerably more of the rocks and piled end-panels of the main breakwater visible around low tide, exacerbating the impression of those elements as an incongruous thing, albeit a slight improvement on the original proposal. The further out the ferry would be in the bay from the modelled view point, the secondary breakwater would come more into view.

[286] Ms Gilbert considered that adverse visual effects for this audience would be moderate to high depending on proximity.

[287] Concerning **Viewpoint 3** (north-western slopes), Ms Gilbert noted the "breathing space" near the beach and historic reserve, however there was still the impression of the north side of the bay being filled by

development and separated from the wider bay setting. She considered that the effects were not reduced to an acceptable level. She added, using this viewpoint and the previous VPO2 photo montage for the original proposal, that the extent of the changed marina visible from the public walkway nearby would be considerably greater than that conveyed in the new Viewpoint 3; along with a significantly reduced perception of the open water separation between the changed marina and the historic reserve coastline from such location, due the screening effect of intervening mature coastal vegetation.

[288] She rated adverse visual effects from this viewpoint as moderate to high, and from the walkway as high.

[289] Concerning **Viewpoints 4 and 5**, on the foreshore by the reserve and northern slopes above, Ms Gilbert acknowledged the perception of more open water in the near view, but that the amended proposal would still create the impression of the marina spreading across this end of the bay. There would still be a hemmed in feeling to the shoreline, and a severing of the sense of connection between it and the broader bay, leading to a feeling of being cut off from the balance of the bay. She anticipated that there would effectively be an “island” of boats in the centre mid-ground of the view, which would be incongruous and displace the relatively open and informal arrangement of swing moorings and open water, with a regimented and relatively intense development pattern contrasting with the open waters of the bay. At low tide, the increased visibility of the breakwaters would amplify the negative contribution of the marina to the outlook.

[290] From the upper viewpoint (5), Ms Gilbert perceived that there would be a greater awareness of the parking deck and its relationship to the coastline, a distinct projection beyond the existing roading into the open waters of the bay. She was concerned that the impression would be exacerbated at low tide, where the parking deck would loom above shallow waters and rocky foreshore and read as a distinctly utilitarian and awkward visual element.

[291] She rated the adverse visual effects from these two locations as high.

[292] Concerning **Viewpoints 8 and 9**, the two views from the northern wharf, Ms Gilbert felt (as did we) that the two views should be considered together rather than separately as Mr Pryor had done.

[293] Ms Gilbert considered this vantage point afforded a quite unique appreciation of the more natural and aesthetically pleasing characteristics of the bay, its classical horseshoe shape, a perception of being “out on the water” amongst the spacious and charming swing-mooring pattern. She considered that the viewpoint was an important one given its ease of access.

[294] Ms Gilbert was concerned that the marina would screen much of the land/water interface, diminish an awareness of the shape of the bay even if still legible, and displace the current relatively tranquil scene with a concentration of boats, piers, office, and parking deck. She feared a distinctly urban pattern being

introduced into a relatively undeveloped and peaceful part of Matiatia Bay. The north wharf would appear to be surrounded by development. The distinctly utilitarian character of both breakwaters and the parking deck at low tide would exacerbate the perception.

[295] The adverse visual effects in relation to the outlook from the north wharf, she rated as high.

[296] Ms Gilbert considered **Viewpoint 10**, from the Alexander residence to the south-east of the bay. Once again she noted that the view had not been modelled at low tide.

[297] She did not consider that the amended proposal would offer meaningful improvements in this outlook; that the proposal would still dominate the waters of the bay visible from this location; introducing a distinctly regimented pattern markedly different to the existing swing-mooring pattern and organic coastline. The visible waters would be “filled up”.

[298] Intervening vegetation could improve matters over time as it matured, but it would need to screen off almost all of the open waters of the bay before achieving that. She accepted that there would still be highly attractive long range views to the Gulf and islands, but that we should not underestimate the importance of the closer range coastal view.

[299] Concerning **Viewpoint 11**, from the seat on the southern walkway, Ms Gilbert said that the viewer’s attention is directed to the eastern end of the bay by the shape of the landform from the position of the seat. She considered that there would be reduced focus on the wider Hauraki Gulf, contrary to Mr Pryor’s opinion. She considered that the steepness of the landform and the foreground (not appearing in the photo montage) enables views to the dramatic rocky shorelines and encourages a sense of drama that in combination with the seat’s influence in formalising the view, arguably makes the vantage point more memorable than many of the views available from other locations on the walkway.

[300] Ms Gilbert acknowledged Mr Pryor’s point that the existing transport hub is clearly visible, and that distance will contribute a moderating effect in this outlook; further that the reduced marina footprint would mean that there would appear to be greater separation between the vessels and the historic reserve on the north eastern coastline. She felt however that these factors would not sufficiently outweigh the negative influence of the amended marina as an incongruous concentration of boats and structures extending across the north-eastern portion of the bay. She felt that there would be a distinctly urban pattern contrasting with the open waters of the bay, and an impression of the existing hub sprawling into the bay. She rated the adverse visually effects here as moderate.

[301] Ms Gilbert commented separately on prospective landscape effects. She acknowledged a higher quality design outcome in the parking deck on account of its materials; also that it does not extend over the rocky foreshore at the southern end of the historic reserve in the manner of the previous reclamation

proposal. She was concerned however that the new configuration would effectively divorce this part of the rocky shore from the wider bay, and dominate and exert an overwhelmingly negative influence in this part of the base coastline. She also felt that the structure would be less grounded or anchored in its setting and read as an elevated structure above the water. While it would be similar to the existing wharf structure, suggesting a contextual fit, the physical relationship between the carpark deck structure and the landscape setting of the bay was quite different to the existing transport hub in her view. While the hub reads as a relatively logical extension of the promontory at the base of the bay, the configuration of the deck would have a more awkward relationship with the coastal landform pattern. It would also create the impression of development spreading out over the waters of the bay. The shadows cast by the deck would exacerbate the impression, particularly at low tide. [This latter feature attracted further supplementary evidence on behalf of the applicant, intended to correct a allegedly wrong impression about shadowing].

[302] Ms Gilbert acknowledged that the breakwaters would have a more sympathetic form, but still read as distinctly engineered elements contrasting with the rocky shoreline patterning.

[303] Mr Brown recorded that he largely agreed with Mr Pryor's opinions, but he had a degree of concern about one aspect of the parking deck. He considered that in the original proposal the reclamation or deck benefitted to an appreciable degree from being attached to the adjoining foreshore by butting into the slopes of the small headland, dividing the two parts of the base of the bay. He considered that the newly proposed deck would suffer from the loss of such anchoring; that it would appear to "float" above the sea, and that this would disrupt the integration of the marina with its coastal setting and adjacent land forms. He thought that it would be incongruous next to the lower-lying marina piers at times of low tide, and even against the lower profile of the ferry wharf and terminal beyond. He perceived an uncomfortable tension, even a degree of visual imposition, relative to the water surface and adjacent foreshore.

[304] Mr Brown was also unhappy about the prospect of vehicles on the elevated deck creating an uncomfortable interaction between the sea and the proposed marina structures that had otherwise been improved. He considered that the deck aspect would have a discernible adverse effect on the historic reserve and the bay, but not in relation to wider views, or such as to carry much weight. Essentially he continued to consider the proposal to be acceptable overall.

[305] The concerns expressed by Mr Gilbert and Mr Brown about visual effects of the parking deck above the water, attracted correcting supplementary evidence from Mr T W Johnston who had been responsible for creating the visualisation. He said that a dark shadow had been wrongly added to the simulation (unlike the visualisation of the earlier larger carpark deck), and that this had now been amended to the correct density by electronic means.

[306] That error was also by commented on in supplementary rebuttal evidence by Mr Pryor, who commented that a wrong illusion had now been rectified.

[307] In that rebuttal statement, Mr Pryor commented on the supplementary statements by the other witnesses. First, in relation to Ms Gilbert's criticism that his ratings had remained the same in relation to some viewpoints, he said that when working with a 5 point scale there can be some variation within each. We think there is some force in that.

[308] In Viewpoint 1 from the ferry, Mr Pryor disagreed with Ms Gilbert's view that the marina would create an impression of development sprawling from the ferry terminal across the north side of the bay, pointing to the prospect of future development within the Matiatia Gateway land unit. We have already expressed views on likely limitations on effects from that, and note that in Viewpoint 1 the marina would extend relatively close to the viewer on the ferry, while the Matiatia gateway unit is on land a considerable distance into the background beyond the wharf and southern beach.

[309] In relation to Viewpoint 3, from the north-western slopes, Mr Pryor was critical of Ms Gilbert's suggestion that the marina would effectively fill the bay north of the wharf despite the reduction in pier lengths. There is some truth in both statements, but we consider that the marina would create an extremely strong impression from this viewpoint, more approaching that suggested by Ms Gilbert.

[310] Concerning Viewpoints 4 and 5 in the north-eastern corner of the bay, Mr. Pryor noted that Ms Gilbert had accepted that there would be a reduced footprint and some breathing space while remaining concerned about the extent of massed boats. He was critical of her "hemmed in" impression. There can be no doubt that there would be more expanse of water close to the beach with the new proposal, but again Ms Gilbert is partly right because the proposed marina and pile moorings do somewhat march across the bay. We are reminded that during the hot-tub at the earlier hearing some witnesses were concerned that if the marina were to be reduced in the vicinity of the beach, it would appear somewhat incongruous, or as something of an "island". Our view is that it can still be said that it would be somewhat incongruous, while offering lesser adverse visual effects, but its apparent attachment to the wharf and ferry terminal does give it the appearance of marching in a somewhat regimented fashion across the bay. There is still a massing of boats in comparison to the "placid" scene of boats on swing-moorings floating on the water. We are reminded of some answers of Mr Brown's during the first hearing which we now consider somewhat prescient. In answer to questions from the Court he opined that removing Pier A [closest to the beach] and taking half a dozen berths off the end of each of B and C, wouldn't have much of an effect, and could look quite odd.⁶⁶

[311] Concerning Viewpoints 8 and 9 from the north wharf, and Ms Gilbert's criticism of the prospect of a distinctly urban pattern being inserted into an undeveloped and peaceful part of the bay, Mr. Pryor returned to his theme of the prospect of future development in the Matiatia Gateway land unit. That, frankly in our view, would be somewhat distantly behind the viewer standing on the wharf looking generally north and west.

⁶⁶ Transcript pages 538, 9.

[312] Concerning Viewpoint 11 (the seat on the southern walkway), Mr Pryor disagreed with Ms Gilbert's view about a "distinctly urban pattern". He re-visited the prospect of expansion of the existing transport hub and further intensification, urbanisation, and development in the Matiatia Gateway zone. We reiterate the comments we have already made about that.

[313] In answer to Ms Gilbert's concerns about the parking deck in this view, he reiterated that the parking deck had been designed to be finished in materials in keeping with the adjacent wharfs, and would sit comfortably in its coastal setting. He pointed to the 60 % reduction in its size, and picked up on some items of positive acknowledgement that she made about some elements of this view.

[314] Mr Pryor referred to Mr. Brown's concern about Viewpoint 5 that the parking deck would project out over part of the bay and "appear to float". He considered that Mr. Brown's and Ms Gilbert's perceptions had been based solely on consideration of the visual simulations which contained an error concerning shading, and believed that the situation was improved in amended visualisations. We do not entirely agree. The deck would stand significantly and noticeably clear of the rocky foreshore, and somewhat above the marina and boats at low tide.

[315] Mr Pryor did not accept Mr. Brown's suggestion of a "disconnect" of the parking deck, with vehicles on top of it, pointing to the presence of car and truck movements on the existing wharfs, principally for loading and unloading of goods from ferries. We prefer Mr Browns' view, given that 39 cars in a fairly regimented pattern on a deck structure beyond the foreshore and out over the water, would be quite different from occasional movements of commercial vehicles to and from the north wharf.

Natural Character Effects

[316] Ms Gilbert considered that her earlier comments about natural character effects remained valid, subject to some further observations. She said that whilst the amended proposal would not obliterate the rocky shoreline at the south end of the historic reserve in the manner of the original proposal, the close proximity of the large scale carpark deck structure would adversely impact on the experiential and scenic aspects of the natural character associated with this part of the bay's coastline; further that the reduced footprint of the amended marina would not meaningfully alter the perception of built modification out into the bay.

[317] Mr. Scott stood by his earlier evidence in relation to potential effects on natural character, considering them to be adverse and more than minor.

[318] Mr. Brown maintained his earlier view about acceptability of the proposal overall, despite some misgivings about the deck.

[319] Mr. Pryor maintained the stance in his evidence in chief regarding both natural character and amenity effects, which he considered would be low in the Matiatia Bay environment. He did not separately address natural character effects in his supplementary rebuttal.

Matters covered in questions of the witnesses

[320] The applicant confirmed that the options for piles throughout the marina are concrete, steel or timber; and that if they are steel or timber they would be sleeved in high density polyethylene similar in appearance to those installed in other marinas in the Auckland area in recent times.

[321] Mr. Pryor was cross examined by Mr. Littlejohn about the extent of shadowing shown under the opposed deck structure, and under existing wharf structures, which had been the subject of advice that there had been a modelling error in visualisations of the reduced proposal. We do not think the issue is of particular moment, it being just one very small part of the overall landscape and visual issues.

[322] Mr. Pryor was questioned by the Court about the view looking north to north-west from the north wharf, and remained of the opinion that the viewer would be aware of activity going on behind him/her on the wharves.

[323] Under questioning from the Court, Mr. Pryor confirmed that the balustrade presently shown as surrounding the parking deck would be 1.2m high, and agreed that vehicles on the deck would fairly commonly be between 1.4 and 1.8 meters high. He accepted that on busy days there would be a lot more vehicles on the parking deck visible above the balustrade, than shown in the visualisation. This is particularly relevant in viewpoint 9, looking north and north-east from the north wharf.

[324] Mr. Brown was also asked about this issue by the Court. He offered the honest advice that the presence of a full carpark in that view point would exacerbate the severance that he had expressed concern about, the disconnection between the viewpoint and the bay caused by these non-natural elements. He conceded that there would be some reduction in the feeling of association with the bay from the presence of activity behind the viewer on the north wharf. Mr. Brown was inclined to agree with some of what Mr. Pryor had said, given the presence of the transport hub and dinghy rack and boat ramp, plus ferry access. He nevertheless thought it important to return to the theme of the connection of the viewer to the bay to the north, and he considered that the previously proposed parking arrangements, despite being larger in scale, offered a slighter softer and more appropriate transition because that earlier car park was actually “anchored into the headland”, and had a walkway provided as a sort of stepping stone to the bay. He considered that the new structure, elevated above the water would become an impediment to that relationship⁶⁷.

⁶⁷ Transcript pages 104 and 105.

[325] In similar vein, Mr. Brown told the Court in answer to a question from Mr. Brabant, that he was critical of the visual effect of the parking deck heading at right angles away from the line of the wharves on to the water. Mr. Brabant put it to him that there was a synergy, but Mr. Brown strongly denied that, and remained critical of its projection.

[326] Ms Gilbert raised a matter concerning what she thought was a lack of accuracy with 3 of the new visualisations, suggesting that they tended to “spread” aspects of the land form and make them look more distant than when personally looking at the landscapes on the ground. She had taken the trouble to use the visualisations provided by the applicant’s consultant Buildmedia, including following the printed advice as to the distance that the visualisation should be held from the eye (other witnesses had not taken this trouble).

[327] There was subsequent further input on the topic, including short evidence by Mr. Johnston of Buildmedia who appeared somewhat troubled about the information, and offered to provide further graphic materials for members of the Court to take into the field on their site visit.

This was arranged, together with an innovation of printing of the simulations onto clear acetate, which we tested in the field. We were grateful to Mr Johnson for offering us this new approach, which in respect of some of the views proved very helpful. Regrettably however, the problem observed by Ms Gilbert was confirmed in at least two of the views, as we advised the parties in open Court on returning from our site inspection. We do record however that nothing turns on the issue, because, as has been said by the Court in previous decisions, there can be no substitute for carrying out site inspections in order to confirm the accuracy of evidence or otherwise. We can work with these slight difficulties, and make an assessment of the expert opinions about the relevant effects.

Discussion and findings on landscape, visual, and related effects

[328] We have made some findings during the course of discussing the evidence in this section of the decision. In the following passages we add further findings and endeavour to draw all together and reach conclusions.

[329] We start by observing that little changed in the evidence about the qualities of the locality, between the two hearings; what changed largely related to descriptions of the changed proposal and its potential effects.

[330] We noted particularly that the experts had agreed that the natural character values of the bay in its entirety are not high or outstanding, but had also agreed about elements that have higher natural character values, and other elements that reduce natural character values. They also reached an important level of agreement about memorability of values in Matiatia Bay, including its main gateway function to Waiheke Island (linked to the character and aesthetic qualities of the bay) the experience of arrival and departure, the

importance of the transport hub and gateway, the contribution of these values to tourism and recreation on the island, the walkways and tracks, shelter offered recreational boating, wharves and infrastructure, foreshore and open spaces in certain landscape features, and the importance of certain viewing sites.

[331] The experts had also reached an agreement on the visual absorption capacity in the bay, and the visual values of the swing moorings.

[332] As noted elsewhere in this decision, we were critical that some important views had not been assessed at the time of the first hearing. Our concerns produced new viewpoints for the second hearing, along with relevant visualisations with marina inserted.

[333] An important agreement was reached about landscape and visual effects, to the effect that these could be the subject of only limited mitigation out on the water space, which mitigation would essentially involve attention to shape, size, and placement. (It occurs to us that different design could perhaps offer some mitigation, for instance use of floating attenuators instead of rock breakwaters, but we cannot determine to what extent in the absence of evidence).

[334] Underpinning a number of our findings is the overall impression we gained about the comparative qualities of the evidence of the four witnesses. We found Ms Gilbert's approach to be thorough, principled, thoughtful, and appropriately detailed. Under questioning she offered appropriate concessions when necessary. She had made thorough and careful use of the NZILA Best Practice Notes.

[335] Mr. Scott performed the task of analysis of relevant statutory instruments with care, and acknowledged that he had expressly worked to avoid duplication of the analytical work of Ms Gilbert. (We noted however that he did somewhat cross that line when offering his supplementary evidence at the second hearing, but he maintained succinctness and did not create any confusion when calling on that aspect of his professional experience and knowledge).

[336] Mr. Pryor, we have observed, was inclined to move directly from a description of the site and surrounding environment, to an evaluation of visual effects with brief discussion only about "visual sensitivity". His analysis lacked the depth and substance, and some of the methodology employed by Ms Gilbert, and in the end we think the short-comings manifested themselves to some degree in the quality of the information that he offered us.

[337] Mr. Brown openly conceded that his task had been simply to undertake a peer review. In the early stages of the hearing his evidence lacked (as he acknowledged under questioning) his usual careful and detailed approach to analysis of effects from viewpoints. It is fair to say however that as the hearing progressed into the second stage, and he somewhat more "warmed to the task".

[338] Mr. Brown offered helpful and objective answers under questioning. Regrettably, we did not feel the same way about Mr. Pryor's approach in this respect, when he tended often to stick doggedly to opinions that were clearly open to differing views and results. On occasion he did not offer appropriately direct and focussed answers to questions.

[339] As will be seen from our findings that follow, we were therefore in the overall sense more assisted by Ms Gilbert and Mr. Scott than we were by Mr. Pryor and Mr. Brown. That is not to say that we have found complete agreement with the views of the former or complete disagreement with the views of the latter. As is so often the case, the truth of matters lies somewhere in between.

[340] We were quite uncomfortable with the way in which Mr. Brown and Mr. Pryor essentially divided Matiatia Bay into two segments, albeit without a hard edge between them. Through the course of many answers by all four witnesses, we became distinctly more comfortable with the approach taken by Ms Gilbert of treating the bay more as a whole in which the curved and quite symmetrical shorelines at the head of the bay played an important part in deciding the landscape character and natural values of the place, while of course properly acknowledging the visibility and importance of the transport hub comprising the existing wharves, and the busy traffic activity behind them, located close in under the high promontory at the southern end of the Matietie Historic Reserve; also the high volumes of pedestrian and vehicular activity throughout the hub.

[341] Another important area where we felt more comfortable with the advice of Ms Gilbert and Mr. Scott, concerned the regenerating native vegetation on the hill slopes around the bay. We could not accept Mr. Brown's criticism which essentially was psychological, based on his own historical knowledge, that these slopes presented a "vener of naturalness", or demonstrated a "trade-off" of housing and development for planting. It is more important in our view to assess what can be seen in the environment, and how it may develop in the future. We find that it will continue to grow and present an increasingly natural character around a high percentage of the slopes above the bay, and that the houses, some of which are indeed presently quite visible, will gradually become the subject of more filtered views, if rarely screened out entirely.

[342] Debate about whether the proposed marina would present as "urban" was a red herring. The Matiatia bay environment is what it is and will become. The question is whether the proposed (reduced) marina would fit acceptably into that environment. As part of that enquiry, it needs to be questioned whether Ms Gilbert was right in her criticisms of utilitarian structures, and the massing of structures and vessels, particularly at low tide.

[343] We consider that Ms Gilbert and Mr. Scott were right to identify Matiatia Bay, in the round, as a cultural or amenity landscape of high value. It is necessary to consider what the marina would prospectively look like in various important view points. We cannot find that the bay presents as compartmentalised in

terms of its landscape, natural character, or amenity. We find that it reads as a whole, which is not surprising given the very enclosed and roughly circular shape of it. The transport hub is a welcoming aspect in terms of the cultural landscape, landscape quality, and overall amenity, and is quite confined in extent in the overall landscape, despite being a busy place.

[344] The prospect of development in the Matiatia Gateway Mixed Use Zone was overplayed by Mr Pryor. It will stand further back from the foreshore than he suggested, and need to be the subject of applications for resource consent for its structures. Objectives and policies, supported by rules, will necessitate attention to landscaping, open space and quality of design, with particular emphasis on protecting the important gateway experience.

[345] As we observed at various points during this part of the decision, when the applicant dropped the “bombshell” removing the car park from consideration, we felt obliged to offer some other thoughts which we believe we did in carefully stated terms. As we have also noted, our tentative view at that time was to question the apparently engineering-led design of the marina, and its significant size. The answers helpfully given by the four landscape witnesses in the “hot-tub” caused us to place some careful (but non-pre-emptive) questions before the applicant about whether certain modifications to the proposal might produce a better result. Leaving aside that the carpark disappeared completely for a period of time, and returned at a reduced scale and on piles instead of on a reclamation, the question now is whether there would be reduced effects of the various relevant kinds, and if so whether they would be acceptable in terms of the level of effect.

[346] Mr. Pryor naturally made much of the breakwaters having been curved, the marina reduced in size and now withdrawn from portions of the foreshore near the Matietie Historic Reserve, and the deck reduced in scale and placed on piles.

[347] Mr. Brown raised new concerns about the deck, but nevertheless felt as he had before, that the result overall was acceptable.

[348] Ms Gilbert and Mr. Scott would have none of that, other than to agree with Mr. Brown’s new concerns about the deck.

[349] As may be seen from some of the findings that we made in the course of this decision, feel convinced about some of the concerns expressed by Ms Gilbert and Mr. Scott. These matters relate most strongly to the breakwaters and the parking deck, which we find would introduce a strong and adverse utilitarian element into many of the views discussed. These concerns are particularly notable at and near low tide, where from out on the bay and from some of the viewpoints on land, they would present as sizeable discordant elements in the quality of landscape as we have found it to be.

[350] We make some particular observations about Viewpoint 1, the view from ferry introduced at the second hearing. First, the visualisation was offered was only a high tide one. The view of the primary breakwater structure at low tide would present as nearly 3 times the height of that seen in the high tide visualisation. We must also observe that the view is taken from a high place on the ferry, from where the curving shoreline of the north part of the bay remains visible to a degree. Many viewers would however be on lower decks on the ferry, or small recreational vessels entering, leaving, or moving through the bay. The breakwaters, particularly at low tide, would present, we find, as a very significant discordant mass, barely mitigated by their curves.

[351] Views from above the bay would be assisted by reduction in size of the marina, particularly up-slope of the Matietie Historic Reserve. In other places that reduction is less apparent, as previously held. We remain concerned that the views from the seat on the southern walkway, the Alexander residence, the historic reserve foreshore, and from the northern walkway, would not be significantly improved by the reduction in size of the marina. In those views, the structures and vessels will present in a regimented form, as a discordant element in landscape, visual, and amenity terms. Similarly in relation to the natural character of the environment to the extent we have found it to be.

[352] We could tentatively speculate that a marina that was smaller again (by which we mean very significantly smaller), and had floating breakwaters, might have been a better fit, but we stress that this is speculation because such features were not modelled for us or discussed in evidence.

[353] In his closing submissions, Mr. Brabant accused Ms Gilbert of having “romanticised” the environment of the bay. We think that criticism was ill-founded. We suspect he was referring to passages of evidence like her description of the boats on swing moorings as offering a placid scene. At face value, such language might appear a little romanticised, but we find that it is not, particularly when one reads the agreement reached by the experts concerning the swing moorings as follows:

The visual values of the swing moorings include:

- Their charm and their history as an established part of the bay
- How they reinforce the maritime characteristics of the bay
- That the moorings exist in their own right, separately from the transport hub of the bay;

[354] They do not dominate the bay and are visually permeable. We hold that the adverse visual, landscape, natural character, and amenity effects of the proposed marina and parking deck are significant. In the case of the breakwaters and deck they are indeed very high⁶⁸.

⁶⁸ We will address potential effects of night-time lighting in a later section of this decision expressly on that subject, but because the subjects are linked, note here that the limited evidence on night-time effects was inconclusive and does not add any dimension to the findings we make at this point.

[355] We have briefly touched on some alternative locations mentioned in evidence, which the parties invited us to visit. Ultimately all proved largely irrelevant or inappropriate, except perhaps for Kennedy Point. This indeed seemed to be a fairly common view amongst the witnesses.

[356] It is not within the jurisdiction of these proceedings for us to express preferences for one location over another. We can only make findings about the proposal before us, in the Matiatia Bay location suggested for it. The most we can say is that a marina might be a better fit at Kennedy Point, but that view is at best tentative because we received no design or landscape evidence about a marina in that location.

[357] Returning to the task at hand we find that in landscape, visual, and amenity terms, the best that can be said for the Matiatia proposal is that it might be a good idea, but would be in the wrong location.

Effects on Tourism and Recreation

What potential effects (positive or negative) on tourism and recreation might the development of a marina in Matiatia give rise to?

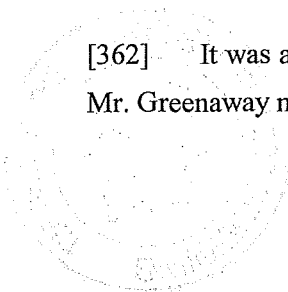
[358] This topic is to some degree allied to the previous one about landscape and related effects, but there are some other dimensions to it as well.

[359] A number of Waiheke residents who make a living in the Island's quite significant tourism industry, gave evidence. Much of that evidence related to traffic and transport pressures that they perceived in the roading network near the wharf, but some of them referred to places to which visitors are taken by tourism and transport operators where good views of Matiatia and the Gulf and Island's out at the head.

[360] The applicant put forward very little evidence-in-chief concerning potential effects, whether positive or negative, on recreation and tourism, other than some fairly generalised claims that the provision of a marina at Matiatia would be of benefit to visitors arriving on boats who might wish to take a short term berth, and provide local residents and some Auckland residents with long term berths from which to be able to conduct recreational activities on the Island and in the Hauraki Gulf.

[361] The issues of potential adverse effects were brought into focus by a substantial statement of evidence-in-chief called by DMI, by Mr. R J Greenaway, a recreation and tourism consultant based in Nelson who has worked throughout New Zealand and holds tertiary qualifications of relevance to his speciality.

[362] It was as a result of that evidence being filed, that Mr. Wardale filed rebuttal evidence, and he and Mr. Greenaway met in conference as an adjunct to the conference of the landscape architects.



[363] In addition to his experience and qualifications as a tourism and recreation consultant, he owns a small keel yacht which he said he would like to moor on a marina because he understands the convenience that a marina offers.

[364] Mr Greenaway conducted a preliminary review of the application to consider whether or not he could support DMI's opposition to the proposal. He made a site visit and held a discussion with a small number of DMI members. He conducted a review of recreation and tourism planning literature about Waiheke and the Hauraki Gulf, and contrasted some of those pieces of literature with information about the Auckland region generally, and the Queenstown-Lakes District as another area in which tourism and recreation are important.

[365] Mr. Greenaway described in evidence a number of publications from which he drew information about the nature of employment in those districts, in particular as relate to the tourism sector. He proffered and analysed business demography data from Statistics New Zealand in this regard, which, in summary, indicate a comparative emphasis on Waiheke over Auckland region, of tree crop growing, beverage manufacturing (wine, in the case of Waiheke), and food retailing. From the figures, he believed that Waiheke Island could be strongly differentiated from the Auckland region, and rather more resembled the business demography of Queenstown-Lakes District. Figures relating to the accommodation and food services sector however tended to indicate that Waiheke is more of day trip destination than Queenstown-Lakes. He said that there were indications that road passenger transport was a key part of the Waiheke business demography, although the statistics were muddled amongst several items.

[366] Mr. Greenaway considered that the employment data for Waiheke paints a picture of local reliance on the visitor industry, with strong employment levels in the retail trade, cafes, restaurants, accommodation, and boutique manufacturing (wine and olive products) sectors, all related to the tourism sector. He offered the opinion that tourism is important to Waiheke Island, although the data did not allow differentiation between domestic and international tourism. On this topic however Mr. Greenaway felt able to point to the evidence of Ms S McCann, an Oneroa retailer targeting the tourism market with gifts and souvenirs, to provide first hand information about this.

[367] Ms McCann said in evidence that she had operated her shop since 1998 and lives on Waiheke Island. She has a Diploma in Business (Tourism) and has been closely involved in the tourism industry on the island, representing Waiheke interests on a wide range of bodies in local and central government.

[368] Ms McCann recorded that there is no readily available reliable data on numbers of tourists visiting the island because the sole passenger ferry operator (at the time of the hearing), Fullers Ferries and sole vehicle ferry operator Sealink have consistently refused to reveal passenger numbers due to alleged commercial sensitivity.

[369] Ms McCann pointed to a 2010 report by Dr Lucy Baragwanath of the School of Environment, University of Auckland, who estimated tourism numbers to Waiheke at that time as between 400,000 and 750,000 visitors per year, which Ms McCann believed would have increased significantly since that time.

[370] Ms McCann talked about the summer high season, with the vast majority of tourists and day trippers arriving on the passenger ferry service at Matiatia. She said that the Waiheke economy had become heavily reliant on tourism, with 38% of people employed in the Local Board area, working in hospitality, accommodation and retail services, all of which are highly dependent on the tourism market⁶⁹. Ms McCann spoke of seeing an enormous growth in numbers of visitors and tourists in the 16 years she has run her shop, and also an extension in duration of the tourism season at each end. In particular (as noted by Mr. Greenaway) she said there had been a massive increase in the number of international tourists, not just from Australia, USA and UK as previously, but more recently from Asian and European countries. She said she speaks with tourists in her shop on a daily basis, so considers this information to be first hand.

[371] Ms McCann told us that Waiheke had won numbers of international awards, for instance in 2013 it was named by the New York Times as one of the 46 places to go in the world. In the same year TripAdvisor named Waiheke as one of the top 10 South Pacific islands to visit. [We note that since the hearing concluded, in October this year, Lonely Planet has named Waiheke Island as fifth in its top ten regions in the world to visit in 2016].

[372] Ms McCann spoke of central government initiatives to attract tourists, particularly Asians. We consider that there can be no doubting that she was right when she prophesied "*I do not expect this growth to stop*".

[373] Ms McCann drew our attention to the Waiheke Local Board Plan (2014), currently of draft status, with its emphasis on creating and maintaining sustainable tourism opportunities and also highlighting the significance of Matiatia as the gateway for tourists coming to the island.

[374] Ms McCann's evidence led into a strongly worded section voicing concerns about the operation of ferries and road transport in the Matiatia hub given the monopoly that Fullers Ferries had on passenger services [at that time]. That alleged monopoly has since ceased, and we imagine that her conclusions now might be different. In any event we are more minded to rely on traffic and maritime experts concerning those matters, so the most use that we have been able to make of Ms McCann's evidence has been her first hand description (supported by some public documents and Mr Greenaway's opinions) about the nature of tourism on the island, including as to the increasing international visitor element.

[375] Mr. Brabant questioned Ms McCann about whether people on the hundreds of boats anchoring in bays near Oneroa might prefer to leave their boats safely in the proposed marina. Ms McCann said that she'd

⁶⁹ Quoting from a demographic report for Auckland Council called *State of Auckland*

thought about that and considered that it might be the case, but that the proposal is simply in the wrong place⁷⁰.

[376] Returning to Mr Greenaway's evidence, he said that there was limited data available to quantify the recreational uses of the western end of the Waiheke Island, although sources do indicate recreation opportunities there. Obvious in the bay are boat moorings and boat launching facilities.

[377] He referred to data published by the Walking Access Commission, which in the Matiatia vicinity identifies only the Matiatia Bay to Owhanake walk, although the accompanying map shows, in addition to the Matietie Historic Reserve on the north side of the bay, the esplanade reserve on the south side.

[378] As to the south side Mr. Greenaway was aware of the Royal Forest and Bird Protection Society reserve Atawhai-Whenua, abutting the Esplanade Reserve and offering three tracks.

[379] The above tracks on the north and south sides of the bay are those referred in the evidence of the landscape witnesses. Mr. Greenaway told us that Forest and Bird Society literature described views from the high tracks [south side] as offering "breathtaking views across Matiatia Bay and beyond". He said as well that the Department of Conservation's "*Recommended Draft Auckland Conservation Management Strategy*" (April 2014) identified the historic reserve [northern side] track as a "local treasure".

[380] Mr. Greenaway told us that Auckland Council gives more detail on walking options on Waiheke Island, in a brochure it publishes, with the first 2 walks mentioned being the 2 Matiatia Bay walks (north and south sides).

[381] Mr. Greenaway reminded us that the south walk is the setting for the important biennial Headlands Sculpture on the Gulf, while the Auckland Council brochure describes the northern walk for the variety of views and local cultural attractions that it offers.

[382] Mr. Greenaway drew our attention to a document published for the Council by Beca Infrastructure in 2012 "*Auckland Recreational Boating Study*". This endeavoured to analyse the makeup by vessel type, of Auckland's recreational boating fleet, and gradual increases in it in recent years. It made a forecast of gradual increases in coming decades.

[383] Mr. Greenaway drew his discussion of the literature together by reiterating that there is only a little data to quantify the scale of importance of Matiatia Bay for recreation, however he considered that his review indicates that its walking options, and its association with the Sculpture event, make it one of a collection of significant recreation settings on the island. He believed that there will be considerable growth and demand in the Auckland Region for facilities to cater for trailerable craft, and while there will be new

⁷⁰ Transcript pgs 804-6

demand for facilities for launches and keel yachts, the expectations for launching facilities for small craft would far out-strip those for facilities for large craft by a factor of approximately 32, according to his studies.

[384] Mr. Greenaway believed therefore that Matiatia Bay should be considered as more than just a transport hub, but also as a recreation and tourism destination by virtue of its natural qualities and its development for public access and events.

[385] Mr. Greenaway referred to the Baragwanath study referenced by Ms McCann, and advised similar data are provided in a 2012 document issued by the Waiheke Local Board called "*Recreation Waiheke*", which estimated a visitor range of 500,000 to 700,000 per year.

[386] That publication estimated that 80% of travellers were visitors to the island during the peak period of the year, and that 91% of those were from the Auckland region; 75% were day trippers; and 75% had previously visited the island. It recorded as well that about two thirds of the parties surveyed indicated that their main reason for visiting Waiheke was for reasons that could be described as a "holiday day out", that is attending a special event, visiting wineries, restaurants/cafes, beaches, walking, and holidaying in general. More than half visited beaches and natural attractions, and in that group visiting beaches and walking the paths on Waiheke were by far the most popular activities. For those with holiday homes on Waiheke, the beaches and walkways registered especially prominently in the decision to visit. Events were popular draw-cards, with particular reference to the Headlands Sculpture on the Gulf, which at that time attracted approximately 25,000 day trippers and was highly commended. Most visitors were happy with their Waiheke excursion, and in particular the natural beauty of the island and its beaches, the friendliness of locals, and the high quality of dining experiences.

[387] Mr. Greenaway reported that the authors identified some key issues from the survey research, amongst them that Waiheke tourism relies heavily on repeat business from Auckland residents, and that the appeal of Waiheke relates to a combination of natural and cultural attractions.

[388] Mr. Greenaway referred to a 2012 Auckland Council Report "*Towards an Economic Valuation of the Hauraki Gulf; the finding of an Eco-Cluster?*", which found as follows:

The Hauraki Gulf area (Auckland + Coromandel) represents 43% of the country's international nature-tourists trips, and 23% domestic nature-trips. This gives the Hauraki Gulf area an overall average of 26% country's total nature-tourism trips, with Auckland comprising 17% of the national total...

When nature-based trips to the Hauraki Gulf are compared to total tourist trips in New Zealand (including both nature and non-nature-based), they represent 30% of total international trips, 5% of total domestic trips, and 6% of total tourists trips (domestic + international)

[389] The report recorded that the top three nature-based tourist activities in Auckland were described as beaches, scenic drives, and cruises. This analysis did not include Auckland-based day trippers to Waiheke who do not stay overnight.

[390] Mr. Greenaway spoke of his visit to Waiheke in June 2014, noting that two tourism viewing sites above Matiatia happened not to include views of the ferry terminal, but would include the proposed marina, if built, as a highly conspicuous element of the scenery. These are the vistas from Delamore Drive and the [former] position of the Rocky Bay Store sculpture on Nick Johnstone Drive. Mr. Greenaway provided us with photographs demonstrating these features, illustrating the point that topography and vegetation screen views of the existing ferry terminal complex from those locations.

[391] Mr. Greenaway provided us with his key conclusions from the data as follows:

- a) Waiheke Island needs to retain and further develop its differentiation from an “Auckland experience” to sustain its market appeal to its core market – Auckland residents. It also needs to consider the appeal of nature-based tourism to international visitors;
- b) Walkways and beaches on Waiheke Island are critical draw cards. The likes of the Headland Sculpture on the Gulf biennial events are very important, and the quality of the setting within which these occur needs to be carefully managed⁷¹;
- c) Pressure on visitor services is a considerable issue during peak periods, and if not well managed, dissatisfaction with crowding and poor access to transport is likely to damage the reputation of the island as an easy day-trip destination. This is a key consideration considering the importance of repeat visitors to the island tourism market.

Tourism and recreation planning in the Hauraki Gulf

[392] In view of the importance (he said) of provisions in the Hauraki Gulf Marine Park Act 2000 (“HGMPA”), Mr. Greenaway lamented a lack of planning initiatives other than some very general documents and early attempts at the writing of a Spatial Plan. At the time he gave his evidence it was anticipated that a Spatial Plan called “*Sea Change – Tai Timu Tai Pari*”, sponsored by Mana Whenua, Auckland Council, Waikato Regional Council, DOC, Ministry of Primary Industries, and the Hauraki Gulf Forum, would be issued in September 2015. [We note from its website that it is now anticipated that the plan will not emerge until sometime in 2016]. His anxiety may be well placed, but it would not be appropriate to say that the applicant should wait for that exercise to advance or be concluded before bringing its application. If the proposed spatial plan had been available for our consideration, it would only have been as a non-statutory document under s104(1)(c)RMA, a point made by Ms Bremner in rebuttal of some of Mr Greenaway’s evidence.

[393] Mr. Greenaway referred to some other non-statutory documents concerning regional growth and regional open spaces, as apparently stressing a need for preservation and protection of natural character of

⁷¹ Mr. Greenaway mistakenly said “annual”, but it is commonly known that the event is biennial.

the coastal environment. We are again minded to place more emphasis on statutory documents (and the HGMPA) which witnesses referred to us and which we have reviewed elsewhere in this decision. Suffice it to say that the documents apparently stress provision of recreational open space and networks including walkways, which is an acknowledged modern trend that we take account of.

Mr. Greenaway questioned

[394] When pressed in cross-examination by Mr. Brabant, Mr. Greenaway acknowledged that his evidence had not dealt with issues like any need for a marina at Waiheke and why Matiatia would be an appropriate location. Mr. Greenaway said that his brief had not been to include such a study, but instead to consider effects in this location, of a marina development. He considered that if he were to have considered the need or appropriateness of a marina at Matiatia he would have needed to make an assessment of alternate locations, and assess potential effects of such sites⁷².

[395] We do not feel bereft of such evidence. There was evidence called by the applicant, particularly from Mr. Wardale, from which we can assess such information, and the joint witness statement signed by Mr. Greenaway and Mr. Wardale makes mention of this by way of recorded agreement amongst other things, like the potential to contribute positively to recreation values of boating, permanent and visiting, and public access to the breakwater.

[396] Interestingly, Mr. Greenaway was tested by Mr. Brabant on his reasons for advising the Court that putting boats into a marina in place of boats on the moorings would have important adverse effects on tourism values. Mr. Greenaway resolutely responded that it was his opinion that in terms of creating a tourism experience on Waiheke Island that seeks to differentiate itself from Auckland (the latter being a more highly developed setting), on Waiheke you come to a completely different experience-setting, featuring a low level of development and selling itself on that “slow down”. He said that having structures that are similar to those people had left [in Auckland] would be inappropriate. He said in particular, in answer to a further question, that he was referring to the highly developed port area, wharves, jetties, the Viaduct Basin, and possibly Westhaven Marina. He believed that Auckland residents in particular would be seeking an alternative experience on an island setting.

Analysis

[397] We find that the principal value of Mr. Greenaway’s evidence was to underline the importance of views from the northern and southern walkways as discussed in the landscape section of this decision. He also pointed to the importance of the regularly frequented tourism lookouts at Delamore Drive and Nick Johnstone Drive, which weren’t the subject of viewpoint evidence, but in respect of which he provided photographs himself. [We also note that the Delamore Drive lookout is essential up the slope above viewpoints 4 and 5 in the landscape evidence, and was visited by us, and we agree with Mr. Greenaway’s

⁷² Transcript pgs 1300-2

assessment of it that any foreground view of the ferry wharf area is obscured by vegetation on landform, but that the marina, if consented, would appear strongly in the view].

[398] Mr. Greenaway, by reference to literature, and Ms McCann, have assisted us with some approximate quantification of levels of use (or audience size) on the northern and southern walkways. The southern walkway, as is common knowledge, is frequented by very large numbers of people during the biennial sculpture event, and both tracks are the subject of steady use by people particularly in the peak summer period, which appears to be extending at each end into spring and autumn.

[399] Some brief but unchallenged statements by Ms J M Coutts about her long term involvement with the Forest and Bird planting on the southern reserve, and the trails being very popular attractions for visitors and locals, supported this aspect of the evidence of Mr. Greenaway and other local residents. Similarly with the evidence of Ms J M Pemberton, who spoke of her late husband's family's long term involvement with the farmland on the northern side of the bay, his gifting of the historic reserve, his wish to re-vegetate the land but lack of financial ability to do so, and its subsequent sale and re-vegetation during the later subdivision stages.

[400] We have considered Mr. Greenaway's evidence, and that of the local witnesses mentioned, alongside the rebuttal evidence offered by Mr. Wardale, who told us that he did not consider a "boutique marina" such as that proposed would be out of place on an island and by implication appropriate only in a city. Mr. Wardale said that he had visited several island and other destinations where a marina supports and contributes to the overall offering at that destination. He had visited Hamilton Island off the eastern coast of Australia, where people go to enjoy beaches, relaxation and other recreational pursuits. He said that people can get to the island by water, either by ferry or on private vessels, and that the island's main ferry terminal is adjacent to and in fact a part of a marina. He exhibited 2 photographs from elevated positions showing these features, which we noted also showed significant land-based development including high rise structures. He had also done some research about a place called Hilton Head Island in Georgia, USA, where he said marinas formed part of a tourist offering that included, arts, bike rentals, family fun, fishing and water sports, golf park, tennis, and worship.

[401] We were not much assisted by the examples offered by Mr. Wardale. We did not hear detailed comparisons as between Hamilton Island and Matiatia, but consider from looking at his photographs that there are major points of difference, particularly in relation to development intensity. It did not appear that Mr. Wardale had been to Hilton Head Island, and we were shown no photographs of that.

[402] A positive effect anticipated by Mr. Wardale, the provision of a timber boardwalk from the marina car park to the historic reserve behind the northern beach, was in fact later withdrawn when the configuration of the proposed car park was changed.

[403] Returning to our finding that the evidence of Mr. Greenaway and the named local residents strongly underlined the evidence of DMI landscape witnesses about the value or view of the northern and

southern walkways, and the seriousness of adverse effects on them from the proposed marina, we now consider whether there would be further adverse effects on tourism and recreation.

[404] We find that the detailed analysis by Mr. Greenaway, supported by a considerable body of literature, and not significantly controverted by witnesses for the applicant or under questioning, and supported as it was by the local resident witnesses, points strongly to potential adverse effects on the tourism values of Matiatia and indirectly on Waiheke Island beyond it, that we consider would be more than minor.

[405] Effects on recreation, particularly use of the walkways and reserves, produce the same result, because they are closely aligned with the tourism issues.

[406] These findings need however to be considered alongside benefits that might flow for tourism and recreation from the provision of a marina in Matiatia, the potential for which was acknowledged in the joint witness statement of Mr. Wardale and Mr. Greenaway

Positive effects of the proposed marina for tourism and recreation

[407] Mr. Wardale told us in his evidence in chief that against the then prospective provision of a 160 berths ranging in length from 10m to 20m, the applicant had received registration of interest from 241 people without there being any active marketing or request for such registrations. He considered that this demonstrated demand. He supported the evidence of Mr. J Dilley, harbour master, that the marina would provide an improved utilisation of the water area currently occupied by 53 swing moorings.

[408] Mr Wardale provided us with an update at the start of the 2014 hearing, reporting on responses received to requests for confirmation sent out to those who had earlier registered interest. 113 (45%) responded, of which 71% confirmed continuing interest. He offered an assumption (questionable in our view) that the same percentage of the balance of registrants would confirm interest. He said that all who responded provided an address on the island, but 78% of those on the original list offered an Island address. Of those confirming, 51% had a mooring at the island.

[409] Under questioning Mr. Wardale conceded that people who had registered interest had not been provided with any costing for the acquisition of berths⁷³.

[410] For present purposes, and given that the proposal has been reduced to a 112 berth marina, we are prepared to assume that there will be some demand for the berths. We actually think that assumption to be generous to the applicant in the circumstances in which people do not yet know how much the berths will cost, but we use that as a starting point for analysing benefits or positive effects.

⁷³ Transcript p46

[411] Furthermore, in a circumstance in which final take-up by identifiable purchasers is unavailable, it is hard from the information supplied to ascertain the relative proportions of take-up as between Waiheke residents on the one hand and Auckland residents on the other (and perhaps also others beyond Auckland).

[412] If one were to start with an inference or assumption that there might be an approximately equal split between ownership by Waiheke residents and non-Waiheke residents, one might start to understand that the potential benefits of attracting non residents as visitors because they can utilize their marina berth, is quite limited. In fact, because the proposed marina would be so small, the potential benefits will frankly also be quite small.

[413] An unidentified number of berths might be held available for use by occasional visitors in contrast to being used by berth holders. Again, given the very small size of the marina, those benefits would logically be quite confined.

[414] Public access out onto the breakwater to provide mid-bay viewing would be a moderately significant benefit (positive effect). Similarly with the offer of a marina berth for use by the Coastguard service.

[415] When these positive effects (two quite significant but the others quite minor) are placed alongside the figures of visitors arriving annually by ferry into Matiatia (hundreds of thousands), it must logically be said that positive effects on tourism and recreation from the establishment of the marina would be very small.

[416] Certainly, as conceded by Mr. Greenaway under questioning by Mr. Brabant, there are potential benefits for boat owners who presently need to anchor in Matiatia or other nearby bays, to gain access to physically secure berthage and thereby enable them to contribute to tourism and recreation activities on the island. However, once again we find such benefits to be comparatively small, indeed very small in comparison to the contributions no doubt made by the hundreds of thousands of visitors arriving by ferry, who, we agree with Mr. Greenaway, would in fairly large measure be looking for an island experience and point of difference with the Auckland conurbation.

Archaeological issues

[417] Slightly related to Maori cultural issues which follow in the next section of this decision, was the input from 3 qualified archaeologists about archaeological sites in the bay, principally on the foreshore. These witnesses were Mr. D Prince for the applicant, Ms M Plowman for Auckland Council, and Dr H-D Bader, called by DMI.

[418] A relatively high level of agreement was reached by these witnesses in their conference, except as to a feature of the evidence of Dr Bader that concerned a methodological approach that the other witnesses did not subscribe to.

[419] Dr Bader's additional methodological thinking apart, the evidence filed by each of these witnesses was concerned with physical archaeological investigation in the bay, in particular with finding and recording evidence of historical Maori occupation.

[420] Subsequent to a conference in late August 2014, the 3 archaeological witnesses recorded their agreements as follows:

- a) The graphic information provided by Ms Plowman as her annexure C to her evidence-in-chief, is an accurate representation of the recorded extent of the historic heritage and the archaeological sites in the vicinity of the proposed marina and specifically within the intertidal zones and on the low coastal bench immediately behind the foreshore;
- b) The historic heritage sites recorded in the northern part of Matiatia Bay will not be affected by ground disturbance associated with the construction of the proposed marina development. [We note that the likelihood of any such effect would be even smaller since the proposal was reduced in scale, and away from the northern beach];
- c) The experts considered that it would be highly unlikely that there would be any effect on potential unidentified/unrecorded archaeological sites in Matiatia Bay as a result of the proposed development;
- d) They agreed that there have been considerable field surveys in the wider Matiatia landscape around the bay and there is a good understanding of the majority of the remaining archaeological/historic heritage sites;
- e) Mr. Prince and Ms Plowman agreed that the anticipated reduction in wave action as a result of the proposed marina might have a positive effect for reducing coastal erosion. This would have benefits for the existing archaeological/historic sites on the coastal bench. They also considered that the proposed board walk from the (formerly proposed) car park to the historic reserve would remove pedestrian traffic from the known archaeological sites and reduce erosion [the boardwalk has been removed from the proposal along with the previously proposed car park on the rocky foreshore].

[421] The experts further agreed that there is a reported historic settlement in Matiatia Bay, and that it would not be impacted by the proposed marina.

[422] Dr Bader's additional methodological approach is called "phenomenology", which he said melds anthropology and social theory, as discussed by some authors in Europe. At its heart, he said is analysis of how individuals experience the world around them now and in the past. It is apparently a physical distinction between individuals and the outside world which can be bridged through perception, bodily action, movements, emotions, language, and awareness, which are structured and give meaning through systems of belief. Dr Bader advocated its application to the present proposal. He considered that the interface between

seascape and landscape was important in Matiatia, and that the marina would impact onto that interface. The other two witnesses did not agree that this approach was relevant for archaeologists.

[423] Dr Bader considered that the way to use this methodology in Matiatia was to move through the waters of the bay on a small hand-propelled craft, and land on the beach. He considered that unimpeded views from various points in the bay onto the seascape were another important component, and that they already suffered from impediments like moored craft and the ferry landing.

[424] We consider that the phenomenological methodology espoused by Dr Bader, is not a part of the discipline of archaeology known and practiced in connection with investigations undertaken for RMA purposes. If it has a place in cases such as the present, we anticipate it would be addressed by witnesses offering evidence about Maori cultural issues, subject to their being appropriately qualified to do so. Slightly similar issues will arise in the next section of this decision concerning Maori cultural values.

[425] Ms Plowman and Mr. Prince were questioned by Mr. Littlejohn and Mr. Enright about the potential for there to be other archaeological discoveries around the foreshore in the future. We do not consider such questioning, and the answers (careful concessions) added much to the agreement reached between all 3 archaeologists that the marina would be unlikely to have an impact.

[426] Slightly more controversially, Mr. Prince was questioned by Mr. Enright⁷⁴, about the potential for Koiwi (human skeletal) remains to be found in the tidal zone. Mr. Prince acknowledged that could be a possibility, but they are more likely to be found on the beaches as they erode out of the foreshore. This line of questioning was not taken further with the archaeological witnesses, we think for good reason. It arose out of evidence that we will consider in the section of this decision on Maori cultural issues, from Ms M Te Waeroa and Ms L Tukua. Ms Te Waeroa in her evidence in chief had made a comment that a local farm manager had in the past commented that the “high tide mark had risen 5 chains within Matiatia Bay since a [certain deed] had been written protecting Waahi Tapu Urupa”.

[427] That assertion gave rise to rebuttal evidence being called by the council from a coastal processes engineer, Mr. R A Reinen-Hamill. He said that the alleged anecdotal record about such rise of the high tide mark could not be accurate. He said that the recorded increase in sea level at the tide gauge at Auckland Port and historical aerial photographs of Matiatia, are evidence that there has been no significant shoreline variation.

[428] Mr. Reinen-Hamill said a chain is an old unit of length in land surveying, and is equivalent to 20.12m. Five chains would therefore be equivalent to 100.6m. Based on historic measurements of Mean Sea Level at Auckland Ports since 1899, there has been an average increase of about 0.1m.

[429] Mr. Reinen-Hamill considered the possibility that the observation referred to was a reference to the horizontal excursion of the high tide, rather than vertical movement, however with that interpretation, the

⁷⁴ Commencing transcript p299

observation would mean that the high tide line has moved around 100m landward over the last 100 years within Matiatia Bay, and reference to historic maps, including one offered by Ms Tukua from 1899, indicated that that had not occurred. Using a technique of overlaying maps, he considered that the present day shoreline was in a similar position to that shown on the historic maps. This was also born out in photographs exhibited by various witnesses including the applicant's planner Mr. M Dunn, and landscape architect Mr. Scott.

[430] The issue about Koiwi potentially being found in the seabed, was, we believe, of greatest concern to Maori parties when the earlier, larger, proposal was before the Court. That involved considerable excavation quite close inshore to enable the establishment of the long inner pier and the use of materials won from the seabed in establishment of the reclamation for a large car park.

[431] The dredging and reclamation have of course gone from the proposal. The archaeological witnesses cannot help us any further than they have with the agreements they reached, and we find that the marina as now proposed will not have adverse effects on known archaeological sites on land, and is unlikely to have any adverse effect on archaeological sites on land that may yet be discovered. Any residual issues about the potential for adverse effects on Maori cultural interests in the marine area, will be considered in the section of this decision relating to those matters.

Maori Cultural and historic heritage matters

[432] It was generally agreed between the archaeological experts that there is clear evidence of historic heritage and archaeological sites in the land area adjacent to Matiatia Bay. We also accept that the very existence of the Matietie Historic Reserve (a significant feature of the northern bay), signals the importance of this area from an historic and cultural point of view, and has the engagement of s6(e) and (f) and 7(a) s104D(1)(a), and s104 of the RMA.

[433] There was agreement by the experts that this particular landscape has already been substantially altered by human activities. Where the archaeological experts parted company was on the methods by which archaeological landscape can be investigated with particular reference to "phenomenology" and the interface between the seascape and the landscape as a feature of the archaeological history⁷⁵. We have described Dr Bader's theory about that, in the section of this decision dealing with archaeological matters.

[434] However, with the benefit of cultural evidence provided by a number of witnesses not all of whom we have specifically named, the Court finds that the historical and cultural connection between the sea and land is as obvious today as it would have been in both pre-European and early European habitation of this part of the island. The northern bay offers a safe harbour for launching and retrieving small craft and with the location of Moke Moke Pa site at this headland that connection is understandable. This is evidenced more

⁷⁵ Joint Witness Statement Archaeology 20 August 2014

recently by the subsequent location of the scheduled historic farm woolshed from where the wool was transported by sea, and the more recently-established boat haul out facility.

[435] The cultural witnesses agreed that in terms of mana whenua, Ngati Paoa hapu, Ngati Hura, Ngati Kapu and Te Urikaraka are recognised at Matiatia Bay and that as kaitiaki, have an enduring responsibility to protect and preserve the mauri of the Bay, both physical and spiritual. Ngati Paoa Iwi Trust (the Trust) is recognised as the mana whenua authority for Ngati Paoa for these proceedings and other purposes.

[436] There was agreement that Matiatia Bay was a mahinga mātaihai at least until the late 1980s and that fish can be caught in the bay now by net and line, but shellfish are no longer regularly harvested in the inner Bay. There was some debate (centring to some degree on the cultural evidence called by the applicant from Mr R P Rikys) about tikanga regarding the gathering of kaimoana across a claimed waahi tapu area, with some witnesses asserting the whole of the bay to be so classified. However, this was not helpful to our considerations and we accept that tikanga in some cases is generic across iwi but there are also differences among iwi. We do not enter that debate as it is not ultimately necessary for our decision.

[437] We heard from Moana Te Aira Karaka Te Waeroa on behalf of the Trust. She set out for the court her ancestral connections to Matiatia and Waiheke as her turangawaewae, and her work and involvement as kaitiaki. She has concerns for the ongoing development of Matiatia generally and the impacts it is having on her ancestral connection. More particularly in relation to this proposal, she explained her understanding of burial grounds at Matiatia now succumbed to the sea which would be disturbed by dredging [a feature of the proposal now withdrawn].

[438] Mr Wilson (also speaking for the Trust), provided us more detail about the Treaty of Waitangi claims which are being pursued by Ngāti Paoa, in which he has the particular role as the mandated negotiator on behalf of the Ngāti Paoa people. We were informed that the Crown acknowledged Ngāti Paoa's interests in the Matietie Historic Reserve which was gifted to the Department of Conservation by the then Matiatia Farm owner Mr Rob Delamore in August 1987⁷⁶. We have described this reserve elsewhere but note for present purposes it encompasses MokeMoke Pa and the seaward edge of the land leading from there around to the north-eastern part of the bay at the end of Ocean Road.

[439] Mr Wilson explained the Maori cultural view of things physical and spiritual and the interconnectedness which is relevant to kaitiaki. In this regard, he addressed the potential ecological impacts of the marina development through leaching/discharge of contaminants, the imposition of the breakwaters on the natural functioning of the bay and the potential impact on koiwi which are, based on oral history and discovery, likely to be buried by the water's edge (the tide line of which is thought to have moved inland, an aspect we consider in the section of this decision on archaeological matters)⁷⁷. His concern was that

⁷⁶ Pemberton EIC page 5 paragraph 26

⁷⁷ Wilson EIC page 9

potential adverse effects would detrimentally impact upon the Mauri of the bay and respect for his peoples' ancestors. This would in turn impact upon the mana of the people who are kaitiaki as they would be unable to fulfil their guardianship role. Mr Wilson summarised his evidence with the concluding statement that the marina development is opposed by Ngāti Paoa for the fact that it will have associated detrimental effects on their cultural values, history, ancestral sites, waahi tapu and taonga⁷⁸.

[440] A key tenet of his evidence and that of other cultural witnesses was that the land below mean high water springs is as important as the land above. This was particularly so due to the claimed advance of the sea and its impact and encroachment upon the land where waahi tapu and urupā are situated. Mr Wilson explained that there is an intangible value of sacredness of what is left⁷⁹. The concern was that this will be disturbed through construction of the marina on the sea bed and through the additional activity generated by the marina to a greater extent than natural processes.

[441] Dredging is no longer contemplated by the applicant, so much of the potential for disturbance of the seabed now falls away. However, in his supplementary statement for the reconvened hearing in July 2014, Mr Wilson continued to express concern with the encroachment of large scale infrastructure on Ngāti Paoa waahi tapu. He set out for us the scope of waahi tapu which could be impacted upon. He referred to the stories handed down through his people which provide explanation of the surviving remnant of the cultural landscape of Matiatia Bay and the cumulative adverse effect development of the area has had on the cultural identity and very foundation of hapū and whānau⁸⁰. He noted that Ngāti Paoa has not previously had the opportunity to voice their concerns at the historical development of Matiatia and this has caused suspicion and pain to local Ngāti Paoa⁸¹.

[442] Lastly Mr Wilson concluded that even in its amended design, the location of the marina will cut through the historic marine pathways, affect the mauri (life essence) of the bay and encroach on waahi tapu of Ngāti Paoa⁸².

[443] We accept the cultural history and significance of this part of Waiheke to Ngāti Paoa and the relevant hapū and whānau. It was told in detail and from the heart. The physical remnants of that history are clearly represented in the landscape of the Bay. We also accept that disturbance of the seabed particularly proximate to land is of particular sensitivity to Ngāti Paoa. The amended marina design would address this concern to quite some degree (dredging not now proposed), and we accept that conditions of consent to provide protocols for limited disturbance (piling for instance) would be appropriate mitigation and address in part, kaitiakitanga. We also consider that the creation of the breakwaters and placement of piers and boats

⁷⁸ Wilson EIC final paragraph last page

⁷⁹ Wilson EIC page 9

⁸⁰ Wilson Supplementary Statement par 13

⁸¹ Wilson Supplementary paragraph 12

⁸² Wilson Supplementary paragraph 17

would have the potential to reduce wave action on the foreshore, and hence reduce erosion of burial sites. The latter would be a positive effect.

[444] However, the breakwaters will significantly alter the relationship of the bay to the land in a way which because of their sheer scale, cause us to agree that the historic marine pathways (at least visually and as a direct line) would be severed. We cannot see a way around this unless (perhaps) a floating structure were to be employed where some visual connection might be maintained.

[445] We have not heard from the applicant as to how the relationship of Maori and their culture and traditions with their ancestral land and water (including interface which must be a relevant consideration) waahi tapu and other taonga, is to be addressed by the marina development. There was no recognition of the relevance of the iwi concerns in the design or layout. We acknowledge that some mitigation has been achieved in the amended design through the downsizing of the marina and its withdrawal from the foreshore, but we see no specific attempt at recognition of the cultural significance of the area in the proposal. This is not surprising given the absence of meaningful consultation.

[446] Given the national importance of this cultural relationship and the historic heritage features in the immediate area of the marina, we conclude that the proposal would not give appropriate attention to these matters and would be contrary to s5 and s6 (e) RMA as to the relationship of Maori and their culture and traditions with their ancestral lands, water and other taonga, and 7(a) RMA (kaitiakitanga). Hand in hand with that finding must be one that the proposal would have more than minor adverse effects on those aspects of the RMA definition of "environment" that are concerned with people and communities and social and cultural conditions affecting them.

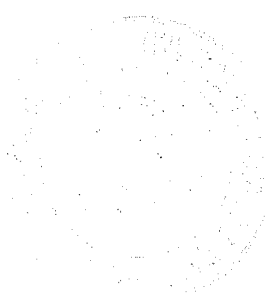
[447] There can no question that Matiatia Bay has high tangible and intangible values for Ngati Paoa, the basis for which we find to be accurately recorded in the operative district plan in clause 1.3.5.2:

Waiheke is the ancestral home of Ngati Paoa. It is recorded that Ngati Paoa occupied Waiheke from as early as the 18th century and continue to do so and therefore are recognised as *Ahi kaa* of the islands and in particular, Waiheke.

[448] There is a relevant policy on the district plan, 3.3.4.8, expressly on point:

By recognising and providing for the relationship between Ngati Paoa, the ancestral lands and water, sites, Waahi Tapu and other Taonga.

[449] We do not think that any of this was really in dispute in the case; rather matters of detail and interpretation were raised on behalf of the applicant by Mr. Rikys.



[450] A key word in s6(e) RM, is “*relationship*” this was recognised in the following passage from the decision of the Environment Court in *Ngati Hokopu ki Hokowhitu v Whakatane District Council*⁸³, with which we agree:

... section 6 (e) is not concerned with Maori’s ancestral lands, water, sites, Waahi Tapu and Taonga in themselves, but with the relationship of Maori and their culture and traditions with those things. The Maori word for relationship is Whanaungatanga... of all the values of the Tikanga Maori, Whanaungatanga is the most pervasive. Denotes the fact that it in traditional Maori thinking relationships are everything – between people; between people and the physical worlds; and between people and the Atua (spiritual entities). They glue that holds the Maori world together as Whakapapa identifying the nature of relationships between all things.

[451] Mr. Wilson, whose evidence we have already to referred to, was ultimately acknowledged by Mr. Rikys in his rebuttal evidence⁸⁴ as having the Whakapapa and credentials to speak on behalf of Ngati Paoa Iwi.

[452] Leaving aside semantic arguments amongst counsel about the relevance of “cultural landscapes”, but noting that the term is employed in the NZCPS⁸⁵, we sense that such encapsulates the matters in section 6(e) and 7(a) RMA.

[453] We find elsewhere in this decision that the evidence on behalf of Ngati Paoa concerning changes in position of the foreshore in the last century is incorrect. That matter aside, we find that the evidence of the Ngati Paoa witnesses, Ms Te Waeroa, Ms Tukua, and Mr. Wilson powerfully draw on Whakapapa and Tikanga and demonstrate to our satisfaction their links with the land and water as an inextricably linked unit in Matiatia Bay. Some examples include Mr. Wilsons statement that sacred sites “*are our history books...necessary for spiritual existence and survival*⁸⁶”; the statements by all three to the effect that the duty of guardianship for the bay is inter-generational and it rises from ancestral and deity linkages, and that duty continues despite alienation of tribal lands in the past⁸⁷; Whenua and Moana (land and water) are not separate but linked, and as important as each other⁸⁸; physical loss or destruction of Koiwi does affect the Wairua⁸⁹.

[454] From our earlier discussion of statutory instrument provisions, we focus on and accept the importance of:

- Objective 3.3 of the Operative ARPS, requiring appropriate priority to be given to the relationship of Tangata Whenua and their culture and traditions with their ancestral Taonga when this conflict with

⁸³ (2002) 9 ELRNZ 111

⁸⁴ At para [33]

⁸⁵ For instance in policy 10 (2) f

⁸⁶ At para 28

⁸⁷ Wilson at Para’s 10-12, Tukua at para 1, Te Waero at 6,46 and 47

⁸⁸ Tukau at para 1, Te Waero at para 46

⁸⁹ Wilson at para 31, where he also refers to “an intangible value of sacredness”

other values (Taonga being defined in the ARPS as including Te Reo, Waahi Tapu, waterways, fishing grounds, mountains and place names);

- Policy 6.4.1 (d) of the ARPS with its reference to natural and physical resources of the coastal marina area being of special spiritual, historical and cultural significance to Tangata Whenua;
- Policy 3.3.4.8 of the operative district plan as previously referred to.

[455] As we have already indicated, certain provisions of Part 2 of the act are strongly engaged. We should point out however, as the Court did in *Verstraete v Far North District Council*⁹⁰ that none of those matters provide a right of veto or priority over other values pertinent to achieving the purpose of the Act where such matters require to be considered.

[456] We have already referred to the evidence of Mr. Rikys as addressing matters more of detail and interpretation than major substance concerning the relationships of Ngati Paoa with Matiatia Bay. Beyond that, we must say that we were quite uncomfortable with much of his involvement, particularly under questioning, when on many occasions he had difficulty providing direct and clear answers.

[457] We need to question whether the proposed marina would recognise and provide for the relationships that we have described, and whether it would take account of Kaitiakitanga. The short answer is that it would not, and in large measure this finding parallels our finding in the landscape section of this decision, that the proposed marina would essentially march across much of the bay between the existing wharf and the northern shore. So too our findings in relation to discharges into the water column and seabed of chemical anti-fouling paints on vessels.

[458] We stress that we have yet to make findings about the relative weight to be accorded these aspects of our decision, which we shall come to towards the end of the decision.

Traffic/Transport

What are the effects of marina traffic and activity on the transport gateway at Matiatia?

General

[459] Waiheke Marinas Limited originally designed its marina to offer 160 marina berths and 17 pile moorings, but after considering the opposition to the proposal, revised the design to cater for 112 marina berths and 12 pile moorings. Very considerable debate had raged in the first hearing concerning the applicant's intention that 55 carparking spaces be provided just north of the "keyhole", the turning area at the terminus of Ocean View Road by the wharves. With the reduction in size of the marina, the applicant

⁹⁰ (2013) 17 ELRNZ 206

ultimately elected to seek consent for 39 parking spaces on a suspended deck in the CMA, also proximate to the keyhole. We can now focus on the evidence about the reduced proposal, drawing on some of the base evidence heard last year to the fairly limited extent necessary.

[460] Mr D F Mitchell, traffic engineer called by the applicant, assessed the parking requirement for the revised proposed marina as being the 39 parking spaces now applied for. He based this figure on surveys of similar developments.

[461] Ocean View Road descends to Matiatia from Oneroa village to give access to the ferry services to and from Auckland. Commuters generate a significant parking demand near the wharf. There are eight nearby parking areas with a parking capacity of 835 spaces. Of those, 253 are leased spaces, 3 are reserved for existing mooring holders, and there are 2 disabled parking spaces. (Mitchell EIC paragraph 44). There are also varying maximum parking durations. By the middle of the day during weekdays most of the parking spaces are occupied. (Mitchell EIC paragraph 37).

[462] Commuters and visitors to Waiheke Island are also serviced by public transport, shuttle cabs, taxis, rental cars and private vehicles. These services have drop-off and pick-up locations near the wharf.

[463] Ocean View Road ends in two small 'in series' roundabouts; i.e. one after the other. The first roundabout forms the end of the road for general public use. Private vehicles drop off or pick up their passengers just before this roundabout or just after it. Buses and other public transport vehicles proceed through the first roundabout and load or unload in the approaches to the second roundabout (the origin of the name "keyhole" no doubt because in plain view it resembles the shape of one). All of the area is public road but signage dictates its use. At peak times an Auckland Transport parking warden oversees the activity.

[464] During the period just after the arrival of a ferry or just before its departure pedestrian numbers and vehicular traffic make the area very busy and at times congested. With two ferry services now operating, timetables that are offset from each other may have slightly flattened the peaks of activity which is now more continuous than in the past.

[465] Access to the proposed parking deck for the marina is proposed to be from the very end of Ocean View Road after the second roundabout through a barrier arm controlled entry and exit way. Marina traffic would then need to negotiate both roundabouts and opponents consider this adds intolerably to the existing congestion in this confined location. Opponents also contend that overflow parking demand from marina activities would aggravate an already acute parking shortage.

Parking Demand

[466] Marina parking demand for the 160 berth marina was agreed by the traffic experts during the weekday peak parking demand to be 55 spaces. (Joint expert witness statement Traffic and Transport 28 Aug

2014 paragraph 10). Mr Mitchell has estimated a proportionally lower demand for the 112 berth marina of 39 spaces. (Mitchell supplementary EIC para 11). We expect the agreement of the experts would continue to apply to the proportionally reduced parking demand. In the same vein peak marina (112 berths) parking demand would be 47 spaces and weekend peak demand would be 34 spaces.

[467] The experts agreed that at times of peak marina (160 berths) demand for parking when it exceeded the dedicated parking area, there would be adequate spare capacity within the public parking area to accommodate the overflow. (JWS 28 Aug 2014 paragraph 10(c)). We expect that would apply even more to the smaller marina.

Trip Generation

[468] Additional trips generated by the marina were assessed by Mr Mitchell and were based on surveys taken at Whitianga Marina. For the 160 berth marina the experts agreed that the trip generation estimate is an appropriate basis of design for marina-based vehicle movements. (JWS 28 Aug 2014 paragraph 7(a)).

[469] For the reduced marina size of 112 berths we expect those figures to be reduced proportionally and to remain agreed by the experts. The trip generation estimates therefore become:

Peak marina demand: 196 trips per day (40 trips per peak hour).

Summer holiday weekend demand: 126 trips per day (26 trips per peak hour).

Regular summer day demand: 119 trips per day (24 trips per peak hour).

[470] The effect of these additional trips on the operation of the 'keyhole' at Matiatia remained a matter of contention.

Traffic Effects

[471] Surveys of the existing traffic entering and exiting the 'keyhole' were undertaken by the applicant, and the experts agreed that the results appropriately represented the existing situation. (paragraph 8(b) JWS 28 Aug 2014).

[472] Traffic generation by the marina during the peak traffic hour is estimated at 0.23 movements per berth. (Mitchell EIC paragraph 53). For 112 berths that is 26 movements per hour.

[473] The effect of this additional marina traffic on existing traffic on Ocean View Road is estimated to be 5% during weekdays, 8% during weekends and 6% on holidays. (Pro-rated for the smaller marina of 112 berths from Mitchell EIC paragraph 54). There did not seem to be any serious challenge to the conclusion that these increases were small.

[474] At the roundabout before the 'keyhole' between 7.00am and 9.55am there were 202 vehicles turning when surveyed. (Mitchell supplementary EIC paragraph 37). That represents 202 movements into the roundabout and 202 movements out during the almost 3 hour period. On an hourly basis that represents 139 vehicle movements into and out of the roundabout.

[475] Assessed vehicle movements into or out of the marina (112 berths) on an average peak summer weekday hour were assessed at one movement each 2.4 minutes or 25 vehicle movements in the hour. The average peak weekday hour vehicle movements were 12. (Mitchell supplementary EIC paragraph 26). At other times in the working week marina generated traffic would be less.

[476] Mr M J Apeldoorn, a traffic engineer also called by the applicant and who used Mr Mitchell's survey results, considered the effects of introducing marina vehicle movements into and out of the marina car park. He concluded that the marina generated vehicle movements would have a negligible effect on traffic (including public transport and tourism vehicles) moving through or around within the 'keyhole' area, either in the third busiest design week or on the busiest individual day. (Apeldoorn Rebuttal 23 Sept 2014 paragraph 13).

[477] On the question of marina traffic disrupting the parking and "un-parking" of public transport in the 'keyhole', a matter raised by Mr A Karndacharuk for Auckland Transport, Mr Apeldoorn concluded that there would be a 'less than minor effect'. (Apeldoorn rebuttal 23 Sept 2014 paragraph 19).

[478] Mr W Shumane, a traffic engineer with the Auckland City Council, also agreed that the effects of marina-generated traffic through the 'keyhole' would be negligible. (Shumane supplementary statement 6 July 2015 paragraph 19).

[479] On the other hand Mr T J Langwell, a traffic engineer called by Direction Matiatia Inc, said even with the reduced marina size he remained concerned that unforeseen eventualities from increased traffic through the 'keyhole' had not been adequately addressed. He was also of the view that management of traffic through the 'keyhole' is made more difficult with marina traffic added to the flow and that controls on the access of marina traffic to the 'keyhole' are possibly ineffective. (Langwell supplementary statement 6 July 2015 paragraph 8).

[480] Mr Langwell extrapolated traffic assessments in Mr Mitchell's supplementary statement, and said that total marina-generated trips on a regular summer weekday could be as high as 357 and on the busiest summer holiday day could reach 588vpd. (Langwell supplementary statement 6 July 2015 paragraph 13). The inference we were being invited to draw was that the effect of marina-generated traffic on the operation of the 'keyhole' would be significant when those traffic flows occurred.

[481] Mr Mitchell did not agree with Mr Langwell's projections. He said the figures were unrealistic and based on an incorrect analysis. He said that his marina traffic assessments were based on surveyed data and controlled marina parking. (Mitchell supplementary rebuttal 13 July 2015 paragraphs 6, 7 and 8). We note also that neither Mr Shumane nor Mr Karndacharuk shared the concerns expressed by Mr Langwell.

Construction Traffic

[482] Construction materials are now primarily to be transported by barge.

[483] The traffic experts agreed on that basis that the construction traffic effects could successfully be managed under a construction management plan (CTMP) that would be approved by Auckland Transport. Provided the CTMP addressed measures to minimise effects on public transport operations and on the operation and safety of the 'keyhole' the draft CTMP was accepted by the experts.

Outcome of traffic issues

[484] The reduced marina proposal has proportionally reduced traffic effects. We are satisfied that a proper assessment of parking needs for the marina has been made and that a dedicated parking area on the deck as proposed for 39 spaces is appropriate. If more parking on peak marina usage days is required it can be found in the public parking areas.

[485] We are also satisfied that the trip generation caused by the marina has been estimated adequately at 24 trips per peak hour on a regular summer day. On a summer holiday weekend that rises to 26 and for a peak marina demand could reach 40 trips per peak hour.

[486] Any increase in traffic on Ocean View Road from marina activities we consider is small and of no real consequence viewed in context.

[487] Adding traffic to the 'keyhole' does cause initial pause for thought because it is clearly congested at times now. We accept that the increase in traffic volumes through the 'keyhole' from marina activities would be small but would add a further complication to the management of the 'keyhole' area.

[488] Use of the Matiatia terminus will inevitably grow as more ferry services are provided and as tourism and the Waiheke population expand. Those changes would in our view potentially swamp any traffic effects the marina may have on the 'keyhole' at some point. That is because the marina traffic would be but a very small part of the equation. The provision of roading facilities at Matiatia will be driven by those growth pressures. It is the responsibility of Auckland Transport to provide the facilities needed to cope with those demands, but we accept that the presence of the parking deck, if consented, would need to be factored into its plans.

[489] We are satisfied that the traffic effects of the marina on the operation of the 'keyhole' and Ocean View Road will be minor, and provided conditions are imposed requiring the control of the marina parking for dedicated marina purposes we conclude that the effects would be acceptable.

Acoustic Effects

[490] Numbers of Waiheke residents expressed anxiety in their submissions and statements of evidence about potential excessive noise from a marina in Matiatia. Mention was made of the noise of halyards slapping on masts on yachts in a breeze, and of concerns about the sounds of boat motors and marina machinery on still and quiet nights.

[491] Two qualified acoustic engineers offered evidence about these things, Mr. J R Styles for the applicant, and Mr. J K C Cawley for Auckland Council.

[492] These witnesses engaged in a conference on 19 August 2014, and reached a fairly high level of agreement, although some matters were left unresolved. One interesting comment was that none of the parties who had raised concerns over the effects of operational noise, happen to own or occupy dwellings overlooking the proposed marina, and would therefore not be directly affected.

[493] Technical agreements were reached concerning levels of construction noise and vibration measured against the relevant NZ Standard. In significant measure there was agreement about control of operational noise through conditions of consent, subject however to perceived a lack of information about the likely frequency of movement of vessels at night. There was also some unresolved debate about the use of a particular sound metric from the NZ standards.

[494] Mr. Brabant cross-examined Mr. Cawley and commenced to go into considerable detail about the choice of metric. The Court was bemused by such issues not having been sorted out in conference and directed a further meeting between the experts. A further conference was subsequently held, and happily the residual disagreements were resolved. This included the issue about choice of metric, and at the same time particular attention given to potential sources of noise from mechanical equipment during the night. It was agreed that a Noise Management Plan (to be approved by the consent authority) would deal with engine noises from within the marina at night as the need arose.

[495] The draft conditions about construction noise and operational noise were tightened up and submitted to us in agreed form with the joint witness statement then produced.

[496] Nothing further had been heard from parties expressing concerns about noise issues, and no party sought to cross-examine the two expert witnesses. We are confident that if the recommended draft conditions of consent were imposed, environmental effects under this head would be no more than minor.

Stormwater effects

[497] Some parties had lodged submissions, and mentioned in evidence, anxiety about the potential for toxic and other polluting substances to enter the waters of the bay in stormwater from the car park. Particular mention was made of oils and heavy metals.

[498] The applicant called evidence on the subject from a civil engineer, Mr. S James and Auckland Council called evidence from its Consents Advisor in this field, Mr. L Blackburn.

[499] These witnesses undertook expert conferencing in August 2014 and reached full agreement that the then proposed stormwater control measures for either a car park on a reclamation or a car park on a suspended deck, would be suitable. They agreed that the then proposed draft consent conditions for stormwater management for the development were appropriate.

[500] Since the change of configuration of car park, the applicant and the council have advised that the stormwater control provisions will remain the same, and that the experts continued to be satisfied with the proposed control measures.

[501] Nothing has been drawn to our attention about this proposal being any different from other structures over or adjacent to the CMA in terms of what might be discharged, and how discharges would be controlled by treatment devices.

[502] We find that the effects on the environment under this head would be minor.

Night time lighting effects

[503] Some parties mentioned concerns in their submissions about glare and other adverse effects from night time lighting within the marina. There was passing mention of this in some statements of evidence.

[504] The applicant engaged Mr. M G Phipps-Black, a director of Light Group Ltd and the holder of a certificate of illumination engineering; Auckland Council called the evidence of Mr. J K McKensey, an electrical in engineer specialising in design and effects of lighting.

[505] While there had been some small disagreements between these two witnesses in their evidence in chief, they met in conference in August 2014 and reached full agreement about the issues.

[506] They agreed that the lighting proposed for the marina would be a permitted activity under the operative district plan, that it would comply with the relevant Auckland City Council By-law, and would comply with the relevant Australia/New Zealand standard. They noted that all of the proposed lighting

would be directed downwards and be modest in terms of output. The witnesses agreed that the effects would be “less than minor”. We have no difficulty in reaching the conclusion that the effects under this head would be no more than minor.

[507] The issue of effects of night time lighting from the marina did not become an issue of any real contention amongst the landscape architects, at least in their prepared statements. Mr. Pryor considered the issue in several passages of his evidence-in-chief, noting the nearby presence of significant levels of lighting on the wharf until about midnight, after which most lights are apparently dimmed. He considered that effects of this nature, viewed from around the bay, would be no more than minor. The issue was not raised by the other landscape architects in their prepared statements, and was not discussed in the expert conference amongst them. Mr Scott and Ms Gilbert were cross-examined on the topic by Mr Brabant. Ms Gilbert in particular commented that if there was an issue, it would be more one for residents around the bay because there would be few people on the tracks at night. She mentioned the view for ferry passengers as well, and in minor disagreement with Mr Scott said that she believed the northern bay to presently be “relatively unlit”, so that if the marina were to be established and lit as proposed, it would extend across the bay and be quite a change. She did not assign a level of effect to that, and we need take this matter no further.

Effects on Coastal Ecology

[508] Five consultant ecologists were called as witnesses in the case, and in addition parties under s274, Thomas Grieve and Kristin Lewis gave evidence about matters of ecological importance to them; in addition some other parties under s274 gave evidence about personal experiences at Matiatia, for instance with little blue penguins.

[509] Evidence was presented by the following experts:

- Ms K Sivaguru (for Auckland Council);
- Mr C Waters, Marine Biologist, for Grieve and Lewis;
- Mr. M Poynter, Ecologist, for Waiheke Marinas Ltd;
- Mr. Stephen White, Ecologist, for DMI; and
- Mr. M Cameron, Scientist, Stormwater Contaminants, for Auckland Council.

[510] Conferencing was undertaken by the experts on 19 and 27 August 2014, and was attended by Mr. Grieve and Ms Lewis on the 19th. Mr. Waters was unable to attend on the 27th, but he subsequently advised in writing that he accepted the statement prepared and signed by the other experts, subject to noting in Point

15 that he disagreed about adequacy of baseline information gathered, his view being: “*a great deal more quantitative information is required before fully informed decisions regarding the potential environmental impacts of the proposed marina on Matiatia Bay can be reached*”.

Agreements reached

[511] Many matters were agreed in the conferences, with the key areas unresolved being the issue taken by Mr. Waters in Point 15, the related issue about contaminants (principally from antifouling paints on boats) in water chemistry and sediment quality; and as to whether draft conditions of consent would be adequate in insuring avoidance, remediation, or mitigation of effects to the extent necessary.

[512] We shall summarise the areas of agreement before discussing the unresolved matters.

Methodology

[513] The experts agreed that the broad scale approach used by Mr. Poynter on behalf of the application for ecological assessment was an appropriate starting point for understanding the existing environment. They differed on next steps, Mr. Waters in particular offering his criticism in Point 15.

Ecological Values

[514] The experts agreed that the intertidal habitats were typical of similar environments or habitats in the Auckland region and that sub-tidal benthic communities are diverse and abundant within Matiatia Bay. The sampling undertaken had not recorded any unique or rare benthic invertebrate species; no wading bird habitats of importance occur; there are no infaunal beds of edible-sized shellfish in the bay; and there are no other sensitive habitats like eel grass beds or mangrove communities.

[515] The experts agreed that the bay is likely to have both resident and migrant fish, plankton, and at times marine mammals.

[516] A separate focus was taken concerning little blue penguins. These birds appear to have burrows in the foreshore near the wharf, and the population is about 24 to 30 birds. They appear to be utilising the bay for habitat.

[517] Little blue penguins are classified as being “at risk” in the New Zealand threat classification system. Policy 11 of the New Zealand Coastal Policy Statement requires the avoidance of adverse effects of activities on indigenous taxa that are listed as being at risk.

[518] Some of the burrows are close to the originally proposed reclamation and construction area. We understand that with the removal of the reclamation, and the focus on barging-in of construction materials, the potential for conflict during the construction period had been at least minimised if not eliminated. At the time of conferencing before the significant changes to the marina were put forward, the experts agreed a set of conditions for management and monitoring of these birds. With the change to a parking deck, a more limited condition was put forward about finding and trans-locating burrows under the advice of an expert; also about creation of new artificial burrows in the breakwaters. The latter exercise appears to us to amount to remediation or even potential enhancement.

Marine Bio-security vertebrate and Plant Pest Management

[519] The experts agreed some draft conditions of consent concerning these matters.

The issue of contaminants

[520] The experts recorded detailed advice for us in their statement. The issue is of sufficient importance and scientific controversy, that we have decided to record the relevant passages in full, below. It will be seen from reading them that certain levels of agreement were reached on preliminary and scientific factual matters, but that some questions were unresolved amongst them, to the point of constituting active disagreements.

10. Contaminants

Preamble

- a. *In terms of effects, contaminants generally (excluding sediment) need to be considered inside the marina and separately outside the marina. The experts agree that effects on the water and sediment quality, and by extension the effects on biological communities outside the marina, are unlikely to be more than minor.*
- b. *In terms of both water chemistry and sediment quality, an issue to be considered is the extent to which it might be acceptable to allow increased effects within the marina. In the past some increased chemical contaminant effects within marinas have been accepted as inevitable because of the lack of alternatives to copper based antifouling paints. Alternatives are now available and being further developed which could reduce the potential for and rate of release of copper into the environment. This will need to be considered in making decisions by the Court and further information is provided below. The proposed conditions offer a mechanism to address a situation where contaminant assessment indicates that effects may be more than minor.*

- c. *If it is reasonably achievable, the experts consider it desirable to use antifouling paints with reduced levels of contaminants. The experts understand that there may be legal impediments to achieving this.*

[We record that items d to f below relate to dredging, an activity no longer proposed since the marina was reduced in size].

- d. *In terms of construction-related sediment disturbance, the experts agree that the main area of consideration is the proposed capital dredging area. The area to be dredged is small (0.73ha) and dredging will be completed within a period of about a month. The works will be subject to a construction management plan and are expected to be surrounded by a floating geo textile boom to contain sediment, which is generally accepted to be the Best Practicable Option. On this basis, this would effectively preclude the movement of sediment outside the dredged area.*
- e. *The experts agree that dredging related sediment effects on water quality and ecology outside the dredged area would be no more than minor.*
- f. *The experts agree that loss of the benthic biota from dredging is a more than minor, short term effect and cannot be avoided. In the medium term (within 2-5 years) recovery of this benthic area should occur through natural re-colonisation, recruitment and migration.*
- g. *The experts agree an extensive amount of benthic biological monitoring would be required to robustly and reliably detect an ecologically significant long term change within the dredging footprint and the wider marina basin. The benefits of doing this would not justify the extent of work required. The experts also agree that the proposed monitoring for sediment and water chemistry would provide an adequate indirect assessment of the level of contaminant effects within the overall marina footprint.*

Water Chemistry

- h. *The primary contaminants of actual or potential concern arising from the marina proposal are antifouling paints (which include the metals copper and zinc and diuron as the current co-biocide of most concern), hydrocarbons and timber treatment chemicals leaching from piles. Other contaminants of concern are arsenic, mercury, chromium, cadmium and nickel. There are a number of other co-biocides listed by the EPA and Auckland Council as being in use in the Auckland region.*

- i. *The experts recognised that stormwater has the potential to add contaminants but this area is outside the focus of their brief. From advice provided by Auckland Council (Leon Blackburn) the experts understand that stormwater discharges could be managed with conditions which will be proposed by stormwater experts. The ecology experts understand that where a stormwater treatment device is certified by the Auckland Council, stormwater discharge monitoring may not be required. However, in the event that trigger levels referred to in the proposed conditions of consent are exceeded, then the possible contribution from stormwater would need to be considered in terms of cumulative effects. The experts note that the primary source of copper from the proposed marina development is likely to be from antifouling paints rather than stormwater.*
- j. *There is no existing water column chemistry information for Matiatia Bay. While there is likely to be some current elevation of some contaminants over pristine conditions due to existing sources within the Bay based on experience of similar areas within the Auckland region it is unlikely that these levels would be above the limit of detection currently available from commercial laboratories in New Zealand. This means that technologies beyond those commercially available in New Zealand would be required to accurately predict the baseline. The experts agree that there is likely to be some existing contamination and any contaminants arising from the marina would be additional to the baseline. This is discussed further below.*
- k. *The proposed conditions to be tabled at the pre-hearing conference require baseline sampling of water chemistry. Following expert conferencing, the experts agree that baseline and ongoing monitoring should include: pH, dissolved oxygen, salinity, temperature, dissolved organic carbon, total suspended solids, total and dissolved copper, total and dissolved zinc and co-biocides. If triggers set out in the proposed conditions of consent are exceeded, then other parameters would need to be monitored so that a bio-availability assessment of copper in particular can be undertaken as set out in the proposed conditions. The experts consider this type of assessment to be achievable through routine methodologies.*
- l. *The use of antifouling paints changes over time. As an illustration, some existing constituents have been de-registered as at July 2013 and several others have had their use time limited by the NZEPA. It is possible that new antifouling paints will be developed in the future. It was unclear to the experts the extent to which the marina operator would have control over the use or types of antifouling paints on individual boat owners' vessels; nevertheless, proposed conditions are suggested for consideration by the Court.*

- m. *In terms of current knowledge the experts agree with the main findings of the NIWA study and model commissioned by the applicant and the main concerns to be addressed are copper and co-biocides and for the purpose of this study NIWA focused on diuron as the primary biocide currently in use in New Zealand. Diuron is not expected to be a long term issue as its manufacture and sale in New Zealand has been time limited to July 2017.*
- n. *The NIWA model predicts that with the marina in operation once full occupancy is reached, copper levels in the water column inside the marina will increase to a level at or about a 95% level of protection (ANZECC). At this level, and taking into account the existing environment of Matiatia Bay, the experts agree that any effects are likely to be no more than minor. Above this level, effects may become more than minor. This would need to be determined by a bioavailability assessment as outlined in the proposed conditions of consent. To assist the Court the experts note that in this context effects might be more than minor in terms of increased risk to, or suppression of, sensitive species and early life history stages for waters within but not likely beyond the marina.*

The proposed conditions offer a mechanism to address a situation where bioavailability assessment indicates that effects may be more than minor.

- o. *In the event that a bioavailability assessment indicates that effects could be more than minor, a decision could have to be taken as to whether a lower level of protection within the marina is acceptable or whether alternatives to achieve the ANZECC 95% protection level are available, such as controls on the types of antifouling paints used within the marina.*

Sediment quality

- p. *The experts consider that the Threshold Effective Level (TEL) is the appropriate trigger for assessing effects on biota in sediments as outlined in the Auckland Regional Plan: Coastal and the Proposed Auckland Unitary Plan.*
- q. *Modelling predictions for contaminant levels in sediment are more uncertain than those in the water column and the model is unable to predict contaminant concentrations beyond 10 years. When existing concentrations of copper are factored into the NIWA modelling predictions, then adverse effects on biota in the sediment within the marina may become more than minor (ie. exceed the TEL) after approximately 5-10 years, resulting in some shift in community composition. Sediment*

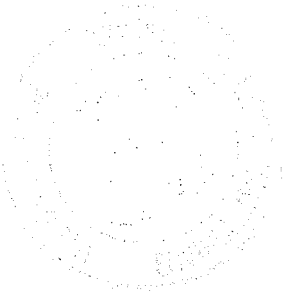
contaminant levels would be likely to continue to increase beyond the 10 year period, albeit at a slower rate resulting in further shifts in community composition. The experts cannot provide a more detailed assessment but agree that some shift toward more contaminant tolerant species is likely to occur. It is noted that within the subtidal soft sediment habitat within the proposed marina unique or rare benthic invertebrate species or communities were not recorded.

- r. For the marina as proposed, potential mitigation options to reduce contaminant build-up in sediments would be dredging and/or the use of alternative antifouling paints. The experts note that the effects of dredging would remove all of the biota and outweigh any ecological benefit.*
- s. In practice, it is the experts view that either it will be necessary to accept that effects on sediment quality within the marina will be more than minor at some stage in the future or to find a means of requiring or strongly advocating for alternative antifouling paints to be used.*
- t. The proposed conditions require the monitoring of sediment quality which will allow review of the extent to which contaminant build up is occurring within the marina. The conditions also provide a review clause. The experts agree that shellfish monitoring for contaminants would not provide any information that would not already be available from sediment and water column monitoring. The experts agree that soft sediment benthic community monitoring would not be required for the same reasons.*

11. Cumulative effects

- a. With regard to cumulative effects, the experts agreed that these could arise from the proposed marina and other activities totally independent from the marina. The experts agree that the primary contaminant of concern is copper. The main source of this is likely to be antifouling paint. The proposed conditions of consent provide a mechanism for addressing this issue. Other contaminants of potential concern are:

 - i. Stormwater from the proposed parking area associated with the marina which would be treated meaning any increase in stormwater contaminants are anticipated to be minor.*
 - ii. Leaching from treated timber. MP advised that based on literature research he had conducted for the recent Opua Marina Stage 2 Resource Consent application that copper, chromium and arsenic treated timber materials are**



normally used for commercial oyster farming. Monitoring of adjacent water columns and oysters showed no significant contamination as a result of chemicals leaching from the treated timber. Other experts had no additional information on this topic.

iii. Increased risk of hydrocarbon discharges as a result of the proposed marina and increased refuelling and maintenance activities.

- Increased use of the existing tidal grid could result in increases in contaminants from that source.*
- Increases in contaminants from other land-based developments and current and future boating activities unrelated to the proposed marina.*

b. The experts had no ability to predict the extent to which the activities in future might occur or how significant they might be.

c. A marina management plan is proposed to manage any other marina related contaminants including microbiological contaminants.

d. Should maintenance dredging be required, if at all, the significance of the effects on the benthic biological communities would depend on the areal extent and frequency of dredging.

e. The experts consider that the proposed conditions that will be tabled at the pre-hearing conference on 30 September will address any other cumulative effects resulting from the proposed marina.

[521] It was unfortunate that Mr. Waters was unable to be present at the second conference of the experts on these topics. We nevertheless have the feeling from the nature of his evidence, and his answers in Court under questioning, that not a lot of further progress would have been made towards agreement had he been able to participate.

[522] Accordingly we have considered all relevant evidence of the witnesses on the matters that remained in dispute, including their answers given in Court under questioning.

[523] It is worth remembering first, that a good deal of the material contained in the evidence in chief of the various witnesses in 2014, became redundant on the removal of the need for dredging in the shallow waters of the north-eastern bay when the marina proposal was scaled down.

[524] Turning now to the evidence of Mr. Waters, strongly addressing issues of water chemistry and quality of sediment within the footprint of the marina, and to a degree beyond that.

[525] Interestingly his evidence-in-chief commenced with a short section on the benefits of anti-foulants. He noted that the economic and environmental benefits of anti-fouling biocides are compelling. Power and fuel consumption for propelling ships under which there is slime film, imparts, he said, a 21% powering penalty from frictional drag, which increases to 86% in cases of heavy bio-fouling. The international economic benefits of use of anti-fouling paints, and of keeping vessels' hulls clean, runs to the billions of dollars according to some commentators. There is a logical consequential reduction also in greenhouse gas emissions when hulls are in good condition. He noted another strong positive effect, that anti-foulants represent a "formidable deterrent" to the spread of invasive species, and again he quoted figures from commentators about the international cost of combating invasive species, notably in New Zealand waters.

[526] Mr. Waters then proceeded to record "the other side of the story", the adverse effects of anti-foulants. Many of the matters he raised are the subject of increasing knowledge in the scientific community, and debate.

[527] What Mr. Waters offered us was essentially a heavily summarised review of the writings of academic commentators, which no doubt have formed a significant part of his own academic studies into marine biology and coral reef ecology in the last 12 years (he presently being a PhD candidate at Auckland University, studying "*the role of dissolved organic matter and amino acids in early biological development and devising innovative methods for reintroducing juvenile clams directly to lagoon substrata*").

[528] Mr. Waters briefly recorded the history of changes in the composition of anti-foulant paints in the last half century, such changes having come about largely in answer to concerns about adverse effects on marine organisms. He noted improvements, but expressed concern about some remaining problems.

[529] Quoting again from literature, he recorded the numbers of mollusc species present around Waiheke, and noted some findings in the literature about copper toxicity in mussels and other types of toxicity in pacific oysters.

[530] Dwelling again on published literature, he spoke of cumulative effects leading to the potential of algal blooms that could result in eutrophication (a decline in soluble oxygen necessary for marine life). When un-checked, algal populations release toxins of their own, with ultimate "devastating" effect on marine ecology.

[531] Mr. Waters then offered his own review of the evidence in chief of Mr. Poynter and the NIWA report obtained by the applicant at the request of Auckland Council, by which attempts were made to predict copper concentrations in Matiatia Bay should the marina be established.

[532] Mr. Waters was concerned that the NIWA report was as important for what it did not address, as for what it did.

[533] Excluded, he said were the potential effects of copper and diuron concentrations on the water chemistry of Matiatia Bay, its biological organisms and communities, and terrestrial organisms such as birds that rely on the bay for food. He also complained that the report excluded the potential chemical, biological and ecological effects of biocide concentrations for at least 16 additional anti-foulants, and lack of information about flushing exchange rates, tidal currents and ranges, wind generated surface currents, boat traffic, and sediment re-suspension mechanisms unique and specific to Matiatia. In addition he raised further questions about the impact of metal concentrations on biological communities, and chemical and biological processes in the water column.

[534] Mr. Waters put forward what we considered was a rather generalised assertion that an increase in copper and other biocides from boats in the marina, would impact on the ability for diverse healthy communities to re-establish on breakwaters and other structures. He questioned future management and maintenance of vessels and the structures, and was concerned about the potential for compromising of ecosystem viability, on account of the likes of oxygen depletion.

[535] A strong theme in his evidence was that samples used in Mr. Poynter's initial studies were small and insufficient to draw meaningful conclusions. He was concerned about the presence of assumptions rather than empirical results, particularly concerning water quality measurements and the presence of fish life. He complained about an over-reliance on visual observation rather than comprehensive scientific surveys.

[536] Mr. Waters was also critical Mr. Poynter's work concerning possible mitigation in the form of removing of contaminated sediments. He said this would be unrealistic and likely to have a greater impact than the perceived problem itself. Mr. Waters posed a number of questions, but did not seem to offer reasons as to why we should be more persuaded by these than by the advice that Mr. Poynter had offered.

[537] As to the potential for biocides to exit the marina, Mr. Waters was critical of the opinion of Mr. Poynter that "*while the marina is obviously designed to provide protection from the prevailing wind, the effect of wind reinforcing tidally-driven eddies in the wider embayment would be expected to enhance currents through the marina at times and reduce residence time within marina and therefore also ambient water column concentrations*", while comparing relative porosity likely to be experienced with that of other marinas in Auckland, and rating Matiatia high on that scale. Mr. Waters's take on this was that biocides would regularly exit the marina and enter the bay and gulf, with no sufficient evidence to state conclusively what the accumulation rate would be, no monitoring proposed to determine the potential effects of biocides beyond Matiatia, and no mapping of tidal direction and how far contaminants could potentially be suspended in the water column.

[538] In his conclusion Mr. Waters was critical of insufficiency of attention being paid to potential impact of anti-foulants on water quality, marine organisms and associated ecosystems. He saw the need for more study on richness and diversity of marine ecosystems, on population dynamics and spawning patterns, followed by methodological assessment of the effects of biocide accumulations for each species and biological community. He offered the opinion that data on such analysis could be used to predict the potential effects of biocides on breeding patterns, progeny survival and dispersal patterns, the trophic web, migratory patterns, prey abundance, and predation behaviours.

[539] Ironically there was no mention in his conclusion of the benefits of anti-foulants which he had helpfully mentioned at the start of evidence but subsequently not returned to at all.

[540] We listened to answers given by Mr. Waters under questioning, with some interest. We gained the distinct impression that he saw his task as assisting the party that called him to succeed in having consent to the marina declined, because he appeared unwilling to acknowledge ways in which solutions could be found. We thought this rather unfortunate in comparison to the views carefully raised, discussed and recorded by the other experts (who were mainly ecologists), and which resulted in the draft conditions of consent being regularly refined over a period months.

[541] One example was Mr. Waters's answer to a question-in-chief by Mr. Littlejohn, as to whether he could comment on appropriateness of certain parameters and techniques for monitoring in the Matiatia location. Mr. Waters said:

"I would have to qualify that a little bit in that first of all it was my understanding that the information provided to the Court would facilitate a decision on whether or not a marina should be constructed, not what would happen after a marina had been had been constructed".

On being reminded by Mr. Littlejohn that he was being asked about the draft conditions of the consent, and could he offer a view on parameters for monitoring, Mr. Waters's response was that he was not familiar with it enough to say one way or the other. On being asked by Mr. Littlejohn whether from his experience and studies he had any ability to offer advice about remedying water and sediment quality contamination after it had been detected, he replied that he some case study experience, but no personal experience (while going on to say that from his study experience he believed that it would be extraordinarily difficult to undo harm and damage)⁹¹.

[542] Asked some questions by Mr. Allan, counsel for the council, Mr. Waters was again unable to offer advice about the appropriateness of conditions put forward to address sediment effects. He had to concede that he did not have sufficient familiarity with other marinas and consents around the country to be able to

⁹¹ Transcript p 1235-6

comment. He said: *"I'm not familiar enough with what you're asking, to say anything. I am just the biologist"*⁹².

[543] In answer to questions from Mr. Brabant, Mr. Waters acknowledged that he had no working experience with the use of treated timber piles in marinas, or concerning approaches taken to manage any such issues⁹³.

[544] Perhaps sensing some concern on the part of the Court about the seemingly limited extent to which Mr. Waters was going to be able to provide expert advice, Mr. Brabant elicited from him that not only had the witness been engaged in full time studies for the last 12 years, but that his working experience prior to that for about 25-30 years, had been in computer science⁹⁴. On being asked a number of other questions about a comparison of the active sampling work and other physical studies undertaken by the ecologist witnesses in the case, Mr. Waters acknowledged (reluctantly) lack of any comparable work undertaken by him⁹⁵.

[545] On being asked by the Court whether he had any familiarity with tidal ranges in the Hauraki Gulf, and in particular at Matiatia, Mr. Waters acknowledged that he no greater information than that provided Mr. Poynter.

[546] Questioning of the other witnesses in this field tended to focus heavily on the nature of existing anti-foulant products which we did not find particularly helpful in undertaking consideration of matters in the round and in context. As will be seen, the more holistic approach undertaken by the witnesses in conference produced information that was more valuable, because it was more inclined to be offered in the fuller context, and to consider real world situations. It was also clear that the work of the witnesses in conference (other than Mr. Waters) had driven considerable refinement of the draft conditions of consent.

[547] Mr. Poynter lodged rebuttal evidence subsequent to the joint witness statement being finalised and signed. We acknowledge the introductory statement of Mr. Poynter in that evidence that it was appropriate he address the matters unresolved in the conferencing.

[548] Mr Poynter first addressed Mr. Waters's concern about potential effects of copper and diuron concentration on the water chemistry of Matiatia Bay, its biological organisms and communities, and terrestrial organisms such as birds that rely on the bay for food. Mr. Poynter advised that the NIWA report through its modelling approach, established a best estimate of what copper and diuron concentrations might be expected once the marina was operational, given its features. He had used those estimated concentration values as a proxy to draw conclusions as to intensity and significance of effect in the biological community,

⁹² Transcript p1238

⁹³ Transcript p 1241

⁹⁴ Transcript pgs 1242-3

⁹⁵ Transcript p1245

with reference to ANZECC 2000 water quality thresholds at the 95% level of protection, as mentioned in clause 10n of the joint witness statement (where quality effects were predicted to be no more than minor)⁹⁶.

[549] Mr. Waters complained that the NIWA report had excluded potential chemical, biological and ecological effects of biocide concentrations of at least 16 additional anti-foulants. Mr Poynter however reminded us that copper was the principal metal involved as a biocide, and diuron is the primary co-biocide currently use in New Zealand (as recorded in clause 10m of the JWS), and said that it was sensible to base the initial analysis on the most commonly-used compounds.

[550] Mr. Poynter noted criticism by Mr. Waters that there should be further focus on such things as flushing exchange rates, tidal currents and ranges, wind generated surface currents, boat traffic, and sediment suspension mechanisms in Matiatia, and advised us that the NIWA modelling report (particularly in Table 3) showed that most of these variables in hydrodynamic processes had been accounted for in the modelling prediction for copper and diuron. Mr. Poynter was also able to point to NIWA's Table 3 having addressed another alleged shortcoming about impact of metal concentrations on biological communities fluctuating in response to pH, dissolved oxygen, salinity and water temperature.

[551] When looking at these issues holistically, as we considered to be necessary, Mr. Poynter openly acknowledged in paragraph 21 of his rebuttal, (repeated from his own earlier acknowledgement in his and evidence-in-chief), that there was the potential for some suppression of sensitive marine life within the marina due to a level of reduction of water quality confined within the marina.

[552] As to chemicals used in the treatment of timber piles in marinas, Mr. Poynter drew attention to a recent publication by NIWA and the Cawthron Institute, concerning effects of elevated levels of metals and discussing associated environmental risks, noting that the levels of copper employed are normally well below regulatory standards, while acknowledging that there remain some knowledge gaps and work is continuing.

[553] Concerning the criticism by Mr. Waters that the sample sizes used by Mr. Poynter were small and insufficient to draw meaningful conclusions, Mr. Poynter stoutly resisted, noting that he, Dr Sivaguru and Mr. White as experience ecologists, had concluded that an appropriate description of ecological values had been made. Mr. Poynter gave us his opinion that it was important in the RMA context to "ask the right questions in the right sequence", and that it was not appropriate to "pursue a highly quantitative approach", (noting the latter would incur substantial costs for an applicant), when a simpler approach still provided enough power to answer important ecological and water quality questions. Mr. Poynter said that the ecological values for a locality can be studied in a semi-quantitative approach (such as he had employed),

⁹⁶ It should also be born in mind that the NIWA report was prepared before the marina was reduced in scale; also that it made some fairly conservative assumptions

and that the initial phase of such a survey would not attempt to set up a baseline for statistical comparison between areas or over time; that task would come later.

[554] He also considered that the quantity of information required to predict the scale and significance of effects on ecological values did not initially have to be done at a high level, and that the initial information gathered at Matiatia provided adequate assessment, especially coupled with the later NIWA modelling.

[555] Mr. Poynter thought that the last question would be as to what information would be required to measure and monitor effects in the event that consent was granted; and that this was the stage at which the type and quality of data became very important and would clearly have to facilitate insightful comparisons between locations over time. Scientific methods and statistical robustness would then become more important, if however targeted. Mr. Poynter considered that the experts other than Mr. Waters had agreed in the JWS in clause 10g, that benthic biological monitoring might not be required to achieve a robust and reliable result; but instead it might be sufficient to conduct of monitoring of sediment and water chemistry as an adequate proxy for monitoring future effects on the biology.

[556] Concerning Mr. Waters's comments alleging that there would be no monitoring to determine the effects of biocides or other metals beyond the marina, Mr. Poynter noted that the expert conference had produced refinements to the draft conditions of consent whereby water and sediment quality monitoring was proposed both within and beyond the marina.

[557] Mr. Poynter was very concerned that Mr. Waters had contended that research would be required in population dynamics and spawning patterns, further suggesting that once the ecosystem had been reasonably quantified a methodological assessment of the effects of biocide accumulations for each species and biological community could proceed. Mr. Poynter considered that what was being suggested went well beyond the threshold of what is required to assess the effects of the marina proposal, because population dynamics of marine organisms are highly variable in space and time and require a great deal of data resourcing to understand. He said that even looking at a benthic community over time is likely to show wide variation in community composition and diversity, all of which is just part of natural processes.

[558] Mr. Poynter concluded, we think entirely with justification, that the approach taken in his assessment had been appropriate for the scale and potential significance of the ecological and water quality risk, and had been endorsed by experienced fellow reviewers on the joint witness panel other than Mr. Waters.

[559] For ourselves we considered that Mr. Waters seemed inexperienced in any practical sense about many of the matters raised by him as questions or statements from academic literature. He had undertaken only a desktop exercise, and in that, was heavily reliant on the writing of others. Regrettably, this amounted to an academic exercise in which problems were searched for, and practicable approaches, solutions and real

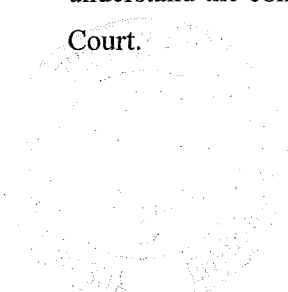
world situations largely ignored. Mr. Waters appeared to have almost no practical experience with New Zealand marine locations, let alone established marinas and the marine environment of Matiatia Bay. Professional work undertaken by him in his career (computer science) seemed well removed from the subject at hand, and during the last 12 years he had undertaken only strictly academic work.

[560] At this point we need to comment on the evidence of the parties who called Mr. Waters, Thomas Grieve and Kristin Lewis, which they expressly conceded was lay evidence.

[561] Ms Lewis and Mr. Grieve impressed as very committed campaigners against the cause of the Matiatia marina proposal. We mean no disrespect to them however when we note that their personal and professional qualifications and experience were limited to IT consulting and recreational sailing and diving in the case of Mr. Grieve, and landscape gardening and undergraduate studies in environmental management and coastal and freshwater ecology, management and geology, on the part of Ms Lewis. Somewhat ironically, lack of qualifications to discuss matters that the independent ecologists brought to our attention, did not slow them offering us an amazingly detailed review of literature on materials used in construction of marinas, effects on marine biota from increased concentrations of anti-foulants, effects of other chemicals associated with marinas, effects of bilge water and toxic petroleum bi-products on the marine environment, cumulative effects of toxins in the environment and the entry of those toxins into the food chain, and the potential impact of the proposal on the general health of the wider Hauraki Gulf, and the initiatives of the Hauraki Gulf Forum.

[562] Ms Lewis and Mr. Grieve further demonstrated their commitment against the marina by offering us detailed evidence on future public transport requirements of residents and visitors to Waiheke Island, effects on the character of Matiatia Bay and Waiheke as a whole, cumulative impacts, and concerns regarding compliance with conditions and inability of mitigation measures to achieve their stated or desired outcomes. We felt that it was a little telling that Ms Lewis had a particular focus on times past on Waiheke, and appeared philosophically opposed to development and change.

[563] We have paid careful attention to the entirety of the information that Mr. Grieve and Ms Lewis brought to us, including the very extensive materials attached as evidence, such as videos, photographs, and other materials they referred to. However, in a case in which numerous experts were called to offer independent evidence based on professional training and experience in their respective fields, we are driven to place more reliance on the evidence of the latter, tested as it was most vigorously at times during hearing. The time and commitment demonstrated by Mr. Grieve and Ms Lewis was notable, but they need to understand the context into which such participation must be placed by a decision-making body such as this Court.



Legal and Jurisdictional Aspects

[564] In the early stages of the case there was resistance on the part of the applicant to the imposition of conditions to control access to the marina by boats bearing certain anti-fouling paints. As the case progressed, that resistance diminished, and by the conclusion of the hearing, the draft conditions of consent contained carefully worded provisions that had been refined a number of times on account of input from relevant experts and the lawyers. This was remarked on in particular by counsel for the council Mr. Allan, and counsel for Mr. Grieve and Ms Lewis, Ms Parkinson.

[565] Counsel drew our attention to a number of decisions of the Environment Court and the High Court, but because of the level of agreement ultimately reached, we do not need to dwell on them.

[566] In submissions, Ms Parkinson undertook a review of some of the expert evidence, and the statements made by the expert witnesses in the joint witness statement. She submitted that deficiencies in the applicant's assessment of ecological effects would produce uncertainty in expert assessments of the extent and scale of potential contamination effects. In particular she noted that predictions for contaminant levels and sediment "are more uncertain" and adverse effects on biota "may become more than minor after 5-10 years", she pointed to the present uncertainty on the part of the experts as to whether there would in future be a shift to colonisation by contaminant -tolerant species.

[567] Ms Parkinson submitted that given such uncertainties, the Court should apply a precautionary approach in assessing the proposal, including under s104D(1)(a). She noted that the precautionary approach is supported in Principle 12 of the New Zealand Coastal Policy Statement, which records that the ability to manage activities in the coastal environment sustainably is hindered by lack of understanding about coastal processes and the effect of activities.

[568] This theme was extended by Ms Parkinson in supplementary submissions offered at the end of the second hearing, taking account of the reduction in the size of the proposed marina and offering further thinking about the proposed conditions of consent, water quality parameters, proposed mitigation, and enforceability of third party conditions.

[569] In submission in reply on behalf of the applicant, Mr. Brabant submitted that complete avoidance of effects was neither required nor realistic. He submitted that the past use of the bay for marine transportation and the use of a haul-out grid, pointed to the waters not being pristine. This submission however in our view possibly takes inadequate account of the issue of cumulative effects.

[570] Mr. Brabant also submitted that Ms Parkinson had tended to mis-state the agreement of the ecology experts about effects of copper concentrations in the water column and sediments, and future effects on biota

in the marina footprint. We considered that Mr. Brabant correctly summarised the position in the following way:

- a) In paragraph 10n of the JWS, the experts had predicted that with the marina in operation and full occupancy, copper levels in the water column inside the marina would increase to a level at or about 95% level of protections (ANZECC) and at this level, and taking into account the existing environment of Matiatia Bay, they agreed that any effects are likely to be no more than minor;
- b) Modelling concerning sediment is more uncertain;
- c) Adverse effects on biota in the sediment within the marina may become more minor after approximately 5-10 years;
- d) Potential mitigation options include the use of alternative anti-fouling paints;
- e) In practice it is necessary (as an alternative to accepting that effects on sediment quality within the marina will be more than minor at some stage in the future), to find a means of requiring or strongly advocating for alternative anti-fouling paints to be used. Mr. Brabant submitted that this is what the ultimately proposed conditions of consent were driving at.

[571] Mr Brabant submitted that draft consent conditions put forward by the applicant, and agreed by the council, addressed the outcomes sought in the JWS.

[572] We have come to the view as a result of the considerable work on the issues by the experts, and significant condition-drafting work contributed by the planners and counsel, that the uncertainties were ultimately lessened, and the effects somewhat less dire as analysed by the ecologists than as predicted by the rather more desktop type studies of Mr. Waters and Mr. Grieve and Ms Lewis. For instance possible changes in composition of the benthic community within the marina footprint have not of themselves been brought home to us as necessarily a bad thing, or even a significant adverse effect. This must be case in the context of the small size of this marina in the extensive waters of the Hauraki Gulf.

[573] Species mortality might be of a little more concern, but the evidence that we find was reliably contributed by the semi-quantitative studies undertaken by Mr. Poynter, suggests that there are no particularly rare, endangered, or at-risk species in the benthic communities or in the water column. Nevertheless, there do remain some uncertainties, and there was agreement that there could in the future be some effects on the environment that would be more than minor. Frankly however, those potential effects were not particularly well described to us in the context of the extensive waters of the Hauraki Gulf where we understand similar species and communities are to be found.

[574] Given the agreement of the experts about possible more-than-minor future adverse effects, the assessment under s104D must reflect this. (We also note Mr Brabant's ultimate concession in his closing submissions that the proposal would not pass the s104(1)(a) gateway). For the purpose of our assessments under s104 however, and given the quality of the draft conditions of consent on this topic, our finding about possible more-than-minor adverse potential effects will be accorded a fairly low weighting in comparison to that of other issues. Further, we do not overlook the information offered to us by Mr. Waters that was rather more objective and balanced than much of his evidence, about the positive benefits of anti-fouling substances on boats. We hold that those matters address the topics of social and economic issues that we are required to consider under Part 2 RMA, something we shall turn to.

Statutory analysis and consideration

[575] The starting point for the analysis that we are required to undertake under the Act is section 104D. We will follow that with an analysis under S104, and then, because s104 is expressed to be subject of Part 2, we will undertake that consideration.

S104D RMA

[576] Section 104D is headed "**Particular restrictions for non-complying activities**". It provides as follows:

1. Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either –
 - a) The adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
 - b) The application is for an activity that will not be contrary to the objectives and policies of -
- ...
- (iii) Both the relevant plan and the relevant proposed plan, if there is both a plan a proposed plan in respect of the activity
2. To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

[577] S104D is engaged in this case because of our finding earlier in this decision that the proposal overall is a non-complying activity.

[578] It is trite that consent cannot be granted unless one of the two gateways in s104D is passed. In his final reply at the end of the hearing, Mr. Brabant acknowledged that if the Court were to determine that the activity status for the proposal was non-complying, then the applicant accepted that the first gateway test [adverse effects to be minor] cannot be passed. That was a logical and proper concession, because the applicant's own witnesses had conceded in evidence-in-chief that some of the potential adverse effects from the proposal would be more than minor.

[579] It remains to be considered therefore whether the second gateway test can be passed. There being an operative regional coastal plan and a proposed plan that will ultimately replace it (the PAUP), the gateway comprises consideration of whether the application is for an activity that will not be contrary to the objectives and policies of both.

[580] In an early part of this decision we set out at some length a description of relevant provisions of these two plans, amongst other things. In that section of the decision we commenced to raise questions for later consideration.

[581] In the section that follows this one, we will undertake our analysis of provisions of statutory instruments including plans for the purposes of s104 RMA. We recognise that the s104D gateway analysis is to be undertaken prior to the s104 consideration, but in the interests of avoiding repetition we will not laboriously set out the lengthy findings of fact and about matters of expert opinion, twice. The analysis for the purposes of s104 was written with the requirements of our task under s104D firmly in mind, but re-framed as needed for the s104D analysis.

[582] As seems fairly commonly acknowledged by the Environment Court in recent times, a statement in the decision *Akaroa Civic Trust v Christchurch City Council*⁹⁷ is considered to describe the task of the decision-maker in relation to the second gateway, appropriately. The Court said:

... in all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game; at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. The proposal may be so strong in terms of that policy that it outweighs all the others if that is intent of plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in the district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before consent authority, it may be open to the consent authority to find a proposal as contrary to the objectives and policies under s104D. We add that it is rare for a consent authority, or the Court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary, can a local authority rightly conclude that the second gateway is not passed.

[583] We consider that the above is a helpful pointer to scenarios that can arise when carrying out the task of a “fair appraisal of objectives and policies read as a whole” as directed by the Court of Appeal in *Dye v Auckland Regional Council*⁹⁸.

⁹⁷ Decision [2010] NZENVC 110

[584] The essential question is whether the proposal will be contrary to the objectives and policies of both plans, in the sense of being repugnant to them. This is a high test.

[585] Informed by our analyses of the objectives and policies set out in other sections of this decision, and reframing them in light of this second gateway test as we have described it, we have come to the view that the second gateway test is passed. This was a slightly marginal call because aspects of the proposal are seriously at odds with some of the objectives and policies, but questionably not so as to be completely repugnant to them. Remembering that Matiatia is not mapped as being within an outstanding natural landscape, the objectives and policies of relevance to that place and this proposal do not set out to completely deny development of built form, but rather to discourage same, even if quite strongly in some respects.

Consideration under s104 RMA

[586] Section 104 RMA provides, to the extent relevant for present purposes, as follows:

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to-
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of –
 - (i) a national environmental standard:
 - (ii) other regulations:
 - (iii) a national policy statement:
 - (iv) a New Zealand coastal policy statement:
 - (v) a regional policy statement or proposed regional policy statement:
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

Potential effects on the environment

[587] We summarise here our findings on effects on the environment, drawing on earlier detailed sections of this decision.

[588] First, there are some (if comparatively limited) positive effects on provision for recreation and tourism in this location, that is provision of a public viewing platform in mid-bay, berthing facilities for a small number of recreational boats (which could offer indirect benefits for recreational and tourism ventures, events, and retail activity on the Island). Also for protection of the shoreline from erosion, the provision of a

⁹⁸ [2002] 1NZLR 337 (ca) at [25]

berth for a Coastguard vessel, and the offered little blue penguin nesting boxes in the principal breakwater (were they to work). We have also found pursuant to Mr Waters's evidence-in-chief that the anti-fouling of boats and keeping the underwater portions of their hulls clean can produce positive effects in terms of fuel-efficiency and the limiting of "carbon footprint". However, properly analysed, those positive effects are generated by boats wherever they are moored and used, not by the establishment of a marina as such.

[589] Effects on traffic and transport management are effectively in neutral territory, which may come as a surprise to some people, but it needs to be remembered that after the proposal was reduced in scope, only a small number of vehicles (a maximum of 39), would be parked on the deck and move through the local roading system to gain access. The applicant and Auckland Transport undertook great deal of work to refine draft conditions of consent, and our overall finding on this topic, for the reasons given in that section of this decision, is that with the imposition of such conditions, the effects would not be more than minor.

[590] Similar findings (effects no more than minor) were arrived at concerning stormwater from the parking deck, acoustic effects, and night time lighting. These 3 items are however quite small issues in the context of all issues about environmental effects in the case.

[591] Our findings on some other adverse effects on the environment are quite different. In the areas of landscape and visual effects, natural character and amenity, the various effects in different public and private views range from minor to high, with a considerable tendency in the direction of the latter. While the applicant resisted the claims by opponents that the adverse effects would be high, it acknowledged that some of them would be moderate (by definition, more than minor), and this in part underpinned the concession made by the applicant at the close of the hearing that the first gateway in s104D was not passed. Landscape and related issues comprised some of the more important issues in the case.

[592] Potential effects on recreation and tourism were analysed. Some positive effects were found, but there would be some significant adverse effects on these very important industries on Waiheke. This proved comparatively to be quite an important issue in the case.

[593] Agreement amongst experts about potential adverse effects on eco-systems produced a result that in the future there could be effects that would be more than minor. The topic however proved to be one of the lesser issues in the case.

[594] We found the potential for significant adverse effects on certain Maori cultural matters. This was an important issue in the case.

[595] Our findings about the levels of adverse effects in all respects will have to be factored into the overall consideration under Part 2 of the Act and the exercise of the overall discretion, given that s104 is expressed to be subject to Part 2.

Relevant provisions of policy statements and plans

[596] We have approached our assessment and findings in relation to the consistency of the proposal with the relevant planning framework, under subject headings related to key policy areas. They are not arranged in any order of importance.

Functional requirement to locate in CMA

[597] It is obvious that a marina has a functional need to be located within the CMA. However, not all of its parts are equal in this respect, and not all components need to be co-located. The latter aspect was brought home to us when after the first hearing the applicant proposed that the parking needs of the marina would be catered for in places in the Matiatia Valley not yet then arranged, but in some instances possibly some hundreds of metres inland.

[598] Our findings about lack of functional need to be in the CMA and for co-location, extend to the office building and dinghy storage too.

[599] In summary, while the boat berthage facilities and the accessways to them have a functional need to locate in the CMA, other ancillary features do not. We note the relevance of this given the presence of many cross-boundary policy directives in the relevant planning framework documents.

[600] This proposal is somewhat unusual as it proposes no use of land, and places all components into the CMA. The applicant has offered little explanation for this. While land immediately proximate to the proposed CMA site is known to be scarce, there was no clear justification provided to us as to why some features of the proposal could not have been located on land nearby or even at moderate distance. The issue is an important consideration in relation to the NZCPS, the APRS and Coastal Plan.

[601] Objective 1 of the NZCPS and some elements of Objective 6, are engaged. The non-marine elements of the marina we consider are strongly discouraged by those provisions. Notably, the car park and marina office are in discord with them. Likewise with Policy 6 concerning activities in the coastal environment. We acknowledge that Policy 6 (2) (a) and (c) require recognition of potential contributions to social and economic wellbeing of people and communities from use and development of the coast, and recognition that there are activities that have a functional need to be located in the coastal marine area. The latter is a "given" in the case of the marina, but the former favours the marina only to a very limited extent, given our findings elsewhere about the comparatively limited extent to which recreation and tourism opportunities will be provided by it, particularly in terms of relative numbers of people who could benefit.

[602] Policy 10.4.10 of the ARPC assists with an understanding of what might be considered "inappropriate" occupation. It directs that occupation is to be considered inappropriate unless it is

reasonably necessary to the functioning of an activity. While Ms Bremner was correct to say that a marina of necessity requires occupation of the CMA, once again the same cannot be said of the car park and marina office.

[603] Policy 12.4.1 in the chapter concerning structures in the ARPC, is framed to assist in identifying structures that might be considered “appropriate”, but is otherwise in similar terms to the other provisions discussed, and can be said to be strongly discouraging of placing the car park and the marina office in the CMA.

[604] This policy thrust is also well illustrated by a consideration of the criteria set out in the Regional Coastal Plan concerning Structures (Chapter 12). We note that the Planners’ joint witness statement did not deal with this chapter, but we note that Mr Serjeant did adopt Ms Bremner’s evidence-in-chief in respect of it at the first hearing. Chapter 12 is specific to structures and is relevant to our consideration of the parking deck as well as the marina as we have set out. At Policy 12.4.1 we find that the marina would offer the following conflicts with this policy framework: there is most likely to be a practical and reasonable alternative for the deck, utilising land based parking; the parking deck does not represent efficient use of the coastal environment because it occupies more than the minimum area necessary to accommodate a marina (similarly for the office building); the structure is likely to have an adverse effect on the adjoining land as it adversely impacts on the public enjoyment of and access to and around the coast (visually and physically, as we address elsewhere).

[605] An analogy can be seen (in a s104(1)(c) context), where parking is largely discouraged near the coastal edge.

[606] It is our impression that the applicant placed some reliance on the existing wharf and transport area defined in the Land Unit – Matiatia (Gateway) provisions of the District Plan as “justification” for the parking deck. However, we find that these provisions are focused much more on provision for and efficiencies around, public transport services rather than pure car parking. Parking related to public transport services is quite different to parking provided for other activities (a nearby marina). The Land Unit must be read as a whole (the sum of its three parts being the transport area, mixed use area and wetland area) and when considered in this manner, again, it must be acknowledged more in a s104(1)(c) light, there is policy preference for parking to occur back from the water’s edge.

[607] We agree that the existence of the wharf and passenger terminal presents a highly modified coastal environment in its immediate location and that co-locating further facilities such as a marina with this wharf is supported by the NZCPS (and lower order instruments) provided the functionality of the wharf is not compromised as an important piece of regional infrastructure (the link between the island and the mainland, and a transport hub for the island’s residents and visitors).

[608] The car park and marina office elements of the proposal stack up very poorly against the provisions we have discussed. The marina itself certainly has a functional need to be in the CMA, but beyond that it receives almost no encouragement from these provisions because of its very limited potential to contribute meaningfully to recreation and tourism opportunities, in comparison to other generators of such benefits, principally visitors who arrive at the island on the ferry services.

Efficiency of use of the CMA

[609] Efficiency of use of the CMA encapsulates a number of principles set out in the relevant instruments which can be summarised as: efficiency in terms of use of space, efficiency in terms of multiple use, and efficiency in terms of planning for the future/ sustainable use.

[610] The marina offers greater efficiency in terms of use of space associated with “storage” of boats within the CMA compared to swing moorings. This is evident from the number of boats able to be accommodated within the same water space in the proposed marina compared to the number accommodated under the current swing mooring arrangement. However, the proposal does not release any area of the bay from being used for mooring purposes. That is, the area of the bay currently used for mooring purposes outside of the area the subject of the proposal, will continue to be used for mooring. The marina would therefore increase the intensity of storage in the bay.

[611] The shift of boats from mooring to marina berth is far from guaranteed. Mr Wardale provided us with figures showing expressions of interest for the potential uptake of a marina berths. Some of these people currently have boats on moorings in the bay. However there is a significant price differential between occupying a swing mooring and occupying a marina berth. Thus there would likely be displacement of moored vessels to other mooring areas and we heard that there is a fixed supply of that resource based on the capacity of existing Mooring Management Areas. So the marina would not result in a significant increase in the supply of moorings, but rather would address a different market for boat storage than that satisfied by the existing mooring areas.

[612] In terms of efficiency of use, the proposal includes public access and viewing arrangements to be secured through appropriate conditions, which would provide for multiple use including walking, fishing and passive recreational opportunity within the CMA consistent with encouraging recreational use. On-water access would also be provided through the marina from the southern part of the bay for kayaks (Perhaps problematic in safety and amenity terms), and there would be nothing to prevent boats accessing through the marina to the northern bay provided skippers were to know that the bay is there (problematic because their view of it will be obscured for a large part by the breakwaters). So to a limited extent, efficiency of use is consistent with the planning framework.

[613] The proposal is probably now relatively neutral on the policy provision for efficient use in the CMA of the passenger wharfs and terminal. The proposal was modified during the course of the hearing to pull the marina out of the navigation channel to the ferry terminal. That drew it out of negative territory concerning these policy directives.

[614] However, we heard no clear evidence in respect of future demand for ferry services except to note that during the life of this case two new ferry operators commenced services to Matiatia. We were provided with much evidence on the land-based traffic constraints of the existing arrangements in Matiatia but little evidence on the future capacity and functionality of the wharfs themselves.

[615] We hold that the proposal is neutral in some respects concerning some of these provisions, while others offer limited support.

Maintenance and enhancement of public open space qualities

[616] Objective 4 of the NZCP is to maintain and enhance public open space qualities and recreation opportunities of the coastal environment by various stated means, importantly including recognition of the coastal marine area as an extensive area of public space for the public to use and enjoy.

[617] Policy 7.4.10, and sub policy 2 of the ARPS require particular regard to had to public open space being maintained or enhanced as far as practical.

[618] Ms Bremner wrote her s87F report and evidence-in-chief in the context of a reclamation or a piled parking deck straddling the CMA with a boardwalk connection to the northern bay. These elements were withdrawn. There is no boardwalk connection proposed but there would be a connection to the marina berths which will be open for public use in daylight hours and a viewing deck on the principal breakwater.

[619] The Planners' joint witness statement did not deal with the relevant Structures Chapter (12) of the Coastal Plan. We suggest this might have been due to the timing of the preparation of that statement and the relative "moving target" the proposal presented in terms of provision for parking. Having considered this Chapter of the Coastal Plan, it is evident that greater attention should have been paid to it, especially as this is directed by the activity status note for out of zone marina proposals as we have mentioned earlier. For instance, structures for public or multiple use are considered more appropriate⁹⁹ in the CMA than others. The design of the proposal relative to this policy was ironically better planned for in the first version than the amended one. Multiple use and public access features are more limited now due to the configuration of the parking deck. While keeping the size to a minimum for that purpose, multiple use benefits have been compromised. The provision of a viewing area on the parking deck is somewhat overcome by the broad range of existing options for the public to view the bay (e.g. existing wharf area and coastal access).

⁹⁹ ARP:C Chapter 12 Policy 12.4.4

[620] As we have said there is no proposal to enhance public access to the northern part of the bay and the historic reserve. The parking deck adjoins the public pathway at the coastal edge and generally runs parallel to it for some 50m with a separation distance expanding to approximately 34m¹⁰⁰. The impact of the parking deck in landscape/visual terms is addressed elsewhere in our decision but here the relevant comparison is with the experience and quality of public access (including the Matietie Reserve) which currently exists in this location. The presence of the parking deck would impact negatively on that arrangement as noted by Mr Brown in particular, and in this respect would be quite strongly contrary to the directive to maintain and enhance public open space and recreation opportunity in this part of the coastal environment¹⁰¹.

[621] The proposal finds limited support from the provisions to the extent that it would offer a public viewing platform on the main breakwater. It is otherwise significantly discordant with the provisions.

Natural character and landscape

[622] This is one of the key topics in this case. We have discussed objectives, policies, and even some policy guidance found in rules under the provisions of the district plan on adjoining land, quite extensively in this decision. We have also made significant findings concerning landscape, visual, natural character and amenity aspects of the evidence advanced. We do not intend to unduly lengthen what is already a very long decision, by recording again what the relevant provisions are.

[623] The word “inappropriate” appears in several of the provisions about development in the coastal marine area. We need to record here the important direction provided by the Supreme Court in its seminal decision *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*¹⁰², where it was indicated that that phrase where it appears in Part 2 of the RMA and NZCPS does not necessarily rule out any development, but that it should be interpreted against the backdrop of what is sought to be protected or preserved, for instance natural character.

[624] These imperatives in the NZCPS are picked up in the ARPC for instance in Objective 3.3.1 and associated Policy 3.4.1. The latter assists particularly with an understanding of the concept where it provides that development will be inappropriate where it is unable to avoid (where practicable), remedy or mitigate its adverse effects on the quality, elements and features which contribute to the natural character of the coastal environment, including areas characterised by modification and development. The applicant is not proposing avoidance or remediation. We have commented elsewhere in the decision that it is as a rule difficult to conceive of means to mitigate adverse visual effects of a large structure placed in open water space, and this proposal presents no departure from that norm.

¹⁰⁰ Transcript (27 Jul 2015) page 100 after line 15

¹⁰¹ NZCPS Objective 4

¹⁰² (2014) 17 ELRNZ 442, especially para's 29(b) 55 and 98

[625] In our evaluation of the evidence on landscape and related effects we have concluded significantly against the proposal. It is therefore logical that we conclude that the proposal is contrary to the relevant objectives and policies. We cannot ignore the relevance of the regional importance of identified parts of the bay and the impact of the breakwaters in particular offering lack of consistency with Policies 6 and 13 of the NZCPS. We also particularly note the directives for maintenance of amenity landscapes, and indeed their enhancement, the fact that this particular resource is part of a significant heritage (the Hauraki Gulf), and the Coastal Plan directives including Policy 4.4.5 which we have set out earlier. We have found the scale of the breakwaters and their placement is such that a significant adverse effect in landscape context is likely, particularly given their proximity and relationship to the identified regionally significant landscape elements of the northern part the bay.

[626] The visual links between the coastal marine area and the land would be adversely impacted upon by the introduction of the breakwaters and their sheer size and scale which would disconnect the foreshore from the wider bay. This adverse impact is likely both in terms of views from the water as one enters the bay, and views from the southern public viewpoints across the bay and from the foreshore looking out from the northern part of the bay. The proposal does not provide mitigation for these adverse effects. Although we could envisage a floating low breakwater system as providing some mitigation, such is not proposed here. The proposal is strongly contrary to this policy thrust.

[627] We acknowledge the recent and ongoing enhancement to the landscape vegetation patterns around the northern and southern flanks of the bay, and understand how this might improve with time as described by Mr Scott in his evidence. As such the naturalness is likely to strengthen over time. Development of the hinterland is encouraged to integrate with the landscape, and we see that occurring especially where the arms of the bay extend beyond the sandy beach areas and the northern part of the bay. We conclude that the marina breakwaters in particular would detract from the existing environment and the potential enhancement of that through time as the landscape matures, and this would be strongly contrary to the policy thrust of the instruments.

[628] The landscape context of this marina is particularly in the northern part of the bay. The presence of the ferry terminal as addressed in our evaluation of the landscape effects of the proposal does not provide a situation where the natural character of that area has been compromised. Rather, its presence and addition of the marina would result in adverse effects of sprawling development. As set out in the ARPS there is a balance to be had between the policies encouraging location in areas where the natural character has already been compromised, and regard to the protection of those elements of remaining natural character¹⁰³. We find that an appropriate balance is not achieved in this case.

[629] Overall, we hold that even though the relevant provisions are not framed so as to deny this kind of development in Matiatia Bay, they at least very strongly discourage it. The proposal can be regarded as

¹⁰³ ARPS Chapter 7, 7.4.10 (8) and (9).

contrary to them not quite to the point where the second gateway in s104D is shut, but at the very next level. This is a major factor militating against grant of consent.

Maori cultural issues

[630] Objective 3 and Policy 2 of the NZCPS require the taking account of the principals of the Treaty of Waitangi, recognition of the role of Tangata Whenua as kaitiaki and provision for Tangata Whenua involvement in management of the coastal environment, in several stated ways.

[631] We have considered them carefully, and the evidence relating to them. Consultation with Iwi is not expressed to be mandatory, but as we have commented elsewhere in the decision, failure to do so may result in an applicant missing out on gaining information of relevance and importance to its proposal. It can also cause offence, which does not assist exchanges of information, for purely human reasons.

[632] It seems to us that lack of adequate consultation has led the applicant into the minefield it now finds itself in concerning these matters. As such it has failed to seek out and utilise opportunities to inform itself and possibly take steps to change the scope, nature or form of its proposal, by way of one example as to possible outcomes.

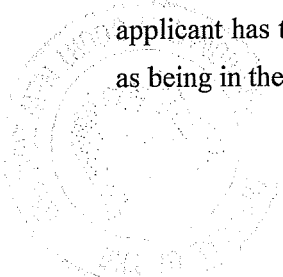
[633] A consequence of our finding about adverse effects in this area, is that the proposal is significantly contrary to the policy thrust in the relevant provisions, another major difficulty for it in terms of consentability.

Moorings and Marinas

[634] In terms of the ARPC, the applicant must of course take the provisions as it finds them. The proposal is to place a marina into a Mooring Management Area, with the obvious consequence that it is in significant discord with the objectives and policies of such, particularly Objective 24.3.1 and Policy 24.4.1.

[635] Chapter 23 of the ARPS concerns marinas. Objective 23.3.1 is "to concentrate marina activities in marina management areas where practicable". We agree with a submission on behalf of DMI that there was no evidence of impracticability of proposing the new marina facility in other areas.

[636] One technique that the applicant could conceivably have employed was to seek a plan change to create a Marina Management Area or otherwise enable a marina in Matiatia, and thus gain better support in the policy sense. It has not chosen do this, and while that is its call, one could make the observation that the applicant has thereby avoided running the gamut of s32 RMA. That observation is not however to be taken as being in the determinative matrix of this case.



[637] Objective 23.3.2 provides for the establishment of marinas “while ensuring that adverse effects are avoided, remedied, or mitigated”. In view of our many findings about adverse effects on the environment, the proposal is strongly out of step with this objective.

[638] Policy 23.4.8 provides that any marina development shall avoid, so far as practicable, remedy or mitigate adverse effects on areas of the coastal marine area that are available for free public use and enjoyment. Subject only to the offer to create a public viewing platform on the breakwater, and some limited if potentially slightly hazardous access to the marina waters by kayak and dinghy, the proposal is in quite strong discord with this policy.

Proposed Auckland unitary plan (PAUP)

[639] The regional rules in this plan relating to water and to sites and places of value to Tangata Whenua have taken legal effect pursuant s86B(3) RMA. Consent is therefore required in relation to those provisions.

[640] The district planning provisions of the PAUP generally do not apply to Waiheke Island¹⁰⁴ in the terrestrial sense.

[641] The provisions of this proposed plan are at a relatively early stage in process terms, and therefore should be accorded less weight in our decision-making than the other plans discussed. However we note that there are objectives and policies in 3 specific zones that are relevant to some degree – the general coastal marine zone, the marina zone, and the mooring zone. The proposal is prominently located within a mooring zone, and therefore similar tensions arise against the provisions of this plan as do in relation to the ARCP. It is trite that placing a marina in the mooring zone will prevent vessels from utilising swing moorings there.

[642] The marina zone in this plan expressly provides only for the development and operation of existing or established marinas, and provides no guidance for the development of marinas outside the zone. There are apparently submissions lodged about these things, including we understand from the present applicant, but we can take no account of those.

[643] The primary relevant Objective in the PAUP, 5.2.1, requires that marina activities be located within a marina zone; hence the present proposal is strongly contrary to that objective.

[644] Another issue arises, perhaps really as a side wind to the issues before us, from clause 5.1.13 of the PAUP. Here one finds an explanation for the policy change from the ARCP. It is clear that the policy for assessing new marinas is now to be through a plan change process, because such a process enables the council and communities to participate in a robust and participatory process to address all relevant effects,

¹⁰⁴ Section 102 (2) Local Government (Auckland Transitional Provisions) Act 2010

both landward, and seaward, in an integrated manor. Related objectives and policies provide a checklist for assessment of new marina zone proposals, but they have not been engaged.

Hauraki Gulf Marine Park Act 2000 (“HGMPA”)

[645] Section 9(4) HGMPA directs that a consent authority must have regard to sections 7 and 8 of the HGMPA in addition to matters in the RMA.

[646] Of some note, this consideration is not subject to Part 2 RMA in the way that s104 RMA matters are.

[647] Section 10(1) HGMPA provides that for the coastal environment of the Hauraki Gulf, sections 7 and 8 must be treated as a New Zealand coastal policy statement issued under the Resource Management Act 1991. These provisions are to be interpreted within the context of the overall purpose of the Act¹⁰⁵.

[648] Section 7 HGMPA recognises the Hauraki Gulf as having national significance, as to which there are two elements, “inter-relationships” and “capacity”. The inter-relationship issue arises from the interface of the coastal marine area, the catchments which drain into it, and the islands contained within it. The concept of capacity relates to its ability to sustain the life-supporting capacity of the environment.

[649] Although it has been said that these provisions of HGMPA rather resemble Part 2 of the RMA, there are some differences. For instance “sustainable” appears displaced by the provision in HGMPA for “sustaining the life-supporting capacity of the environment”. Additionally, there appears in section 8 to be a stronger emphasis on protection (and where appropriate, enhancement) of such things as the life-supporting capacity of the relevant environment, the natural, historic and physical resources, and the natural, historical and physical resources (including kaimoana) with which Tangata Whenua have a historic, traditional, cultural and spiritual relationship. It also calls for the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic and physical resources.

[650] Section 8 calls for a slightly lesser standard of approach (*maintenance* and where appropriate *enhancement*), of the contribution of the natural historic and physical resources the gulf, islands and catchments to the social and economic wellbeing of the people and communities, and of those same resources, which contribute to the recreation and enjoyment of the Hauraki Gulf for people and communities.

[651] Hence we find that recreation and enjoyment of the Hauraki Gulf has slightly less emphasis in this Act than the earlier mentioned life-supporting capacity of the environment, natural historic and physical resources, matters of Maori cultural importance. This is another factor that quite strongly counts against the

¹⁰⁵ Commerce commission v Fonterra Cooperative Ltd [2007] NZSC 36 at [22]

present marina proposal when regard is had to this particular “national coastal policy statement”, perhaps to an even slightly greater degree than under the 2010 NZ Coastal Policy Statement¹⁰⁶.

Final decision, Part 2 consideration, and exercise of ultimate discretion

[652] We have made a finding pursuant to s104D RMA that the proposal passes through the gateway in subsection 1(b) concerning objectives and policies of the operative regional coastal plan and the PAUP. We therefore have jurisdiction to consider the merits of the application, and to that end we have provided an analysis of the proposal as a consideration of matters directed by s104 RMA.

[653] We reiterate that the application has been considered as one at “first instance” as a direct referral and that we are to determine it under s86G RMA. Subsection 5 of that provision directs that are Parts 11 and 11A of the Act apply to our consideration of the proceedings. These parts relate to the constitution and work of the Environment Court, and prohibitions on activity by trade competitors. We confirm that the Court has worked to the necessary relevant extent pursuant to the provisions of Part 11, and Part 11A has not been engaged.

[654] The steps required by s87F RMA appear to have been followed, including the provision of a report to the applicant and parties (lodged with the Court and duly taken account of by us), and assistance offered by Auckland Council to the Court as required by subsections (6) and (7). Indeed, we record our gratitude to counsel for the council, Mr Allan, and the witnesses he called, for their helpful and thoughtful approach to the issues arising in the case.

[655] We note also subsection (6) of s87G, whereby in considering a matter that is an application for a resource consent, the Court must apply sections 104 to 112, and 138A, as if it were a consent authority. We record that we have done so.

[656] Our findings about effects on the environment (s104(1)(a)), and relevant provisions of statutory instruments (s104(1)(b)) militate quite strongly against grant of consent to the marina when each matter is independently weighed and placed in the mix, despite some support being offered by some aspects.

[657] Importantly, the matters to which we must have regard under s104, are expressly made subject to Part 2. We proceed to that stage now, and to the exercise of the overall ultimate discretion.

[658] Part 2 of the Act comprises sections 5, 6, 7, and 8. All are engaged to a degree in the present case.

¹⁰⁶ In making this finding we record that we are conscious of s10(2) HGMPA which provides that where there is a conflict between provisions of ss7 and 8 HGMPA and a NZ Coastal Policy Statement, the latter shall prevail. We doubt the presence of conflict here, simply a matter of emphasis. Were we to be wrong in that, that is if there could be said to be a conflict, the point would not be determinative in our ultimate decision about the outcome.

[659] Section 5, stating the purpose of the Resource Management Act, has sometimes been called the “touchstone” of the work of consent authorities in cases such as this. Because some readers of this decision might not be familiar with it, we set it out as follows:

5. Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while-
 - (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[660] Section 6 sets out matters of national importance that we are expressly required to recognise and provide for. Of relevance, they include:

- (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;
- ...
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers;
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[661] Of relevance under section 7, we are directed to have particular regard to:

- (a) Kaitiakitanga
- ...
- (c) The maintenance and enhancement of amenity values;
- (d) Intrinsic values of ecosystems;
- ...
- (f) Maintenance and enhancement of the quality of the environment

[662] Section 8 RMA is headed “Treaty of Waitangi” and provides:

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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[663] Relevant portions of section 5 (2) require us, in this case, to focus on managing the use, development and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural well being... while sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; safeguarding the life-supporting capacity of... water... and ecosystems; and avoiding, remedying, or mitigating any adverse effect of activities on the environment.

[664] We have found that the proposed marina will offer some benefits for recreation and tourism, albeit in a limited way in comparison to other modes of accessing the Island and the Bay for these purposes. The principal benefits or effects of this sort will be experienced by permanent berth holders in this relatively small marina, and unknown numbers of visitors granted permission to occupy berths short term. A reasonably significant benefit or positive effect would be the provision access out on to the breakwater for members of the public to go and experience views out in the middle of the bay. This would be particularly beneficial for people who don't have access to water craft in Matiatia. Another, perhaps smaller positive is the offer of a berth in the marina for the Coastguard service.

[665] In a different light, the early proposal to provide access to the northern bay shoreline by means of a boardwalk attached to the then proposed larger car park, has been deleted from the changed proposal. This is not a negative for the proposal, simply an opportunity lost to engage s5 in a positive way.

[666] These matters represent relevant pluses and minuses concerning the social (and a lesser extent economic) conditions in respect of which people and communities are to be enabled.

[667] Our findings concerning landscape, visual, natural character and amenity effects have the potential to negatively impact these conditions by detracting from the recreation and tourism opportunities in the bay that we have discussed.

[668] There being the potential for more than minor adverse effects on the ecology of the bay from contaminants in anti-fouling paints in the future, the requirement to safeguard the life-supporting capacity of water and ecosystems may be negatively impacted, although we have accorded this matter relatively low weight for reasons recorded.

[669] The requirement to avoid, remedy, or mitigate adverse effects of activities on the environment (s5) is a broad issue that in this case will in large part draw holistically on the findings that we make concerning sections 6,7, and 8 RMA.

[670] As we have noted, s6(1)(a) RMA is engaged concerning the preservation of natural character of the coastal environment and its protection from inappropriate subdivision use and development. Section 6(1)(b) concerning outstanding natural landscapes and features, is not engaged, but we note that essentially the same

level of protection is afforded them (that is from inappropriate subdivision use and development), with the preservation aspect being added in the former.

[671] We have found potential adverse effects on natural character to be considerably more than minor, and in the case of the breakwaters and deck, very high. It follows that if the marina were to be established, the natural character of the bay would not be protected from inappropriate development (“inappropriate” of course relating to that which is sought to be protected as we have discussed earlier in relation to the decision of the Supreme Court in the *King Salmon* decision). (Noting as well from the *King Salmon* decision that the presence of these words in s6(1)(a) does not necessarily rule out development). However on this occasion bearing in mind our findings about natural character, and about potential effects on it from the marina, it follows that we must hold that the development would be inappropriate, and we do. Because section 6 requires us to recognise and provide for this particular matter of national importance, and meaningful mitigation not being achievable as we have held, we consider that any possibility of granting consent is seriously called in question under this head.

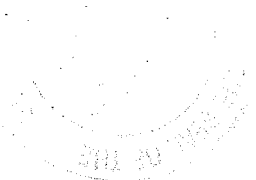
[672] Section 7(c) and (f) are engaged as we have said. We are to have particular regard to those matters. This is a higher level of consideration than the phrase “have regard to” in s104 (1).

[673] Our findings that adverse visual, landscape and amenity effects from the proposed marina would be considerably more than minor (and in the case of the breakwaters and deck, very high), the particular regard that we should have to maintenance and enhancement of amenity values and maintenance and enhancement of the quality of the environment again leads to a conclusion (meaningful mitigation not being achievable as we have held) that consentability is called in question.

[674] Turning Maori cultural matters, section 6(e) is engaged as we have said. The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, and other Taonga, is a matter of national importance that we are required to recognise and provide for. Establishment and operation of the marina would not enable such recognition and provision, leading once again to a conclusion that refusal of consent might be required for us to meet the obligation imposed on us.

[675] Section 7(a) (Kaitiakitanga) is also engaged, and we are to have particular regard to this matter. Once again our findings about adverse effects under this head, militate against a grant of consent.

[676] Under section 8 concerning management of the use, development and protection of natural and physical resources, we are to take into account the principles of the Treaty of Waitangi (Tiriti o Waitangi). This is a lower level of consideration again than section 7, but having regard to our earlier findings about potential effects on Maori cultural values as described, consent would not be favoured when taking into



account the principals of the Treaty of Waitangi. We recognise that as a decision maker we do not take on the “obligations” of the Crown under the treaty, we simply take account of the principles of the treaty¹⁰⁷.

[677] Section 6(d) concerns the maintenance in enhancement of public access to and along the coastal marine area. This would have been quite well served by the earlier proposed boardwalk from the car park to the Historic Reserve, but that feature disappeared when the car park was re-designed. Consideration of this aspect leads to a neutral conclusion, the previous positive having gone.

[678] Section 7(f) concerning maintenance and enhancement of the quality of the environment, is engaged to some degree by the potential adverse effects on ecosystems from chemicals in anti-fouling paints. However, as we have noted, this potential difficulty weighs less with us than the other matters under sections 6 and 7 where we have found the proposal confronting significant difficulties.

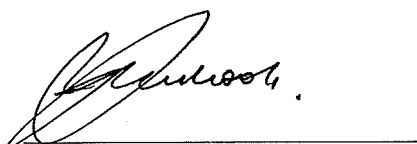
[679] We must record that the applicant has striven to tailor its draft conditions of consent to mitigate effects as far as possible and address the many concerns of parties opposing; but in a way that huge effort has ironically illustrated the difficulties of mitigating large structures on water and on or near the foreshore and ultimately the inappropriateness of the proposal.

[680] Our overall conclusion is that the purpose of the Act, the promotion of sustainable management of natural and physical resources, would not be served by granting consent to the marina, particularly informed as it is by our findings on the relevant matters of national importance in s6, and at a slightly lesser level by the relevant matters in ss7 and 8 and our findings in our s104 consideration. We feel duty bound therefore to exercise our discretion against granting consent, and that is the ultimate outcome in the case.

[681] Costs are reserved.

Dated at Auckland this 17th day of December 2015

For the Court



L J Newhook
Principal Environment Judge

¹⁰⁷ See for instance *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (Environment Court)

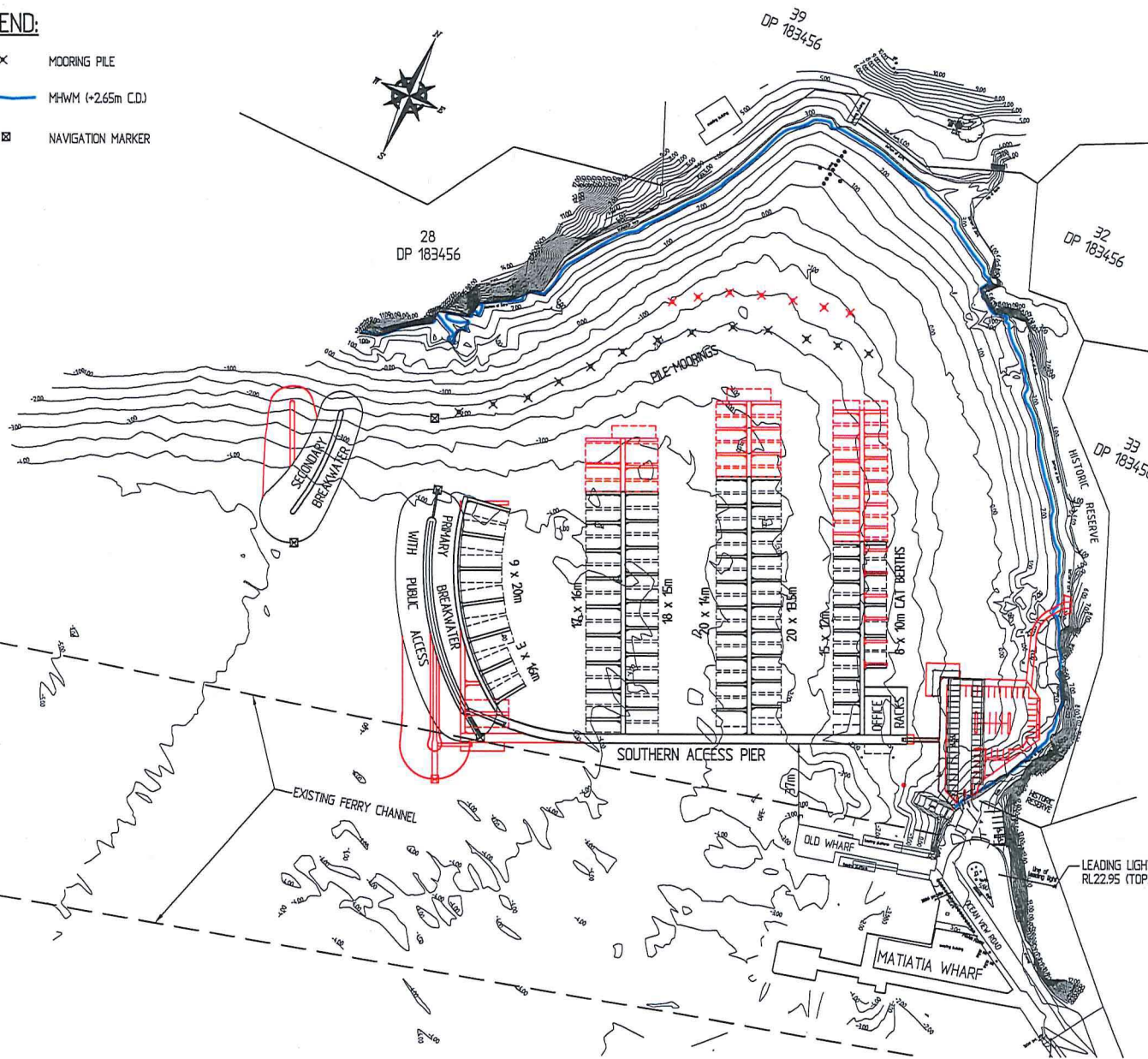
NOTES:

1. ALL DIMENSIONS ARE IN METRES UNO.
2. ALL LEVELS ARE IN METRES AND REDUCED TO CHART DATUM.
3. MARINA STRUCTURAL COMPONENTS AND PILES ARE SUBJECT TO DETAILED DESIGN.
4. ON SHORE LAYOUT AND CONTOURS ARE BASED ON AXIS CONSULTANTS DRAWINGS DRAWING FILE : 10150-SS01.DWG AND DRAWING FILE : 10150-E01-JDWG
5. PIER A 10m CATAMARAN OR MULTIHULL VESSEL BERTHS FOR SHALLOW DRAFT VESSELS ONLY.

LEGEND:

- × MOORING PILE
- MHW (+2.65m C.D.)
- ▣ NAVIGATION MARKER

A.



PLAN



B 21/05/15 PARKING DECK OUTLINE LIGHTENED
A 19/05/15 REDUCED SUSPENDED DECK

Revisions

This plan is copyright and cannot be used or reproduced without the written permission of International Marina Consultants

International Marina Consultants
Consultants to the Marina Industry.

International Marina Consultants Pty. Ltd.
A.C.N. 079 905 481

473 Annerley Road
ANNERLEY QLD 4103
AUSTRALIA
Phone (07)3892 5711 Fax (07)3892 5611
Email : inc@inc-marinas.com

CLIENT:
WAIHEKE MARINAS LIMITED

PROJECT:
MATIATIA MARINA

TITLE:
**REDUCED MARINA LAYOUT
DEPICTING MARINA EXTENT
REDUCTIONS / DELETIONS**

Date:	12/12/2014
Drawing No.:	4208-222-Rev B
Scale:	AS SHOWN
Drawn By: J.C.	Designed By:
Approved By:	

Figure 140 - Marina Concept Plan with Amendments



B 21/05/15 SUSPENDED DECK COLOR CHANGED
 A 19/05/15 SUSPENDED DECK ADDED

Revisions

This plan is copyright and cannot be used or reproduced without the written permission of International Marina Consultants

International
Marina
Consultants

Consultants to the Marina Industry.

International Marina
 Consultants Pty. Ltd.
 A.C.N. 079 905 481

473 Annerley Road
 ANNERLEY QLD 4103
 AUSTRALIA
 Phone (07)3892 5711 Fax (07)3892 5611
 Email : imc@imc-marinas.com

CLIENT:
WAIHEKE MARINAS LIMITED

PROJECT:
MATIATIA MARINA

TITLE:
**AERIAL PHOTO WITH
 REDUCED MARINA OVERLAY**

Date:	12/12/2014
Drawing No.:	4208-200 + Rev B
Scale:	1 : 2500 (A3)
Drawn By:	J.C.
Designed By:	
Approved By:	

Figure 142 - Marina Concept Plan Aerial Overlay



Photomontage of Revised Design

Viewpoint 01 - Photomontage from Auckland Ferry - High Tide 2.79m

Photographed 18 November 2014 4:42pm

Captured - Canon 6D with a 16mm lens

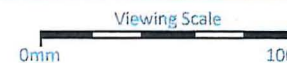
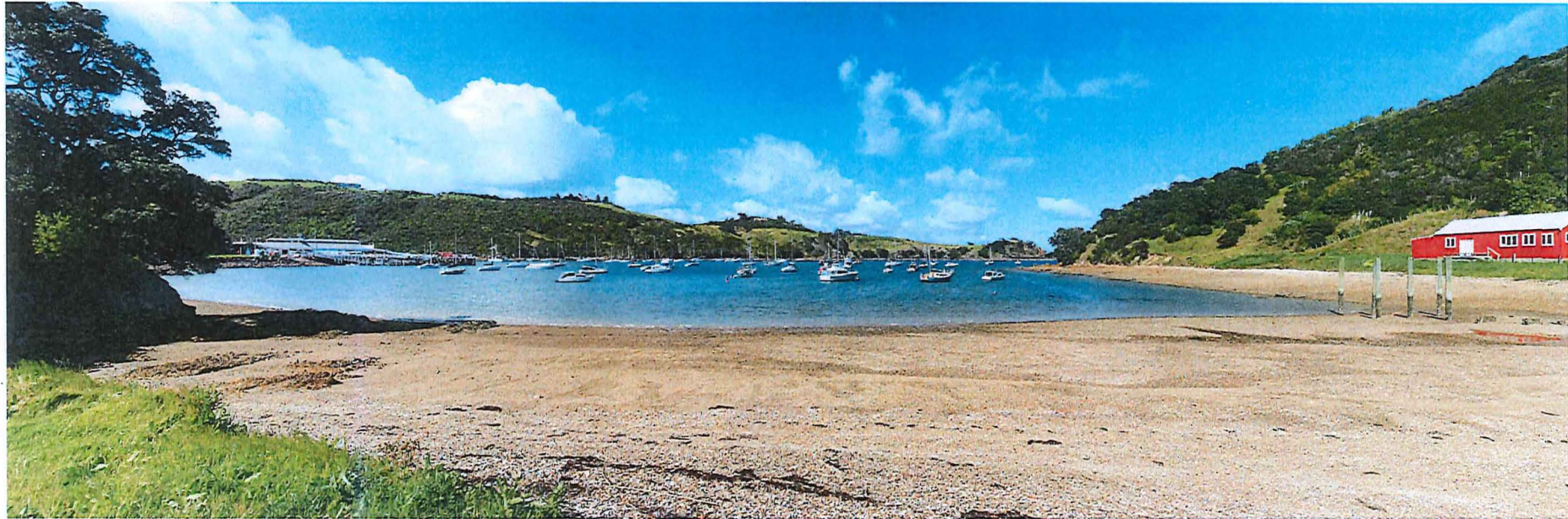
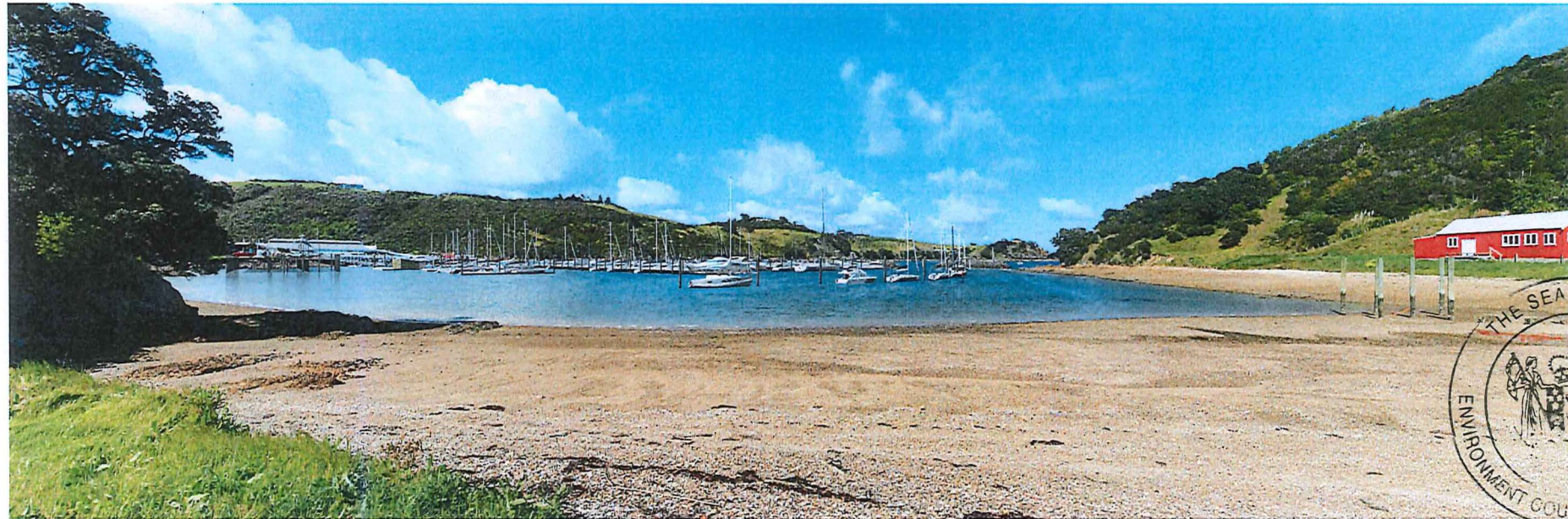


Figure 158: Marina from Arriving Ferry



Existing View



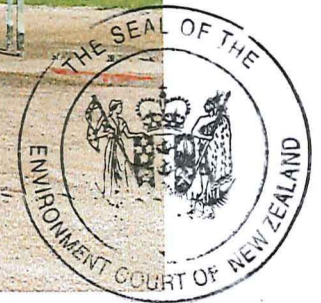
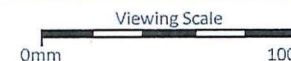
Visual Simulation of Revised Design

Viewpoint 04 - Foreshore Adjoining Matietie Reserve - Low Tide 1.00m

Camera Position - 420218.723, 811317.108, 2.868 - Co-ordinate system Mt Eden 2000.
Camera 1680 mm above ground. Photographed 11 October 2012 10:05am

Captured - Canon 5D MarkII with a 24mm lens
Image Projection Method - Rectilinear Perspective

Field of View - 124 degrees Horizontal x 55 degrees Vertical
Viewing distances - A1 230mm, A2 163mm, A3 115mm



buildmedia
seeing is believing

Figure 162: Low Tide Viewpoint 4



Existing View



Visual Simulation of Revised Design

Viewpoint 09 - Old Wharf - Right - High Tide 2.59m

Captured - Canon 6D with a 85mm lens
Image Projection Method - Rectilinear

Field of View - 90 degrees Horizontal x 35 degrees Vertical
Viewing distances - A1 375mm, A2 265mm, A3 187mm

Camera Position - 420270.616, 811023.103, 4.269 - Co-ordinate system Mt Eden 2000.
Camera 1500 mm above ground. Photographed 11 November 2014 1:37pm

