BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

ENV-2009-AKL-000211

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	**DIRECTOR GENERAL OF CONSERVATION**
	Appellant
AND	**NORTHLAND REGIONAL COUNCIL**
	Respondent

SUBMISSIONS OF COUNSEL FOR THE RESPONDENT ON JURISDICTION

Dated 11 March 2010

Next Event Date:

WEBB ROSS
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MAY IT PLEASE THE COURT:

Introduction

1. Ms Gibbs-Smith is before the court as a s274 party in support of the appeal by the Department of Conservation ("DoC"). She is a s274 party under s274(1)(d) of the Resource Management Act ("RMA") as she claims to have an interest in the proceedings greater than the general public.

2. DoC as the appellant in these proceedings has reached agreement with the respondent and all other parties about how the appeal should be disposed of and the respondent has presented to the court a draft consent order reflecting that agreement. All other relevant s274 parties have signed that consent order.

3. Ms Gibbs-Smith's principal argument in her letter to the court dated 18 February 2010 continues the theme argued by her before the Committee hearing that there was a lack of consultation with local Maori and the Cultural Impact Assessment ("CIA") put before the Committee was inadequate, because specifically there was a need for local Maori to prepare the CIA.

4. It is submitted by the respondent that Ms Gibbs-Smith's principal arguments, are outside the scope of the DoC appeal and therefore there is no jurisdiction for the court to hear those arguments.

Lack of consultation and CIA

5. At the committee hearing Ms Gibbs-Smith argued that there had been a lack of consultation and there was a need for a CIA prepared by tangata whenua.

6. The committee's findings on this issue set out the efforts made to address those issues. At para 9(b) the committee decision states[1]:

> "*The Committee accepts the submissions of the applicant and finds that the applicant did endeavour to consult with iwi. Representatives of the Runanga and local tangata whenua expressed the strong viewpoint that a cultural impact report (CIA) should have been prepared by them and stressed that until such time as an appropriate CIA is prepared then the Committee cannot address its*

[1] Pg 29

responsibilities under Part 2 of the Act. The Committee accepts that the applicant did require a CIA – ideally the CIA would have been prepared with direct local input but in the absence of an actual engagement on behalf of local iwi representatives progress had to be made.

After hearing the initial evidence the Committee clearly recognised the significance of this area to tangata whenua and agreed to an adjournment so as to provide local iwi representatives with the opportunity to provide the Committee with further information. The Committee also clearly indicated that they would be prepared to use the provisions of Section 42C in a consideration of new evidence. When the Committee was reconvened no great matter of additional information was presented by iwi submitters.

The applicant demonstrated to the committee that it had made several attempts to engage with local iwi representatives. Clearly there was an expressed frustration that the cultural impact assessment was not completed by local iwi. However, submissions showed that the applicant had attempted to engage with those matters concerning Part 2 of the Resource Management Act. The committee has resolved that to further adjourn the hearing for the preparation of another cultural impact report was unfair to the applicant and that it had given maori every opportunity to raise any specific concerns."

7. While Ms Gibbs-Smith's letter to the court dated 18 February 2010 raises a number of issues, it appears her primary issue is with lack of consultation and an inadequate CIA.

The DoC appeal

8. DoC's appeal raised a number of issues. It is accepted that the appeal notice does make general references to the historic and cultural significance of Motumaire Island and Nihonui Point and that the proposed breakwaters will have adverse effects on historic and cultural values.

9. The general position that the area has significance to tangata whenua was accepted by the committee. It was also accepted by the applicant and respondent.

10. Importantly the DoC appeal does not raise as an issue the lack of consultation with local Maori or that the CIA was not prepared by local Maori.

The law

11. Section 120(1) of the RMA sets out a person's right of appeal and provides:

"***120 Right to appeal***

(1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority ... on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:

(a) The applicant or consent holder:

(b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation."

12. Ms Gibbs-Smith had a right of appeal because she had made a submission at the committee hearing, however she chose not to exercise that right and instead chose to be a party under s274.

13. Section 274 of the RMA provides:

"***274 Representation at proceedings***
(1) The following persons may be a party to any proceedings before the Environment Court:
(a) the Minister:
(b) a local authority:
(c) the Attorney-General representing a relevant aspect of the public interest:
(d) a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person's right to be a party is limited by section 308C if the person is a person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favour of a person B as defined in section 308A:
(e) a person who made a submission to which the following apply:
(i) it was made about the subject matter of the proceedings; and
(ii) section 308B(2) and clauses 6(4) and 29(1B) of Schedule 1 were irrelevant to it:
(f) a person who made a submission to which the following apply:
(i) it was made about the subject matter of the proceedings; and
(ii) section 308B(2) or clause 6(4) or 29(1B) of Schedule 1 was relevant to it; and
(iii) it was made in compliance with whichever of section 308B(2) or clause 6(4) or 29(1B) of Schedule 1 was relevant to it.
(2) A person described in subsection (1) may become a party to the proceedings by giving notice to the Environment Court and to all other parties within 15 working days after—
(a) the period for lodging a notice of appeal ends, if the proceedings are an appeal:
(b) the decision to hold an inquiry, if the proceedings are an inquiry:
(c) the proceedings are commenced, in any other case.
(3) The notice given under subsection (2) must state—
(a) the proceedings in which the person has an interest; and

*(b) whether the person supports or opposes the **[[proceedings]]** and the reasons for that support or opposition; and*
(c) if applicable, the grounds for seeking representation under subsection (1)(c) or (d); and
(d) an address for service.
(4) A person who becomes a party to the proceedings under this section may appear and call evidence in accordance with subsections (4A) and, if relevant, (4B).
(4A) Evidence must not be called under subsection (4) unless it is on matters within the scope of the appeal, inquiry, or other proceeding.
(4B) However, in the case of a person described in subsection (1)(e) or (f), evidence may be called only if it is both—
(a) within the scope of the appeal, inquiry, or other proceeding; and
(b) on matters arising out of that person's submissions in the previous related proceedings or on any matter on which that person could have appealed.
(5) A person who becomes a party to the proceedings under this section may not oppose the withdrawal or abandonment of the proceedings unless the proceedings were brought by a person who made a submission in the previous proceedings on the same matter.
(6) For the purposes of determining whether a person has an interest in proceedings greater than the interest that the general public has, the Environment Court must have regard to every relevant statutory acknowledgment (within the meaning of an Act specified in Schedule 11) in accordance with the provisions of the relevant Act in that schedule.
(7) Subsection (2) is subject to section 281.

14. Under s274(4A) the evidence called in support by the s274 party must relate to "*matters within the scope of the appeal*".

15. The general principle is that even though an appeal to the Environment Court is heard de novo, it is still limited to the scope of the appeal.[2]

16. While the court is required to have regard to s104 of the RMA and Part II matters in deciding any particular resource consent application, that must be with respect to the matters at issue, and as raised by an appellant in the notice of appeal. A s274 party is not entitled to enlarge the scope of the proceedings beyond any matters being pursued by an appellant.[3] [4] [5]

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[2] Transit New Zealand v Pearson (unreported 18/12/2001, AP166/01)

[3] Winstone Aggregates Ltd v Franklin District Council (2000) 7ELRNZ 79 (per Whiting J),

[4] Beasley v Wellington City Council (unreported 4 April 2006, W27/2006 per Shepherd J)

[5] Hinton v Otago Regional Council (unreported 27/1/2004, C5 2004 per Jackson J)

Consultation and cultural impact assessment

17. It appears the principal ground of Ms Gibbs-Smith's argument is the lack of consultation by the applicant with her and the people she represents. Her other principal ground is the failure by the applicant to have the CIA prepared by tangata whenua.

18. Both these arguments are outside the scope of DoC's notice of appeal.

19. DoC's notice of appeal challenges the parts of the decision relating to the breakwaters, dredging of the seabed, replenishment of the beach and timing of bonding and the provision of esplanade strips on the reclamations. The scope of Doc's appeal is set out in para 7 of its notice.

20. The sub-paragraphs of para 7 deal with a wide variety of matters. However none of those relate to an argument that that as a matter of fact there was a lack of consultation by the applicant. Further, none of these relate to an argument that the CIA was inadequate because it was not prepared by tangata whenua.

21. The same can be said in relation to the peripheral matters raised by Ms Gibb-Smith in her letter to the Court dated 18 February 2010, namely the DoC appeal does not raise:

    a. The need for consent monitoring by tangata whenua

    b. A lack of consideration of the effects of climate change and silt deposition

    c. That no independent review was undertaken of the hydrological modelling.

22. It is submitted that Ms Gibbs-Smith is not permitted to raise these matters in the Environment Court in the context of the DoC appeal.

Dated this 12th day of March 2010

Wayne D McKean
Counsel for the respondent

MINISTRY OF JUSTICE
Tāhū o te Ture

24 February 2010

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Dear Parties

Re: ENV-2009-AKL-000211 Director-General of Conservation v Northland Regional Council
ENV-2009-AKL-000213 Far North Holdings Limited v Northland Regional Council & Anor

The presiding Judge has seen Ms Gibbs-Smith fax dated 18 February and directs as follows:

(Please find attached a copy of the letter from Emma Gibbs- Smith.)

*Parties who have signed the memorandum seeking Consent Order may file and serve submissions by **15 March 2010** in response to Ms Gibbs-Smith's communication. The Judge will probably set up a telephone conference after that. Parties are particularly asked to address the jurisdiction for addressing Ms Gibbs-Smith's issues in the DOC appeal where she is a party, and offer their thoughts for resolution of the appeals. (The Judge is minded to require Ms Gibbs- Smith to exchange evidence first, with a deadline to be strictly observed in view of past difficulties with her participation in cases. This possibility is however subject to the Court agreeing jurisdictional parameters, and being satisfied that the proponent has previously offered evidence on such issues as are within jurisdiction and pertinent, before the hearing commissioners of NRC)*

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RESOURCE MANAGEMENT UNIT

18 February 2010

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RE: BEFORE THE ENVIRONMENT COURT AT AUCKLAND – ENV-2009-AKL-000211 IN THE MATTER OF AN APPEAL UNDER SECTION 120 OF THE ACT

Nga mihi nui ki a koutou iroto tenei huihuinga mo tenei whenua/moana ki Horotutu I timata mai ki Nihonui, te mutunga kote Manukaihuia me nga motu e wha ko te Kuia rongo uru, Motumaire Motuma me Motumea hoki. Ahatia i tenei waahi e korero mai ana me whakaaro mai tatou ki Taputaputa o Pahi raua ko te one o te Tii ki Waitangi. He whenua tahi noiho enei me te moana katoa i raro te Kaitiakitanga o te haukainga. Nga hapu nei ko Te Ngareraumati, Ngatikawa, Ngati Rahiri me Te Uriongongo. Nga whanau tuturu enei I konei, e noho tonu ana matou no reira e te manuhiri tena koutou tena koutou tena hoki tatou katoa.

The Director General of Conservation appealed against the Paihia Waterfront Redevelopment (reference no. ENV-2009-AKL-0000211), namely for the following reasons:

1. The parts of the recommendation relating to the breakwaters
2. The part of the recommendation relating to the dredging of a re-routed navigation channel

3. The decision on the beach replenishment proposal, including the timing of bonding
4. The part of the recommendation relating to the provision of esplanade strips on reclamations

Nga Whanau o Horotutu me Taputaputa o Pahi attached as a s274 party and a request has been made to sign off on a Joint Memorandum Seeking Orders By Consent to resolve outstanding matters. The Memorandum that I received states that the Director-General of Conservation plans to enter into a separate side memorandum addressing the Northern Breakwater which the parties agree is not to be part of the Court orders.

Firstly, as a s274 party I cannot sign the memorandum as I am not privy to the changes and agreements made to the matters raised above.

Secondly, as discussed with you today I am unable to sign the proposed Joint Memorandum Seeking Orders By Consent as past issues raised are yet to be resolved in the Memorandum. If we are able to resolve the matters raised below and include them in the appropriate agreements, I will be happy to sign on behalf of Nga Whanau o Horotutu me Taputaputa o Pahi.

1. The parts of the recommendation relating to the breakwaters

1.1 Affected party/landowner status

As discussed with the parties Kuia Rongouru (Taylor Island) is held in freehold Maori ownership and set apart as a Maori Reservation for the purposes of "a landing place, fishing ground and recreation ground for the common use of members of the Ngapuhi tribe". To date there has been no assessment of the effects on the beneficiaries of the island as landowners. Such effects could include access to the island, impacts on kaimoana resources and other cultural assets, and the impacts of tidal flow on the island from the new development.

This matter must also be considered in light of the Prime Minister, Mr John Key, announcing that the Foreshore and Seabed Act 2004 is to be repealed. The Act is arguably the most significant piece of legislation affecting Maori in recent history. The United Nations repeatedly found that the Act discriminated against Maori because it extinguished property rights without consent or compensation.

It is recommended that appropriate assessments are carried out regarding the Paihia Waterfront Redevelopment with the support of the beneficiaries to Kuia Rongouru.

1.2 Consultation and Cultural Impacts

In *Ngati Rangi Trust and Others v The Manawatu-Wanganui Regional Council* [A067/2004], the Environment Court said that consultation, or the need to consult, arises from the principle of partnership in the Treaty of Waitangi; this requires the partners to act reasonably and to make informed decisions. Nga Whanau o Horotutu me Taputaputa o Pahi have requested consultation reflecting such a partnership approach to assess the overall cultural impacts of the Paihia Waterfront Redevelopment. Our primary request was for a Cultural Impact Assessment so that we could all be fully informed of the activity, it's effects and how those affects could be avoided, remedied or mitigated.

As directed by the Ministry for the Environment's quality planning website, a Cultural Impact Assessment is generally prepared by, or on behalf of, the iwi/hapu who hold mana whenua in the area of the proposed activity. It website goes on to say, it is important that the person preparing the CIA has a good understanding of the Maori cultural values and interests in the area affected by the proposal and that ideally the writer of the CIA report will have a clear mandate from the tangata whenua they are preparing the assessment for and the final report should have the sign off from the iwi/hapu. A Cultural Report was produced by Opus International Ltd which has not been approved or supported by any mandated Maori group within the Bay of Islands. This shows a lack of information of the Part II matters for the decision maker.

Without having the opportunity to have focused hui with the relevant parties to carry out a Cultural Impact Assessment process I can still state confidently that the breakwater and dredging will have an impact on the Cultural Landscapes within the Bay of Islands which Motumaire and Kuia Rongouru contribute to. Sections 6(e) and 6(f) require that "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga" and "the protection of historic heritage from inappropriate subdivision, use and development" is recognised and provided for.

The entire island of Motumaire has been identified as being covered in archaeological material. Although material was not found within the inter-tidal zone, (probably due to tidal disturbance) the sites where the proposed northern and western reef breakwaters are to be constructed will be within the cultural landscape. The historical relevance of these islands is touched upon however they are not provided for.

As also discussed with the applicants consultants, but not conveyed properly, is the historical spiritual connection of Motumaire and Kuia Rongouru that should not be linked in a physical manner. This issue is yet to be resolved.

1.3 Avoid, Remedy or Mitigate Effects

Also the *Maori Cultural Values in Far North Landscapes* published by the Far North District Council and Te Runanga A Iwi O Ngapuhi states that once a developer or landowner has a reasonable understanding of the particular cultural values of a landscape, the next question is what to do next. Ideally values may be able to be retained or even enhanced through a win-win solution. In other cases the parties may need to mutually explore options to remedy or mitigate adverse effects on valued landscapes where these cannot be avoided.

To date some cultural effects of the Paihia Waterfront Redevelopment have been identified but are yet to be avoided, remedied or mitigated. The avoidance of effects would be identified by the Cultural Impact Assessment proposed above. Methods to remedy any currently unknown effects which may arise after the redevelopment is completed could be identified through consent monitoring by tangata whenua. Methods to mitigate effects could be the erection of a pouwhenua.

1.4 Climate change and silt deposition

There is a lack of consideration within the application for the effects of climate change and silt deposition related to the breakwaters. General projections state that sea level will rise over the next 35 years and that with the establishment of breakwaters silt deposition will increase the level of the seabed. It is of my opinion that the breakwaters with their already hydrological unknowns may be submerged further than predicted by the proposal over the next 35 years. It is recommended that independent technical advice is sought out before this application is granted.

1.5 Hydrological flows

It is also noted that there has been no independent review of the hydrological modeling provided by the applicant. If there were an independent review undertaken, alongside a Cultural Impact Assessment then the issues still under appeal could be resolved.

2. The part of the recommendation relating to the dredging of a re-routed navigation channel

2.1 Again the issues raised in sections 1.2, 1.3 and 1.5 are yet to be resolved.

3. The decision on the beach replenishment proposal, including the timing of bonding

3.1 Again the issues raised in sections 1.2 and 1.3 are yet to be resolved.

4. The part of the recommendation relating to the provision of esplanade strips on reclamations

4.1 I raise again the issue of the foreshore and seabed as referred to in section 1.1 above and the issues raised in sections 1.2 and 1.3.

To conclude, I believe that these matters are outstanding because of a lack of the parties following best practice guidelines (www.qualityplanning.org.nz) which state that consultation can:

a. lead to a stronger understanding of the issues,
b. result in better environmental outcomes, and
c. consultation is most effective when a mutually trusting relationship is developed.

I am hopeful that we can take the "precautionary principle" approach as there is no option to take a transformative management technique due to the permanent nature of the breakwaters.

Finally if the Court were able to give more time I will be able to provide further evidence to assist to resolve these matters.

I look forward to hearing from the Court.

Em Gibbs-Smith 18/2/2010

Emma Gibbs-Smith
Nga Whanau o Horotutu me Taputaputa o Pahi