

Decision No. A95/2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN

**NGATIKAHU KI WHANGAROA CO-
OPERATIVE SOCIETY LIMITED,
WAITARUKE MARAE, D GOW,
R GOW, P A HUGHES, P WEBER,
N WEBER, E WEBER,
A PENNEFATHER, L D M
PENNEFATHER, T ALLERBY,
E ALLERBY, R JENKINS, B JENKINS,
R FOOTE, G HARE, C HARE, and
CATHOLIC PRESBYTERY**

(RMA 937/98)

Appellants

AND

**THE NORTHLAND REGIONAL
COUNCIL**

Respondent

AND

**M HEMI and MURI-TAI TIO
LIMITED**

Applicants

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)

Environment Commissioner P A Catchpole

Environment Commissioner F Easdale

HEARING at PAIHIA on 4, 5, 6, 10, 11, 12, and 13 April 2000.



COUNSEL

G J Mathias for the appellant

R M Bell for the respondent

S J Grey for the applicants

I Frechtling for the Director-General of Conservation

DECISION

Introduction

[1] This is an appeal against a decision by the Northland Regional Council granting a coastal permit for structures to farm Pacific oysters on an 8-hectare site in the Whangaroa Harbour. The appellants seek that the grant be cancelled, and that consent be refused.

The parties

[2] The applicants are Morgan Hemi and Muri-Tai Tio Limited. Mr Hemi lives at Waitaruke, a settlement near the western shore of the Whangaroa Harbour, and is of tangata whenua there. He had six years experience working on and managing oyster farms in the harbour (one in the inner harbour), and also had commercial building experience. It is intended that he would manage the proposed oyster farm, and would be a joint owner of the business, although the extent of his share had not been settled.

[3] Muri-Tai Tio Limited is the co-applicant for the resource consent. Mr P J Brierley, an aquaculture consultant, described it as his family company. He had been asked by Te Whaingaroa Runanga (representing 17 marae in the Whangaroa area) to assist them to establish an oyster farm on a joint-venture basis.

[4] The Northland Regional Council, being the regional council for Northland, has the functions conferred by section 30(1) of the Resource Management Act 1991 for the purpose of giving effect to the Act in its region, including control of occupation of foreshore and seabed. Having heard the application for the coastal permit for the proposed oyster-farm structures and the submissions in opposition, it granted consent and imposed conditions. At the hearing of this appeal the Regional Council was represented by counsel and called evidence in support of its decision.



[5] The appellants are people and societies associated with the Waitaruke area. They claim that the site for the proposed oyster farm is in a part of the harbour which has traditional and historical links with the community and is used by them for fishing and recreation.

[6] One of the people on whose behalf the appeal was lodged, Mrs V Hughes, had died prior to the appeal being heard. Accordingly Mrs Hughes's name is omitted from the list of the appellants in these proceedings.

[7] The Director-General of Conservation is, by section 52 of the Conservation Act 1987, the administrative head of the Department of Conservation which was established by section 5 of the Conservation Act 1987. The Department's functions include advocating the conservation of natural and historic resources generally.¹ The Area Manager of the Department of Conservation had lodged a submission on the resource consent application, and the Director-General took part in the hearing of the appeal in support of the appellants.

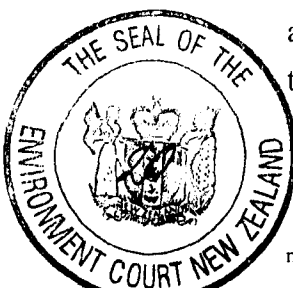
The site

[8] The Whangaroa Harbour has a total area of about 25 square kilometres. The inner harbour (within a line between the two main settlements of Whangaroa and Totara North) is relatively shallow and muddy.

[9] The application site is adjacent to the western shore of a broad embayment (about 2 kilometres wide) in the southern sector of the inner Whangaroa Harbour into which the Kaeo River and other smaller streams flow. The site is rectangular in shape, the dimensions being 283 metres by 282.7 metres. The north-western corner is 100 metres south from Ferguson Point (which rises to an elevation of about 60 metres), and the south-western corner is about 700 metres from Taupuke Point. At mean low water the water depth ranges from 0.4 to 1 metre and generally increases to the north. At the north-western corner the depth would be about 0.8 of a metre. The harbour bed of the site is relatively firm muddy sand.

[10] Across the embayment to the east, at a distance of about 450 metres, there is an existing oyster farm comprising 10 separately leased areas and occupying in total about 95 hectares. There are five other oyster farms occupying 19 hectares in total in three other bays of the Harbour.

¹ Conservation Act 1987, section 6(b).



[11] The foreshore in the Ferguson Point area varies from a relatively muddy and rocky substrate at the point to a wider muddy-sandy beach running south, Huruata Beach. The shore adjacent to the site consists of low cliffs fringed with coastal vegetation, beyond which the land is in pasture. Further south, a small stream discharges into the harbour in an area of mangroves. The site is only accessible by boat.

[12] Pacific oysters are common on the upper intertidal shores to the south and west of the site. Wedge shells, snapping shrimps and crabs are common from mid to low water, but cockles are sparse and small.

[13] There are three dwellinghouses in the small bay between Ferguson Point to the north and Taupuke Point to the south (Waitaruke Bay). The nearest is about 350 metres from the site. Waitaruke Marae and associated church, school, and housing is located to the west of State Highway 10, about 1.3 kilometres from the site.

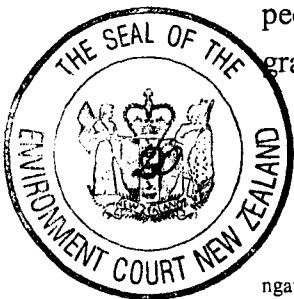
The proposal

[14] The proposal is to erect post-and-rail structures on the site to support racks for netlon bags, trays and sticks for cultivation of Pacific oysters. The structures would be partly exposed above the water level for the lower part of the tidal cycle, and would be below water for the upper part. At mean low tide the structures would stand about half a metre above the water.

[15] The on-shore base would be an existing jetty and packing shed at Totara North, although it is possible that oysters from the farm might be processed at an existing facility at Kaeo.

[16] During operation of the oyster farm, there would be times when it would be necessary to wash oysters, and a small motor would power the pump used for that purpose.

[17] Mr Brierley deposed that he expected that for construction of the farm, two or three people would be engaged at anyone time, and once fully developed, two to four people would be employed on site, and considerably more engaged in sorting and grading at the on-shore base.



The legal context

[18] In considering the legal context in which the appeal has to be decided, we address the Resource Management Act 1991 under which the application and the appeal were made, and also the fisheries legislation, so as to identify the interface between the two regimes.

Resource Management Act

[19] The purpose of the Resource Management Act 1991 is stated to be the promotion of sustainable management of natural and physical resources.² The meaning of sustainable management is stated in section 5(2), and elaborated in following sections of Part II. Definitions are given of the terms 'environment'³ and 'natural and physical resources'⁴ used in the Act. Those definitions are wide and general enough that, taken on their own, they might extend to include fish populations, organisms cultivated on marine farms, and the conditions which affect their health such as the availability in the water of nutrients on which they depend.

[20] The Resource Management Act controls various classes of activity, identifying those which are unlawful if they contravene a plan unless allowed by a resource consent,⁵ and those which are lawful only if authorised by a regional plan, proposed regional plan, or a resource consent.⁶ It allocates functions to regional councils⁷ and territorial authorities,⁸ empowers them to make various kinds of planning instrument,⁹ and to grant resource consents according to their functions.¹⁰ The Act also contains directions to consent authorities about matters to which regard

² Resource Management Act 1991, section 5(1).

³ "Environment" includes -

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

⁴ "Natural and physical resources" includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

⁵ Section 9.

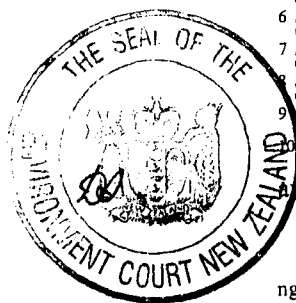
⁶ Sections 11-15.

⁷ Section 30(1).

⁸ Section 31.

⁹ Sections 59-77.

¹⁰ The combined effect of section 105 and the definition in section 2(1) of the term 'consent authority'.



is to be had in considering resource consent applications,¹¹ and specifies the scope of the authority to decide those applications.¹²

[21] In dealing with an appeal, the Environment Court has the same power, duty and discretion in respect of the decision appealed against as the primary consent authority had.¹³ Accordingly we have now to identify more specifically those relevant to the Northland Regional Council's decision of the application in respect of the proposed oyster farm.

[22] The need for resource consent for the proposed structures arises from section 12(1), of which we quote relevant parts:¹⁴

12. Restrictions on use of coastal marine areas— (1) No person may, in the coastal marine area,—

...

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed;

...

unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.

(2) No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council,—

(a) Occupy any part of the coastal marine area;

...

unless expressly allowed to do so by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.

(3) Without limiting subsection (1), no person may carry out any activity—

(a) In, on, under, or over any coastal marine area; or

(b) In relation to any natural and physical resources contained within any coastal marine area,—



¹ Section 104.

² Section 105.

¹³ Resource Management Act 1991, section 290(1).

¹⁴ As amended by section 10(1) and 12(2) of the Resource Management Amendment Act 1993, and by section 4(1) of the Resource Management Amendment Act 1997.

in a manner that contravenes a rule in a regional coastal plan or a proposed regional coastal plan unless the activity is expressly allowed by a resource consent or allowed by section 20 (certain existing lawful activities allowed).

...

[23] In allocating the functions under the Act of local authorities, the functions of regional councils are stated in section 30, and we quote relevant parts of that section:¹⁵

30. Functions of regional councils– (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of–

(i) Land and associated natural and physical resources:

(ii) The occupation of space on land of the Crown or land vested in the regional council, that are foreshore or seabed ...

...

(v) Any actual or potential effects of the use, development, or protection of land ...

(vii) Activities in relation to the surface of water:

...

(2) The functions of the regional council and the Minister of Conservation under subparagraph (i) or subparagraph (ii) or subparagraph (vii) of subsection (1)(d) do not apply to the control of the harvesting or enhancement of populations of aquatic organisms, where the purpose of that control is to conserve, use, enhance, or develop any fisheries resources controlled under the Fisheries Act 1996.

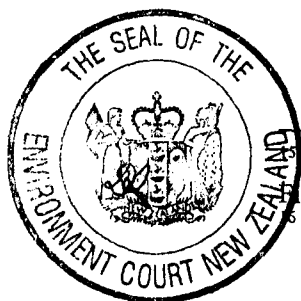
[24] The directions to consent authorities to have regard to various matters when considering resource consent applications are contained in section 104, of which we quote relevant provisions:¹⁶

104. Matters to be considered – (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –

(a) Any actual and potential effects on the environment of allowing the activity; and

...

As amended by section 21 of the Resource Management Amendment Act 1993, section 316 of the Fisheries Act 1996, and section 37 of the Fisheries (Remedial Issues) Amendment Act 1998.
As substituted by section 54 of the Resource Management Amendment Act 1993.



(c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and

(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and

(e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and

...

(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

...

(4) Without limiting subsections (1) and (3), when considering an application for a coastal permit, a consent authority shall have regard to—

(a) Any relevant policy stated in a New Zealand coastal policy statement in respect of the Crown's interests in land of the Crown in the coastal marine area; and

(b) Any relevant provisions included in the appropriate regional coastal plan to implement that policy.

[25] The decision of a resource consent application is provided for by section 105. As it was common ground that the subject of the present application is a discretionary activity, we quote the parts of the section which are relevant to that class.¹⁷

105. Decisions on applications— (1) Subject to subsections (2) and (3), after considering an application for—

...

(b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108

...

[26] The power to impose conditions on a resource consent is conferred by section 108, of which we quote relevant parts:¹⁸

108. Conditions of resource consents— (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any one or more of the following conditions:

...



¹⁷ As substituted by section 54 of the Resource Management Amendment Act 1993.

¹⁸ As substituted by section 24(1) of the Resource Management Amendment Act 1997.

(h) *In respect of any coastal permit to occupy any part of the coastal marine area (relating to land of the Crown in the coastal marine area or land in the coastal marine area vested in the regional council), a condition –*

(i) *Detailing the extent of the exclusion of other persons:*

(ii) *Specifying any coastal occupation charge.*

...

[27] Section 395 if the Act also applies to applications for coastal permits for structures in the coastal marine area, and we quote relevant parts of that provision:¹⁹

395. Applications for works, etc., in coastal marine area – (1) A regional council that receives an application for a coastal permit in respect of ... the construction of any structure ... in respect of the coastal marine area shall forward a copy of the application to the Minister of Transport.

...

(2) The Minister of Transport shall, within 15 working days after receiving a copy of the application, report to the appropriate local authority on any navigation related matters that the Minister considers relevant to the application, including any conditions which the Minister considers should be included in the consent for this purpose, and a failure to report on or before that date may be taken as an indication that the Minister has nothing to report.

(3) The local authority shall–

(a) Ensure that a copy of the Minister's report under subsection (2) is served on the applicant and every person who has made a submission on the application; and

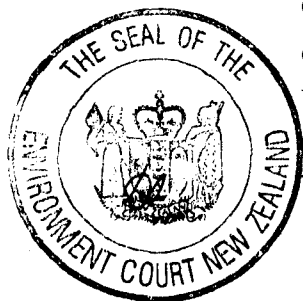
(b) Take the report into account in its consideration of the application.

...

Jurisdictional issue

[28] The grounds stated in the appellants' notice of appeal contain allegations (somewhat repetitively) that the site is used for recreational and commercial fishing and is a traditional kaimoana fishing area; that the proposal would have a cumulative effect as there are a large number of oyster farms in the area; that the overall effects of the existing developments when they have reached their maximum carrying capacity have not been quantified or ascertained; that the effects of the proposal in conjunction with the existing marine farms in the area have not been considered on a cumulative basis; that there are sufficient undeveloped oyster farms in the Whangaroa Harbour which should be utilised before new farms are created; and that

¹⁹ As amended by section 186 of the Resource Management Amendment Act 1993.



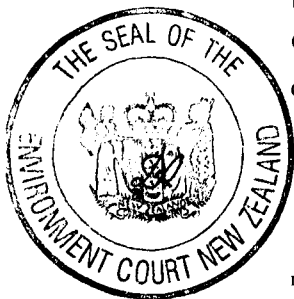
the establishment of a further oyster farm in this part of the Harbour may affect the sustainability of the existing oyster farms.

[29] In those respects, a witness called on behalf of the appellants, Mr V R Syddall, gave evidence of his concern about the proposed oyster farm on the food available for the existing marine farms in the vicinity, saying that more oysters to be fed would mean less food source available. Another witness called on behalf of the appellants, Ms B E Hay, included in her evidence reference to the relative nutrient availability in different harbours, and the extent to which the oyster-farming activities might influence oyster farm production. In cross-examination, Ms Hay reported on concern expressed by some people that feral oysters are not harvested because they are too small, and gave the opinion that this could be result of lack of nutrition.

[30] The witness for the Director-General of Conservation, Ms J A Edwards, made part of her evidence in these proceedings concern over the lack of information on sustainability or carrying capacity of areas for Pacific oyster farms, and that adverse effects of the proposed marine farm on productivity of the existing block of marine farms and sustainability of the industry and depletion of food sources (plankton) is unknown and uncertain. The witness also reported that marine farmers in the existing block were reporting a decline in yield. In cross-examination Ms Edwards stated that her concern was sustainability of all the harbour's natural and physical resources, including the native species and all the things which support the harbour ecosystem.

[31] Counsel for the Director-General of Conservation, Mr Frechtling, expressly stated that the Director-General was not taking part to seek control on harvesting or enhancement of populations of aquatic organisms for the purpose of conserving, using, enhancing, or developing any fisheries resource. Counsel for the appellants, Mr Mathias, also announced that they did not claim that effects on the carrying capacity of the harbour were a relevant issue. Even so, those counsel called the evidence mentioned about claimed effects of the proposed oyster farm on the amount of food available.

[32] Counsel for the respondent, Mr Bell, submitted that the Court is not able to consider effects on the management of fisheries resources, relying on section 30(2) of the Resource Management Act and the Court's decision in *Challenger Scallop*



Enhancement Co v Marlborough District Council.²⁰ Counsel contended that the Fisheries Act 1996 has its own code directed at providing for the utilisation of fisheries resources while ensuring sustainability,²¹ with specific environmental principles to be taken into account,²² and certain information principles to be taken into account.²³ Mr Bell also submitted that if the applicants obtain resource consent for the proposed structures, they would also need a marine farming permit under the Fisheries Act 1983,²⁴ and that if there is any inconsistency between the Resource Management Act 1991 and the Fisheries Acts in this respect, the latter are to prevail.

[33] Counsel for the applicants, Ms Grey, accepted that the applicants would need a marine farming permit issued by the Ministry of Fisheries as well as the resource consent the subject of this appeal. Counsel also submitted that there is considerable overlap between the factors considered by decision-makers under the two regimes.

[34] It was the case for the applicants that the Resource Management Act applies to the erection of fish-farming structures in, and physical occupation of the coastal marine area; and that the Fisheries Acts apply to fisheries management, including access to fisheries resources in the coastal marine area, control of harvesting or enhancement of populations of aquatic organisms, and consideration of competition for nutrients and other resources between fishing interests. Therefore, it was submitted, the effects of the proposed structures on the use of the site may properly be considered by the consent authority under the Resource Management Act; but the effects of the proposed oyster farming using those structures on other marine farms, other fisheries and bacteria, phytoplankton and other species in the aquatic environment, are for consideration by the consent authority under the Fisheries Acts.

Fisheries legislation

[35] We start by referring to the relevant statutory provisions. We have already quoted section 30(2) of the Resource Management Act 1991,²⁵ which declares among other things that the function of regional councils of control of occupation of foreshore and seabed space in the coastal marine area does not apply to control of



²⁰ [1998] NZRMA 342.

²¹ Fisheries Act 1996, section 8.

²² *Ibid*, section 9.

²³ *Ibid*, section 10.

²⁴ Fisheries Act 1983, section 67J.

²⁵ See paragraph [24] above.

harvesting of aquatic organisms to conserve use enhance or develop any fisheries resource controlled under the Fisheries Act 1966.

[36] The provisions of the fisheries legislation requiring permits for marine farms is in section 67J of the Fisheries Act 1983:²⁶

67J. Marine farming permit— (1) No person shall farm any fish, aquatic life, or seaweed except under the authority of—

(a) A marine farming lease or licence; or

(b) A marine farming permit;

...

(2) A marine farming permit shall only be issued—

(a) To a person who holds a coastal permit for the area applied for; or

(b) To a person who holds a certificate of compliance for the area applied for.

...

(8) The Director-General may not issue a marine farming permit unless he or she is satisfied that the activities contemplated by the application would not have an undue adverse effect on fishing or the sustainability of any fisheries resource.

...

(10) A marine farming permit may be issued on conditions—

...

(c) That the Director-General considers necessary or desirable to avoid, remedy, or mitigate adverse effects on fishing or the sustainability of any fisheries resource.

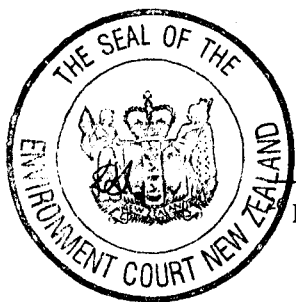
...

[37] Section 6 of the Fisheries Act 1996 addresses the relationship between that Act and the Resource Management Act 1991:

6. Application of Resource Management Act 1991— (1) No provision in any regional plan or coastal permit is enforceable to the extent that it provides for—

(a) The allocation to one or more fishing sectors in preference to any other fishing sector of access to any fisheries resource in the coastal marine area; or

(b) The conferral on any fisher of a right to occupy any land in the coastal marine area or any related part of the coastal marine area, if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area.



Inserted by the Fisheries Amendment Act 1993, section 6.

(2) Subsection (1) of this section does not prevent any regional plan or coastal permit authorising the erection in the coastal marine area of any fish farm structure or other structure.

(3) In this section—

“Fishing sector” means—

(a) Commercial fishers:

(b) Recreational fishers:

(c) Maori non-commercial customary fishers:

(d) Fish farmers:

(e) Other fishers authorised under this Act to take fish, aquatic life, or seaweed:

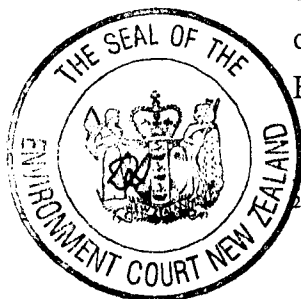
“Occupy” has the same meaning as in section 12(4) of the Resource Management Act 1991.

[38] Section 8 of that Act states a purpose of utilisation of fisheries resources while ensuring sustainability. Sections 9 and 10 set out environmental principles and information principles that functionaries under the Act are to take into account. Section 11 of that Act contains provision enabling the Minister to set sustainability measures after taking into account (among other things) effects of fishing on any stock and the aquatic environment, and having regard (among other things) to any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991.

Challenger decision

[39] The Environment Court decision cited by counsel for the applicants and for the respondent, *Challenger Scallop Enhancement Co v Marlborough District Council*,²⁷ was given on an application to strike out an appeal under section 120 of the Resource Management Act 1991 against a decision granting a coastal permit for a marine farm. The appellant alleged adverse effects on scallop beds in the area of the application site, and the applicant claimed that scallops being a fisheries resource, the question of adverse effects on them was one for the jurisdiction of the chief executive of the Ministry of Fisheries under the Fisheries Act 1983, and was outside the scope of the Resource Management Act 1991 and the jurisdiction of the Environment Court.

²⁷ [1998] NZRMA 342.



[40] In her decision Judge Kenderdine referred to section 30(2) of the Resource Management Act 1991 and to section 6 of the Fisheries Act 1996, and said:²⁸

When issuing a coastal permit for a marine farm, the local authority is exercising its functions in the context of the coastal marine area, being where the marine farm is located, pursuant to section 30(1) of the RMA. The most relevant functions with respect to marine farms are the control of land and associated natural and physical resources, the control of the occupation of space on land that is seabed, the control of any actual and potential effects of the use and development of land, and the control of activities in relation to the surface of the water.

Given that granting a coastal permit to authorise the establishment of a marine farming operation involves the control of the harvesting or enhancement of populations of aquatic organisms, three of these four relevant functions may be restricted by s 30(2) of the RMA (depending on the purpose of the control).

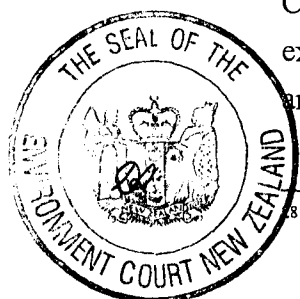
The Council raised the argument that controls undertaken pursuant to s30(1)(d)(v) of the Resource Management Act, being control of the effects of the use and development of land, are not subject to the exclusion in s30(2) of the RMA. However, in the case of a marine farm, the use of the land is limited to the anchorage of the lines. The bulk of the marine farm operation falls within the activities on the surface of the water, and the occupation of space, being the seabed. These two uses are restricted by s30(2) of the RMA, and it is clearly the intention of Parliament to restrict the local authority's functions in that regard, but only in so far as the controls have the purpose of conserving, using, enhancing, or developing any fisheries resource controlled under the Fisheries Act 1996.

I accept the submission that the distinction between controlling the effects of a use and controlling the use itself is illusory. Therefore, to control the effects of a use for the purpose of conserving, using, enhancing, or developing any fisheries resource controlled under the Fisheries Act 1996 would be to control the use itself based on a criteria [sic] which has been expressly excluded by Parliament. Not only would such an interpretation defeat the purpose of s30(2) of the RMA, it would also invoke a strained interpretation of the section.

However when the purpose of the controls is not to conserve, use, enhance or develop any fisheries resource controlled under the Fisheries Act 1996, then the local authority is acting within its jurisdiction. This is reinforced by s6(2) of the Fisheries Act 1996 which expressly retains the Council's ability to authorise a fish farm structure in the coastal marine area.

Therefore the jurisdiction of the local authority, and hence the Environment Court, to consider matters with respect to the granting of a coastal permit to control harvesting or enhancement of aquatic organisms is limited only where the purpose is to conserve, use, enhance, or develop any fisheries resource controlled under the Fisheries Act 1996.

[41] Applying that reasoning, the learned Judge struck out, as being beyond the Court's jurisdiction, grounds of appeal about the loss of seabed for scallop dredging, excluding fisherpeople from the marine farm area, impact on other forms of fishery, and sustainability of the fishery resource.



²⁸ Ibid 354.

Application of the law

[42] There is consistency in the legislation about control over the activities concerned. There are three classes of activity: the activity of marine farming as such; the erection of structures in the coastal marine area for marine farming; and the occupation of land in the coastal marine area for marine farming. (Although effects of the use and development of land, and activities in relation to the surface of water are –as the learned Judge observed in *Challenger*– within the functions allocated to regional councils by section 30(1) of the Resource Management Act, they are not directly controlled by section 12 of the Act.)

[43] Control of marine farming is entrusted to the Director-General of Fisheries by section 67J of the Fisheries Act 1983. Control of the harvesting or enhancement of populations of aquatic organisms for the purpose of conserving, using, enhancing, or developing fisheries resources controlled under the Fisheries Act 1996, is excluded from the functions of regional councils and the Minister of Conservation by section 30(2) of the Resource Management Act. By section 6(1) of the Fisheries Act 1996, regional plans and coastal permits are not enforceable to the extent that they provide for allocation of access to fisheries resources in the coastal marine area to one or more fishing sectors in preference to any other.

[44] Erection of structures in the coastal marine area is, by section 12(1)(b) of the Resource Management Act, to be controlled by regional coastal plans and coastal permits under that Act; control under that Act of structures in the coastal marine area is also recognised by section 395; and control by regional coastal plans and coastal permits over the erection in the coastal marine area of fish farm structures and other structures is recognised by section 6(2) of the Fisheries Act 1996.

[45] The occupation of land in the coastal marine area is by section 12(2) of the Resource Management Act to be controlled by regional coastal plans and resource consents under that Act; and by section 30(1)(d)(ii) is a function under that Act of regional councils (in conjunction with the Minister of Conservation). However the exercise of that control is limited by section 6(1)(b) of the Fisheries Act 1996 so as not to exclude any other fisher from fishing in any part of the coastal marine area.



[46] In short, we hold that the activity of marine farming is to be controlled under the Fisheries Act, and not under the Resource Management Act; the erection of structures in the coastal marine area for marine farming is to be controlled under the Resource Management Act, and not under the Fisheries Act; and the occupation of land in the coastal marine area is to be controlled under the Resource Management Act, not the Fisheries Act, though it is limited by section 6(1)(b) of the Fisheries Act 1996.

[47] We now apply that understanding of the law to the present appeal. The first step in addressing the issue is to identify the activity that the coastal permit is sought to authorise. Reference to the relevant provision of the Resource Management Act can assist in making a correct identification.

[48] In this case, the applicants applied for a permit to erect structures on the seabed.²⁹ That is prohibited by section 12(1) unless expressly allowed by a rule in a regional coastal plan or relevant proposed regional coastal plan or a resource consent. As the structures are not expressly allowed by the proposed regional coastal plan, but are classified by it as a discretionary activity, the applicants have applied for a resource consent for the structures.

[49] The applicants have made clear that the purpose of the proposed structures is for oyster farming. That is an activity in the coastal marine area and in relation to natural resources in the coastal marine area, so the effect of section 12(3) of the Resource Management Act is that if it is carried out in a manner that contravenes a rule in the proposed regional coastal plan, it is prohibited unless it is expressly allowed by a resource consent.³⁰ However if the applicants' submission about the relationship between the Resource Management Act 1991 and the Fisheries Acts regime is correct, the activity cannot contravene a rule lawfully contained in the proposed regional coastal plan, because it would be beyond the lawful scope of such an instrument. No doubt that is the reason why they have not applied for resource consent for the activity of oyster farming, but only for the structures on which the oyster farming would be carried on. They accept that for the activity of oyster farming, they would have to obtain a marine farming permit under the Fisheries Acts regime.

²⁹ Paragraph 2 of the application states: *This application is for a coastal permit to erect structures to farm Pacific oysters ...*

³⁰ As it is not an existing activity, the reference to section 20 does not apply.

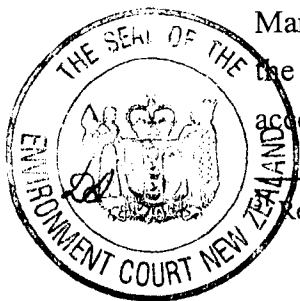


[50] We return to the resource-consent application that the applicants have made, which is for a coastal permit for the proposed structures, not for consent to the oyster-farming activity that is intended to be carried out on the structures. By section 104(1) (subject to Part II) when considering the application the consent authority is to have regard to any actual or potential effects on the environment of allowing the activity. The words “the activity” in that subsection relate to the activity that is the subject of the application, in this case the erection of the structures. The structures will have some effects on the environment, and there is no question that the Regional Council, as primary consent authority, had regard to them in deciding the application, and that that this Court is to have regard to them in deciding the appeal.

[51] If there was no other opportunity for an independent consideration of the effects on fishing or sustainability of a fisheries resource of the proposed oyster-farming activity to be carried out on the structures, it is possible that a consent authority might consider it relevant and reasonably necessary to have regard to those effects when considering the application for the structures. However in this case it is clear that it would not be necessary to do so, because the Director-General of Fisheries is required by section 67J(8) of the Fisheries Act 1983 to consider those effects in deciding the marine farming permit application, and has power under section 67J(10) to impose conditions to avoid, remedy or mitigate adverse effects on fishing or the sustainability of any fisheries resource.

[52] We have already observed that the definitions in the Resource Management Act of the terms ‘environment’ and ‘natural and physical resources’ are wide and general enough that, taken on their own, they might extend to include fish populations, organisms cultivated on marine farms, and the conditions which affect their health, such as the availability of nutrients in the water. However those are general definitions, and are stated to apply “unless the context otherwise requires”.³¹ In the present context, the relationship of the Resource Management Act and the Fisheries Acts is that marine farming and control of harvesting and enhancement of populations of aquatic organisms for the purpose of conserving, using, enhancing, or developing fisheries resources is allocated to control under the Fisheries Acts, and excluded from the functions of the relevant authorities under the Resource Management Act. To that extent the context requires that the meaning to be given to the terms ‘environment’ and ‘natural and physical resources’ has to be limited accordingly.

³¹ Resource Management Act 1991, section 2(1).



[53] The outcome is that in considering and deciding this appeal, we hold that we have to reject some of the grounds of appeal, and exclude some of the evidence. In particular we reject the grounds of appeal to the effect that the proposed structures would allocate to the fish farming sector, in preference to commercial fishers, recreational fishers, and Maori non-commercial customary fishers access to a fisheries resource in the coastal marine area; that the oyster farming on the proposed structures would have effects, cumulative on those of other oyster farms, on the carrying capacity of the harbour, and on the sustainability of existing oyster farms in the harbour; and that undeveloped oyster farms should be utilised before new farms are created. For the same reasons we hold that we are not to give consideration to the evidence (such as it was) of the effect of the proposed oyster farm on the availability of nutrients in the harbour as food for existing marine farms, and consequential effects on oyster farm production and sustainability.

[54] Because the subject application is only for a permit for structures, the limit on the constraint on control under the Resource Management Act to where the purpose is to conserve, use, enhance or develop a fisheries resource controlled under the Fisheries Act 1996 (that was identified by Judge Kenderdine in *Challenger*) is not in point in this case.

Relevant planning instruments

[55] The opening words of the section 104(1) "Subject to Part II" indicate that the duty to have regard to the matters listed has to yield in cases where to have regard to them would conflict with Part II.³² In this case, no party submitted that any such conflict would arise, and we are not aware of any reason why it might. We therefore proceed to have regard to such of the matters listed as are material. So that we can have regard to effects on the environment as indicated in any relevant planning instrument, we have regard to the planning instruments first.

New Zealand Coastal Policy Statement

[56] Section 104(1)(c) directs a consent authority to have regard to any New Zealand coastal policy statement. The New Zealand Coastal Policy Statement³³

³² *Paihia and District Citizens Assn v Northland Regional Council* Planning Tribunal Decision 77/95; *Russell Protection Society v Far North District Council* Environment Court Decision 125/98; *Kotuku Parks v Kapiti Coast District Council* Environment Court Decision A73/2000. NZ Gazette, 5 May 1994, pg 1563.



contains 14 general principles and some 40 policies. Consistent with section 6 of the Act, those policies seek as a national priority to preserve the natural character of the coastal environment;³⁴ and (among other things) to protect seascapes³⁵ and characteristics of special significance to Maori identified in accordance with tikanga Maori.³⁶ The instrument recognises that this need not preclude appropriate development in appropriate places, that some activities can only function in the coastal marine area, and some are important to the well-being of people and communities;³⁷ and indicates that policy statements and plans should define where development would be appropriate in the coastal environment.³⁸ It also states that a precautionary approach should be adopted towards proposed activities, particularly those the effects of which are unknown or little understood.³⁹

[57] One policy encourages locating activities in areas that have already been compromised;⁴⁰ another states priorities for protection of significant indigenous vegetation and significant habitat of indigenous fauna;⁴¹ and another identifies the importance of protecting the functioning of natural marine systems.⁴² There is a policy of avoiding adverse effects as far as practicable;⁴³ and another about giving priority to unrestricted public access to and along the coastal marine area.⁴⁴

Northland Regional Policy Statement

[58] Section 104(1)(c) directs a consent authority to have regard to any regional policy statement. The Northland Regional Policy Statement is a comprehensive document containing several hundred objectives and policies and methods of implementation, many of which repeat content from Part II of the Act and from the NZ Coastal Policy Statement.

³⁴ New Zealand Coastal Policy Statement, Policy 1.1.1.

³⁵ Ibid, Policy 1.1.3(a).

³⁶ Ibid, Policy 1.1.3(b).

³⁷ Ibid, General Principle 1.

³⁸ Ibid, Policy 3.2.1.

³⁹ Ibid, Policy 3.2.1.

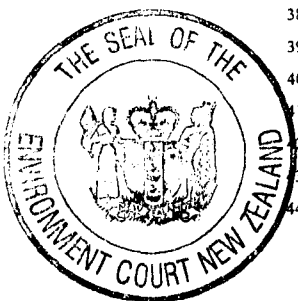
⁴⁰ Ibid, Policy 1.1.1(a).

⁴¹ Ibid, Policy 1.1.2.

⁴² Ibid, Policy 1.1.4.

⁴³ Ibid, Policy 3.2.2.

⁴⁴ Ibid, Policy 3.5.1.



[59] There is an objective of preservation of the natural character of the coastal environment including protection from inappropriate use and development.⁴⁵ There is a policy of avoiding adverse effects on significant landscape values, including seascapes.⁴⁶ There are policies of involving tangata whenua in the management of natural and physical resources,⁴⁷ of encouraging applicants to consult appropriate tangata whenua groups,⁴⁸ and of preventing damage to and loss of traditional fisheries habitats of significance to tangata whenua.⁴⁹ There is a policy of enabling activities that have an operational need to be in the coastal marine area provided adverse effects can be avoided, remedied or mitigated,⁵⁰ and a policy of limiting occupation of space, including erection of structures in areas of cultural or landscape value.⁵¹ There is a policy of adopting a precautionary approach where knowledge is limited.⁵²

[60] There is a policy of considering cumulative effects;⁵³ there is an objective of providing an adequate information base for making sound policies and decisions;⁵⁴ and there are objectives of minimising contaminants entering coastal waters,⁵⁵ and affecting traditional, cultural and spiritual values of water held by tangata whenua.⁵⁶ There is a policy of controlling uses of water that would adversely affect significant areas of indigenous vegetation or significant habitats of indigenous fauna, or water bodies that are part of an outstanding natural scenic feature;⁵⁷ and a policy of maintaining public use enjoyment and access to the coastal environment.⁵⁸

Transitional regional coastal plan

[61] Section 104(1)(d) directs a consent authority to have regard to any relevant objectives, policies, rules or other provisions of a plan. The transitional regional coastal plan for Northland consists of various instruments made under previous

⁴⁵ Northland Regional Policy Statement, Objective 22.3.1; Policy 22.4(a)1.

⁴⁶ Ibid, Policy 22.4(a)1(i).

⁴⁷ Ibid, Policy 14.3.1.

⁴⁸ Ibid, Policy 14.4(b)2.

⁴⁹ Ibid, Objective 22.3.2.

⁵⁰ Ibid, Policy 22.4(c)(i).

⁵¹ Ibid, Policy 22.4(c)2.

⁵² Ibid, Policy 22.4(a)7.

⁵³ Ibid, Policy 12.4(f).

⁵⁴ Ibid, Objective 15.3.2.

⁵⁵ Ibid, Objective 17.3.2.

⁵⁶ Ibid, Objective 17.3.3.

⁵⁷ Ibid, Policy 18.4(a)1.

⁵⁸ Ibid, Policy 22.3.3.



legislation which by section 370 of the Resource Management Act are deemed to be a regional coastal plan pending the becoming operative of a regional coastal plan prepared under that Act. Counsel for the Regional Council informed the Court that the deemed regional coastal plan does not contain any provision relevant to the decision of the present appeal. No party or planning witness suggested otherwise.

Proposed Northland Regional Coastal Plan

[62] Section 104(1)(d) also directs a consent authority to have regard to any relevant objectives, policies, rules or other provisions of a proposed plan. The Regional Council has given decisions on submissions about the content of the proposed Northland Regional Coastal Plan, but there are outstanding references to the Environment Court.

[63] By the plan the Whangaroa Harbour generally is classified as being in the Marine 2 (Conservation) Management Area, except for areas occupied by existing marine farms (which are classified as being in the Marine 3 (Marine Farming) Management Area) and existing mooring areas (which are classified as being in the Marine 4 (Mooring) Management Area. The application site is therefore in the Marine 2 (Conservation) Management Area.

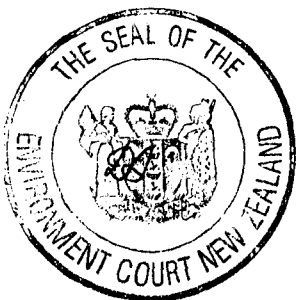
[64] Generally in the Marine 2 Management Area, marine farming (including the erection of oyster racks) is classified as a discretionary activity.⁵⁹ There are some particular parts of that management area in which marine farming is a prohibited activity.⁶⁰ Those provisions reflect a policy to prohibit marine farms in locations within the Marine 2 Management Area which are already fully developed, are unsuitable because of potential conflicts with adjacent urban development or recreational activities, or because of potential conflict with high existing natural character and amenity values.⁶¹ However the site is not in one of those areas where marine farming is a prohibited activity, and it was common ground that the subject of the application is a discretionary activity.

[65] The proposed regional coastal plan contains an abundance of objectives and policies, many stated in general language, many repeating themes from Part II of the

⁵⁹ Ibid, Rule 26.4.4.

⁶⁰ Proposed Northland Regional Coastal Plan (as amended by decisions on submissions), Rule 26.4.10(b).

⁶¹ Ibid, Section 22, Policy 9.



Act and the superior instruments under it,⁶² many overlapping, and many expressing values which at least in some circumstances may be in conflict with the values expressed in other objectives and policies. Although we have had regard to them all, a punctilious addressing of each of them would not add to the clarity of our decision. We will content ourselves by mentioning those which were particularly relied on by the parties, and which we consider are apt to influence our decision of this appeal.

[66] Recognising that marine farming is an important contributor to the economy of Northland, there are policies of providing for expansion of marine farming in the Marine 2 Management Area, and for structures for which there is an operational need within the coastal marine area, repeating the customary recital of minimising adverse effects.⁶³ There is a policy of fully utilising existing space authorised for marine farming.⁶⁴ Another is to monitor the effects of intensive marine farming to assess proposals for new farms or extensions of existing ones.⁶⁵ In the context of identifying certain harbours in Northland as having important conservation value and natural character, there is reference to the potential effect of marine farming on that value and character.⁶⁶ In respect of the Whangaroa Harbour, only the entrance and Pekapeka Bay are identified for that purpose.⁶⁷

[67] The plan states that there is a lack of sufficient environmental information and understanding to assess long-term and cumulative effects of human uses and developments, citing a general lack of knowledge of the distribution and abundance of aquatic life in subtidal areas, and of the tolerance levels of marine life to physical disturbance and pollutants. Given that, it is recorded that a precautionary approach is adopted in the plan.⁶⁸

[68] The proposed regional coastal plan contains numerous assessment criteria to be applied to applications for coastal permits: general criteria,⁶⁹ and additional criteria for structures and marine farms.⁷⁰ These criteria repeat themes from the objectives and policies, and direct attention to effects on the environment of allowing

⁶² I.e., the New Zealand Coastal Policy Statement and the Northland Regional Policy Statement.

⁶³ Proposed Northland Regional Coastal Plan (as amended by decisions on submissions), Objective 22.3; Policies 22.4.6 and 22.4.8; and Policy 16.4.3.

⁶⁴ Ibid, Policy 22.6.

⁶⁵ Ibid, Policy 22.7.

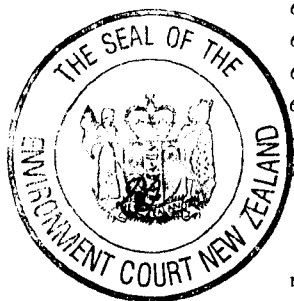
⁶⁶ Ibid, Section 22.1.

⁶⁷ Ibid, Section 8.4.

⁶⁸ Ibid, Section 5.4.

⁶⁹ Proposed Northland Regional Coastal Plan (as amended by decisions on submissions), Section 27.1.

⁷⁰ Ibid, Section 27.2.



an activity that would be considered anyway because of section 5(2)(c) and section 104(1)(a) of the Act. Although we have had regard to them all, a point-by-point addressing of each of them in this document would not be helpful in explaining how we come to our decision.

Transitional district plan

[69] Section 104(1)(e) directs a consent authority to have regard to any relevant district plan or proposed district plan where the application is made in accordance with a regional plan. The application being made in accordance with the proposed regional coastal plan, the relevant district plan is the Whangaroa section of the deemed Far North district plan, being provisions of the former Whangaroa County district scheme under the Town and Country Planning Act 1977.⁷¹ There was no proposed district plan at the time of the hearing of this appeal.⁷²

[70] The deemed district plan shows the land in the Ferguson Point area zoned Rural, with an indication of a possible tourist hotel site. That zoning only extends to the mean high-water mark. Permitted activities in that zone include camping grounds and other forms of travellers' accommodation, and up to three dwellings on a site; and controlled activities include rural industries. A wide range of commercial and industrial land uses is provided for as discretionary activities. The planning maps record sites of special wildlife interest, but no such sites are shown in the Ferguson Point area.

Environmental effects

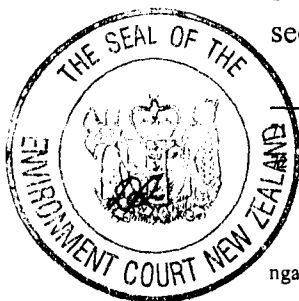
[71] Section 104(1)(a) of the Act directs a consent authority, when considering a resource consent application, to have regard to any actual and potential effects on the environment of allowing the activity. Therefore we now address the effects on the environment of allowing the proposed oyster-farm structures.

Effects on natural character and appearance

[72] The relevant planning instruments, applying section 6(a) and (b) of the Act, seek as matters of national importance to preserve the natural character of the coastal

⁷¹ Resource Management Act 1991, section 373(1).

⁷² A district plan that had formerly been proposed had been withdrawn.



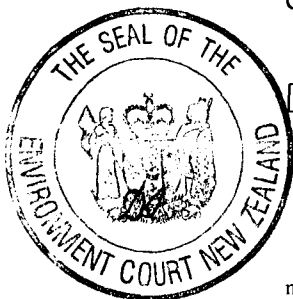
environment, and protection of outstanding natural features and landscapes from inappropriate use and development. The proposed oyster-farm structures would be visible above the surface for the lower part of each tidal cycle. We need to consider whether their appearance and rectilinear layout would have an adverse effect on the environment, and would derogate from the values described in paragraphs (a) and (b) of section 6.

[73] In those respects a landscape architect, Mr M I Farrow, gave his opinions in evidence that the site is associated with a significant coastal landscape, and displays high levels of natural coastal character by virtue of its mangrove forest fringe, unmodified tidal flats, limited level of visible built development, and natural backdrop of farmland and indigenous scrubland. He considered that the structures would compromise the prevailing natural character of the embayment's coastline, and would generate significant negative visual effect when seen from vantage points near Waitaruke. The witness referred to the orderly, built characteristics of the oyster farm as being visually intrusive in the more natural setting, when exposed during mid to low tide, and considered that it would have significant adverse visual effects in its natural setting.

[74] In cross-examination Mr Farrow agreed that in his assessment over 90 per cent of the coastal area had been ranked as being more significant than the location of the site; and that one of the crucial viewing audiences he had in mind was people extending over the intertidal flats gathering shellfish, that public access vantage points are very limited, and he could identify only one house that would have a view of some of the site.

[75] Mr P D Stanley, a planning consultant called on behalf of the appellants, gave the opinion in evidence that the natural character of the upper Whangaroa Harbour and Waitaruke Bay should be protected from what he considered to be an inappropriate proposal, and agreed that the area does not have any outstanding features and does not constitute part of an outstanding landscape that requires protection. He considered that the amenity values of the area would not be maintained or enhanced by the proposal. The witness supported Mr Farrow's opinion that the proposal would result in significant visual effects on a portion of the coast that has quite high levels of natural character.

[76] In cross-examination Mr Stanley listed a number of non-natural features around Waitaruke Bay, including buildings and a concrete boat-launching ramp.

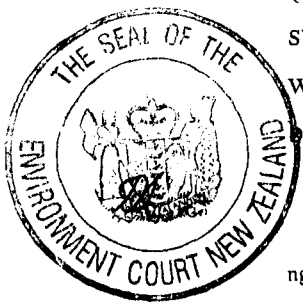


[77] With reference to section 6(b) of the Act, a planning and resource management consultant called on behalf of the applicant, Mr M J Dunn, gave the opinion that the site is not within or adjacent to an outstanding natural feature or landscape. He acknowledged that the inner harbour contains significant areas where natural elements and natural processes are dominant, but considered that the section in which the site is located has relevant low natural character values, has been modified to a large degree, affecting its overall natural character. He gave the opinion that the proposed oyster farm would not adversely affect any natural character values or be inappropriate.

[78] On visual impact, Mr Dunn testified that even at low tide the structures would only project a metre or so above the water surface, and only one or two houses would have views of the oyster farm. He agreed that it would also be visible from a group of houses approaching Totara North, and from some houses at Whangaroa, but these would be distant views, in the context of the much larger existing oyster farm.

[79] Mr Dunn also considered that the area of the site has relevant low amenity values because of its limited public access and inner harbour setting, but having no particular remoteness or wildness. He remarked that its shallow waters and muddy foreshore, containing feral oysters and mangroves, make fishing and swimming difficult. He also observed that people would still be able to enjoy the limited recreational values of the area, as the immediate shoreline would be left undisturbed.

[80] We have considered the evidence in the light of our observations in visiting the site and its environs. We accept that when exposed above the water surface in the lower part of each tidal cycle, the appearance of the structures would detract from the natural character of the coastal environment (modified as it is), and would have a generally adverse visual effect, albeit that there would be few people to see them. However, because an extensive area of the inner harbour is already occupied by similar structures, and the proposed regional coastal plan treats marine farming as a generally suitable activity there (subject to specific assessment), we do not consider that it would be inappropriate development from which that particular part of the coastal environment should be protected. We accept that the amenity values (such as they are) of the locality would not be maintained or enhanced by the structures, but the adverse effect on those values would be minor, and no more than would be expected from any oyster farm in the inner harbour. In short, there would be adverse effects on the natural character of the coastal environment, and adverse



visual effects, but we do not accept the extent ascribed to those effects by Mr Farrow and Mr Stanley.

Effects on harbour hydraulics

[81] We now consider whether the structures would have an adverse effect on the hydraulics of the inner harbour. In that respect Mr W Peterson, a local kaumatua, asserted that the proposed oyster farm would create another obstacle blocking the flow from the Kaeo River out to the inlet of the harbour, and that flooding of Waitaruke settlement and marae was a major concern. However Mr Peterson did not claim any expert qualification that would justify our making a finding about that on his evidence alone.

[82] A consultant marine zoologist, Ms B E Hay, described channels in the harbour bed from the outflow of rivers and streams, and testified that one of the channels runs through the site, and that there is little definitive data available regarding tidal flushing or currents of the upper Whangaroa Harbour. She reported that a 1991 study had found a uniform mixing pattern at high tides but that the currents were more complex at low tide, and that local oyster farmers had suggested that the flow of water in and out of the embayment is complex and variable.

[83] Ms Hay deposed that, depending on the strength of tidal currents and wave action, the farm structures might possibly cause scouring in adjacent areas as existing currents or channels are diverted due to physical obstruction to water flow. The witness stated that the proposed farm would increase the proportion of the mouth of the embayment in which the water flow is interrupted from approximately 54% to approximately 66%, but she acknowledged that in the absence of definitive data on tidal flows and flushing rates it is difficult to predict the impact of this.

[84] Asked in cross-examination whether she possessed formal qualifications in hydraulics and tidal flow, Ms Hay stated that as part of the course for her Masters degree in Zoology she had studied oceanography, but acknowledged that she did not have the same depth of understanding as a hydrographer. Ms Hay also agreed that she had relied on a draft report, not the final report, by other scientists. She agreed that the complexity of the tidal flow at low tide is of little significance because the oysters would be out of the water over that period.



[85] Asked about her evidence of the increase in the extent to which the tidal flow is interrupted, Ms Hay explained that she was referring to the impediment to flow from the posts and racks, and agreed that the effect of that would be difficult to predict. The witness told the Court that as far as she was aware, there had been no quantitative or systematic study undertaken. She also told the Court that she had had no formal training in fluid dynamics or hydraulics, and that she would not ask the Court to accept as qualified evidence her own assessment of the effects on harbour flows of oyster farm structures.

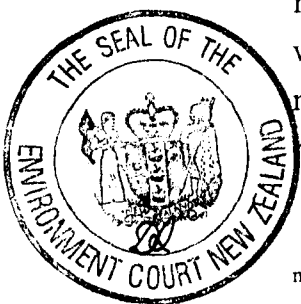
[86] Mr Stanley testified that he understood that oyster farm structures, and detrital shell and organic material beneath and immediately around structures, can impede water flows and may reduce water velocities through a marine farm as a result of increased turbulence and friction. However in cross-examination Mr Stanley stated that he did not claim to have any particular expertise in tidal hydraulics or related subjects.

[87] Mr M R Poynter, a consulting ecologist called for the applicants, deposed that the potential for reduction of water velocities would be reduced by orientation of the structures parallel to the predominant tidal flows, by maintaining half a metre clearance between the base of the racks and the harbour bed, and by regular removal of detrital shell from beneath the structures and by growing oysters in bags. He gave the opinion that any changes in local current patterns would be very localised and would not cause physical changes that could affect marine habitats or marine fauna above the low water mark.

[88] Having considered the evidence, we are not able to find any basis for concluding that the proposed structures would have any significant effect on the hydraulics or currents of the inner harbour, let alone on potential for flooding at Waitaruke.

Effects on water quality

[89] Ms Hay testified that the filter-feeding activity of bivalve shellfish increases the rate of biodeposition, because finer particles of suspended sediment and organic material are concentrated in faeces and pseudofaeces, which then settle out of the water column. Organic enrichment and reduction in oxygen levels in the substrate may occur, and anaerobic respiration by decomposers in the substrate produces hydrogen sulphide, which can periodically impact on water quality if the substrate is



disturbed or scoured. Ms Hay explained that the extent of these impacts is very difficult to measure or predict, apparently due to localised variables. In respect of the subject site, the witness observed that as the sediment grain size there is fine, the potential impacts would be minimal.

[90] Mr Poynter gave a similar description of the process of biodeposition, and the opportunity for organic material to be dispersed with water movement.

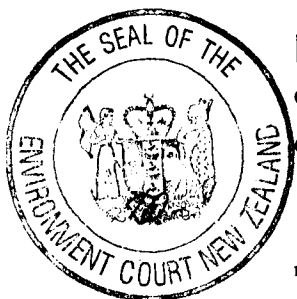
[91] Mr Brierley deposed that the main degradation of water quality in the upper harbour is caused by runoff from land following heavy rain. He testified that the farming operation would involve no discharges or feeding of stock or addition of any other substance.

[92] We accept that there would be likely to be some adverse effect on water quality due to the proposed oyster farm, and that it would be cumulative on the contributions to degraded water quality from runoff from land in the catchment used for animal farming, and from the existing oyster farms in the inner harbour. There is no basis in the evidence for quantifying the proportion potentially attributable to the proposed oyster farm, nor is there any basis for a finding that the proposed oyster farm would bring the total contamination of the waters of the inner harbour near to a significant threshold.

Effects on wildlife

[93] Ms Hay cited a report that fewer birds had been observed foraging in oyster farm areas than in surrounding areas, testified to her own experience that oyster-catchers find oyster farms excellent places to forage, but that farming activities can discourage some species. The witness also cited the same report for evidence that oyster farming had affected the amount and distribution of eelgrass in Houhora Harbour, with reduced biomass at the farm site; and she deposed that the impacts of oyster farming on eelgrass would be localised to the area of the farm. She also suggested that there is a possibility of cumulative impacts over a larger scale on the ecology of the embayment, and acknowledged that impacts on this scale are less well understood.

[94] In cross-examination Ms Hay stated that there is eelgrass on about one-third of the application site, and that she had observed that eelgrass under the existing oyster farms in the inner Whangaroa Harbour is less dense than outside the farms,



but she had not made measurements. She also acknowledged that no-one had recorded any adverse effect on bird life in the Whangaroa Harbour, that there are some birds for whom an oyster farm is a source of food, and that oyster farms also have good effects in encouraging fish into the area. Ms Hay agreed that there are significant differences between the Houhora Harbour and the proposed site on the Whangaroa Harbour.

[95] Ms Edwards deposed that the Whangaroa Harbour is listed in the Department of Conservation's Sites of Special Biological Interest (SSBI) database as having high (nationally significant) value as a coastal/estuarine habitat for wildlife, although she confirmed that the data about birdlife in the Whangaroa Harbour is not up-to-date and may no longer be reliable for resource management decision-making. She explained that this value reflects the presence of several threatened and regionally rare species, most of which inhabit estuarine wetlands and/or feed on intertidal areas.

[96] Ms Edwards deposed that the proposed location for the oyster farm would lessen its adverse effects on birdlife (especially estuarine and wader species), and that access to and servicing of the farm using coastal land and foreshore could adversely affect wildlife and habitat through physical disturbance and degradation of foreshore by pugging. The witness also reported that a rare plant had been found on cliffs in the vicinity of Ferguson Point, and that she did not consider that the proposal would have any effect on this plant.

[97] Mr Poynter deposed that the basis for the SSBI ranking of the site was the presence of fernbird, banded rail, bittern, reef heron, brown teal, and caspian tern, but that only reef heron and caspian tern were likely to occur in the vicinity of the site. Reef heron might feed on the exposed intertidal flats and rocky zones, some distance from the site, and caspian tern might occur throughout the harbour. The other species would not be present in the vicinity of the proposed farm, and he reported that the upper Whangaroa Harbour is not noted in the databases as an important wading bird habitat. He concluded that there would be no significant adverse effects on birdlife from the proposed farm, which is away from intertidal feeding zones, but that some bird species (shags, herons, and terns) might benefit from increased invertebrate abundance and more prolific epifauna created on the marine farm structures which might create additional feeding opportunities.



[98] Mr Poynter testified that at the time he had made his marine survey of the site there had been no eelgrass there; and he did not believe that destruction of eelgrass is likely in marine farms, although there could be reduced vigour due to shading. He accepted that if farm workers were routinely moving between the racks on foot there would be potential for some trampling of eelgrass, but because the farm is in a shallow subtidal location, he thought that unlikely, as most activity would be from punts or small vessels. He deposed that birds, and waders in particular, become accustomed to the activities around marine farms and are not affected in any significant way; and that there are no special avian features such as roosting sites in the Ferguson Point area.

[99] Having considered the evidence about effects on wildlife, we find no basis for concluding that the proposed oyster farm would have any significant adverse effects on birdlife or on such eelgrass as may grow at the site. The area might be more attractive to some species of birds, and others may avoid it, but adding the area to that of the existing oyster farms in the inner harbour, the total would be a small part of the total area of that part of the harbour, and there is no evidence that the site is particularly favoured by any species. Likewise, if the eelgrass under the shade of the oyster farm grows with less vigour, there is ample space for eelgrass elsewhere in the upper harbour.

[100] We do not accept as valid Ms Edwards's concern that access to and servicing of the farm could cause physical disturbance and degradation of foreshore by pugging. The applicants' uncontradicted evidence was that the oyster farm would be serviced from the jetty and sorting shed at Totara North, not from the beach or foreshore.

Effects on navigation

[101] The secretary of the Waitaruke Marae Committee, Ms M V Hape, deposed that the proposed oyster farm would leave very limited access on the water 'if one wants to motor or row out from Kaeo, Pupuke and Waitaruke towards Whangaroa town or Totara North'. In cross-examination she agreed that she knew of no public launching area at Waitaruke, that she knew of only two people at Waitaruke with boats, one kept at the beach, and the other launched at Totara North; and she agreed that the oyster farm would leave plenty of room for boating activity.



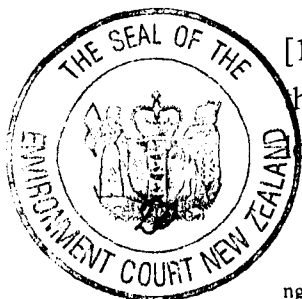
[102] Mrs R A Gow, whose family has a long association with Waitaruke, claimed in evidence that the oyster farm would mean that some two-thirds of the entrance to the upper Whangaroa Harbour would be blocked to public access and effectively occupied by oyster farms; that navigation through the upper harbour would be seriously impeded and at night very dangerous. She added that several other boating residents of the upper harbour (besides those at Waitaruke) would be disadvantaged by the navigational hazards.

[103] Mrs Gow testified that there would be a 420-metre opening between the existing block of oyster farms and the proposed new farm, and remarked that while passage through that area would be possible, apart from being visually unattractive it would require caution due to the proximity of the oyster farms. The witness observed that on the Ferguson Point side, the distance between the oyster farm and the shore would vary from 220 metres to 85 metres, and that this passage would be difficult to navigate due to the rocks off Ferguson Point and tidal effects. She considered that it would be unwise to attempt to travel by boat between the oyster farm and the Ferguson Point, or to come round the upper harbour boundary of the marine farm at any time after 1 to 1½ hours either side of high tide, because of the depth of water would allow only restricted access. Mrs Gow also stated that it would be difficult to navigate at night between the two oyster farms.

[104] Mrs Gow also referred to criteria for Maritime Safety Authority approvals for marine farms that the farms do not occupy more than one-third of the distance between shorelines and should not be located within 150 metres of a prominent headland.

[105] In cross-examination Mrs Gow referred to two boats that are regularly launched from Huruata Beach. She agreed that depending on the size of the tide they could launch two and a half or three hours either side of high tide; and that small boats would have ample space to pass between the proposed oyster farm and the existing block of oyster farms at high tide. Mrs Gow also estimated that the width of the entrance of the Whangaroa Harbour is less than 200 metres, and agreed that the larger boats from Whangaroa and Totara North manage to pass through the harbour entrance successfully, although she added that at night there is beacon.

[106] Mr Dunn quoted two of the Maritime Safety Authority Guidelines. One is that marine farms should generally not extend more than 200 metres from the mean low water mark; and the other than marine farms should not be located within 150



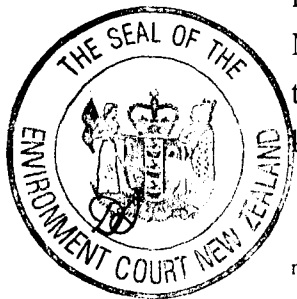
metres of any prominent headland. On the first he testified that the proposed oyster farm would extend from about 50 metres to about 330 metres from the mean low water mark. He also deposed that there would be about 450 metres of open navigable water between the outer edge of the oyster farm and the outer edge of the existing oyster farm are on the opposite side of the harbour. The witness gave the opinion that it is unlikely the farm would adversely affect boat navigation, because it would not obstruct a harbour channel and is in an area seldom used by boats. On the second of the guidelines, Mr Dunn gave the opinion that Ferguson Point is unlikely to be considered a prominent headland, and that the proposed oyster farm would not give a problem for any sailor who wished to use Ferguson Point as a mark to steer by. In cross-examination Mr Dunn agreed that the depth between the oyster farm and the shore would vary according to the state of the tide.

[107] We quoted section 395 of the Resource Management Act in paragraph [27] of this decision. The effect of that provisions is that in the absence of any report from the Maritime Safety Authority to the contrary, we are to assume that the Authority has nothing to report adverse to this proposal. However that does not preclude the Court from making its own finding on the evidence before it.

[108] We find that the inner harbour is tidal, and that at the lower part of the tidal cycle, there may be marginal draft for even small boats close inshore around the site. We also accept that boats will generally avoid passing close to the oyster farm. Even so, the gap between the proposed farm and the existing oyster farm block would be more than 400 metres wide. We accept that there may be reduced depth over some of that width at low tide. Even so we are not persuaded that inadequate space would be left so as to create an adverse effect for navigation. For small boats inclined to pass between the oyster farm and the shore, we do not accept that the 50 metres at mean low tide would be an adverse navigation effect. In short, we do not find that there would be any actual or potential adverse effect on navigation from allowing the proposed structures.

Maori cultural effects

[109] Section 6(e) of the Resource Management Act states as a matter of national importance that functionaries are to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Section 7(a) states that they are to have particular regard to kaitiakitanga.



[110] Mr Peterson, a kaumatua of Nagti Kahu ki Whangaroa, gave evidence of the value placed by local Maori people on seafood from the Whangaroa Harbour. He also referred to historic associations of Huruata Beach. He claimed that oyster farms are causing gradual extermination of natural and physical resources valued by the Maori people, mentioning blocking and diversion of channels, and claiming that the proposed oyster farm is in direct contrast with their tikanga.

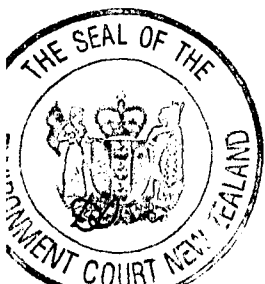
[111] In cross-examination Mr Peterson explained that his main concern was the possibility of flooding in the marae, at Waitaruke. He accepted that the main cause of silting was from the land, but stated that since the oyster farms had been established near Whangaroa, there had been a gradual build-up of silt at the entrance to the Kaeo River. He also ascribed the absence of cockles on the shores of the Waitaruke inlet to the introduction of the oyster farms.

[112] Mrs Hape also gave evidence that fish and shellfish had traditionally been valued by the local Maori people. She deplored the build-up of silt or mud, which she attributed to oysters.

[113] In cross-examination Mrs Hape identified the area of the harbour shore where shellfish are taken by Waitaruke people as being towards the Pupuke River. When it was suggested to her that access to the area of Pupuke would not be affected by the proposed oyster farm, the witness answered that she did not know really. She stated that she did not know anything about marine farming or how it would affect their getting other seafood.

[114] Mr H Tauroa is chairman of Te Whaingaroa Runanga which represents the hapu and iwi of 17 marae in the Whangaroa area, a total of about 2000 or more people. He gave the opinion that the proposal would not affect any matters of special cultural significance. The only feature he had identified was a canoe landing site, marked by a stone memorial about 300 metres from the site, and he had asked local kaumatua who had expressed no concerns about the oyster farm in respect of that landing place and memorial. In cross-examination Mr Tauroa accepted that the Waitaruke marae is the closest marae to the site, and that they have the right to be involved.

[115] On the assertions about oyster farms being the cause of blocking and diversion of harbour channels, and for the absence of cockles, we are not persuaded that the oyster farms were the cause of any such effects. Nor are we persuaded that



oyster farms in general, or the particular proposal the subject of these proceedings, would hinder the collection of shellfish or other seafood by the local people, or conflict with the relationship described in section 6(e) of the Act. There was no claim that the proposal would hinder the exercise of katiakitanga. We find that there would be no actual or potential effects on Maori cultural values of allowing the proposed oyster farm structures.

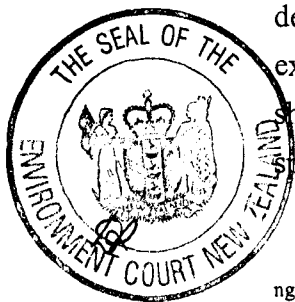
Effects on recreation

[116] Mr Stanley gave the opinion that the occupation of part of the harbour by the proposed oyster farm would have an adverse effect of precluding recreation there, referring in particular to fishing, laying of nets, flounder spearing, gathering pipi and cockles, and swimming. He acknowledged that the marine farm would not impede access along the coastline. However his understanding in those respects was dependent on the evidence of other witnesses.

[117] Mr Peterson and Mrs Hape deposed to recreational fishing and shellfish-gathering in the inner harbour generally, but neither of them gave evidence of any recreational use of the area of the site in particular, nor did they show how the proposed oyster farm would specifically restrict or preclude any recreational activity.

[118] Mrs Gow gave evidence that the general area between Ferguson Point and Taupuke Point is the main area in the upper harbour for recreational activities such as boating, swimming and water-skiing. She referred to the beach as being one of the few in the harbour which is accessible without requiring a boat or having to cross private land, and deposed that although it is tidal, it had been used for generations by children from Waitaruke School for swimming and nature studies. Mrs Gow acknowledged that use of the beach by children for swimming has decreased because of the presence of feral oysters, and expressed concern that the proposed farm would make that situation worse, and destroy the beach as a useable beach.

[119] Mrs Gow stated that the site area is regularly used by local people for water-skiing, boating, kayaking, sailing, and fishing for up to two and a half hours either side of the high tide. She gave the opinion that if the proposed oyster farm is developed then recreational use of the upper harbour would effectively be precluded, explaining that the area between Taupuke Point and the Kaeo River is much shallower. Mrs Gow also testified that the site is also a primary flounder netting and spearing area, and that other fish, such as snapper, parore, mullet, and kahawai are



often caught there as well. The ability of local people to fish in a bay easily accessible to them would be lost.

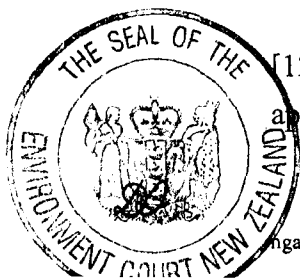
[120] In cross-examination, Mrs Gow stated that boats could be launched from Huruata Beach for up to 3 hours each side of the high tide; and she confirmed that her family swim off the beach. The witness agreed that the proposed oyster farm would be a couple of hundred metres from the beach, and more than 100 metres from where they launch their boat. Mrs Gow also agreed that the harbour entrance used is less than 200 metres wide; that the passage past Peach Island in the harbour is not much wider; and that boats safely pass through those gaps.

[121] Mr Dunn gave the opinion that the area of the site has relatively low amenity values because of its limited public access and inner harbour setting, but having no particular remoteness or wildness. He had found no evidence that the area of the site is used for sailing or water-skiing, noting that one-third of the site is within 200 metres of the shore where water-skiing is prohibited by harbour bylaws. The witness remarked that the shallow waters and muddy foreshore of the embayment, containing feral oysters and mangroves, make fishing and swimming difficult. He also observed that no facilities or structures are planned on the shoreline which could interfere with or detract from recreational activities there, so that people would still be able to enjoy the limited recreational values of the area.

[122] Accepting that recreational use would sometimes be made of the site area, we consider that the extent of recreation currently enjoyed that would be precluded by the proposed oyster farm was somewhat overstated by witnesses for the appellants. Even so, the proposed oyster farm would deprive the local community of the opportunities for recreation in the 8-hectare site, which they would have to avoid for most boating, fishing and shellfish-gathering activities. We are not persuaded that those activities could not be carried on equally enjoyably elsewhere in the inner harbour. Nor are we persuaded that the proposed oyster farm would have a significant effect on the use of the beach for picnicking, swimming and nature studies. In short, some adverse effect on recreational opportunities was made out and should be taken into account.

Other relevant issues

[123] Section 104(1)(i) of the Act directs that when considering a resource consent application, a consent authority is to have regard to any other matters that it



considers relevant and reasonably necessary to determine the application. We now address a number of matters that were raised at the appeal hearing that may deserve consideration in that respect.

Consultation

[124] Although not addressed by counsel for the appellants, Mr Peterson included in his evidence a claim that the applicants had made no attempt to consult with Ngati Kahu Ki Whangaroa. The witness asserted that consultation with the tangata whenua had been creatively diverted and that this had been a blatant abuse of the process of consultation under the principles of the Treaty of Waitangi.

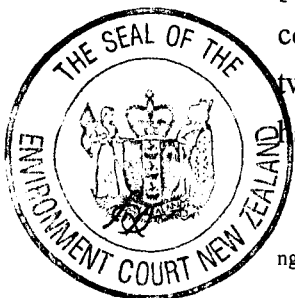
[125] In cross-examination Mrs Hape agreed that the applicant Mr Hemi, and his wife, are themselves tangata whenua of the locality.

[126] Mr Brierley testified that prior to making the application the applicants had initiated consultation with tangata whenua, and local property owners, among others. He added that since the appeal had been lodged the applicants had approached the objectors but no parties would meet with the applicants unless they withdrew the application.

[127] In cross-examination Mr Brierley confirmed that they had consulted with some groups at Waitaruke, in particular the Catholic Church. They had not consulted with the marae as such, because they had understood that the marae community was part of the runanga who were supporting the application. Mr Brierley stated that Mr Tauroa had also carried out consultation, Mr Tauroa being a prominent and well-respected Maori who Mr Brierley considered would be better qualified to consult with the iwi interests than he was.

[128] Mr Tauroa acknowledged that some local Maori are opposed to the proposal. He deposed that he had had discussions with local Maori about the site, and that he believed that the great majority of local Maori support the project, and only a very small percentage of local Maori were opposed.

[129] In cross-examination Mr Tauroa confirmed that some of the people he had consulted about the proposal were members of the Waitaruke marae, including kuia, two of whom were residents of Waitaruke. He also confirmed that the applicants had had a meeting with the chairman of the marae society after the Council hearing.



[130] We accept that where exercise of a resource consent may affect particular cultural or spiritual interests of the tangata whenua, conformity with the principles of the Treaty of Waitangi calls for an applicant to consult with the tangata whenua about the proposal.

[131] In this case we find that one of the co-applicants is himself of the tangata whenua. We also find that on behalf of the applicants Mr Tauroa, himself a kaumatua and the Chairman of the runanga, had engaged in consultation with the tangata whenua over the project. That he was unable to persuade all of the tangata whenua to support the proposal does not detract from the fact of consultation. The tangata whenua are not obliged to form a common attitude to a proposal, and individuals are, of course, free to oppose what others support. We do not accept the claim that the applicants failed to consult with tangata whenua, nor do we accept the claim that there was a blatant breach of the process of consultation in accordance with the principles of the Treaty.

Undeveloped oyster farm leases

[132] Reference was made to the policy in the proposed regional coastal plan of fully utilising existing space authorised for marine farming. Counsel for the Director-General of Conservation submitted that there is unused space in the existing block of oyster farms on the eastern side of the upper harbour. He contended that the effect of granting consent to the present proposal would be inefficient use and occupation of space in the coastal marine area.

[133] In cross-examination Ms Edwards deposed that the existing block is not fully developed. She did not take opportunity to contradict the evidence that only 2 percent of the block had not been developed.

[134] Mr Stanley gave his understanding that the existing block is mostly fully developed. Mr V R Syddall, General Manager, Operations, of Pacific Marine Farms (1996) Limited, deposed that his company is involved in the management of a number of oyster farms in the existing block, and that only the northwestern part of Lot 1, the north-eastern part of Lot 2, and Lot 9 are undeveloped. In cross-examination he agreed that Lot 9 is one of the shallow blocks, and that there is a possibility of problems from that.



[135] Mr L W Curtin, formerly a policy analyst and fisheries advisor of the Ministry of Fisheries, also deposed that Lot 9 has not been developed. He summarised the overall position that 79.44 hectares have been developed and 1.94 hectares of apparently suitable ground remain undeveloped.

[136] Mr Brierley deposed that he had identified only one authorised site that had not been developed. He described it as predominantly deep water, technically not suitable for the method proposed by the applicants (that is, rack culture), and anyway not for sale.

[137] Mr C Harwood, who has had many years' experience in oyster farming in Northland, testified that he has a deep water 10-acre block in the Whangaroa Harbour and that, apart from one shallow inshore block, it is the only block not yet developed out of the grid of 12 blocks in the upper Whangaroa Harbour. He confirmed that because the water is deep it is a relatively difficult block to develop, and that it is not on the market.

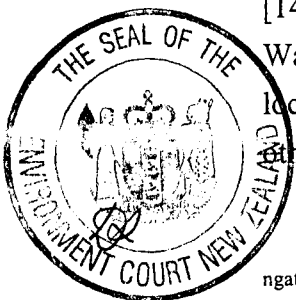
[138] Having considered the evidence, we find that the existing space in the upper Whangaroa Harbour authorised for marine farming and suitable for the purpose has nearly all been utilised, and we do not accept that granting consent for the present proposal would allow inefficient use and occupation of space in the coastal marine area.

Other possible sites

[139] Mr Stanley gave the opinions that it would be preferable for new marine farms to be located in the eastern sector of the upper harbour, being already compromised by existing marine farms, and that the western sector is unsuitable for marine farming because of potential conflicts with recreational activities and with existing natural character and amenity values.

[140] In cross-examination Ms Hay agreed that she had not made any enquiries about or investigated any alternative sites for oyster farms in the harbour.

[141] The applicants maintained that because of Mr Hemi's association with the Waitaruke locality he had good reason to seek to establish a marine farm in that locality, and although other sites had been considered, it had been found that no other suitable sites were available.



[142] Mr Brierley and Mr Tauroa both referred to another site, to the north of Ferguson Point, that had been considered and rejected because the visual effects of an oyster farm at that site would have been too great. Mr Brierley deposed that he had considered other potential sites in the Whangaroa Harbour, and had concluded that the proposed site was the best location. Mr Harwood endorsed that.

[143] To the extent that a finding is necessary, we find that the applicants did responsibly give consideration to other possible sites for a proposed marine farm.

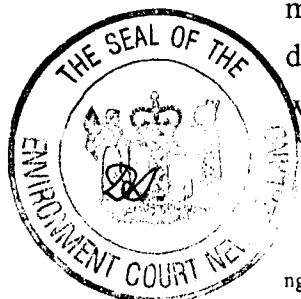
Strategic planning

[144] Counsel for the Director-General of Conservation submitted that decisions on applications such as this need to be made within a strategic planning context, and that a strategic plan has not yet been adopted for marine farming in the Whangaroa Harbour.

[145] The Department of Conservation's Northland Conservancy Coastal Planner, Ms Edwards, testified that the Resource Management Act, the New Zealand Coastal Policy Statement, and the Northland Regional Policy Statement seek a strategic approach to planning for use and development in the coastal environment. The witness gave the opinion that the proposed regional coastal plan takes a limited strategic approach, because it does not use zones, policies or assessment criteria to direct decision-making on a marine farm proposal. She observed that the assessment criteria simply identify the sorts of effects of marine farms that need to be considered in the decision process.

[146] Ms Edwards referred in her evidence to issues that the Director-General had taken up in his submission on the proposed regional coastal plan, and were included in the Minister of Conservation's reference to the Environment Court in respect of that plan.

[147] In cross-examination, Ms Edwards gave the opinion that without a strategic plan exercise to investigate suitable and appropriate areas for marine farms, it cannot be concluded whether there are any areas in the Marine 2 Management Area where marine farming is appropriate. However she accepted that classification as a discretionary activity implies that marine farming is considered generally appropriate within the Marine 2 Management Area.



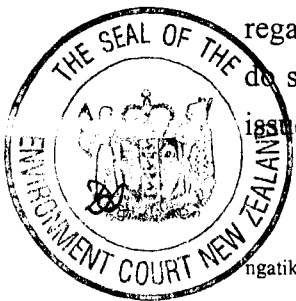
[148] Ms Edwards also agreed that the strategic study she referred to would cover suitability for all kinds of marine farming in all the harbours and other parts of the Northland coastal marine area (except parts in the Marine Management 1 Area, where marine farming is a prohibited activity). The witness confirmed that this was sought by the Minister's reference, and by the Minister's participation in the reference by the New Zealand Oyster Farms Association in respect of the coastal plan, and contended that a moratorium in the interim would be sensible.

[149] Mr Stanley supported a study of the sustainability of marine farms in the harbour, and suggested that the study may lead to a policy of avoiding development of new marine farms in the area. He gave the opinion that in the interim, new farms should be rejected, and the proposed regional coastal plan varied to make any new marine farms in the upper Whangaroa Harbour a noncomplying activity.

[150] Ms Grey submitted that although the proposed coastal plan is criticised for failing to take a strategic approach, its intent is clearly to make provision for marine farming generally in areas where it is provided for as a discretionary activity (such as the upper Whangaroa Harbour), and stated that the Regional Council had declined to impose a moratorium on further marine farms in that area pending completion of the planning process. Counsel also submitted that the Director-General's case in this respect was primarily an opportunistic attempt to air its grievances with the Regional Council over the proposed coastal plan, and that its so-called strategic approach is misconceived. She contended that the scale of the suggested strategic study is such that Ms Edwards approach would effectively end all marine farming development in the Northland region for the foreseeable future.

[151] Mr Bell submitted that the Court does not need to address in these proceedings the issues that the Minister of Conservation is pursuing in her reference to the Court of the proposed regional coastal plan; and that the Court can decide this appeal the Court in accordance with sections 104 and 105 of the Act.

[152] The Minister of Conservation has exercised her entitlement to make a reference to this Court of the failure of the proposed coastal plan to adopt the strategic method described by Ms Edwards; and has joined the proceedings of a reference by the Oyster Farms Association in which the Minister's case in that regard may also be pursued. The Court has not yet heard those proceedings, but will do so in due course. It would be inappropriate for us to express any opinion on the issues in those proceedings in this decision, and we decline to do so.



[153] The Department of Conservation has endeavoured to persuade the Regional Council to adopt a moratorium on new marine farms pending the outcome of those proceedings, and the Regional Council has declined to do so. We do not know what authority the Regional Council might have had to impose such a moratorium, if it had wished to do so. Certainly no party pointed to any authority this Court might have to impose such a moratorium, and we know of none. It is our understanding of the Court's duty on this appeal that it should decide the resource consent application on its merits in accordance with the provisions of sections 104 and 105 of the Resource Management Act 1991 and for the purpose stated in section 5 of that Act. It is also our understanding that the Court would not be entitled to avoid that duty pending decision on the Minister's reference seeking inclusion of what was called a strategic approach in the coastal plan.

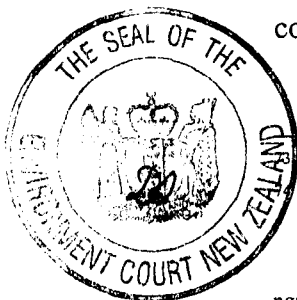
[154] Accordingly we hold that we should proceed to consider and decide the application on its merits, referring to the proposed coastal plan in its present form, and recognising that its final form has yet to be settled in accordance with future decisions on references.

Precautionary approach

[155] Counsel for the appellants, Mr Mathias, submitted there was not evidence to show that the site could appropriately be used for oyster farming, and that the activity would not impact on the environment, so that the precautionary principle should apply. He urged that little was known about the dynamics of the part of the harbour where the site is located, or about the impact on the upper harbour of the existing oyster farms there. In presenting his submissions, Mr Mathias accepted the submissions of counsel for the applicants about the precautionary principle and the application of the Court's decision in *McIntyre v Christchurch City Council*.⁷³

[156] Counsel for the Director-General of Conservation, Mr Frechtling, also submitted that there is insufficient information on the Whangaroa Harbour to properly assess the adverse effects of the proposal, and contended that, applying the precautionary principle, consent should be refused. He cited examples of cases where the precautionary approach had been applied by the Court to refuse resource consents (*Greensill v Waikato Regional Council*⁷⁴ and *Wratten v Tasman District*

(1995) 2 ELRNZ 84; [1996] NZRMA 289.
Planning Tribunal Decision W17/95.



*Council*⁷⁵) and contended that this would allow time for studies and investigations of the Whangaroa Harbour before it is compromised by further development.

[157] Ms Hay deposed that that the cumulative effect of increasing oyster-farming in the area was unknown, and that until more information was available, a precautionary approach should be taken to additional farms in the area. Mr Stanley gave a similar opinion, and quoted a passage from the proposed regional coastal plan⁷⁶ stating that as there is a lack of sufficient environmental information and understanding to assess long-term and cumulative effects of human uses and developments, a precautionary approach is adopted in the plan towards providing for use and development of the coastal marine area. In cross-examination he agreed that the Regional Council had classified marine farming in the Marine 2 management area a discretionary activity, although it had made marine farming a prohibited activity in other parts of Northland.

[158] Ms Edwards gave the opinion that the proposed regional coastal plan does not fully implement the precautionary approach to planning for marine farming and does not apply the precautionary approach to management of marine farming, so that applications are considered on a case-by-case basis. The witness concluded that, because key strategic information about the effects of the proposal is unknown or uncertain, the precautionary approach is applicable and granting consent to the proposal would be premature.

[159] In cross-examination Ms Edwards accepted that in the *Wratten* decision cited by Mr Frechtling the Court had held that the precautionary principle should only be applied to prevent serious and irreversible environmental damage. She also accepted that her evidence had invoked the precautionary principle at a considerably lower threshold than preventing serious and irreversible environmental damage.

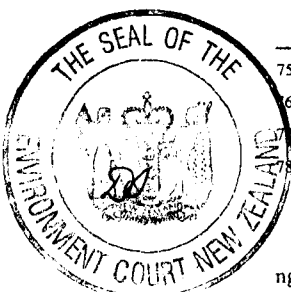
[160] Ms Grey relied on the Court's decision in *McIntyre v Christchurch City Council*⁷⁷ that the weight of the precautionary principle depends on the circumstances, and on the decision in *Wratten* that the principle may be applied to avert irreparable harm in cases where there is scientific uncertainty, it is not applicable in low risk cases. Counsel also accepted that the Court's decision in *Shirley Primary School v Telecom Mobile Communications*⁷⁸ was consistent with

⁷⁵ (1998) 4 ELRNZ 148.

⁷⁶ Proposed Northland Regional Coastal Plan, section 5.4.

⁷⁷ (1995) 2 ELRNZ 84; [1996] NZRMA 289.

⁷⁸ [1999] NZRMA 66.



those earlier decisions, and supported the proposition that a no-risk approach is not justified by the Act. Ms Grey contended that on the evidence in this case it is possible to form a strong indication of the likely effects of allowing the additional oyster farm in an area where significantly larger oyster farms have been operated successfully for many years, and submitted that application of the precautionary principle is not necessary.

[161] The decisions cited (*McIntyre*, *Wratten*, and *Shirley Primary School*) are consistent in dealing with the precautionary approach in respect of resource consent applications. The Court makes a judgment on such an application after finding facts based on evidence of probative value. The precautionary approach may be applied in making the judgment where, on the totality of the evidence, it finds that due to scientific uncertainty, exercise of the consent would be likely to cause serious or irreversible harm to the environment. So opponents are not able to invoke the precautionary approach in default of presenting a case.

[162] In this appeal none of the witnesses who urged application of the precautionary approach (Ms Hay, Mr Stanley and Ms Edwards) provided any material of probative value that would tend to show that exercise of the consent sought would be likely to cause serious or irreversible harm to the environment, either on its own or cumulatively with other oyster farms. All they did was point out the absence of research identifying the effects of oyster farming in the Whangaroa Harbour.

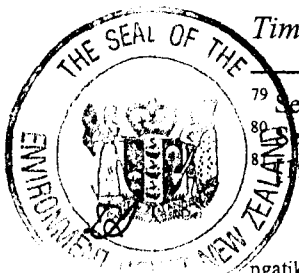
[163] Having made our findings on the evidence about likely effects of the proposal, we have not been persuaded that the proposed oyster farm (alone or cumulatively) is likely to cause serious or irreversible harm to the environment. Therefore we do not accept that we should apply, in making our discretionary judgment on the application, a precautionary approach beyond that implicit in the Act itself⁷⁹ and in the proposed coastal plan.⁸⁰

Positive social and economic effects

[164] The applicants submitted that the benefits of a proposed activity should be taken into account, relying on the judgment of the High Court in *Elderslie Park v Timaru District Council*.⁸¹ We accept that.

⁷⁹ See *Shirley Primary School* at paragraph (114).

⁸⁰ See section 5.4 where it is stated that a precautionary approach is adopted in the plan.
⁸¹ [1995] NZRMA 433.



[165] It was the applicants' case that by this proposal they aimed to provide employment for the local community, improving their work opportunities and income. Mr Brierley deposed that once the farm is developed there would be employment on the farm for about 2 to 4 people, but there would be considerably more associated with sorting and grading at the on-shore base.

[166] Mr Tauroa deposed that Te Runanga O Te Whaingaroa, of which he was Chairman, is active in encouraging local Maori to establish business ventures to provide work opportunities for their people. The runanga had itself operated an oyster farm in the Whangaroa Harbour, and he described the circumstances in which it had sold that business. Mr Tauroa gave the opinion that success by Mr Hemi in managing the proposed business would give confidence to other local Maori as well as directly providing work opportunities. He added that marine farming is one of the few opportunities available in the area for Maori to develop their own businesses.

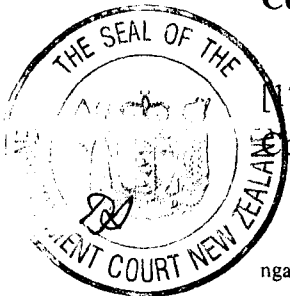
[167] In cross-examination, Mr Peterson was asked about Mr Tauroa's evidence that the oyster farm previously run by Te Runanga had provided employment for between 4 and 14 people, and agreed with that. Mrs Hape also agreed that there are currently no employment opportunities for the young people of Waitaruke, and that employment is important for their future.

[168] Mr Stanley accepted that the proposal would create employment for local people in Whangaroa in food production, and that local Maori are likely to be involved. He gave the opinion that this is a positive economic effect of the proposal.

[169] It is not for the Court to decide whether the proposed business would be successful or not. However we can make a finding on the assumption that, with the combination of skills, experience, and resources of the applicants, and support of the runanga, it will succeed. On that assumption, we find that the proposed oyster farm would be likely to have positive effects of enabling the applicants, and those engaged in the business to provide for their economic and social well-being; also adding to the economic activity in the locality; and providing an example of small business in the community.

Conditions

[170] In granting consent, the respondent imposed a number of conditions. Condition 6 stipulated that plastic trays used on the oyster farm should be coloured



grey. Mr Brierley deposed that some modern trays made from recycled materials are black, and sought an option of using black trays. No one opposed that, and we will consider the application on the basis that Condition 6 would be amended by adding the words “or black”.

[171] Condition 8 stipulates–

All refuse from the marine farm shall be collected and reused or disposed of on land in an approved manner or to an approved landfill.

[172] That condition was not criticised as far as it goes. However although we do not accept that the oyster cultivation would affect siltation, we do accept that it is possible that there may be accumulations on the harbour bed under the oyster racks of products of biodeposition from the oysters. As a precaution we will amend the condition so that it explicitly applies to any such accumulations as well as to refuse generally.

[173] Because of the time that has elapsed between the respondent’s decision and the giving of this decision, we will extend the expiry date of the consent so that it is 15 years after the giving of this decision.

Judgment

[174] Section 105(1) of the Resource Management Act directs that after considering an application for a resource consent for a discretionary activity, a consent authority may grant or refuse the consent. That discretionary judgment has to be exercised for the purpose of the Act stated in section 5, the promotion of sustainable management of natural and physical resources. In making the judgment we have also to consider the various criteria in the planning instruments.

[175] Counsel for the respondents, Mr Mathias, submitted that what is required is an overall broad judgment of whether the proposal will promote the sustainable management of natural and physical resources, recognising that the Act has a single purpose, the judgment allowing for comparison of conflicting considerations and the scale or degree of them and their relevant significance or proportion in the final outcome (citing *North Shore City Council v Auckland Regional Council*⁸²). Although that formulation was stated in the context of a reference under clause 14 of



[1997] NZRMA 59.

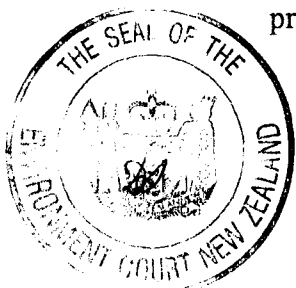
the First Schedule to the Act, we accept that it is generally applicable to the decision of a resource consent application.

[176] We take into account that the oyster farm enabled by the proposed structures would be likely to have positive benefits of enabling people and the community to provide for their economic and social well-being, and less direct economic and social benefits. We also take into account that the structures would have adverse effects on the natural character of the coastal environment and adverse visual effects, though no more than would be expected from any oyster farm in the inner harbour. Further we take into account that the oyster farm would be likely to have some adverse effect on water quality in the harbour, but that the extent of it would not be significant. In addition we take into account that there would be some adverse effect on recreational opportunities.

[177] We have had regard to the relevant planning instruments. The general objectives and policies of the NZ Coastal Policy Statement, and of the Northland regional policy statement, are implemented by the proposed regional coastal plan, by which, in general, marine farming is generally acceptable in the part of the harbour where the site is located, subject to assessment of the specific proposal in the specific site. We recognise that the contents of the coastal plan have not been finally settled, but without attempting to predict the outcome of references that have not yet been heard, we have to take the instrument as it was amended by decisions on submissions.

[178] In assessing the proposal by reference to the objectives and policies of that plan, we find that it is consistent with the policies for expansion of marine farming, and for structures for which there is an operational need within the coastal marine area. Because very little space is left unused in the existing oyster farm block in the upper harbour, the proposal is not inconsistent with the policy of utilising space authorised for marine farming. The policies about monitoring and understanding long-term effects are for the Regional Council to implement after the plan becomes operative.

[179] The other assessment criteria mainly apply to considering effects of the proposal on the environment, and we have already made our findings in that respect.



[180] We have also given consideration to the various matters raised by sections 6 to 8 of the Act to the extent that they apply to the case. Those matters have already been addressed in this decision, mainly in relation to our assessment of effects on the environment.

[181] In the light of our findings in that respect, it is our judgment that the proposal represents managing the resources involved in a way which enables people and the community to provide for their social economic and cultural wellbeing without impairing the potential, or the capacity described in paragraphs (a) and (b) of section 5(2). Although the proposal would not fully avoid, remedy or mitigate the adverse effects on the natural character of the coastal environment, the visual effects, and those on water quality and recreational opportunities, it is our judgment that the scale or degree of those effects is such that enabling the provision for wellbeing ought to prevail. In short, we conclude that the proposal is consistent with the statutory purpose of sustainable management of natural and physical resources.

Determination

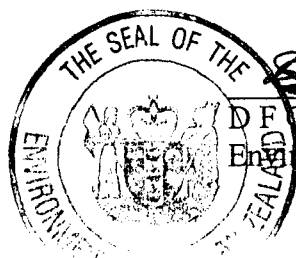
[182] For those reasons the appeal is disallowed, the application is granted and the respondent's decision confirmed (subject to the minor alterations to the term and conditions referred to in paragraphs [170] to [173]).

[183] Counsel for the parties are invited to present a draft order to give effect to this decision accordingly.

[184] The question of costs is reserved. Any application for an order for costs may be made in writing within three weeks of the date of this decision; and the parties charged may reply in writing within two weeks after receiving the application.

DATED at **AUCKLAND** on 4 August 2000.

For the Court:

 *D F G Sheppard*
D F G Sheppard
Environment Judge

