IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-152
[2018] NZHC 3306

UNDER	the Judicature Review Procedure Act 2016
IN THE MATTER	of an application for review of decisions under the Resource Management Act 1991
BETWEEN	KAWAU ISLAND ACTION INCORPORATED SOCIETY Applicant
AND	AUCKLAND COUNCIL First Respondent
	ROD AND PATRICIA DUKE Second Respondents

Hearing: 18-19 October 2018

Appearances: G Chappell and S Darroch for the Applicant
D Hartley for the First Respondent
S Stienstra and O Manning for the Second Respondents

Judgment: 14 December 2018

JUDGMENT OF GORDON J

This judgment was delivered by me
on 14 December 2018 at 1.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Webster Law, Takapuna, Auckland
DLA Piper, Auckland
Cockcroft D'Young Moorhouse, Devonport, Auckland
Counsel: G K Chappell, Auckland
S Stienstra, Auckland

Introduction

[1] The second respondents, Rod and Patricia Duke (the Dukes), own a residential property in Sarsfield Street, Herne Bay, Auckland. The property included a boatshed within the Coastal Marine Area (CMA).

[2] The Dukes applied to the first respondent, the Auckland Council (the Council), on 4 August 2016 for a land use consent and a coastal permit (together, the consent application). In the consent application, the Dukes described the proposed activity as "Reconstruction of existing boatshed and the establishment and use of a helicopter landing pad on the replacement building". The existing boatshed was subject to a coastal permit.

[3] The Council determined not to publicly notify or to limited notify the consent application (the notification decision) and it granted the resource consents (the consent decision). The notification decision and the consent decision were issued contemporaneously on 18 August 2017.

[4] The applicant, Kawau Island Action Incorporated Society (KIA), applies for judicial review of both the notification decision and the consent decision.

[5] The application for judicial review is opposed by the Dukes.

[6] The Council abides the decision of the Court but has filed legal submissions on certain issues.

The various applications

[7] As well as the application for judicial review, the Court has before it the following:

(a) An application by the Dukes to strike out the proceeding, on two bases, namely that there is no reasonably arguable cause of action and that

KIA does not have standing to bring the claim.[1] The strike out application is opposed by KIA;

(b) An application by KIA to admit a further affidavit from Herc Coleman sworn 28 September 2018. Mr Coleman is a member of KIA. His affidavit is relevant to the issue of standing in (a) above. The application is opposed by the Dukes; and

(c) An application by KIA pursuant to s 130 of the Evidence Act 2006 to offer documents in evidence without calling a witness. The application is opposed, in part, by the Dukes.

[8] The Council does not take a position on these additional applications.

[9] I will deal with the above applications after my consideration of the substantive application for review.

Background

[10] The (then) existing boatshed[2] was located at the eastern end of Sentinel Beach which is a popular recreational public beach in Herne Bay. The beach is small (about 100 metres long), and only has pedestrian access by way of steps at the end of a cul de sac and sea access.

[11] The old boatshed measured approximately 25 metres in length, by 6.4 metres in width and 6.3 metres in height (from the floor level to the apex of the gable roof). It had a concrete foundation and timber piles and was clad with timber weatherboards at the base with corrugated iron above and a corrugated iron roof. It had a timber slip-

---

1 For the purposes of their argument as to KIA's lack of standing, the Dukes had sought a direction under s 14(2) of the Judicial Review Procedure Act 2016 permitting them to administer interrogatories to KIA and a consequential application for an order that KIA answer the interrogatories, both of which were for consideration on the first day of the hearing. However, both were abandoned at the commencement of the hearing, although the lack of standing submission was maintained.

2 The existing boatshed has now been demolished and construction of the new boatshed has commenced. I will therefore refer to the existing boatshed as the old boatshed.

way which extended from the floor of the boatshed approximately 29 metres beyond its northern elevation.

[12] The old boatshed was mostly within the General Management area of the Coastal Plan, and the CMA of the District Plan, also subject to the Coastal Protection Yard (CPY). The CMA, where most of the structure was situated, was in the General Coastal Marine Zone under the various Auckland Unitary Plan documents.

[13] As noted, the old boatshed was subject to a coastal permit. The expiry date is 10 July 2038. The purpose of the consent as recorded in the coastal permit is, "To occupy and use part of the coastal marine area in accordance with Sections 12(2)(a) and 12(3) of the Resource Management Act 1991, for the purpose of a boatshed and slip-way for recreational purposes".

[14] A condition of the coastal permit was that, "The consent holder shall only use the boatshed for the purpose of recreational boating and yacht storage".

[15] An advice note recorded on the coastal permit is in the following terms:

> 1. The resource consent holder is advised that pursuant to Section 122(5)(c) of the Resource Management Act 1991, the permit holder may not exclude the public or any class of persons from the area for which the occupation consent is granted.

[16] The consent application sought approval to establish a replacement building on the existing platform. In other words, there was to be no extension of the footprint. The existing slip-way was to be retained and repaired as necessary.

[17] It was proposed that the new boatshed would retain the same form as the old boatshed, including a gable roof, but it would be clad with slatted natural weatherboards on both the walls and the roof. The helicopter landing pad was to be constructed at the northern end of the boatshed beneath the gable roof. In other words, it is internal to the building on a flat surface. To expose the landing pad, the northern section of the gabled roof would slide back over the southern end. It was proposed that the helicopter landing pad would be for occasional use only and it was not intended to be used for the permanent storage of helicopters.

[18] As is required by the Resource Management Act 1991 (the RMA), the Dukes filed an assessment of environmental effects with their application. The Council officers obtained their own reports and engaged in correspondence with the Dukes' consultants in relation to adverse effects.

[19] In the consent decision, the Council granted both land use consents under s 9 of the RMA and coastal permits under s 12 of the RMA. The consent decision contained the following conditions in relation to the helicopter operation:

(a) The consent holder shall ensure that the flight paths to and from the helipad shall generally be to and from the north until the helicopter is at a minimum height of 500ft in order to provide a reasonable noise level for the wider environment.

(b) The consent holder shall ensure that the helicopter activity shall have a maximum of 3 flights (3 arrivals and 3 departures) in any 7-day period, with a maximum of one flight in any one day.

(c) The consent holder shall ensure that all flights are restricted to the hours of 7:00 am to 7:00 pm Monday to Friday and 9:00 am to 7:00 pm Saturday, Sunday and Public Holidays, or between Morning Civil Twilight and Evening Civil Twilight, whichever is more restrictive.

(d) The consent holder shall ensure that no helicopter creating noise effects greater than an AS350 will be used unless the expected noise levels can be demonstrated to comply with the noise limits.

(e) The consent holder shall ensure that a log will be prepared in order to keep a log of flights, which will be made available to Council if requested.

(f) The consent holder shall ensure that all flights will be flown in accordance with the requirements of the Fly Neighbourly Guide.

(g) No refuelling of the helicopter shall be undertaken on the helicopter pad.

(h) Prior to the commencement of the helicopter pad operation, the consent holder shall obtain the approval of the Civil Aviation Authority to construct a helipad on the boatshed. The approval shall be provided to the Team Leader Central Monitoring.

(i) The arrival and departures to and from the helicopter pad shall be for domestic purposes only and not for commercial purposes.

[20] There were also conditions in relation to the noise generated by helicopters.

[21] There was a similar restriction to that contained in the original coastal permit on the use of the boatshed, namely that the consent holder shall only use the boatshed for the purpose of recreational boating and yacht storage.

[22] In relation to the extent of occupation, the right to occupy part of the CMA and coastal area with the boatshed and helipad is expressed to be an exclusive right. But the right to occupy the CMA and coastal area with the slip-way is not an exclusive right, and the consent holder is required at all times to permit all persons to use the slip-way for the purpose of providing public access to and along the CMA.

[23] The Dukes had in fact sought consent for six return flights, but, as noted above, consent was granted for only three return helicopter flights in a seven-day period, with a maximum of one flight in any one day. The Dukes appealed the decision to the Environment Court. However, they subsequently withdrew the appeal and they have commenced construction of the boatshed pursuant to the consent decision as granted.[3]

---

[3] Prior to the appeal being withdrawn, the Dukes applied to the Environment Court under s 116 of the Resource Management Act 1991 (the RMA) seeking an order allowing the consent to commence pending the appeal. The application was granted by Judge Thompson on 1 December 2017: *Duke v Auckland Council* [2017] NZEnvC 195.

KIA's challenge

[24] The main focus of KIA's challenge was to the part of the consent for the use of the boatshed as a helipad. In relation to the first cause of action, it was directed at the decision not to publicly notify the consent application (as opposed to the decision not to limited notify). KIA submits that in the notification decision, the Council made a number of material errors of law, any one of which is a sufficient ground to invalidate the notification decision. KIA says:

(a) The Council failed to have regard to the correct activity status. The Council proceeded on the basis that overall the activity was a discretionary activity. Whereas, KIA says overall it was a non-complying activity;

(b) The Council erred in failing to take any account or any proper account of the following:

(i) The presumption that public use and access should be freely available;

(ii) The rights of the public to use the beach for recreational purposes and the safety risks associated with the landing and taking off of the helicopter;

(iii) The limits of the original coastal permit (which excluded exclusive occupation); and

(iv) The adverse noise effects.

(c) The Council erred in determining that there were no special circumstances as the decision was based on irrelevant considerations;

(d) The Council failed to consider a rule in a plan that required notification.

[25] In terms of the consent decision, which is the subject of the second cause of action, KIA submits that:

(a) The Council erred in law by determining that the proposal was consistent with the relevant statutory documents. It failed to take into account, and failed to give proper weight to, relevant parts of the applicable planning instruments; and

(b) The Council erred in law by failing to take into account relevant considerations.

Which version of the RMA?

[26] The parties were agreed that the relevant sections of the RMA were the provisions that applied prior to its amendment by the Resource Legislation Amendment Act 2017, as the relevant parts of that Act did not come into force until 19 April 2017 (after the application for resource consent had been lodged).[4]

[27] Sections 95A-95D and s 104 of the RMA then in force governed the Council's notification obligations when processing the consent application. When determining whether to publicly notify, s 95A applies. Of particular relevance in this case are s 95A(2)(a) and (4):

> **95A Public notification of consent application at consent authority's discretion**
>
> (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.
>
> (2) Despite subsection (1), a consent authority must publicly notify the application if—
>
> (a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or
>
> (b) the applicant requests public notification of the application; or
>
> (c) a rule or national environmental standard requires public notification of the application.

[4] See Resource Legislation Amendment Act 2017, ss 2(4) and 137; RMA, sch 12, pt 2, cl 12(1).

(3) Despite subsections (1) and (2)(a), a consent authority must not publicly notify the application if—

(a) a rule or national environmental standard precludes public notification of the application; and

(b) subsection (2)(b) does not apply.

(4) Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

[28] Section 95D then provides:

95D Consent authority decides if adverse effects likely to be more than minor

A consent authority that is deciding, for the purpose of section 95A(2)(a), whether an activity will have or is likely to have adverse effects on the environment that are more than minor—

(a) must disregard any effects on persons who own or occupy—

(i) the land in, on, or over which the activity will occur; or

(ii) any land adjacent to that land; and

(b) may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect; and

(c) in the case of a controlled or restricted discretionary activity, must disregard an adverse effect of the activity that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion; and

(d) must disregard trade competition and the effects of trade competition; and

(e) must disregard any effect on a person who has given written approval to the relevant application.

[29] Then, in terms of making its consent decision, s 104 provides:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

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

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

…

(3) A consent authority must not,—

(a) when considering an application, have regard to—

(i) trade competition or the effects of trade competition; or

(ii) any effect on a person who has given written approval to the application:

(b) *[Repealed]*

(c) grant a resource consent contrary to—

(i) section 107, 107A, or 217:

(ii) an Order in Council in force under section 152:

(iii) any regulations:

(iv) wāhi tapu conditions included in a customary marine title order or agreement:

(v) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:

(d) grant a resource consent if the application should have been notified and was not.

(4) A consent authority considering an application must ignore subsection (3)(a)(ii) if the person withdraws the approval in a written notice received by the consent authority before the date of the hearing, if there is one, or, if there is not, before the application is determined.

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

Regulatory framework

[30] As at 4 August 2016, when the consent application was lodged, there were several relevant district or regional plans that were operative or proposed. The operative plans were:

(a) The Operative Auckland Regional Policy Statement (RPS);

(b) The Operative Auckland Council Regional Plan – Coastal (the Coastal Plan); and

(c) The Operative Auckland Council District Plan – Isthmus Section (the District Plan).

[31] In relation to proposed plans, before the consent application was lodged, the proposed Auckland Unitary Plan (PAUP notified) had been publicly notified and the Independent Hearings Panel had released the recommendations version of the PAUP notified on 22 July 2016.

[32] After the consent application was lodged, but before the notification decision and consent decision were made, the Auckland Unitary Plan became operative in part (PAUP (OiP)).[5]

---

5 On 15 November 2016.

[33] Section 153 of the Local Government (Auckland Transitional Provisions) Act 2010 provides for the deemed approval or adoption of the PAUP notified on and from certain dates.

[34] Section 86B of the RMA addresses when rules in proposed plans have legal effect.[6] The rules that had legal effect at the time the consent application was lodged were those that had been identified in the PAUP notified as having legal effect under s 86B(3). These rules were shown as shaded in the activity tables in accordance with the provisions of Chapter A of the PAUP notified and s 86E.

[35] As s 86B deals only with rules, even where rules do not have legal effect or have not yet become operative, the objectives and policies of a proposed plan are still relevant for the purposes of s 104 of the RMA.

[36] Section 86A(2) provides that ss 86B to 86G do not limit or affect the weight that a consent authority gives to objectives, policies and other issues, reasons, or methods in plans before the plan becomes operative (except to the extent that the rules in those sections specify that a rule in a proposed plan has legal effect).

[37] Finally, s 88A(1A) preserves the activity status of an activity as at the date that an application is made if the status of the activity changes between making the application and a proposed plan being notified or decisions being made. The application continues to be processed, considered and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

[38] The upshot of the foregoing is that the relevant planning instruments were:

(a) The provisions of the operative plans (the RPS, the Coastal Plan and the District Plan);

---

6 Sections 86A to 86G of the RMA are preserved by s 153 of the Local Government (Auckland Transitional Provisions) Act 2010.

(b) The rules with legal effect in the PAUP notified (that is the shaded rules); and

(c) The objectives, policies and other issues, reasons or methods of the PAUP notified and the PAUP (OiP) which combined the RPS, the Coastal Plan and the District Plan provisions.

Proper approach to judicial review

[39] The proper approach to judicial review in the RMA context is not in dispute. However, I set out the principles because of the submission made on behalf of the Dukes regarding the nature of KIA's case. Ms Stienstra, for the Dukes, submits that although the case for KIA is dressed up in the language of judicial review, the essence of KIA's case is that the Council made errors in its assessment of certain factual matters, which Ms Stienstra submits were matters all considered by the Council. She further submits that KIA's case is fundamentally an attack on the merits, namely it is an appeal in the guise of judicial review.

[40] A useful starting point is the statement by the Court of Appeal in *Pring v Wanganui District Council*, where the Court said:[7]

> [7] … It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant, considerations were taken into account, and whether the decision was one which, upon the basis of the information available to it, a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must be *some* material capable of supporting the decision …

[41] There is a more recent comment by the Court of Appeal on the principles of judicial review in the RMA context involving a decision on non-notification which is to be found in *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu*, where the Court said:[8]

---

7 *Pring v Wanganui District Council* [1999] NZRMA 519 (CA).
8 *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu* [2013] NZCA 221.

> [56] In our judgment the aims and purposes of the RMA cannot be construed as justifying a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers. The judicial inquiry is required to determine whether the decision maker has complied with its statutory powers or duties. The construction or application of the relevant provisions remain objectively constant, and there can be no justification for adopting a sliding scale of review of decisions under the RMA according to a judicial perception of relative importance based upon subject matter.
>
> (Citations omitted)

[42] Another helpful summary of the approach to judicial review in RMA proceedings is contained in the judgment of Wylie J in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*:[9]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.
>
> (Citations omitted)

[43] Finally, the relevant principles were succinctly stated by Whata J in the recent judgment of *Ennor v Auckland Council*, where he said:[10]

> [30] It is necessary to reiterate that judicial review is not an opportunity to revisit the merits of a decision made by the Council to proceed on a non-notified basis or to grant a consent. As Harrison J stated in *Auckland Regional Council*:
>
> > The High Court does not exercise an appellate function on review. It is the decision-making process followed by the consent authority and its lawfulness, not the decision itself which is under consideration.
>
> [31] Thus, an applicant on review must identify an error of law, failure to have regard to a relevant consideration, regard to an irrelevancy or procedural unfairness …

---

9 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442. The decision was upheld on appeal: *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73.

10 *Ennor v Auckland Council* [2018] NZHC 2598; citing *Auckland Regional Council v Rodney District Council* HC Auckland CIV-2007-404-3436, 24 August 2007 at [44].

Adequacy of information as a foundation for the notification decision

[44] There is a further principle which informs the issues raised by the parties. KIA says that by denying public participation, the Council has deprived itself of relevant information which would provide a foundation for its decision on notification.

[45] In a recent judgment, Fitzgerald J conducted a thorough review of the relevant authorities which address the legal principles to be applied when considering the adequacy of the information before a consent authority which is making a decision as to whether or not to publicly notify an application for resource consent.[11]

[46] While there was no argument in that case as to the legal principles, the Judge nevertheless reviewed the relevant authorities and concluded:

> [142] … I accordingly proceed on the basis that while there is no separate ground for judicial review based on the (now repealed) statutory requirement for a consenting authority to be satisfied as to the adequacy of the information, a decision to notify a resource consent, and to grant a consent itself, must nevertheless be reached on the basis of adequate and reliable information. As Glazebrook and Arnold JJ observed in *Auckland Council v Wendco (NZ) Ltd*, "sound public administration permits nothing less."
>
> (Citations omitted)

[47] One of the judgments referred to by Fitzgerald J was *Gabler v Queenstown Lakes District Council*, where Davidson J said:[12]

> [65] … While a consent authority does not have to be "satisfied" of the "adequacy" of information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects. I recognise there is room for debate whether the word "satisfy" as opposed to "decides" indicates a higher degree of certainty was required before the amendment, but a decision whether adverse effects are, for example, "less than minor" could not be reached unless the decision maker was "satisfied" of that. I do not see how a Council could decide something unless it was satisfied that it was sufficiently and relevantly informed and satisfied of the decision it makes. A Council could not say it was "not satisfied" about those matters but nevertheless go on to make a decision which affects the rights of others.
>
> [66] In short, I agree with Wylie J that the obligation on the Council to be "satisfied" that it has adequate information is no longer a separate and reviewable element of its decision making process. I do not consider that this in any way altered the need for a decision maker to be sufficiently and

---

11 *Mills v Far North District Council* [2018] NZHC 2082.
12 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086.

> relevantly informed. It does not alter the need for the decision maker to apply relevant and not irrelevant considerations, and make a decision which stands up to the test of "reasonableness". Being sufficiently and relevantly informed does not ensure these elements of decision making will be lawfully undertaken. In these respects *Discount Brands* in my view has undiminished force. It recognised a distinct step in the (repealed) legislation, but there must always be a secure foundation for such important decisions. Parliament cannot have intended to remove that foundation. That is not to endorse a counsel of perfection, but of sufficiency and relevance, and that is how I conclude the decision in this case should be judicially reviewed. It is fundamentally a test of the quality of the decision.

[48] I respectfully follow the approach of Davidson J and Fitzgerald J as set out above.

The notification decision – activity status

[49] The first alleged error of law is that the Council failed to have regard to the correct activity status. The application was "bundled" by the Council. There is no challenge to this approach.

[50] The Council's position, both at the time it made the notification decision and in this Court was that when the application was lodged, under the applicable plans, the activity status was:

(a) Auckland Council District Plan (Isthmus section – discretionary activity);

(b) Auckland Council Regional Plan (Coastal) – discretionary activity;

(c) PAUP notified – permitted activity (in terms of the (shaded) rules that have legal effect).

[51] The Council's position was therefore that overall the application was a discretionary activity. The notification decision records that s 88A of the RMA provides for the activity status of an application to remain the same as first lodged. Under the AUP (OiP) (in force by the time of the notification decision), the activity status is non-complying. The notification decision acknowledges that while this

would change the overall activity status, the discretionary activity status when lodged was safeguarded by s 88A.

[52] KIA submits that the overall activity status for the application for resource consent was non-complying rather than discretionary. It makes two main arguments. I will deal with each in turn.

[53] KIA first contends that rules with legal effect in the PAUP notified were not taken into account by the decision-maker. Under these rules, which had legal effect, the activity was non-complying. The argument proceeds as follows.

[54] Ms Chappell, on behalf of KIA, submits that the starting point is the rules in Chapter I.6.1.9 and I.6.1.10 of the General Coastal Marine Zone of the PAUP notified. Part I.6.1.9 listed activities in a table under the heading: "Use and activities (s12(3)RMA) and associated occupation of the common marine and coastal area (s.12(2))".

[55] In that table, "Helicopter landing areas" were provided for as a non-complying activity.

[56] But, as Ms Chappell acknowledges, this rule was not shaded so it did not have immediate legal effect.

[57] However, the argument for KIA continues in this way. Part I.6.1.10 listed activities in a table under the heading: "CMA structures (construction in the CMA (s.12(1) RMA) occupation of the CMA (s.12(2) and their use (s.12(3)))".

[58] One of the activities in that table was: "CMA structures and buildings not provided for elsewhere where their use is a non-complying or prohibited activity" as a non-complying activity (non-complying structures rule). This activity was shaded and therefore had immediate legal effect from the date of notification of the plan.

[59] Ms Chappell submits that the non-complying structures rule, when read in combination with the rule in Table I.6.1.9 providing for helicopter landing activities as a non-complying activity (which did not have immediate legal effect), meant that

together the rules had legal effect. This then changed the overall activity status of the application from discretionary to non-complying.

[60] Ms Chappell further submits that the activity status relied on by the Council (which I refer to below) was not the most restrictive rule, and accordingly it did not apply.

[61] Ms Hartley, for the Council, who carried this argument in opposition, refers to the activity in Table I.6.1.10 of the PAUP notified providing for "maintenance, repair or *reconstruction* of existing lawful CMA structures of buildings" as a permitted activity (I have added emphasis).

[62] That rule was shaded and therefore had immediate legal effect. It was the relevant rule.

[63] Ms Hartley submits that the non-complying structures rule relied on by KIA did not apply. She says the plain words of that rule indicate that it applied to CMA structures and buildings not provided for elsewhere. She submits that the reconstruction of the boatshed was provided for elsewhere (in terms of the rule she identified) as the structure in question was a lawfully existing structure.

[64] I do not accept the submission that Ms Chappell makes on behalf of KIA. The argument advanced would give legal effect to a rule (helicopter landing areas) as non-complying, by a side-wind, when that rule did not have immediate legal effect.

[65] The submission Ms Chappell makes, namely that legal effect could be read into the rule relating to helicopter landing areas in Table I.6.1.9 as a result of the non-complying structures rule in Table I.6.1.10 would be inconsistent with s 86E of the RMA. That section provides that a local authority must "clearly identify" any rule that has legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified at the time a proposed plan is notified.

[66] If the argument for KIA were to be accepted, in other words that legal effect could be implied from some other rule, there would be no certainty regarding early or delayed legal effect of rules.

[67] In any event, the non-complying structures rule relied upon by KIA was no longer included in the relevant activity table[13] of the AUP (OiP) which applied at the time of the notification decision. Rule (A121) classifies CMA structures and buildings unless provided for elsewhere as a discretionary activity in the General Coastal Marine Zone.[14]

[68] I accept Ms Hartley's submission that where, as in *Pierau v Auckland Council*,[15] there has been a change in the planning framework with provision for an activity in a somewhat more enabling manner, an applicant should be able to rely on that and not be hamstrung by the activity status in a superseded plan.

[69] The second argument that KIA puts forward, either as an additional or alternative argument, is that Rule 5B.7.2A(4) of the Operative District Plan provided for buildings used *principally* for the storage or maintenance of boats in the Coastal Protection Yard as a discretionary activity (I have added emphasis). Because the principal use of the boatshed would not be for the storage or maintenance of boats, KIA says it should have been classified as non-complying under the Operative District Plan.

[70] Rule 4A.1 (the common rules) of the Operative District Plan provided:

> [a] resource consent for a non-complying activity shall be obtained for:
>
> Any activity, including the erection of a building or use of any land or building which is (a) not specifically provided for as a permitted, controlled or discretionary activity in the parts of the Plan applying to the location of the activity …

[71] Ms Chappell submits that the plans accompanying the consent application suggest that the principal use of the proposed new structure was not for the storage or

---

13 Activity Table F.2.19.10.

14 The Council had made its decisions on the Unitary Plan and it had become operative in part on 15 November 2016.

15 *Pierau v Auckland Council* [2017] NZEnvC 90 at [18]-[19].

maintenance of boats, but for use as a helicopter landing pad. To support that submission, Ms Chappell relies on the affidavit of an experienced registered architect, Kerry Francis, sworn 6 July 2018, filed in support of KIA in this proceeding.

[72] Mr Francis proffers the opinion that the purpose of the proposed structure is substantially different from the old boatshed. Mr Francis says that one of the drawings shows a structural beam along the base/floor line of the structure that would appear to impede a boat from accessing the structure in the same manner as occurs with the old boatshed. Additionally, having regard to the construction of the floor of the structure, Mr Francis is of the opinion that, in conjunction with the structural beam, the proposed design of the structure appears to preclude using the ramp to store a boat.

[73] Ms Chappell submits that even if it is accepted that there was a dual use of the building, namely as a boat storage shed and a helicopter landing pad, it cannot be reasonably inferred from the information provided that boat storage was the principal use of the structure.

[74] However, the Council processed the consent application relying on the contents of the application which stated that the principal use of the structure was as a boatshed. The proposal was to replace the existing boatshed with a new boatshed incorporating a helicopter landing pad, and the consent application stated that the landing pad would be for occasional use only and not for the permanent storage of helicopters.

[75] Although there was no objection by either of the respondents to the affidavit of Mr Francis, in my view the argument by KIA, relying on his evidence, is a merits argument and accordingly not one which the Court would entertain on an application for judicial review. It is not an argument that goes to the process followed by the Council.

[76] My conclusion therefore on the activity status is that the Council correctly classified the activity for which consents were sought on a bundled basis as a discretionary activity.

[77] I therefore find against KIA on this alleged error of law.

Failure to take into account key issues

[78] KIA submits that in making the notification decision, the Council failed to take any account or proper account of a number of issues which are set out in [24] above. I repeat what is earlier set out in this judgment, namely that it is for the consent authority to determine what weight is to be given to particular relevant matters. It is not for the Court to consider if "proper account" was taken of those matters. The Court will consider a failure to take into account relevant matters at all.

[79] I now address each of those issues in turn.

Presumption that public use and access should be freely available

[80] KIA submits that the Council erred in its conclusion that the adverse effects were "less than minor" because it failed to consider (a) the presumption that public use and access to the CMA should be freely available; and (b) that use and development needs to be managed to ensure that any exclusion of the public is temporary and short-term.

[81] Ms Chappell submits that these presumptions form part of the general Coastal Marine Zone provisions of the PAUP notified and the AUP (OiP).[16]

[82] Ms Chappell submits that the notification decision did not refer to any objectives and policies. She highlighted those which had particular relevance to this issue.[17]

[83] Ms Chappell submits that together these statements provided a clear direction regarding the "commons" nature of the CMA and an inherent presumption that encroachment of rights to use and occupy would adversely affect, not just adjoining land owners, but the public who use the beach and appreciate use of the "commons". This was an important context to any assessment of the effects on the environment.[18]

---

16 See PAUP notified at D5.1.13 "Background" and the RPS at Chapter B7.

17 The objectives and policies of the AUP (OiP): the RPS Chapter B Objective B8.4.1 (1-2), B8.3.2, B8.4.2(1-3), Chapter 5B4.4 of the District Plan, Coastal Plan Objective 7.3.1, policies 7.4.1-7.4.2, and RPS Policies 7.4.10, 7.4.13, PAUP notified – Chapter D 5.1.13 and 5.1.15.

18 Includes people, communities and amenity values: see s 2 of the RMA.

[84] Ms Chappell submits that the notification decision addressed public access only in the context of the existing boatshed to the west, with the decision stating that "while the boatshed authorised to the west is present, the proposal will not provide any significant impediment to public walking along the foreshore".

[85] Ms Chappell concludes on this point by saying that in the absence of any consideration of the objectives and policies or relevant objectives and policies, there was no sufficiently informed assessment about the presumption of public use and access of the CMA against which determination about the level of effects could be made for the purposes of notification.

[86] In response, Ms Hartley submits that it is not necessary for the consent authority to expressly refer to and identify the detail of each plan or other relevant document considered, particularly in the course of making a notification decision. It is for the Court to determine whether the relevant provision has been considered.

[87] In *Duggan v Auckland Council*, one of the judgments relied upon by Ms Hartley in support of her submission above, Venning J stated:[19]

> [79] The requirement to "have particular regard to" some criterion requires the consent authority to consider the relevant provisions and weigh them as part of the overall decision. However, a consent authority is not required to expressly refer to every relevant consideration and decision on every application. To do so would be to impose an impossible burden on the consent authority. Where the provisions are not expressly referred to in the relevant decision it is for this Court to determine on the facts of the case before it whether it can be said the consent authority has considered the relevant provisions and weighed them as part of its decision.
>
> (Citations omitted)

[88] A similar statement was made by Venning J in an earlier judgment.[20]

[89] I also refer to two recent decisions of this Court, *Tasti Products Ltd v Auckland Council*[21] and *Ennor v Auckland Council*.[22] Each decision addresses non-notification decisions made by the Auckland Council, but they reached different conclusions on

---

19 *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317.
20 *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [102].
21 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673.
22 *Ennor v Auckland Council*, above n 10.

the issue of specific references to the relevant objectives and policies. In reaching those different conclusions, the cases are not inconsistent with each other, but rather they are consistent with the principle in *Duggan*, namely that cases are fact-dependent.

[90] In *Ennor*, Whata J first noted that the non-notification and substantive decisions were not models of their kind.[23] They did not assess the merits of the application by express reference to all relevant objectives, policies and criteria. Nevertheless, Whata J was satisfied that the Council considered the matters of key importance to the applicant for judicial review, having regard to the most salient objectives and policies of both plans.[24] Whata J found correspondence in various passages of the non-notification decision, with the key relevant policy under the PAUP.[25]

[91] Further, although the substantive decision on the application for resource consent did not reiterate the findings made in the notification decision, the Judge considered they could be readily interpolated, "given the two decisions were delivered at the same time and were both subject to the oversight of the resource consent team leader, Mr Wright".[26] Whata J referred to *Tasti Products*, saying that:

> [43] … this case is nothing like *Tasti Products* … In that case, the Council failed to consider relevant effects, applied the wrong statutory threshold by effectively relying on a permitted baseline and did not address the objectives and policies of the PAUP at all.
>
> (Citations omitted)

[92] Turning then to *Tasti Products*, although, as noted by Whata J, the Council's notification decision in *Tasti Products* did not refer to the policies and objectives in the PAUP, it had referred to the provisions of the operative plan. However, Wylie J held that where there is a relevant operative plan and a relevant proposed plan, the consent authority has to be satisfied that the application is for an activity that will not be contrary to the objectives and policies of both plans.[27] In that case, the Council

---

23 At [32].
24 At [37].
25 At [37].
26 At [41].
27 *Tasti Products Ltd v Auckland Council*, above n 21, at [81]-[82].

failed to take into account the objectives and policies in the PAUP at all. Wylie J further held:

> [82] If the policies and objectives contained in a proposed plan are required to be taken into account in making the substantive decision on the resource consent application, then, in my judgment, it is axiomatic that they must be relevant in determining whether a person is affected by the application, so as to require that the consent authority find the person to be effected under s 95E(1), and then give limited notification of the application to that person pursuant to s 95B(2).

[93] Although the Court in *Tasti Products* was considering limited notification, the same approach would apply to public notification.

[94] Ms Chappell is correct when she says that there is no express reference to the relevant objectives and policies regarding maintenance and enhancement of public access in the notification decision.

[95] The question for this Court is whether the Council considered the substance of the relevant provisions and weighed them as part of its decision.

[96] I consider it did so. I say that for the following reasons.

[97] In its notification decision, the Council referred to the following comments made on behalf of the Local Board:

> We submit that this application should be limited notified to surrounding properties on the basis of noise caused by the helicopter operation. *We would also like to see public access along the waterfront to be maximised so that the passage of members of the public along the shoreline is not unreasonably obstructed by the construction*.
>
> (emphasis added)

[98] The notification decision then states:

> These comments have been taken into consideration in this assessment.

[99] It is not clear whether the words "the construction" in the communication from the Local Board mean the process of constructing or building the boatshed or whether

it means the structure, namely the boatshed, itself. The words are capable of either meaning.[28]

[100] However, I consider the more natural meaning when the words are considered in context is the structure itself.

[101] The notification decision has therefore taken into account not only access being obstructed, but also the need to maximise access.

[102] In any event, there is a further reference to public access. The Council obtained an internal report from Kala Sivaguru, described as a Senior Consents and Compliance Advisor – Coastal. In her report of 10 February 2017, Ms Sivaguru addressed the issue of public access and amenity by reference to the boatshed immediately to the west of the old boatshed.

[103] The notification decision referred to Ms Sivaguru's report as follows:

> Public access and amenity
>
> Ms Sivaguru noted in her memo that the boat shed immediate to the west (authorised by Consent 38448) occupies part of the beach and impedes access along the sandy beach to the east. It was further noted that public walking access can be gained from the seaward side of the ramp when the tide retreats. Accordingly, it was concluded that while the boat shed authorised to the west is present, the proposal will not provide any significant impediment to public walking access along the foreshore.
>
> Consent 38448 expires in 2043. Given the proximity of the boat shed to Sentinel Beach, and the linkage in terms of effects public access to the presence of the boat shed authorised by Consent 34884, it was recommended by Ms Sivaguru that the duration for this boat shed should be linked to the expiry date for Consent 38448 such that when these consents expire the matter of the appropriateness of the presence of boat shed on Sentinel Beach can be considered as a whole. Instead of 35 years, it was therefore recommended that the duration of consent be set such that it expires on 30 June 2043. As per email correspondence by the applicant's agent Paul Arnesen, this condition has been offered.
>
> I concur that this portion of the Herne Bay shoreline is not readily accessible to the public and note it will not hinder access along this portion of the coast given the location of the boat shed to the west. Therefore I consider the adverse effects of the proposal in terms of public access to be less than minor.

---

[28] See Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) at 496.

[104] While Ms Chappell is correct that the issue of public access in this part of the notification decision is linked to the existence of the neighbouring boatshed, I do not consider that could be said to be a reviewable error. It was open to the Council to consider public access in this way.

[105] The decision therefore does address the question of public access in substance, although there is no reference to any particular objectives and policies. Following the approach in *Duggan*, I find against KIA on this ground.

[106] Although I have found there is no reviewable error, for completeness I address a further argument advanced on this issue.

[107] This case has similarities to *Ennor* in that both the notification decision and the consent decision were issued on the same day and both were made by the same individual (Matthew Wright, the team leader, resource consents).

[108] The consent decision made the following references to public access:

> - The proposal will not be inconsistent with the New Zealand Coastal Policy Statement and the Hauraki Gulf Marine Park Act 2000.
>
> … Objective 4 seeks to maintain and enhance public open quality (including public walking access) …
>
> The proposal will maintain public space qualities and recreational opportunities of the coastal environment …
>
> - The proposal will not be inconsistent with the objectives and policies of the Regional Policy Statement. Particular regard has been had to objectives B8.2.1(1-3), B8.3.1(1-6), B8.4.1(1-2) and policies B8.3.2(4), B8.3.2(1-4) and B8.4.2(1,3). This centres on natural character use & development and public access.
>
> The proposal … has been designed and managed to minimise impacts on public use of and access to and along the coastal marine area.
>
> - The proposal is generally consistent with the objectives and policies relating to the Coastal Management Area (5B.4.1-5B.4.6) under the Auckland Council District Plan (Isthmus Section) … The proposal will not hinder public access to the coastal marine area along the Herne Bay coastline …

[109] The question arises as to the effect on the notification decision of the references to relevant objectives and policies in the consent decision.

[110] Ms Chappell submits that the case before the Court is distinguishable from *Ennor*, which concerned a dispute between two urban neighbours. First, she submits that the failure to assess the objectives and policies occurred at the notification decision stage, not at the consent decision stage, so it is the reverse of *Ennor*.

[111] There is some force in that submission, but at the end of the day both decisions were issued on the same day by the same person. That argument on its own may not have carried the day.

[112] However, I would have been persuaded by the second argument that Ms Chappell makes in distinguishing *Ennor*. These proceedings involve issues relating to public use and access. For that reason, the relevant objectives and policies were significant in determining the need to involve the public. They therefore needed to be considered specifically in the context of notification rather than in the context of whether a consent should be granted. I would therefore not have been prepared to infer that the analysis after the fact in the consent decision applied to the prior notification determination.

[113] However, that is all academic as I have found the notification decision, in substance, addressed the issue of public access.

Public use of the beach for recreation and safety risks – helicopter taking off and landing

[114] Prior to the notification decision, the Council issued a s 92 RMA request to the Dukes to provide further assessment of the effects of the proposal on all persons using the public beach to the west of the structure. The response on behalf of the Dukes stated that:

> Given that the subject boatshed is separated from the beach by another boatshed, wash from helicopters arriving and leaving is not anticipated to adversely affect beach users. Some beach users may find enjoyment in watching the arrival and departure of helicopters.

[115] It does not appear that there was any consideration by the Council of the adequacy of this response. There should have been such a consideration.

[116] Of relevance here is the statement by Tipping J in *Westfield (New Zealand) Ltd v North Shore City Council*, where he said, "[i]nformation should be distinguished from assertion".[29] In my view, the response by the Dukes to the Council is simply an assertion. Further, it takes no account of anyone who is in a boat arriving at the beach.

[117] Turning then to the notification decision itself, Ms Chappell submits that the decision did not refer to effects on the amenity values of recreational users of the beach or the public safety of those on the beach or in the water.

[118] I accept that submission, both in relation to the amenity values of recreational users and in particular, the safety of users of the beach. These were important factors the Council should have taken into account, bearing in mind the provisions of s 5 of the RMA.[30]

[119] Ms Chappell submits that there were a number of questions relevant to recreation and safety that should have been asked and satisfactory answers given, such as:

(a) To what extent would beach users be affected by the wash (noting that the location of the boatshed to the west would be irrelevant to their use of the surrounding water)?

(b) What were the effects of wash likely to be and how would the boatshed to the west mitigate wash and blowing sand into the air?

(c) What were the health and safety obligations incumbent on the Dukes when the helicopter was landing and taking off in a public amenity and how would those effects be mitigated?

---

29 *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597 at [146].

30 See s 5(2): "In this Act, **sustainable management** means manging the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while …".

[120] On this aspect of KIA's argument, I accept that the Council failed to make sufficient inquiry as to the basis for the assertions made in response to the s 92 request, and failed to consider the potential effects on the amenity values of recreational users and the safety of the helicopter landing and taking off on users of the beach and surrounding water.[31] In this regard, the Council's considerations were in respect of adjacent landowners and not those using the beach.

[121] The Council therefore failed to take into account a relevant consideration. It proceeded on the basis of inadequate information, relying on the assertion made on behalf of the Dukes, when assessing whether the activity will have or is likely to have adverse effects on the environment that are more than minor. That was directly relevant to its decision on whether the application should have been publicly notified.

[122] For completeness, the consent decision, while stating that the "helicopter activity … will not noticeably detract from amenity values", does not specifically refer to public safety effects. In any event, for the reasons given in [112] above, even if there had been such a reference in the consent decision, that could not be read into the notification decision.

Limits in original coastal permit

[123] KIA submits that the Council erred in law by failing to take any or proper account of what KIA says is a significant difference between the existing coastal permit, which enabled the construction of the old boatshed on public land for the express purpose of recreational boating and yacht storage, and the application to build a new structure for use as both a boatshed and helipad.

[124] Ms Chappell submits that the original coastal permit was for an activity directly associated with the marine environment. By contrast, the use of the structure as a helicopter landing pad is not an activity that is directly associated with or incidental to the enjoyment of the marine environment.

---

[31] I address the effect on acoustic amenity separately.

[125] Further, Ms Chappell submits the original permit expressly limited exclusive occupation, whereas the consent decision granted rights of exclusive occupation. In the notification decision, there was no consideration of the effect of granting exclusive occupation rights against the existing coastal permit which had limited those rights. Had that comparison been made, the decision-maker would have had to consider if there was an effect on the public that was more than minor, that is, the removal of or interference with the public's right to free access of a part of the CMA.

[126] That submission is accurate only in part. At least in relation to the boatshed slip-way, the rights of occupation are not exclusive rights.[32] However, in relation to the boatshed itself, KIA's submission that the notification decision did not consider the effect of granting exclusive occupation rights against the existing coastal permit is accurate.

[127] In this regard, objective F2.14.2(3) in the AUP (OiP) applying to use, development and occupation in the CMA is relevant. It says:

> (3) Limited exclusive occupation to where it can be demonstrated it is necessary for the efficient functioning of the use and development or is needed for public safety, and any loss of public access and use as a result minimised and mitigation is provided where practicable.

[128] There was no reference to this objective either specifically or in substance in the notification decision.

[129] In my view, the difference between the rights under the coastal permit for the old boatshed and what was proposed for the replacement boatshed in terms of exclusive occupation is a relevant matter which the Council should have considered in coming to its decision under s 95A of the Act.

[130] There is no relevant reference in the consent decision, but for the reasons expressed in [112] above, such reference could not be read into the notification decision.

---

[32] See condition 26 of the consent decision.

Noise effects

[131] KIA submits that in relation to the noise assessment the adequacy of the evidential foundation was flawed, individually or cumulatively, for the following reasons:

(a) The decision-maker took into account factors (the proposed conditions of consent) that were irrelevant to mitigating the effects of the activity;

(b) The decision-maker reached a conclusion that was not supported by the evidence; and

(c) The decision-maker failed to directly consider whether public users of the CMA would be affected by helicopter noise.

[132] Ms Chappell submits that the above factors, either separately or in combination, meant that there was no foundation for concluding that the adverse noise effects on the environment would not be more than minor.

[133] I first refer to the report the Council commissioned from its own noise expert, Mr Styles, in response to the report from the Dukes' noise expert, Mr Hegley. On 9 March 2017, Mr Styles stated:

> … I remain concerned at the very high Lmax level during the landing movement (in particular) where I expect the noise level to be between 90-95 Db and as high as 100 Db if the machine is heavily loaded with people and fuel. This level of noise is significant and would preclude any kind of conversation that the neighbour [sic] property, and is higher than any Lmax level that would be permitted for construction activities (by way of comparison). The effect would only be short and would only be twice a day, but noise levels that high cannot, in my opinion *be deemed to be less than minor* (strictly from a noise point of view).
>
> (Emphasis added)

[134] In his formal report to the Council dated 5 May 2017, Mr Styles said:

> Based on my measurements the proposal will be noncompliant with the relevant Ldn noise limits (in both ARP:C and the AUP-OP) by 2 dB, and will be non-compliant with the 85 dB Lafmax limit in the AUP-OP by 10 dB. Compliance with the AUP-OP limit of Lafmax 85 dB would not typically be achieved consistently within approximately 80 m of the landing area. … It is

> my opinion that based on the measured noise levels, the noise effects on the closest neighbours will be at least minor.

[135] Mr Styles did not address the issue of how much more than minor the effects would be, nor did he specifically refer to effects on members of the public.

[136] Turning to the notification decision, there is a paragraph which indicates the decision-maker did consider the issue of non-compliance with the Lafmax limit:

> Mr Styles conducted field tests … The measured levels were shown to be higher than the predictions from Hegley Acoustics … The Lafmax would not typically be achieved within approximately 80m of the landing area.
>
> When considering noise, I also note this is limited to between ground level and 500ft. This is typically of a short duration, already the helicopter may be heard beyond this …

[137] The notification decision continued:

> Overall, having reviewed the information and rationales put forth by both Mr Hegley and Mr Styles it is considered that the proposed level of the helicopter activities would not comply with the noise limits set out in NZS 6807 given that the measurements taken by Mr Styles were based on field tests. Taking into account the conditions offered by the applicant to minimise adverse effects, noting that there will be adverse noise effects over that permitted beyond land adjacent that it is my opinion however that the adverse effects of helicopter use will not noticeably detract from aural amenities, and on those persons beyond land adjacent that are afforded notable separation as a result of the scale and duration of flights proposed. Adverse noise effects on the environment and on persons will be less than minor.
>
> For the above reasons, I consider that adverse noise effects generated from the proposal on the wider environment will be less than minor, based on recommended mitigation measures, the proposed frequency and short durations of the flights and the predicted noise levels resulting from the flights (although shown not to comply with the relevant noise standards).

[138] Ms Chappell expands on the three errors she says are demonstrated in the noise assessment. First, taking into account the conditions offered to minimise the adverse effect, she says there was a double counting as the noise exceedance had already been assessed against limiting the number of flights to three arrivals and three departures per week.

[139] However, the mitigation measures imposed went beyond a limiting of the number of flights from the number proposed by the Dukes. Those other conditions

included the flight path, restriction on hours, and type of helicopter (or its equivalent in terms of noise effects) permitted to land. Those were all mitigation measures.

[140] But there is another issue at this point. Although mitigation can be taken into account when considering the effect of an activity, for the purposes of a non-notification decision, the words of the Court of Appeal in *Bayley v Manukau City Council* need to be borne in mind:[33]

> … whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional sound proofing.

[141] In this case, the balancing exercise has not resulted in the decision-maker being satisfied that the adverse effects he recognises will occur will be *excluded* by the conditions.

[142] It was therefore an impermissible balancing exercise.

[143] Second, Ms Chappell says the definition of "effect" in s 3 of the RMA includes any temporary effect, regardless of the scale, intensity, duration or frequency of the effect. In other words, Ms Chappell submits that an effect is not necessarily minor because it is temporary or for limited duration.

[144] I accept the submission that in referring to the "proposed frequency and short durations", the decision-maker has not taken into account the definition of "effect" as referred to by Ms Chappell.

[145] Thirdly, Ms Chappell submits although the decision refers to adverse noise effects "on the wider environment" and contains a reference to "those persons beyond land adjacent", there was in fact no consideration of adverse noise effects that might be experienced by members of the public in the water or on the beach and who would not have the benefit of any "noticeable separation". Bearing in mind Mr Styles' report and its focus on neighbours as opposed to members of the public, the conclusion

---

[33] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580.

reached in the report that adverse noise effects on the wider environment will be less than minor is not a conclusion that reflects the preceding parts of the decision.

[146] In the paragraph that leads up to the conclusion that adverse noise effects on the wider environment will be less than minor, there is a reference to the information put forth by Mr Hegley (the Dukes' noise consultant).

[147] In his affidavit filed in this proceeding, Mr Hegley deposes that his assessment points (as referred to in his letter which was before the Council) represent the most exposed locations on the adjacent beach and higher noise levels than will be received at any other public space in the area.

[148] On the one hand, it might be said that, in referring to Mr Hegley's information, the decision-maker was taking into account adverse noise effects that might be experienced by members of the public.

[149] But the decision does not say that. The conclusion regarding "noise effects on the environment" links back to "persons beyond land adjacent that are afforded notable separation" and not to members of the public on the beach.

[150] I also note Mr Styles' focus on the neighbours in his two reports. On 5 May 2017, he concluded, "it is my opinion that based on the measured noise levels, the noise effects on the closest neighbours will be at least minor". Then, on 20 July 2017, in his "Assessment" section, he concluded, "… I consider that the noise levels will be reasonable at the properties from which written approval has not been obtained".

[151] I therefore conclude that the Council has erred in its assessment of noise effects by taking into account mitigation measures that did not exclude adverse effects, by failing to take into account that the term "effect" includes temporary effects, and by failing to consider the effect of noise from the proposal on members of the public.

[152] For completeness, I refer to the consent decision. It refers to certain objectives and policies. Apart from Objective E25.2, which refers to people generally ("People are protected from unreasonable levels of noise and vibration"), the focus is on

residential sites rather than the public. But for the reasons expressed in [112] above, any references to members of the public in the consent decision could not be read into the notification decision.

Special circumstances

[153] Under s 95A(4) of the RMA, a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

[154] Special circumstances are not defined in the RMA. In *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu*, the Court of Appeal stated that:[34]

> [36] … A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification. As Elias J noted in *Murray v Whakatane District Council*:
>
> > ... the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.
>
> (Citations omitted)

[155] In *Urban Auckland v Auckland Council*, Venning J accepted that there is limited scope for judicial review of a decision as to whether there are special circumstances, saying:[35]

> [137] … It involves the exercise of a discretion based on the Council's assessment of the factual position and use of its expertise and judgment: *S &M Property Holdings Ltd v Wellington City Council.* Concern on the part of an interested party could not of itself be said to give rise to special circumstances because if that was so every application would have to be advertised where there was any concern expressed by the people claiming to be affected.
>
> (Citations omitted)

---

34 *Far North District Council v Te Rūnanga-Ā-Iwi O Ngāti Kahu*, above n 8.
35 *Urban Auckland v Auckland Council*, above n 20.

[156] However, in *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council*, Simon France J rejected the suggestion that the broad nature of the discretion made it immune from review so long as the decision-maker acknowledged the existence of the discretion.[36] He further said that this "is an area where experience is an important component in assessing whether an application gives rise to special circumstances", and "[a]ny review must recognise the familiarity a Council has with resource consent applications".[37]

[157] Ms Chappell submits that the answer "no" to the question in the notification decision whether there were any special circumstances requiring notification was not one open to a reasonable decision-maker because the conclusion was based on irrelevant considerations. There are three aspects that Ms Chappell refers to.

[158] First, she submits that the decision-maker's finding that the new boatshed would be of the same size and have the same dimension as the old boatshed, was not relevant where the true nature and principal purpose of the application was to use the structure as a helipad.

[159] I have already determined that the evidence of Mr Francis that would support this submission is not evidence the Court would take into account on an application for judicial review.[38] I therefore do not accept this submission.

[160] Second, Ms Chappell refers to the statement in the notification decision that, "although the activity of helicopter flights are not overly common in the coastal marine area and the wider environment, there are other examples of similar helicopter pads located on boatsheds within the Herne Bay area (such as 12 Cremorne Street)".

[161] Ms Chappell submits the application was not for "helicopter flights" and the existence of one other consent to establish a helicopter pad in a boatshed nearby but where the landing pad was not in the CMA and where the location was away from a

---

36 *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-635, 21 November 2007 at [131].
37 At [131].
38 See above at [74].

main beach, did not mean that this application was not exceptional or unusual or outside the common run of things.

[162] I will return to that submission in [168] below.

[163] Ms Chappell's third submission relates to the third consideration by the Council supporting its conclusion that there were no special circumstances. That is the location of the landing area, the type of helicopter proposed and other measures. Ms Chappell submits these matters did not relate to the true nature and purpose of the application.

[164] This submission is simply a variant of Ms Chappell's first submission on this issue, which I do not accept. The submission that the true purpose, in other words the principal purpose, was not for a boatshed but for a helicopter landing pad is an appeal issue. It is not a matter for judicial review. I have already rejected that argument.

[165] Ms Chappell submits that there are a number of special circumstances in this case:

(a) That the application was to replace the existing boatshed with a new boatshed and helicopter pad within the CMA, and to use it for helicopter flights;

(b) A dominant or underlying purpose of the application was to construct a helicopter landing pad within the CMA for the activity of carrying out helicopter flights for private purposes from a public beach;

(c) There was no functional or operative necessity related to the marine environment, or to achieve the purpose of the existing coastal permit associated with a helicopter landing pad in the CMA; and

(d) The significant public interest in activities occurring in parts of the CMA used and enjoyed by the public.

[166] Stripped down, this is an application for use of a boatshed which is on a beach used by the public as a helicopter landing pad, with the Council itself accepting in the consent decision that helicopter activity does not have a functional or operational need to be undertaken in the CMA.

[167] All of those factors would support a conclusion that the proposal is "outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique". I say that, even taking into account that the use of the proposed helipad will not be the main or dominant activity.

[168] In particular, it is the location of the boatshed incorporating the helicopter landing pad on a public beach which gives rise to special circumstances. To that extent, the proposal differs from the example given by the Council in its decision and referred to by Ms Chappell in [160] and [161] above, which is a more isolated location away from a main beach.

[169] Ms Chappell also submits that it is apparent from newspaper articles written after consent was granted that there is a foundation for suggesting there would have been significant public interest.

[170] That is not a supporting reason that I accept. I adopt the statements of Venning J in *Urban Auckland v Auckland Council*,[39] referred to in [155] above.

[171] In conclusion on this issue, I consider that the Council erred in determining that there were no special circumstances.

Failing to consider a rule in a plan that required notification

[172] Section 95A(2)(c) of the RMA requires the Council to notify an application if there is a rule requiring notification.

[173] KIA submits that the Council erred in concluding there were no rules in the District Plan that required public notification of the application. In the consent

---

39 *Urban Auckland v Auckland Council*, above n 20.

application, the Dukes identified R 5B7.2A(iv) of the District Plan as relevant. That rule provided for "Buildings used principally for the storage or maintenance of boats are deemed to be discretionary activities".

[174] The rule further provided that:

> Any application for a discretionary activity shall be notified unless the Council are satisfied that the following criteria can be met:
>
> - The written approval of all parties who in the opinion of the Council, may be affected has been obtained by the applicant; and
>
> …
>
> - There is little probability of any material effect on the coastal marine area of the proposal, including effects on the habitats or water quality.

[175] KIA refers to the second part of the rule. In my view, KIA is wide of the mark in identifying this rule. While on its face, the use of the words "any material effect" appears to be wide, in my view it is qualified by the addition of the words "including effects on the habitats or water quality". Its focus is on effects on the CMA itself as opposed to effects on those using the CMA.

Consent decision

[176] Given my conclusion that the notification decision is flawed and invalid, it must follow that the consent decision is also deficient and cannot stand. The notification decision precedes the consent decision. As the notification decision is invalid, the Council will need to reconsider the question of notification and deal with it according to law, before then considering whether or not consent should be granted to the Dukes' application.

[177] In those circumstances I do not consider it appropriate to address any of the submissions made in relation to the consent decision.

Strike out application (including standing)

[178] The Dukes filed an application to strike out the second amended statement of claim on 20 July 2018. The Court directed that the application be heard with the substantive application for review.

[179] The strike out application has two grounds:

(a) That the judicial review application discloses no reasonably arguable cause of action; and

(b) KIA does not have standing to bring the proceeding.

No reasonably arguable cause of action

[180] The first ground relies on the fact that no planning, aviation or acoustic expert evidence has been filed by KIA.

[181] This is an application for review of the process followed by the Council in making its decision. It is not an appeal against the merits. The causes of action address the alleged procedural errors and issues of statutory interpretation. Expert evidence such as is suggested by the Dukes is not required and would not assist the Court.

[182] But in any event, this ground of the strike out application has been overtaken by my decision on the substantive application for review in which I have found in favour of KIA at least on some of the grounds it has advanced. No more needs to be said on this ground of the strike out application.

[183] I turn to consider the second ground, namely the standing of KIA to bring the claim.

Standing

[184] I first address a preliminary issue, namely the admissibility of Mr Coleman's affidavit sworn 28 September 2018.

[185] In his affidavit of 6 August 2018 filed in response to the strike out application, Mr Coleman sets out various factual matters relevant to the issue of standing.

[186] The 28 September 2018 affidavit updates the evidence in the 6 August 2018 affidavit. Mr Coleman deposes:

> 3. Since that date [6 August 2018] I confirm that new members have joined the Society. These include the Herne Bay Residents Association Incorporated (Number 2558603) which has a membership of approximately 250 people, many of whom are residents of the suburb of Herne Bay, which includes Sentinel Beach.
>
> 4. Under the Incorporated Societies Act 1908 an incorporated society may become a member of another incorporated society and the society joining is deemed to be the equivalent of three members.
>
> 5. In my affidavit of 6 August 2018, I produced and attached a copy of the Kawau Action Incorporated Society's rules. It has come to my attention that I omitted to include an amendment to those rules filed with the Registrar on 11 April 2018, which I annex and mark Exhibit HC A.

[187] The Dukes oppose the admission of the affidavit on the basis that no additional affidavit from the Herne Bay Residents' Association is provided "to explain the relevance of this application for joinder". I understand that submission to refer to the Herne Bay Residents' Association joining KIA. The Dukes also say no interests are served by the admission of this additional affidavit.

[188] Rule 7.7(1) of the High Court Rules provides that no affidavit may be filed after the close of pleadings date without the leave of a Judge. However, r 7.7(2)(b) provides that r 7.7(1) does not apply to an affidavit that merely brings up to date the information before the Court.

[189] The affidavit (apart from paragraph 4 which is a legal submission and paragraph 5) is admissible by virtue of r 7.7(2)(b). Leave is not required. I also do not accept it is necessary for there to be an additional affidavit from the Herne Bay Residents' Association in order for Mr Coleman's affidavit to be admitted. Paragraph 5 refers to evidence inadvertently omitted from an earlier affidavit. To the extent that leave is required in relation to that paragraph, leave is granted. The objection by the Dukes did not appear to extend to the evidence in paragraph 5.

[190] The affidavit is accordingly admitted (but putting aside paragraph 4).

[191] There is a helpful discussion of the principles of standing in judicial review proceedings in the judgment of Palmer J in *Smith v Attorney-General*.[40] In that case, the Crown had sought to strike out a claim by Mr Smith in relation to a temporary regime instituted by the Department of Corrections, on the ground that he lacked standing to bring a challenge. The Judge heard the application on a pre-trial basis. He said:

> [18] The requirement of standing in judicial review proceedings has been significantly relaxed in New Zealand. But it is not so relaxed that it is horizontal. It still exists. The requirement of standing reflects the general attitude of the New Zealand legal system that a judicial decision on the application of law is made in a context of particular facts …
>
> …
>
> [27] … A party who has a personal interest at stake, or whose personal rights and interests are affected, has standing to bring a proceeding. If not, he or she may be permitted to pursue a claim if that is warranted by the public interest in the administration of justice and the vindication of the rule of law. The apparent merits of the case are relevant to that assessment, as is whether a wider issue of general importance is raised. Standing is not automatic and decisions are made on the totality of facts, with a generous approach prevailing.
>
> …
>
> [30] … For a judicial review to be struck out on the basis of standing, claims to both personal standing and public interest standing must be so untenable that the court must be certain they cannot possibly succeed. That requires assessment of the litigant's personal rights and interests, and the merits of the challenge, on the basis the facts pleaded in the statement of claim are true. If the personal interest of a litigant may be impacted by the decision under challenge, or the decision under challenge may be unlawful, an application to strike out a judicial review proceeding on the ground of standing cannot succeed. Rather, the substantive judicial review proceeding, which is supposed to be simple, un-technical and prompt, would need to be heard.
>
> [31] For that reason, objections to standing in judicial review proceedings will usually be considered in the course of the substantive proceeding. That allows standing to be assessed in light of the merits of the case which may illuminate the public interest at issue. And it avoids delay. It is no coincidence that the Crown was not able to point to a New Zealand judgment striking out a judicial review proceeding on the basis only of standing. Only rarely is standing likely to found striking out judicial review proceedings before a substantive hearing.

---

40 *Smith v Attorney-General* [2017] NZHC 1647.

[192] In the context of environmental issues, the following two cases have commented on the question of standing. In *Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd*, the High Court commented on the approach to be adopted in determining who is adversely affected when an environmental concern is raised:[41]

> … A liberal approach to standing is appropriate because otherwise public interest groups, whose status in planning cases has been recognised for some years, might be precluded from appearing on behalf of the community in general. This would leave the "grave lacuna" in our system of public law to which Lord Diplock referred at p 644 of the *Self Employed* case. A liberal approach to standing in matters of judicial review is appropriate where a question of damage to the environment is an issue. It will be determined on a case by case basis … The question of standing does not appear to have been a major cause of difficulties for Planning Tribunals.

[193] A similar approach was adopted by Tipping J in *O'Neill v Otago Area Health Board*:[42]

> Any person who shows an honest interest in a public issue may invoke the processes of the Court to have the substantive matter of concern considered. It will usually be necessary to examine the substantive issue or issues before a decision on standing can be made. If the Plaintiff fails on the substantive issues the question of standing will be academic. If the Plaintiff would otherwise succeed it will be an unusual case in which either as a matter of standing or as a matter of discretion the Plaintiff will fail. It is my view that the only circumstance in which a Plaintiff should be shut out in limine for want of standing is where the Defendant can show that the Plaintiff lacks good faith or that the complainant is clearly frivolous, vexatious or otherwise untenable.

[194] In this case, having first examined the substantive issues, I have found in favour of KIA at least in relation to some of the grounds in the first cause of action. I then ask the question, is this such an unusual case that the claim should fail simply on the question of KIA's standing?

[195] Mr Coleman's evidence is that KIA is an incorporated society under the Incorporated Societies Act 1908. It was incorporated on 20 May 2015. Its objects include the following:

---

41 *Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC).

42 *O'Neill v Otago Area Health Board* HC Dunedin CP50/91, 10 April 1992. See also *Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2001] NZRMA 209 (HC) at [27]; *Egan v Commissioner of Police* [2013] NZHC 550 at [37].

> To oppose commercial and unnecessary private development within the Coastal Marine Area (cma) and Coastal Environment of Auckland City, in particular, including Waiheke, Waitemata Harbour and Kawau Island.

[196] Mr Coleman deposes that he lived on Kawau Island for the last 30 years until recently moving to Devonport. He says that KIA had its beginnings as a separate incorporated society, but was solely focused on Kawau Island. However, the current society was subsequently incorporated with a broader focus on the wider Hauraki Gulf. Mr Coleman says one reason for this is that the Auckland Unitary Plan now applies across the whole of Auckland, including Kawau Island, so that management of the CMA in such places as the Waitemata Harbour creates precedents for the management of the CMA across the Hauraki Gulf, including Kawau Island.

[197] Mr Coleman further says that KIA retains a broad interest in other matters beyond Kawau Island. In this regard, he refers to KIA's current involvement in the America's Cup proceeding in relation to the grant of resource consents for the infrastructure and related activities in the CMA. KIA has filed a notice under s 274 of the RMA dated 11 July 2018. The particular issue raised in that notice is the matter of public access in front of the syndicate sites around the waterfront.

[198] Finally, Mr Coleman says that KIA has brought these proceedings because it considers that there is a need for the public, in addition to directly affected parties, to be notified about consents for certain activities within the CMA in a manner consistent with the planned provisions and the principles of the New Zealand Coastal Policy Statement.

[199] Ms Stienstra has referred the Court to the decision of Venning J in *Urban Auckland v Auckland Council*, where Venning J refused an application by KIA to join or intervene in judicial review proceedings in which the plaintiff was challenging the Council's decision granting consent to Ports of Auckland Ltd to extend the Bledisloe Wharf.[43] Ms Stienstra submits that the statement by Venning J that:

> [12] While I accept Mr Coleman and KIA are genuinely interested in the outcome of the judicial review in the proposed wharf extension, they have no greater interest than any other member of the public.

---

43 *Urban Auckland v Auckland Council* [2015] NZHC 1183.

should be applied in this case.

[200] However, I make the following observations in relation to that case:

(a) First, Venning J noted that although the application was styled as an application for an order permitting KIA to join the proceedings, Mr Coleman was unable to identify the legal basis for his application other than to submit generally that it was in the interests of justice for KIA to be joined;[44]

(b) the Court also stated that having heard from Mr Coleman and having considered the submissions he proposed to make, the Court was satisfied it would not be assisted by those submissions;[45]

(c) to the extent that there was anything of substance in Mr Coleman's submissions, the Court was satisfied the issues would be addressed by Urban Auckland in its submissions;[46]

(d) the issues before the Court involved relatively complex factual issues and difficult legal argument, and Mr Coleman was not legally qualified; and

(e) nothing Mr Coleman raised suggested the interests of justice would be served by joining KIA to the proceedings.

[201] This case is different in my view. KIA is the sole entity that has brought a claim, it has been represented by counsel and I have accepted that at least part of its case has merit.

[202] Ms Stienstra also questions whether KIA has a sufficient number of members under the Incorporated Societies Act. That Act requires at least 15 people to be

---

44 At [5].
45 At [11].
46 At [13].

enrolled as members to be properly constituted.[47] Ms Stienstra refers to the process under the Act to reduce the numbers to less than 15. She refers to Mr Coleman's affidavit that in this case he has applied to remove the requirement for 15 members, but she says he has not confirmed that the correct paperwork has been filed to achieve this objective. She therefore says that it is unclear whether KIA is in fact properly constituted. Ms Stienstra did not, however, pursue the application to issue interrogatories which, as I have already noted, was abandoned at the beginning of this hearing.

[203] Ms Stienstra submits that the addition of the Herne Bay Residents' Association does not overcome the issue of standing for KIA.

[204] While I note those submissions, I intend to adopt a liberal approach to the question of standing. Having found that some of KIA's arguments do have merit, I do not consider that this is a case where the claim should then fail upon the issue of standing.

Notice to admit documents

[205] KIA applies under s 130 of the Evidence Act to offer documents in evidence without calling a witness. The documents are contained in volumes 2 and 3 of the common bundle. Although the index to each of those volumes records that the Dukes objected to the production of all the documents, at the hearing their position was modified somewhat. I work through the documents in turn:

(a) Volume 2: tab 1

This is a copy of the Council's decision to re-sand Sentinel Beach which KIA submits is evidence of the importance of the beach for recreational use. Ms Stienstra accepts that this document is relevant (but peripheral). It is accordingly admitted.

(b) Volume 2: tabs 2-7

---

47 Incorporated Societies Act 1908, s 4(1).

KIA's position is that these documents are referred to or otherwise incorporated in the decisions of the Council and are relevant to the issue of information before the Council in making its decisions. Ms Stienstra accepts that documents 2-4 are relevant (but peripheral). In respect of document 5, Ms Stienstra submits that it is part of the application documents and cited in the decision as such. I admit documents 2-5.

I will address documents 6 and 7 along with the next category of documents.

(c) Volume 2: tabs 8-18

These are emails between the Council and the Dukes in advance of the making of the decisions. KIA says these documents are relevant to the issue of information before the Council prior to its making the notification and consent decisions. Ms Stienstra's response is that these communications do not impact on the substance of the application and should therefore not be permitted as part of the record. I consider that these communications (including documents 6 and 7) are relevant evidence as they form part of the background to the notification decision and they are admitted.

(d) Volume 2: tab 19

This is the decision of the Environment Court on the Dukes' application under s 116 of the RMA referred to in [23] above. Ms Stienstra's submission is that this document is not relevant. It is a judgment which is publicly available and I admit it.

(e) Volume 2: tabs 20-22

These three documents are all annexed to the 6 August 2018 affidavit of Mr Coleman and have been included in the common bundle for ease of reference. They are admissible as documents annexed to Mr Coleman's affidavit. There is no reason why they cannot also be included in the common bundle for convenience.

(f) Volume 3

This volume contains the relevant provisions of the Auckland Regional Coastal Plan, the Auckland Regional Policy Statement, the Auckland District Isthmus Plan, the proposed Unitary Plan as notified, and the Auckland Unitary Plan – Operative in Part. In her oral submissions, Ms Stienstra submitted that the contents of this volume are unnecessary as it is a repetition of what is already before the Court by way of documents exhibited to the affidavit of Mr Wright sworn 16 August 2018. I admit the documents. It is convenient to have them in a paginated bundle (as opposed to Mr Wright's affidavit which is not paginated).

Relief

[206] The relief sought by KIA is:

(a) An order quashing and setting aside the notification decision;

(b) An order directing the Council to hear and determine the Dukes' application on a fully notified basis; and

(c) An order quashing and setting aside the consent decision.

[207] The Court has a discretion whether or not to grant the relief sought by KIA. As noted by Wylie J in *Tasti Products Ltd*, various factors have typically been discussed by the Courts in considering the exercise of the discretion – for example, whether innocent parties would be unduly prejudiced, whether an applicant has delayed and the like.[48] Each case needs to be looked at on its own facts.

[208] The default position is to grant relief. There must be strong reasons to refuse it.[49] Ms Stienstra submits that relief is futile as ultimately the consent under challenge confers a right for a helicopter to land on the boatshed occasionally, and this will be

---

48 *Tasti Products Ltd v Auckland Council*, above n 21, at [91].

49 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]-[61]; *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at [186].

subject to a separate approval process under the auspices of the Civil Aviation Authority.

[209] Ms Stienstra also submits that the new consent granted to the Dukes is subject to the original coastal permit. She submits that the new consent simply extends the life of the original permit. That original permit contains a condition which reads as follows:

> 2. That in accordance with Section 128 of the Resource Management Act 1991, Council may on each anniversary of the granting of this consent review any of the conditions of this consent for any of the following purposes:
>
> (i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
>
> (ii) To deal with any other adverse effect on the environment on which the exercise of the consent may have an influence.

[210] Ms Stienstra therefore submits that there is an in-built safeguard within the original coastal permit.

[211] While I acknowledge there is a condition in the consent decision that requires the Dukes to obtain approval from the Civil Aviation Authority to construct a helipad on the boatshed prior to the commencement of the helipad operation, in my view, that does not entitle a Council to delegate its own decision-making duty on various matters, including safety. Its duties are separate to those reposed in the Civil Aviation Authority.

[212] In relation to Ms Stienstra's second argument, I do not accept that the review condition in the original coastal permit would enable the Council to deal with adverse effects associated with the use of a helicopter. The consent decision incorporates both land use consents and a coastal permit, and reads as a new consent. It does not purport to incorporate the terms of the original coastal permit. Further, the consent is said to expire on 30 June 2043, which is five years longer than the coastal permit which would have expired on 10 July 2038. There is therefore an inconsistency in the expiry dates.

[213] Even if I am wrong in my view that the consent decision does not replace the previous coastal permit, I do not consider the review condition in the coastal permit could be relied on to address the effects of the use of the boatshed as a helipad when such use was not the subject of the original coastal permit. In other words, the review condition would only apply to the effects from the use of the structure as a boatshed.

[214] I next turn to consider the materiality of the errors I have identified. A discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision. If some form of relief could have practical value, then it ought to be granted.[50]

[215] I consider that the errors I have identified meant that the Council reached the notification decision based on insufficient relevant information and, in some instances, took into account irrelevant matters:

(a) There was a failure to consider the amenity value of recreational users of the beach and in particular, their safety;

(b) There was a failure to consider the differences in the rights under the original coastal permit;

(c) In its assessment of noise effects, the Council took into account mitigation reasons that did not exclude adverse effects, failed to take into account that the term "effect" includes temporary effects, and failed to consider the effect of noise from the proposal on members of the public; and

(d) The Council erred in determining there were no special circumstances.

[216] As part of the relief, KIA seeks an order directing the Council to hear and determine the consent application on a fully notified basis. I do not propose to make such an order. The Council has a discretion under s 95A(1) whether or not to publicly

---

[50] *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39]. See also *Gabler v Queenstown Lakes District Council*, above n 12, at [107].

notify an application. If, after taking into account the relevant matters I have identified, it decides that the activity will have or is likely to have adverse effects on the environment that are more than minor, only then must it publicly notify the application.

[217] In relation to special circumstances, the Council has a discretion under s 95A(8) whether or not to publicly notify an application where special circumstances exist. It is for the Council to exercise that discretion.

[218] I acknowledge that the Dukes have commenced rebuilding the boatshed, but they have done so in the knowledge of these proceedings. It cannot be said there was delay on the part of KIA in commencing the review proceedings. The s 116 application permitting the Dukes resource consent to commence, prior to the appeal (later withdrawn) being heard, was granted on 17 December 2017. KIA's notice of proceeding was filed in this Court on 2 February 2018.

[219] As to any impact on third parties, the consent application makes it clear that the helicopter landing pad is intended for private use. There is no suggestion that there would be any commercial detriment either to the Dukes or a third party. In any event, one of the consent conditions is that the arrival and departures to and from the helicopter landing pad are for domestic purposes only and not for commercial purposes.

[220] I therefore return the decision on notification to the Council for fresh consideration.

Orders

[221] I make the following orders:

(a) The decision of the Council dated 18 August 2017 determining to process the application by the Dukes without public notification or limited notification is quashed and set aside; and

(b) The decision of the Council dated 18 August 2017 granting the application by the Dukes for coastal and land use consents is quashed and set aside.

Costs

[222] Costs are reserved. I encourage the parties to agree costs. If agreement can be reached, a joint memorandum should be filed within 30 working days of the date of this judgment. In the event that agreement cannot be reached, KIA is to file and serve its memorandum within five working days of the date for the joint memorandum, and the Dukes and the Council are to file and serve their memoranda within a further five working days. Memoranda should not exceed five pages (excluding attachments).

_____

Gordon J