



8 June 2026

Fast Track Applications



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Fast Track Approvals Application FTAA-2512-1163: Port of Tauranga Stella Passage Application – Response to Minute 5

This letter is in response to the request for information identified in paragraph 7(a) of Minute 5, dated 22 May 2026. The Panel has asked for the Bay of Plenty Regional Council's (**Council**) interpretation of the matters of discretion relating to Rules PZ5, PZ8, PZ10 and PZ11 that references '*site specific historical or cultural values under ss 6(e) or 7(a) of the RMA*'. Specifically, the Panel has requested Council's *interpretation and application of this matter of discretion in its plan to date, including whether it has been the subject of judicial consideration*.

The section 32 evaluation of the proposed Regional Coastal Environment Plan (**RCEP**) provisions (which were made operative in December 2019) identified that Te Awanui Tauranga Harbour, including the area identified as Port Zone, is of cultural significance to tangata whenua, even though there are no specific historical sites mapped within the Port Zone. The analysis notes that the inclusion of assessment criteria/matters of control are provided to enable the tangata whenua to specifically identify potential effects relevant to individual proposals through resource consent applications, to enable these identified effects to then be considered through the consenting process. A copy of the relevant parts of the s32 analysis is attached as Annexure A to this letter.

Historically, the implementation of the identified assessment criteria/matters of control has been to ensure that the resource consent processes have resulted in engagement with tangata whenua, to assist in identifying how sections 6(e) and / or 7(a) are specifically relevant to the area subject to the resource consent application. The Stella Passage resource consent application (RM21-0341, that was subsequently directly referred to the Environment Court for consideration) was limited notified to tangata whenua parties, as a

result of the potential for site specific cultural effects to arise from the proposal. Other applications in the vicinity of Stella Passage, including the Tauranga Bridge Marina (reference RM20-0629 / NZEnvC 163) were also limited notified to tangata whenua parties as a means of understanding the potential effects on cultural values as per sections 6(e) and 7(a) of the RMA.

The following cases are considered relevant to the Panel's question regarding the judicial consideration of these provisions. Copies of these cases are provided in **Annexure B** to this letter.

Port of Tauranga Ltd v Bay of Plenty Regional Council [2023] NZEnvC 270

In *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 270, the Environment Court identified as a key issue that the most stringent activity status under the RCEP was restricted discretionary, and that one of the relevant matters of discretion was "site specific historical or cultural values under ss 6(e) or 7(a) of the RMA". In that context, the Court identified cultural effects on tangata whenua as a central issue. The conditions included the establishment of a Transitional Iwi Liaison Group, the Te Awanui Advisory Group and the payment of money to third parties. Those conditions were offered on an *Augier* basis by Port of Tauranga and accepted by the Court.

Ngāti Kuku Hapū v Bay of Plenty Regional Council [2023] NZEnvC 163

The Environment Court's decision in *Ngāti Kuku Hapū v Bay of Plenty Regional Council* [2023] NZEnvC 163, relating to the renewed occupation of existing Tauranga Bridge Marina (a controlled activity), also addresses the identified assessment criteria/matters of control. In this instance, the Court accepted that the marina had continuing cultural effects on Ngāti Kuku, including effects associated with occupation of an area of longstanding cultural significance, loss of access and customary use, loss of views, effects on the ability to exercise kaitiakitanga, and the cumulative effect of surrounding industrial development on the hapū's relationship with Te Awanui. The Court also recognised that the relevant planning framework required tangata whenua involvement, recognition of customary activities, protection of taonga and areas of cultural significance, restoration of mauri, and the use of conditions incorporating mātauranga Māori based methods or cultural indicators. Conditions of consent were imposed requiring the establishment of a Kaitiaki Group and continued direct engagement with Ngāti Kuku.

Financial Contributions

In addition to the question directed to Council in paragraph 7(a), it is noted that Minute 5 also addresses a matter raised by Mr Enright on behalf of Ngāti Kuku Hapū regarding the

requirements of conditions being imposed as financial contributions under section 108(10) of the RMA. It is acknowledged that the Panel has indicated it may ask for further consideration by the parties of this matter following clarification from Mr Enright. However, in the context of section 108(10), it is considered opportune to draw the Panel's attention to the provisions of the Regional Coastal Environment Plan (**RCEP**) that are relevant to Financial Contributions.

Financial Contributions are addressed in Schedule 11 of the RCEP, which specifically addresses the Circumstances and Purposes of Financial Contributions; the Amount of Contribution and Matters to be considered for financial contributions. A full copy of the Schedule is provided as **Annexure C**.

Yours faithfully,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a small flourish.

David Greaves

Consultant Planner to Bay of Plenty Regional Council

Annexure A RECP S32 Assessment Excerpt

20 Port Zone

20.1 Summary of relationship between issues, objectives, policies, rules and methods

Issue(s)	Objective(s)	Policy	Rule (or specific rule condition where relevant)	Schedules
Port of Tauranga operational needs: Issues 49, 50, 51, 52.	Objective 48.	PZ 1.	PZ 2. PZ 3. PZ 4.	Schedule 9. Outline Development Plan for the Port of Tauranga 2013.
		PZ 4.	PZ 5.	
		PZ 6.	PZ 10.	
Port of Tauranga dredging: Issues 50, 52.	Objective 49.	PZ 2.	PZ 7, PZ 9.	
		PZ 3.	PZ 2, PZ 3, PZ 4.	
		PZ 9.	PZ 5(g), PZ 6(o), PZ 8(g), PZ 9(f), PZ 10 and iwi or hapū with a statutory acknowledgement can be considered as an affected party.	
		PZ 10.	PZ 8.	
		PZ 11.	PZ 8.	
	Objectives 48, 49.	PZ 5.	PZ 2, PZ 3, PZ 4.	
		PZ 7.	PZ 10.	
		PZ 8.	PZ 1.	

20.2 Evaluation of Objectives 48 and 49

20.2.1 Objective 48

	Option 1 (selected option)	Option 2 Status Quo (existing Objective in RCEP)
Plan Provision(s)	Objective 48. The current operational needs of the Port of Tauranga are provided for as a matter of priority while limiting the effects of those activities on cultural values and the environment.	The existing RCEP does not contain any objectives specific to the Port and its operations; therefore the status quo is the 'do-nothing' approach.
Relevance		
Directly related to a resource management issue that must be resolved to promote the purpose of the RMA.	Yes – the objective addresses issues 49 and 51, which relate to the importance of the continued operation of the Port of Tauranga and difficulties associated with disposal of all dredge material on land.	N/A
Will achieve one or more aspects of the purpose and principles of the RMA (Part 2).	The Objective provides for the efficient use and development of physical resources, consistent with s7(b) of the RMA.	N/A
Relevant to Māori environmental issues? (s6(e), 6(g), 7(a) and 8 RMA).	The Objective specifically refers to limiting the effects of activities on cultural values, such as those encompassed by s6(e) of the RMA.	N/A
Relevant to BOPRC's statutory functions and powers under the RMA.	Yes – s12(1) and s30(1)(d)(i), (v) and (vi) and S30(1)(gb) RMA.	N/A
Gives effect to the RPS and/or the NZCPS?	Yes – gives effect to Proposed RPS Policy 13B and NZCPS Policy 9.	No.
Usefulness		
Will effectively guide decision-making?	Yes – the objective is clear about the importance of maintaining the Port's existing operational capacity, but also recognising that adverse effects of activities require consideration.	No – the objectives of the existing RCEP do not provide any guidance with regard to Port activities.
Meets sound principles for writing objectives?	Yes – the objective is specific to the Port of Tauranga and the importance of its continued operation.	N/A
Consistent with other relevant objectives?	Yes – the objective is consistent with Objective 49.	N/A

Reasonable and achievable		
Does not impose an unreasonable burden on people and communities.	No – the Port of Tauranga has been in operation at its current location for decades; its continued operation (rather than relocation elsewhere) is an efficient use of resources.	N/A
Achieves an outcome in terms of the scope, tools and resources available to BOPRC.	The objective can be achieved via the resource consent process and use of an appropriate regulatory framework (rules) for activities in the Port Zone.	N/A
Overall assessment	An appropriate objective to include in the RCEP.	The absence of a management regime targeted at the port area is not consistent with the NZCPS.

20.2.2 Objective 49

Plan Provision(s)	Objective 49. The future expansion and operational needs of the Port of Tauranga and its shipping channels are provided for in appropriate locations, having regard to the potential adverse effects on the environment.	The existing RCEP does not contain any objectives specific to the Port and its operations; therefore the status quo is the 'do-nothing' approach.
Relevance		
Directly related to a resource management issue that must be resolved to promote the purpose of the RMA.	Yes – the objective addresses issues 49, 50, 51 and 52, which relate to the importance of incremental growth for the Port of Tauranga, including capital dredging activities and alterations to wharves and berths. The issues listed also acknowledge the potential for adverse effects on the environment to occur as a result of expansion activities.	N/A
Will achieve one or more aspects of the purpose and principles of the RMA (Part 2).	The objective provides for the efficient use and development of physical resources, consistent with s7(b) of the RMA.	N/A
Relevant to Māori environmental issues? (s6(e), 6(g), 7(a) and 8 RMA).	Yes – One of the potentially significant adverse effects associated with expansion of the Port of Tauranga is effects on tangata whenua values.	N/A
Relevant to BOPRC's statutory functions and powers under the RMA.	Yes – s12(1), s30(1)(d)(i), (v) and (vi) and s30(1)(gb) RMA.	N/A

Gives effect to the RPS and/or the NZCPS?	Yes – gives effect to Proposed RPS Policy 13B and NZCPS Policy 9.	No.
Usefulness		
Will effectively guide decision-making?	Yes – the objective directs that whilst expansion of the Port of Tauranga is desirable, any expansion needs to be in appropriate locations and potential adverse effects need to be appropriately managed.	N/A
Meets sound principles for writing objectives?	Yes – the objective is specific to the Port of Tauranga and its planned expansion.	N/A
Consistent with other relevant Objectives?	Yes – the objective is consistent with Objective 48.	N/A
Reasonable and achievable		
Does not impose an unreasonable burden on people and communities.	No – the Port of Tauranga has been in operation at its current location for decades; its continued and enhanced operation (rather than relocation elsewhere) is an efficient use of resources.	
Achieves an outcome in terms of the scope, tools and resources available to BOPRC.	The objective can be achieved via the resource consent process and use of an appropriate regulatory framework (rules) for activities in the Port Zone.	
Overall assessment	An appropriate objective to include in the RCEP as it provides clear guidance for managing Port activities.	The absence of a specific objective is not consistent with the NZCPS.

20.3 Policies, Methods and Rules to achieve Objectives 48 and 49

	Option 1 (selected provisions)	Option 2 Status Quo (existing policies, methods and rules in RCEP)
Plan provision(s)	Policies PZ 1-PZ 11. Rules PZ 1-12. Schedule 9.	Policies 13.2.3(b), 13.2.3(c), 14.2.3(k), 14.2.3(l), 14.2.3(r), 15.2.3(c), 20.2.4(b). Rules 9.2.4(g), 9.2.4(h), 13.2.4(o)i), 13.2.4(o)ii), 13.2.4(p)i), 13.2.4(p)ii), 13.2.4(q). 14.2.4(t), 14.2.4(u), 14.2.4(v), 14.2.4(w), 14.2.4(x). 14.2.4(y), 15.2.4(e), 20.2.4(b). Eighth Schedule - Outline Development Plan Port of Tauranga 1994-2004.

20.3.1 Efficiency

Efficiency	Option 1	Option 2
Benefits		
Environmental Benefits		
Coastal ecosystems and biodiversity.	Effects on coastal ecosystems and biodiversity are included as matter of control or discretion for dredging and deposition activities in the Port Zone requiring resource consent.	As per Option 1.
Water quality or quantity.	The policies and rules contained in the Coastal Discharges section apply within the Port Zone, and are discussed in that section of this report. For other activities in the Port Zone requiring resource consent, effects on coastal water quality are retained as matter of control or discretion.	As per Option 1.
Natural character and outstanding landscape features.	The modified nature of the Port Zone means that the natural character values are reduced. However, parts of the Port Zone and areas used for Port activities are intersected by Outstanding Natural Feature and Landscapes. These overlays have been retained where they intersect the Port Zone to ensure that consideration is given to these values during consent processes.	As per Option 1.
Biosecurity.	The release and/or spread of harmful aquatic organisms is included as matter of control or discretion for dredging activities in the Port Zone requiring resource consent (refer to Rules PZ 5 and PZ 8). Vessels visiting the Port are also controlled through the Maritime Transport Act.	No benefits identified – biosecurity considerations are not retained as a matter of discretion for existing maintenance dredging rule 14.2.4(v).
Natural hazards.	The Coastal Hazard policies apply to the Port Zone – and are discussed in that section of this report.	As per Option 1.

Risk of hazardous substances and contaminated sites.	Permitted Rule PZ 2 – Maintenance, minor alteration, repair or reconstruction of lawful structures and erection of new buildings and ancillary services - includes conditions (e) and (f) specific to the management of hazard substances. The management of hazardous substances is listed as a matter for discretion under Restricted Discretionary Rule PZ 6 – Other buildings and structures in the Port Zone.	No benefits identified – management of hazardous substances is not identified as a matter of discretion in existing rule 13.2.4(o)(i).
Historic sites.	No historic sites have been identified within the coastal marine area of the Port Zone; however the controlled and restricted discretionary rules include site specific historical values as a matter for control/discretion.	As per Option 1.
Economic Benefits		
Opportunities for employment and economic growth.	Inclusion of the Port Zone and associated rules and policies is intended to specifically provide for the Port to continue its existing operations and be able to incrementally increase shipping capacity as outlined in Schedule 9. The policy framework recognises the importance of the Port to the regional and national economy. Policy PZ 2 specifically recognises that developing shipping capacity is important to maintain the Port's operational efficiency and ability to be competitive. This is consistent with the findings of the UNISA report⁹ that found that the Upper North Island port network has the capacity to meet the projected freight task, provided that efficiency gains, incremental investments in infrastructure and the uptake of already consented works are undertaken in a planned and timely manner. The latest independent valuation on the shipping channels was performed by OPUS in 2012 and was \$117,490,000. This value does not include any of the planned future dredging works.	The existing RCEP does contain a Port Zone; however the policy direction does not specifically provide for the development of shipping capacity.

⁹ PricewaterhouseCoopers A technical study of the supply and demand for ports and port-related infrastructure in the Upper North Island 27 November 2012.

Reduced compliance costs (to resource users).	Option 1 is consistent with the Tauranga City Plan provisions relating to the Port (particularly relevant to rules relating to noise and cranes), thereby reducing compliance costs. Option 1 provides for more minor activities to be undertaken as permitted activities compared to Option 2. This means that the Port will be required to seek fewer resource consents, thereby reducing the costs associated with preparing applications, processing fees and compliance monitoring charges. Controlled activity status has been applied to maintenance dredging. This reflects the fact that maintenance dredging is required to maintain previously established channels and berthing areas and is essential to the ongoing operation of the Port. Option 1 combines the Port specific policies and rules within one chapter, which means it is easier to locate the relevant provisions.	No reduced compliance costs compared to the status quo.
Fiscal costs (to BOPRC – implementation, monitoring and enforcement).	No savings identified.	As per Option 1.
Social Benefits		
Recreational use of the coastal environment and resources.	New structures, dredging and reclamation in the area immediately adjacent to the Otumoetai Channel have been given full discretionary status (rather than restricted discretionary). This means that any potential effects on other users of the harbour can be considered and affected party approval sought or an application public notified if warranted.	As per Option 1.
Noise.	Policy PZ 8 and Rule PZ 1 ensure that noise generated within the Port Zone will be managed to appropriate standards that are consistent with those included in the Tauranga City Plan and the current NZ Standard for Port Noise Management.	Noise is controlled by use of noise control boundaries; however the provisions are not as efficient as Option 1 as they are inconsistent with the Tauranga City Plan and current best practice for managing Port noise.
Navigation.	The provisions provide for safe navigation of commercial shipping vessels.	As per Option 1.

Cultural Benefits		
Mauri of coastal waters.	No direct benefits identified.	As per Option 1.
Cultural well-being of people and communities.	No direct benefits identified.	As per Option 1.
Ability to meet Principles of Treaty of Waitangi.	No direct benefits identified.	As per Option 1.
Legislative requirements (e.g. MACAA, Treaty settlements).	The controlled and restricted discretionary rules specifically refer to the following as parties that can be included in limited notification of consent applications: iwi and hapū with a statutory acknowledgement over an affected area; an affected protected customary rights group; and an affected customary marine title group.	Not as efficient as Option 1 as the existing restricted discretionary rules do not refer to the recognitions available under Treaty of Waitangi Settlements and the Marine and Coastal Area Act.
Relationship of Māori and their cultures and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga; kaitiakitanga.	Policy PZ 9 specifically directs that consultation and engagement with iwi and hapū groups that have a recognised relationship with Te Awanui shall be undertaken during the development of any proposal that involve capital works (expansion of the port and its operations). This policy is intended to provide clear direction to the Port of Tauranga that early consultation and engagement is required. The policy recognises the shortcomings with regard to early and meaningful consultation that were identified by the Environment Court in its 2011 decision with respect to the resource consent application for expansion of existing shipping channels [NZEnv 402].	Not as efficient as Option 1 as no specific direction provided regarding consultation and engagement.
Costs		
Environmental Costs		
Coastal ecosystems and biodiversity.	The area around Mauāo has biodiversity values related to the rocky reef ecosystem (of which the sandy areas are an integral part). Dredging and the deposition of dredge material may have adverse effects on these values.	As per Option 1.
Quality and functioning of the coastal environment.	Activities associated with the operation and expansion of the Port of Tauranga have the potential to affect the quality and functioning of Tauranga Harbour.	As per Option 1.

Water quality or quantity.	Dredging and activities associated with the construction of new wharves, berths and reclamations can have an adverse impact on water quality.	As per Option 1.
Natural character and outstanding landscape features.	The Port Zone is located in the Tauranga Harbour Outstanding Natural Feature and Landscape (ONFL). Some of the most highly modified areas have been removed from the ONFL (such as the Tauranga Bridge marina); however technical advice from landscape architects does not support the removal of all the Port Zone from the Tauranga Harbour ONFL. Further development within the Port Zone has the potential to adversely affect the values of the Tauranga Harbour ONFL; however, given that the ONFL status has been confirmed including the current Port and shipping activities it is unlikely that such effects will be significant.	As per Option 1.
Biosecurity.	The disposal of organic material from dredging has the potential to cause the release and/or spread of harmful aquatic organisms.	As per Option 1.
Natural hazards.	The Coastal Hazard policies apply to the Port Zone – these are discussed in that section of this report.	As per Option 1.
Risk of hazardous substances and contaminated sites.	No costs identified.	Management of hazardous substances is not identified as a matter of discretion in existing rule 13.2.4(o)(i).
Historic sites.	No costs identified.	As per Option 1.
Economic Costs		
Opportunities for employment and economic growth reduced.	No costs identified.	
Compliance costs (to resource users).	No additional compliance costs identified.	Minor activities require resource consent under the existing RCEP, which increases compliance costs unnecessarily. The current RCEP is inconsistent with the recent changes made to the Tauranga City Plan with regard to noise and cranes.

Fiscal costs (to BOPRC – implementation, monitoring and enforcement).	No costs additional to those already incurred as a result of consent processing, compliance monitoring and enforcement activities.	As per Option 1.
Social Costs		
Recreational use of the coastal environment and resources.	Recreational users of Tauranga Harbour have expressed concern about the potential effects of new capital dredging in Otumoetai Channel (at the northern end of Sulphur Point) on the use and activities of Sulphur Point Marina and the Yacht Club.	As per Option 1.
Public access to and along the coastal marine areas.	Public access to and along the coastal marine area is restricted in the location where the Port of Tauranga Ltd holds a section 384A occupation permit. This is necessary to protect public health and safety.	As per Option 1.
Noise.	Activities in the Port Zone have the potential to generate significantly more noise than experienced in other areas of Tauranga Harbour.	As per Option 1.
Navigation.	No costs identified.	No costs identified.
Cultural Costs		
Mauri of coastal waters.	Activities associated with the operation and the expansion of the Port of the Tauranga have the potential to affect the mauri of coastal waters.	As per Option 1.
Legislative requirements (e.g. MACA, Treaty settlements).	A Treaty Of Waitangi settlement is pending for the Tauranga Moana Iwi, which will create a co-governance body for Te Awanui. Changes may be required to the RCEP at a later date to reflect the outcomes of the settlement and work undertaken by the co-governance group.	As per Option 1.
Relationship of Māori and their cultures and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga; kaitiakitanga.	Tangata whenua have a strong and established relationship with Mauāo, Panepane Point and Te Awanui (Tauranga Harbour). There are also mahinga kai (including shellfish beds) in and around the Port Zone. Mauāo in particular is of cultural and ritual significance from the ocean floor to its peak.	As per Option 1.

	The ongoing presence of the Port and its operations has an adverse effect on this relationship. Further expansion has the potential to have increasing cumulative adverse effects.	
Overall assessment	<i>High.</i>	<i>Medium.</i>

20.3.2 Effectiveness

Effectiveness	Option 1	Option 2
<i>Relevance and transparency</i>		
Directed towards achieving objectives 48 and 49.	Yes.	Directed toward achieving Objective 48, but not Objective 49 (which relates to future expansion and operational needs).
Will clearly achieve, or partly achieve the objective.	Will clearly achieve the objectives.	Will partly achieve the objectives.
<i>Usefulness</i>		
Will effectively guide decision-making?	Yes – provides clear direction to decision-makers (in conjunction with the other relevant policies) and to the Port of Tauranga as a consent applicant.	To a lesser extent than Option 1 as lacks policy direction on the importance of the continued operation and incremental expansion of the Port of Tauranga to the regional and national economy.
Meets sound principles for writing policies and rules?	Yes.	The number of rules included in the existing RCEP in relation to the Port Zone is unnecessarily complicated.
Assumptions made.	The Port of Tauranga is part of an efficient network of safe ports. Relocating the Port is not a realistic alternative. Incremental expansion of the Port of Tauranga is necessary to meet future international shipping requirements and ensure the long-term efficient operation of the Port.	
Risk involved.	Low.	Low.

Achievability		
Within BOPRC's functions and powers.	Yes.	Yes.
Within the scope of BOPRC's available tools and resources.	Yes.	Yes.
Rules can be complied with and enforced.	Yes.	Yes.
Degree of uncertainty in the ability to achieve.	Low.	Low.
Māori values		
Provides for Māori interests in the environment compatible with tikanga (where appropriate).	Yes – cross references to relevant policy in the Iwi Resource Management section of the RCEP.	Not specifically.
Overall assessment	<i>High.</i>	<i>Medium.</i>

20.3.3 Risk of acting or not acting

Risk of acting or not acting	Option 1	Option 2
Is there uncertain or insufficient information on the topic?	No – there is a considerable amount of information available on the value of the Port of Tauranga, its development plans and the potential adverse effects of operations and expansion on the coastal environment.	
Is the topic of high significance or complexity?	Yes - the Port of Tauranga is of significant importance to the regional economy and also contributes to the national economy. The Port Zone is located in close proximity to areas of known cultural significance.	
Risk of acting or not acting (risk is a factor of potential consequence and the likelihood of a consequence occurring).	The RMA restricts the erection, reconstruction, placement, alteration, extension, removal or demolition of structures; dredging and deposition of material; and reclamation in the coastal marine area (i.e. a consent is required unless permitted by a rule in a regional coastal plan). The risk of not acting on Port related activities in the CMA (no policy or rules in the RCEP) is therefore low. However, it is significantly more efficient to include policy and rules in the RCEP to provide clear guidance for decision making on resource consents and provide for minor activities as permitted, subject to conditions. It is also necessary to have policies and rules in the RCEP to give effect to relevant provisions of the RPS and NZCPS.	

20.3.4 National Environmental Standards

National Environmental Standards	Option 1	Option 2
Is there a relevant NES?	No.	No.

20.3.5 Summary of Assessment

Options Assessed	Efficiency	Effectiveness	Most appropriate option?	Summary of reasons for selection
Option 1.	High.	High.	Yes.	Option 1 gives effect to the Policy 9 of the NZCPS and Policy CE 13B of the Proposed RPS, and gives clear direction to decision-makers. Placing the Port related policies and rules within one section of the RCEP is a more efficient layout. Option 1 is also consistent with Port related provisions in the Tauranga City Plan, providing for integrated management of the Port.
Option 2.	Medium.	Medium.	No.	

20.3.6 Other policy options considered

Option	Reason(s) why option rejected
Remove the Port Zone.	The inclusion of the Port Zone provides certainty to the Port of Tauranga and the community, and reflects the highly modified nature of the area. Removal of the Port Zone would be inefficient and would not give full effect to NZCPS Policy 9(b), which requires plans to consider where, how and when to provide for the efficient and safe operation of ports and the development of their capacity for shipping.
Remove any overlays that intersect the Port Zone.	This would not give effect to the NZCPS provisions that relate to indigenous biodiversity and landscape features, and would be inconsistent with Part 2 of the RMA which requires consideration of adverse effects.
Replicate the provisions in the Waikato Regional Coastal Plan.	The Waikato Regional Coastal Plan is of a similar age to the Bay of Plenty RCEP and does not contain a Port Zone or port related provisions.
Replicate the provisions in the Gisborne Regional Coastal Plan.	Port Gisborne is not directly comparable to the Port of Tauranga in terms of its location, size and shipping volumes. In addition, Gisborne District has a distinct coastal environment from social, cultural, environmental (e.g. geological) and economic perspectives. Therefore it is not efficient or effective to replicate policy that is not appropriate to the Bay of Plenty.

Annexure B Identified cases

Port of Tauranga Ltd v Bay of Plenty Regional Council [2023] NZEnvC 270 – included as Appendices 3 and 4 of the Substantive application

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 163

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	NGĀTI KUKU HAPŪ (ENV-2021-AKL-136) Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent
AND	TAURANGA BRIDGE MARINA LIMITED Applicant

Court: Chief Environment Court Judge D A Kirkpatrick
Environment Commissioner A C E Leijnen
Environment Commissioner J Hodges

Hearing: 14 – 16 November 2022 at Tauranga

Appearances: R Enright for Ngāti Kuku Hapū
K Barry-Piceno for Tauranga Bridge Marina Limited
M Hill for Bay of Plenty Regional Council

Date of Decision: 7 August 2023

Date of Issue: 7 August 2023



DECISION OF THE ENVIRONMENT COURT

- A: The appeal is allowed in part. Amendments are to be made to the conditions of consent as set out in this decision.
- B: The appeal against the duration of consent of 35 years is refused.
- C: The parties are directed to confer and file a joint memorandum setting out the conditions in their amended form, for confirmation by the Court.
- D: Costs are reserved.

REASONS

Introduction

[1] This appeal concerns a decision by the Bay of Plenty Regional Council to grant an application for a controlled activity by Tauranga Bridge Marina Limited (**TBM**) for a coastal occupation permit for an existing marina and breakwater in the coastal marine area (**CMA**) adjacent to 101 Awanui Drive, SH2, Tauranga known as the Tauranga Bridge Marina. Ngāti Kuku Hapū appeal against two conditions of that consent relating to its duration and the scope of any review of it.

[2] The marina was established in 1995 when TBM was granted:

- a) A coastal permit to occupy the common marine and coastal area identified as consent 40148 by the Regional Council with a duration of 35 years and expiring on 31 March 2030.
- b) A land use consent for related marina facilities on the reclamation from the Tauranga District Council.

[3] A new breakwater was authorised in 2014 by consent 66504 which expires on 31 March 2024 but the full works associated with that consent have not yet been implemented. As the new breakwater would be outside the existing consented occupation area, consent 40148 was amended at the same time to provide for an increased area of occupation at the northern end of the marina to include the new breakwater area.

[4] TBM has two other relevant existing consents:

- (a) Consent 68440 which authorises maintenance dredging of the marina fairways to a maximum of 5,000m³ of sediment every two years and which expires on 31 August 2031; and
- (b) Consent 65854 which authorises stormwater and treated washwater discharges from the boatyard to the harbour which expires on 30 April 2039.

[5] TBM now seeks to replace consent 40148, seeking a 35-year coastal permit to continue to occupy the existing consented area of 11.74ha in the common marine and coastal area within the Port Zone.

[6] The occupation area is the same as the existing consented area, including the area to be covered by the new breakwater at the northern end of the marina. No additional coastal space or works are proposed or sought under the application.

The marina and surrounding environment

[7] The site is in the CMA as defined in the RMA and in the common marine and coastal area as defined in the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACAA**). In addition, the marina occupies 1.95 ha of adjacent land which includes extensive car and boat parking areas, haulout and associated services and retail. These land-based activities are not included in the present application.

[8] The site is surrounded by a large area of predominantly industrial activity associated with the Port of Tauranga. This includes log, bulk solids and tanker berths together with associated storage yards. The Ballance fertilizer manufacturing plant is located to the north-east of the site and beyond that are oil processing facilities and tank farms. To the east is the Whareroa boat ramp, with Whareroa Marae and its community, including dwellings and kohanga reo located adjacent to the CMA. Across the Stella Passage channel to the west and north-west, on the Te Papa Peninsula and at Sulphur Point, is the container port. Adjacent to the site running along its eastern and southern boundary is Te Awanui Drive/State Highway 29. Tauranga Airport is

located further to the east and its eastern flight path traverses the site.

[9] The marina footprint lies within the ancestral waters of Ngāi Te Rangi. The appellant Ngāti Kuku is a hapū of Ngāi Te Rangi iwi with recognised mana whenua and mana moana over this part of Te Awanui - Tauranga Harbour. As well as the area of the marina, Ngāti Kuku exercise ahi kā over the area called Waipū Bay, also known as Te Pātaka kai a Taiaho, famously named as part of Ngāti Kuku's gardens by the rangatira Taiaho Hōri Ngātai.¹

[10] The following figure illustrates the location of the marina (in the red oval) together with the Port, the harbour bridge, the state highway and Whareroa marae.²



The Commissioner's decision

[11] Commissioners David Hill and Reginald Proffit made their decision on the application on 11 October 2012. The reasons for their decision were summarised as

¹ Submissions of Ngāti Kuku, 16 November 2022, at [3].

² EIC Craig Shearer, Figure 1: Location of Tauranga Bridge Marina.

follows:

86. After having regard to the actual and potential effects on the environment of allowing the proposed activity, and taking into account the relevant statutory provisions, we find that consent can be granted for the following summary reasons – as well as those more particularly discussed throughout this decision - on the basis that:

- the activity has existed since 1997 and no change (either in nature or scale) is proposed through this application;
- The adverse effects are unchanged and can be managed within the relevant parameters set by the Bay of Plenty Regional Coastal Environment Plan and the conditions imposed (including specific review conditions); and
- granting consent to the application does not challenge the sustainable management purpose of the RMA.

[12] Section 290A of the RMA requires the Court to have regard to the first instance decision. The requirement does not mean that the decision under appeal is presumed to be correct, or that a party disputing it must establish that it is demonstrably wrong. It means simply that the Court must give the decision genuine and open-minded consideration.

The appeal

[13] This appeal challenges two of the conditions attached to the resource consent. The two conditions at issue are the duration of the consent and whether to amend the review condition under s128 RMA in order to recognise and provide for the customs, beliefs, and relationships between Ngāti Kuku hapū and their ancestral lands, waters, and taonga including the exercise of their rangatiratanga and kaitiakitanga over mana whenua and mana moana.

[14] Ngāti Kuku's appeal sought the following relief:

- (a) Ngāti Kuku seek relief in the form of consent conditions and/or other appropriate mechanisms that allow, to the extent possible under RMA, for Ngāti Kuku expressions of rangatiratanga over our taonga, Te Pataka Kai a Taiaho Hori Ngatai.
- (b) We seek relief in general that will ensure that we are appropriately recognized and provided for within the consent conditions to ensure the ongoing management of the marina activities and use of space is

consistent with our tikanga values.

- (c) We seek to be provided for in a way that has proper regard for our ongoing obligations as tangata whenua and in keeping with the spirit of the Treaty of Waitangi.
- (d) We seek amendments to the consent conditions to give effect to the concerns raised in the submissions from Ngāti Kuku whānau to achieve these ends, including (but not limited to) a review clause that represents the intent of RCEP Policy IW 10 with appropriate triggers.
- (e) We seek adjustment be made to the duration of the consent and clarity on the actual term, which may include the surrender of existing occupation consent.
- (f) We seek to adjust the consent conditions to simplify the processes that underpin implementation of overly onerous conditions.
- (g) We seek to adjust the conditions in a way that achieves clearer intent and expectations and removes any burdensome responsibilities on Ngāti Kuku.

[15] During the hearing a third issue was identified in relation to whether the suite of kaitiaki-related conditions could be amended to better recognise and provide for the exercise of authority (mana whenua and mana moana) of Ngāti Kuku hapū over their ancestral lands and waters.

The activity status of the proposal

[16] The marina is in the Port Zone of the Bay of Plenty Regional Coastal Environment Plan (**RCEP**). Port Zone Policy PZ 5 specifically provides for the marina as follows:

Provide for activities that are consistent with the purpose of the Port Zone, which is to: ...

- (d) Enable efficient and ongoing storage of vessels in the Tauranga Bridge Marina.

[17] Port Related Activities are defined in the RCEP as:

Industrial and commercial activities that for operational purposes require a location near the Port, including: ...

- (b) Marine berthage and storage, construction, repair, servicing and maintenance facilities – including the Tauranga Bridge Marina;

[18] Port Zone Rule PZ 6 provides for the occupation of the CMA by existing lawfully established structures in the Port Zone as a controlled activity. Applications for activities under Rule PZ 6 must be considered without public notification unless special circumstances exist.

[19] The marina is an existing lawfully established structure, constructed in 1996 under consent 40148. It is common ground that the application is for a controlled activity pursuant to Rule PZ 6(2) which applies to coastal occupation within the Port Zone and states:

The following is a controlled activity: ...

- (2) The occupation of the common marine and coastal area by structures and activities in the Port Zone that were lawfully established at the date this Plan became operative.

[20] The matters over which the Regional Council has reserved its control are identified in Rule PZ 6 as:

- (a) The duration of the consent having regard to the role of the Port as one of the Region's most significant pieces of infrastructure.
- (b) Measures to avoid, remedy or mitigate adverse effects associated with maintenance and use of the structure including on indigenous biodiversity or cultural values under ss 6(e) or 7(a) of the RMA.
- (c) Measures to avoid, remedy or mitigate adverse effects on hydrodynamics and geomorphics.

Legal Framework

[21] In reaching our decision on this appeal against the grant of consent, the Court must have regard to the same considerations as a consent authority when making a decision under s 104 RMA.³ Section 104(1) and (2) relevantly provide:

- (1) When considering a requirement and any submissions received, the consent authority must, subject to Part 2, have regard to
 - (a) any actual or potential effects on the environment of allowing the activity; and

³ Section 290 RMA.

- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effect on the environment that will or may result from allowing the activity;
 - (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 an environmental standard or the plan permits an activity with that effect.

[22] As a controlled activity under s 104A(a) of the RMA the Court must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity. The Court may also impose conditions on the consent under section 108 of the RMA, but only for those matters over which control is reserved in national environmental standards or other regulations, or over which the Regional Council has reserved its control in its plan or proposed plan.⁴

[23] Being for a controlled activity, the application by TBM must therefore be granted but may be subject to conditions related to the specified matters of control. These matters relevantly include:

- (a) the duration of the occupation, having regard to the role of the Port as one of the Region's most significant pieces of infrastructure; and
- (b) measures to avoid, remedy or mitigate adverse effects associated with

⁴ Section 104A(b)(i) and (ii) RMA.

maintenance and use of the structure including on cultural values under ss 6(e) or 7(a) of the RMA.

[24] Also important to this application is s 104(2A) of the RMA, which requires the consent authority to have regard to the value of the investment of the existing consent holder when considering an application for which there is an existing consent.

Permitted baseline and the existing environment

[25] There is no rule in the RCEP that permits the occupation of the CMA. Therefore, no permitted baseline exists.

[26] The marina opened in 1997 and forms part of the existing environment. The expert planning witnesses agreed that the consented breakwater also forms part of the existing environment based on the principle in *Queenstown Lakes District Council v Hawthorn Estate Limited*⁵ that the existing environment includes activities which have been granted consent and are likely to be implemented.

[27] In their JWS the planning experts also noted that cumulative effects need to be considered in the context of the additive effects over time. They agreed that other activities that form part of the existing environment in the vicinity or the TBM include the Whareroa Marae, the offices of Ngāi Te Rangi, the kaumatua housing/papakainga housing adjacent the Whareroa Marae, private homes, the harbour bridge (Te Awanui Drive, SH29), the Mount Maunganui industrial area, Tauranga airport, the Port of Tauranga and the offshore shipping movements (container ships, cruise ships and recreational boating)

[28] Mr Carlyon, the expert planning witness for the Appellants, noted Ngāti Kuku have ahi-kā-roa and that the customary practices associated with that continue to be exercised where that is possible.

[29] The evidence of Ms Bosch, the expert planning witness for the Regional Council, was that as the marina forms part of the existing environment, any cultural

⁵ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 at [74].

effects it poses by itself or cumulatively that cannot be practically avoided or remedied should be mitigated.

[30] In this situation Policy IW2 of the RCEP provides this particularly relevant direction:

Avoid and where avoidance is not practicable, remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

[31] Ms Bosch's evidence was that, as the application is for a controlled activity that must be granted, the only mechanism which could mitigate cultural effects through the consent process (as distinguished from any compensation that might be volunteered by an applicant outside of the consent process) would be through conditions of consent. We agree with that opinion.

Relevant statutory planning instruments

[32] The statutory planning instruments that are relevant to the marina proposal are the:

- (a) New Zealand Coastal Policy Statement;
- (b) Bay of Plenty Regional Policy Statement;
- (c) Bay of Plenty Regional Coastal Environment Plan; and
- (d) Tauranga Moana Iwi Management Plan 2016-2026.

Relevant National Policies

New Zealand Coastal Policy Statement.

[33] The NZCPS sets out policies to be given effect to by councils when they develop their plans⁶ and to be had regard to by consent authorities when they consider

⁶ Sections 67(3)(b) and 75(3)(b) RMA.

applications for consent.⁷ In preparing the RCEP, the Regional Council was relevantly required to give effect to the following policies:

- (a) take into account the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment (Objective 3);
- (b) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they lived and fished for generations (Policy 2(a));
- (c) provide for the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment (Policy 4);
- (d) in relation to the coastal environment:
 - a. recognise tangata whenua needs for papakāinga, marae and associated developments and make appropriate provision for them (Policy 6(1)(d));
 - b. recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places (Policy 6(2)(c));
 - c. promote the efficient use of occupied space (Policy 6(2)(e));
- (e) in preparing policy statements and plans (Policy 7):
 - a. consider where, how and when to provide for activities in the coastal environment;
 - b. identify areas of the coastal environment where particular activities are or may be inappropriate and provide protection from them;
 - c. identify coastal processes, resources or values that are under threat or

⁷ Section 104(1)(b)(iv) RMA.

at significant risk from adverse cumulative effects;

- (f) Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes (Policy 9).

[34] Although Policy 9 is directed towards commercial ports, the Port Zone and Harbour Development Zone covers both the commercial Port of Tauranga and recreational marinas, as Councils are required to do under Policies 2, 6 and 7.

[35] Policies 18 and 19 also require Councils to provide public open space or enhance public walking access to the CMA.

Relevant Regional Objectives and Policies

Regional Policy Statement

[36] The Regional Policy Statement (**RPS**) contains objectives and policies that provide for the sustainable use of the CMA and direct that zoning or other spatial mechanisms are used to identify activities that have a functional need to be in the CMA. Particularly relevant provisions include issues statements at 2.2.3 and 2.2.5(3), objectives 3 and 22, policies CE 3A and 11B and method 69. These are set out in the **Appendix 2**.

Regional Coastal Environment Plan

[37] The planning experts agreed that the RCEP is the primary document for assessment purposes and that the RCEP gives effect to both the NZCPS and RPS. Relevant provisions are set out in **Appendix 2**.

[38] Especially relevant provisions for the Port Zone are Policy PZ 5 and Rule PZ 6, as already identified above. These provisions support the continued existence of the marina.

[39] Especially relevant provisions associated with the rights and interests of tangata

whenua are Objectives 13–16 and 18 and associated Policies IW1–IW8, IW10 and IW11. These provisions seek to protect those rights and interests. In that context, there is a clear evidential basis on which to identify that tangata whenua are unable to undertake customary activities including gathering kai moana, mahinga mātaihai and/or protect taonga, sites of significance or cultural landscapes.

[40] The expert planning witnesses were agreed that it would be fanciful to remove the marina, and therefore avoidance of any effects of its occupation is not possible. The planners, except for Mr Greg Carlyon, considered that the mitigation and compensation contemplated by these provisions could be achieved through the proposed conditions of consent. Mr Carlyon considered that the inability of Ngāti Kuku to exercise customary values is better addressed through limiting the duration of the consent.

Relevant District Plan Policy

[41] The Tauranga District Plan also provides the following policy for the marina:

13A.6.1.1 Policy – Recreation and Leisure Scheduled Sites

By ensuring that identified Recreation and Leisure Scheduled Sites at Mount Maunganui Golf Course, Papamoa Top 10 Holiday Resort, Mayfair Holiday Park, Tauranga Bridge Marina, Tauranga Marina, Tauranga Race Course and Tauranga Golf Course, Mauao Recreation Reserve, the Papamoa Domain, Elizabeth Street and 10 Salisbury Avenue are developed in a comprehensive manner in accordance with the Scheduled Sites Outline Development Plan (where applicable) while ensuring that all developments are sited and designed so that the adverse effects on the amenity values of the surrounding environment are avoided or mitigated, including: ...

- (d) Land scheduled as the Tauranga Bridge Marina, Tauranga Marina and Marine Park has regard to:
 - i. The provision for limited commercial and non-commercial activities opportunities that relate to recreational marine activities;
 - ii. The provision for recreation and leisure opportunities;
 - iii. The retention of public access to and along the margins of the Tauranga Harbour;
 - iv. Landscape planting to ensure the mitigation of visual effects on the

surrounding environment, including the site's interface with the State Highway network;

- v. Traffic management measures to ensure the safe and efficient use of the transport network.

Iwi and Hapū Management Plans

[42] Ms Bosch's evidence was that the Tauranga Moana Iwi Management Plan 2016-2026 (**TMIMP**) (a joint management plan for Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga) is the most recent and relevant Iwi Management Plan relating to this matter. The TMIMP sets out the following under the heading "Coastal Issues":

Coastal Issues

- (1) The mauri of Te Awanui (Tauranga Harbour) and coastal areas are at risk of further degradation as a result of:
 - contaminant discharges such as wastewater, stormwater and ballast water.
 - ...
 - Coastal use and development, including port activities, marina development, dredging, reclamation, structures as well as recreational activities.

Part 2 of the RMA

[43] In Part 4 of JWS all the expert planning witnesses agreed that there is no need for recourse to direct consideration of any Part 2 matters as they have all been given sufficient consideration and weight within the RPS and the RCEP, and reference to them would not add anything to the evaluative exercise.⁸

Effects on the Environment

Landscape and visual effects

[44] A landscape and visual effects assessment⁹ was undertaken for the breakwater

⁸ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [46] – [52] and [71] – [76].

⁹ Assessment of Landscape and Visual Effects Prepared by Principal Landscape Architect Rebecca Ryder of Beca, for Tauranga Bridge Marina, dated 10 May 2013 and referenced 201206080000.

consent application which concluded that the natural character in the location of the marina is very low to low, with the surrounding landscape consisting of a highly industrial harbour edge.

[45] Views to the west from the Whareroa marae are largely obstructed by Te Awanui Drive (SH29) and the wall erected on the side of the road corridor. The marina itself is not visible, but the tops of masts of sailing boats can be seen. Views from the marae to the north are obstructed by the premises of Ballance, the Port, and industrial infrastructure.

[46] The evidence of Ms Bosch was that if the marina did not exist in its current location the landscape and views from the Whareroa marae would be unchanged, except that the boat masts would not be visible above the SH2 wall. For this reason she considered the impact of the continued occupation of space by the marina on the landscape and on visual amenity values will to be less than minor from the Whareroa marae.

Hydrodynamic and geomorphic effects

[47] Hydrodynamic effects were modelled by Tonkin and Taylor in support of the breakwater consent (RC 66504). As part of that process the Regional Council engaged Brett Beamsley of MetOcean Ltd to independently peer review the model. Mr Beamsley concurred that hydrodynamic effects would be appropriately avoided or mitigated. Ms Bosch's evidence was that no changes to the marina structures are proposed and no adverse effects on hydrodynamics and geomorphics are evident from its past 26 years of occupation of space in the CMA.

[48] However, as climate change and sea level rise may have effects which are currently unknown, a review condition has been proposed under s 128 of the RMA to respond to any uncertainty or unforeseen hydrodynamic or geomorphic effects that may occur in the future.

Effects on indigenous biodiversity

[49] TBM is authorised by consent 68440 to dredge the seafloor to maintain the

water depth within the marina. Outside of the marina footprint there are significant modifications of the seafloor in association with harbour dredging activities. In this respect the environment is already highly modified.

[50] TBM provided a benthic invertebrate survey for the breakwater consent (RC 66504), which concluded that the marina area is characterised by a low to medium diversity benthic invertebrate community typical of shallow, sub-tidal harbour habitats and the assemblage of organisms is typical of Tauranga Harbour subtidal areas and that no species of particular scientific, conservation, or kaimoana value were identified.

[51] The ongoing use of the marina will require periodic maintenance dredging within the marina footprint. The evidence of Ms Bosch was that any effects from that activity will be contained within the marina footprint.

Effects on the cultural environment / cultural effects

[52] The parties all acknowledge that the marina has and will continue to have cultural effects. These effects were summarised within the JWS of the expert planning witnesses as follows:

- (a) Occupation of an area of the foreshore of the CMA which was once used to store fish that had been caught.
- (b) The loss of views across the Harbour from Whareroa marae, brought about by the reclamation for the road, the bridge, and the marina.
- (c) The loss of afternoon sun due to the masts of yachts in the marina.
- (d) The marina exists in the CMA in an area considered a community asset that the hapū can no longer enjoy.
- (e) Land taken under the Public Works Act 1981 was not returned when it was not used for the purpose that it was taken for.
- (f) Taiaho, the Ngāti Kuku ancestor who established the Whareroa

settlement claimed authority over the waterways as an extension of his garden and this community asset claimed by their ancestor is now lost due to the development of the Port and the marina.

- (g) The cumulative effects of all the industrial development around the Whareroa marae has adversely affected Ngāti Kuku's cultural connection to and use of the CMA, causing emotional trauma. Some of the effects referred to are water pollution which affects swimming and the gathering of kai (loss of shellfish and fish) and boating traffic.

[53] In addition, the Court heard evidence on behalf of Ngāti Kuku and the Whareroa Marae Reservation Trust concerning the cultural impact of the marina and the other activities established in the vicinity of the marae.

[54] Ngāti Kuku consider that the development within the CMA and on the foreshore surrounding their land has adversely affected the health of the harbour, their connection with the harbour and their ability to undertake cultural practices, such as their ability to exercise kaitiakitanga and manaakitanga.

[55] Ms Awhina Ngātuere set out the key issues for Ngāti Kuku and Whareroa marae in her evidence. Further context was provided by Ms Amie August and Mr Peter Stokes. Their evidence addressed the loss and negative effects the marina and the other development in the area has had on Ngāti Kuku and the Whareroa marae and their fears that these effects will continue and harm future generations.

Evidence of Ms Awhina Ngātuere

[56] Ms Ngātuere's evidence provided a history of Ngāti Kuku's customary interests which are derived through Ngāi Te Rangi. She explained that Ngāti Kuku's mana, tino rangatiratanga and kaitiakitanga were cemented through conquest of Tauranga Moana and the acquisition of rights through ahikaaroa and whanaungatanga. Her evidence was that Ngāti Kuku has continuously exercised mana, tino rangatiratanga and kaitiakitanga in its rohe since the seventeenth century to the present day.

[57] Her evidence was that the body of water extending across the eastern side of

the Tauranga harbour on the Mount Maunganui peninsula is called Waipū Bay, an area also known as ‘Te Pātaka kai a Taiaho’. The area is of cultural significance and is a precious source of ancestral connection to Ngāti Kuku which can be traced back before 1800.

[58] Ms Ngaturere quoted the kōrero of Taiaho Hōri Ngātai which, in her submission, captures the character and significance of Ngāti Kuku’s traditional rights to the foreshore and its fisheries, and the nature of the rangatiratanga protected by the Te Tiriti o Waitangi:

Now, with regard to the land below high-water mark immediately in front of where I live, I consider that that is part and parcel of my own land ... part of my own garden. From time immemorial I have had this land and had authority over all the food in the sea.... I am now speaking of the fishing-grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing-places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high-water mark belongs to the Queen, people have trampled upon our ancient Māori customs and are constantly coming here whenever they like to fish. I ask that Māori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga Harbour have been apportioned among our own different people; and so, with regard to the fishing-grounds outside the heads: those are only small spots. I am speaking of the fishing-grounds where hapūku and tarakihi are caught. Those grounds have been handed down to us by our ancestors. This Māori custom of ours is well established, and none of the inland tribes would dare to go and fish on those places without obtaining the consent of the owners. I am not making this complaint out of any selfish desire to keep all the fishing- grounds for myself; I am only striving to regain the authority which I inherited from my ancestors. I ask that the Queens sovereignty shall not extend to those fishing-grounds of ours but remain out in the deep water away beyond Tuhua. These are all the subjects upon which we wish to hear your opinion ... In our opinion they affect the Natives very deeply. I dare say some Natives have private matters to bring before you, but these matters which have been spoken about affect the whole of the people ... the whole of the Māori people... I look upon the land below high-water mark as being part of my own garden...

[59] Ms Ngātuere also referred to Articles 25 and 26 of the United Nations Declaration of the Rights of Indigenous Peoples, which has been endorsed by New Zealand and addresses the right of indigenous peoples to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have

otherwise acquired.

[60] Her evidence then provided a personal account of her connection to Whareroa. She explained that her family moved back to Tauranga in 1988 to reconnect with their ancestral roots and to raise their children. Her mother purchased a family home at Whareroa around 1997 and still lives there to this day.

[61] She explained that as a family they would camp at Whareroa during the Christmas break. Every day they would swim in the moana, jump off the jetty or the bridge, fish, catch crabs and sleep under the stars. Her mother and others would share stories of their upbringing at the marae.

[62] Her evidence was that Whareroa's ancestral lands have drastically changed from green spaces to what is present today, and that Whareroa and Ngāti Kuku have been subjected to planning decisions that have gone terribly wrong. They are now surrounded by poisonous industries as well as companies who do not take responsibility for their individual or collective contribution (inherited or otherwise) to the destructive situation in the Mount Maunganui 'industrial zone'.

[63] She explained that Te Pātaka kai a Taiaho was once an abundant moana that contributed to a booming community and hapū. Today it no longer reflects the same plentiful resource it once did.

[64] Her evidence was that the effects from the establishment of the Tauranga Bridge and the marina are that:

- (a) Ngāti Kuku's ability to exercise their customary rights (which have never been extinguished) has been impeded;
- (b) the existing structure impedes the views of cultural sites of significance including where their ancestor Taiaho is buried at Otamataha Pa;
- (c) their ability to access the moana and fish the way their ancestors once did has been obstructed;

- (d) the kaimoana have been depleted;
- (e) the sand banks have almost completely eroded;
- (f) the flows to the tide have changed causing changes in sea life ecosystems; and
- (g) The number of boats coming out to their jetty have increased, causing a hazard for whānau.

[65] She explained that Ngāti Kuku’s vision is to have an abundant future where:

- (a) there is no heavy industry poisoning their people and environment;
- (b) their ancestral lands are protected for future generations;
- (c) descendants can return home to a toxin-free environment;
- (d) they can engage in tikanga, kawa and whakapapa without being poisoned;
- (e) they can utilise natural resources for economic purposes and in alignment with their tikanga; and
- (f) they can engage with their natural world and enjoy abundance as their ancestors once did.

Evidence of Ms Amie Maumoko August

[66] Ms August gave evidence of visiting Whareroa marae every Christmas in the 1960s and ’70s. She explained that they would stay for 6 weeks at a time and that her grandmother, Kimi Ngatai, had a little bach just off a road that is now private called Tasman Quay. While they stayed at the marae they would live off the land and off the sea. Her grandmother would set the net just outside their marae, and children would gather raspberries and blackberries from the bush, kukuroa (horse mussels) and oysters off the rocks. Grown-ups would go across the channel to get horse mussels sticking out in low tide on the sand banks. Now she explains “there is nothing”.

[67] Her evidence was that there have been many changes that have occurred over time. The changes have impacted Ngāti Kuku, and “none of the impacts have been good”. They now live with heavy industry on their doorstep. She explains “when I say heavy, I mean it. It doesn’t get any heavier than this.” The Port is their biggest neighbour but they are also surrounded by a chemical plant and refinery and a fertiliser plant that has a track record of contaminating their whenua and groundwater.

[68] On the other side of Whareroa marae is the marina, situated in the moana area they know as Te Pātaka Kai a Taiaho Hori Ngātai. Ms August told us: “It’s the area where we used to get kai”. She believes the causeway has been one of the big reasons why their tahuna has silted up. The silting smothers the kai and where the kai live. With the power of the tide now being directed through a narrow channel under the Whareroa bridge, it started to horo/erode the foreshore away.

[69] Her evidence was they have already lost so much. They want to bring back the kukuroa and their tuangi, see Tangaroa respected and to restore Te Pātaka Kai a Taiaho Hori Ngatai.

Evidence of Mr Peter Stokes

[70] Mr Stokes explained that his family moved back to Whareroa in 1959. In those days Ballance had one fertilizer shed and they had the aerodrome wharf to fish and swim and they would catch the ferry to Tauranga to shop. It was also possible to walk all the way to Pilot Bay and the marae was the focal point for their whānau and the wider Māori community. Seafood was plentiful and the moana was uncluttered.

[71] His evidence explained the impacts on those living in the Whareroa community, which have been numerous. These include:

- (a) the complete loss of their ability to carry out tikanga when it comes to manaki Manuhiri and the inability to provide the kai that they used to provide like tuangi, kukuroa/horse mussel and fish;
- (b) a sense of loss and embarrassment;

- (c) the loss of being able to sight their tipuna Taiaho's grave site from the marae as the marina creates a visual impairment;
- (d) the loss of a safe swimming area in front of the marae caused by the tidal flow which the marina's footprint contributes to;
- (e) the mauri of the moana outside Whareroa marae has been negatively affected, and "we are the moana and the moana is us"; and
- (f) The feeling of helplessness when 35-year consents are given and another generation will be affected.

Other matters

[72] Other matters that are relevant and reasonably necessary to have regard to in determining this appeal are:

- (a) Claims under the Marine and Coastal Area (Takutai Moana) Act 2011;
- (b) the value of the existing consent to the consent holder under s104(2A) of the RMA; and
- (c) the positive effects of the marina on the environment.

The Marine and Coastal Area (Takutai Moana) Act 2011

[73] The purpose of the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACAA**) is to:

- (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand;
- (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua;
- (c) provide for the exercise of customary interests in the common marine and coastal area; and

(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).¹⁰

[74] In April 2017, on behalf of all Ngāi Te Rangi hapū, the Ngāi Te Rangi Settlement Trust (**NTST**) sought recognition orders for customary marine title (**CMT**) under MACAA over an area encompassing the whole of Tauranga Harbour.

[75] If granted, a CMT order comes with a bundle of rights which includes a “RMA permission right”. This allows a CMT holder to withhold consent to a resource consent commencing within the CMT area, including for controlled activities.¹¹ Existing consents are exempt,¹² but renewals are not unless it can be established that it is an “accommodated activity”. There is a process for applying to the Minister to have infrastructure deemed exempt, which must occur prior to any renewal of the consent.¹³

[76] No CMT orders been made over the part of Tauranga Harbour where the marina is located.

[77] TBM’s position is that unless and until a CMT order is granted, the only requirement on TBM (as an applicant for resource consent under the RMA) is to notify the CMT “applicant group” of, and seek its views on, the consent application.¹⁴

[78] “Applicant group” is defined to include a legal entity appointed by one or more iwi, hapū, or whānau groups to be their representative and to apply for and hold any CMT order on their behalf.¹⁵ In this case NTST is the applicant group and therefore is the entity that TBM was required to notify and seek the views of.

[79] The evidence of Ms Bosch and Mr Shearer confirmed that all iwi registered in the Regional Council’s records as having MACAA claims to Tauranga Harbour were contacted by TBM in accordance with s 62 of MACAA.

¹⁰ Section 4(1) MACAA.

¹¹ Sections 66-68 MACAA.

¹² Sections 20 and 64(2) MACAA.

¹³ Schedule 2, Part 1, MACAA.

¹⁴ Section 62(3) MACAA.

¹⁵ Section 9 MACAA.

[80] It has also been found by the Court in cases such as *Brooke-Taylor v Marlborough District Council*¹⁶ that the prospect of obtaining a CMT order under the MACAA is not a relevant resource management issue.

[81] Ngāti Kuku agree that the Environment Court cannot prejudge the outcome of MACAA litigation in the High Court but submitted that there is an overlap between the RMA and MACAA and they should be read together. They submitted that the *Brooke-Taylor* decision should be limited to its facts because it was decided in 2004, before the enactment of the MACAA and the making of the NZCPS 2010.

Value of the Investment to the existing consent holder

[82] Under s104(2A) of the RMA the value of the investment to the existing consent holder should be taken into account by the Court. In this case the marina's assets are valued at \$45 million. The new breakwater involves a \$8.4 million investment.

Positive effects of the marina

[83] There are undoubtedly positive effects associated with the marina. It has won several awards. It received its first Clean Marina accreditation in 2014 and was again accredited in 2017. This accreditation is still current today. In 2019 it received the NZ Marina Operators Association Environmental Initiative Award for its work on glass recycling and in the same year one of the marina's tenants, Bridge Marina Travelift, received the Boatyard of the Year award.

[84] Other benefits or positive effects include the safety provided by the marina, the financial benefits associated with the marina and the benefit the marina provides for the wider community, including public access to the coastal marine area in a locality where such access is limited.

Safety and efficiency

[85] Marina facilities are the safest and most environmentally secure way to store

¹⁶ *Brooke-Taylor v Marlborough District Council* EnvC Wellington, W67/2004, 2 October 2004.

small vessels. Managing vessels within a well-managed marina, rather than on swing moorings in a harbour, protects the wider CMA from unregulated contaminants and chemicals. It also significantly lessens the risks of environmental harm from vessels being damaged or sunk during extreme weather events.

[86] Other safety features include 24/7 security via staff and CCTV and other vessel maintenance facilities, water and electricity. There is also continuous monitoring and management of environmental issues such as bilge discharges, fuel or oil spills, encroachment of environmentally harmful drift or discharge entering the marina area.

[87] Marinas are also the most efficient method of storing continuously floating vessels. Marinas maximise the number of vessels in a unit of water surface area as they are moored side by side, are usually in berths that are almost the same length as the vessel. Currently the marina has nearly 500 boats in it. The area of water surface required to provide occupancy for those vessels would be “enormous” should the marina structure not be there.

Financial benefits

[88] The Court heard evidence that the marina and its facilities will create employment and financial benefits to the region through the marine industry and business opportunities.

[89] The evidence of Mr Layne was that Tauranga has one of the strongest marine industry sectors in New Zealand, with numerous skilled marine professionals choosing to live and set up businesses there. This has been recognised and funded by the District and Regional Council, with a marine precinct funded and set up at Sulphur Point at the cost of \$11.4 million in 2018.

[90] Tauranga’s marine manufacturing sector is also known internationally for its craftsmanship and innovation. Many overseas boatowners come to Tauranga as a destination for their boats to be refitted or serviced over the winter season. In the late 1990s the marina became a major ‘cyclone season stopover port’ for 60-70 overseas cruising boats a year.

Benefits to the community

[91] It is recognised that the marina is an important recreational facility. When TBM first obtained consents in 1995 to build a private marina, public access and public areas were required. TBM only limits access to the piers at night and public areas during major repairs and emergency situations. The rest of the time the public can enjoy the free 200 car parks, beach access and fishing from the Southern Breakwater.

[92] TBM have hosted numerous boat shows over the years, and annually holds a 'Kids gone fishing event'. In 2002 TBM hosted Sir Robin Knox Johnson's 'Around Alone' solo around the world yacht race Christmas stopover and The Clipper - Around the World race in 2011-2012. The marina car park has been used for car shows, swap meets, marathons and other sporting events. TBM also provide a berth for local Iwi waka and for the Tauranga Coastguard vessel.

The consented but unconstructed breakwater

[93] TBM want to construct this breakwater and brought evidence of the efforts they are making to secure funding for it. We were provided with a copy of the Council report addressing the application which provides for the new breakwater structure and the extension of the existing occupation area to accommodate it to 2030. The occupation application was considered as a variation to the then current occupation permit under s127 of the RMA. The consent pertaining to the breakwater structure and construction were new covering disturbance of the seabed, deposition of materials on or under the foreshore or seabed and earthworks within 20m of the Coastal Margin this was granted to 2024.

[94] TBM sought the maximum allowable 35-year term of consent. Mr Thomas Wilson, the chairperson of the board of directors of TBM, provided evidence on why this is necessary to secure funding from berth holders for the proposed breakwater. The Marina assets have a valuation for insurance purposes as at July 2022 of \$45 million. We must have regard to this in accordance with s 104(2A) of the RMA.

[95] In addition, Mr Wilson estimated the value of the boats owned by berth holders

as \$160 million, making the combined value of the Marina and boats berthed within it \$205 million. Annual expenditure on infrastructure maintenance is \$500,000, with another \$250,000 for dredging when required every two to three years. The construction of the new breakwater is estimated to cost \$8.4 million and will have to be funded by the 500 berth holders as TBM does not have the commercial ability to fund that cost or raise a loan to cover it. As a precondition of berth holders providing their share of the new breakwater, they required commercial certainty for their return on investment through a new 35-year seabed occupation permit.

[96] We accept this as the reason for seeking a 35-year consent. While cost is a matter we can have regard to, it is not a determining factor for the Court when considering the appropriate term of consent. Neither can we be influenced by the position adopted by the berth holders of only being prepared to fund the breakwater if a 35-year consent is granted.

[97] Ngāti Kuku supported the breakwater proposal subject to conditions agreed with TBM for:

- Monitoring of the Whareroa beach front and an ability to remediate adverse effects on the beach if deemed necessary,
- Provide for tangata whenua kaitiakitanga by way of involvement in the monitoring, methodology, programming and sharing in the interpretation of the results.

Ngati Kuku EMU understands that the detailed design of the pile and panel breakwater structure is yet to be finalised but understand that Tauranga Bridge Marina has agreed to improve the aesthetics of the proposal by incorporating cultural design elements (such as koru) into the outward face of the pre-cast.

[98] The Council report concluded:

The Applicant has drafted conditions that are consistent with those recommended by Ngati Kuku. In respect of the proposed monitoring conditions the consent holder would need to be responsible for analysis of these monitoring results to determine whether the proposal was directly related to any changes of the beach in front of the Whareroa Marae. The requested inclusion of motifs in the pre-case panel design is considered appropriate and practical mitigation. Overall, in accordance with the findings of the above CIA it is considered that cultural effects in respect of Ngati Kuku can be suitably avoided, remedied or mitigated.

[99] The breakwater consent will need extending given its expiry is imminent. However, the current occupation permit will continue either way until 2030. The Council decision will provide a new occupation permit to 2058. The new occupation permit enables the breakwater should it proceed, and the continued operation of the existing marina which of themselves required resource consents which are subject to conditions. The evidence before us confirmed that Ngāti Kuku continues to support the breakwater. The question then is whether limiting the duration of the occupation now sought is an appropriate measure to avoid, remedy or mitigate adverse effects associated with maintenance and use of the structure including on indigenous biodiversity or cultural values under ss 6(e) or 7(a) of the RMA. TBM and the Council say the conditions of consent will achieve this so the duration as approved by the Council is appropriate.

Conditions of Consent

[100] Conditions of consent offered to the Court and attached to the Planners JWS were considered by Ngāti Kuku to fall short of achieving mitigation of the cultural effects caused by the marina.

[101] Ngāti Kuku remain of the view that a short consent term provides the most appropriate means to avoid, remedy or mitigate adverse effects associated with maintenance and use of the structure including on cultural values under ss 6(e) or 7(a) of the RMA. We also heard that conditions could be improved particularly by addressing whether a mechanism could be put in place to address mana to mana (Rangatira ki te Rangatira) engagement between the consent holder and the hapū. Mr Carlyon provided an example of the type of process which he has experienced with the re-development of the Whanganui Port. He explained that in the Whanganui Port example:

... the iwi and hapū are at the table, they are at the decision-making table, they are part of the project team, they are part of the delivery team and that's been evidenced since day one, so there's a governance team in place for that and I heard evidence yesterday it may have been, from Mr Wilson about the ability or the conflicts present potentially for iwi in relation to governance on projects of this type and the experience and observations I've made from that site are that all that iwi and hapū have brought is benefits to the project with the wisdom and experience and skills that they have being tangata whenua at place.

So the framework is set up from the outset to provide for the interests of those at play. It doesn't mean that every party has the same interest at that site ...

Three of those consents have been granted to date and they have been granted on a non-notified basis and that is because the iwi and hapū are at the table providing the lead and fundamentally there is an acceptance that the projects do not advance without the interests of Whanganui hapū and iwi being provided for. So that occurs at the governance level. It occurs with the committee of hapū that come together on a weekly basis to work through those projects, fully resourced by the project developers and it occurs in the consent conditions and one of the fundamental conditions that has emerged over this past few months I potentially would've drawn it into evidence once it was on the public record, but it only occurred in recent times, but one of the most recent conditions provides for the project to be stopped at any time as a consequence of feedback that's come from hapū that it will halt, these are conditions that are offered by the developer parties. There is a relatively sophisticated process of mediation and arbitration and a number of feedback loops but ultimately in the event that a meeting of the minds cannot occur between those who have mana then it is acknowledged that the mana rests with iwi and that the call is theirs to make on where the project goes from that point. So it is a sophisticated large scale infrastructure development within the marine environment and I think it's extraordinarily successful for the way that it has brought that community together ...

[102] My Carlyon opined that consent conditions should provide for outcomes that might be mutually agreed between parties. In his opinion, substantial modifications are required to the conditions to “provide for that, and fundamentally underpinning that is the ability for Ngāti Kuku to exercise their mana, so they are not the receivers of decisions”.

[103] Through further questions of Mr Carlyon we understood that it is not a “stop works” situation in this case (as this is an occupation permit), but reframing conditions is required “which currently are very much associated with monitoring and understanding the context and changes to that context and not necessarily responding to those matters when they come to light”.

I think it would take some hard work and some pretty clever thinking to get there. Underlying that would need to be an understanding from the Regional Council and the applicant that they are going to have to provide for the mana of Ngāti Kuku in that exercise because I cannot see how works any other way.¹⁷

[104] He and others also considered the ability of a review condition to address hapū concerns and in this regard we understood Mr Carlyon's concerns to be two-fold:

¹⁷ Transcript, pp187-193.

- (a) From his experience he hasn't a lot of confidence in the s128 review process because of their limited scope in only addressing conditions and the discretion left to the consent authority whether to initiate them;
- (b) To trigger a review there is a need to demonstrate to the consent authority that there is a causal relationship between the condition to be reviewed and the outcome sought, which is often almost impossible to prove. The example he gave was in relation to the marina activity consent and not the occupation permit which we would expect would be likely to be even more difficult to demonstrate.

[105] There was some attempt at further collaborative drafting of amendments to the proposed conditions of consent but in the end the Court was provided with a revised set with the closing submissions of Ms Barry-Piceno. This set was agreed with the Regional Council but not with Ngāti Kuku. We have attached those conditions as **Appendix 1**.

Duration of consent

[106] Section 123 of the RMA governs the duration of resource consents. The relevant provision is s 123(c) which provides that the period for which any coastal permit (other than for a reclamation) can be granted is:

... such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116.

[107] TBM seeks a duration of 35 years for the consent. This is supported by the Regional Council. Ngāti Kuku opposes a duration of that length. On behalf of Ngāti Kuku, Mr Carlyon's expert opinion is that a duration between 15 to 20 years would be appropriate in this case. However, the witnesses for Ngāti Kuku express the view that a duration of 10 years would be more appropriate.

[108] TBM's view is that for a shorter duration than 35 years to be justified, it must be based on clear evidence that the proposed conditions of consent will not sufficiently address the relevant ss 6(e) and 7(a) RMA considerations over the 35-year

duration. Importantly, it must also be established that there is a material difference between allowing those effects to continue for a duration of 35 years as opposed to 15-20 years. TBM submitted that a consent duration of less than 35 years should only be considered where good reason for a shorter duration exist and that in this case the evidence does not justify a shorter duration. For example, in *Brooke-Taylor v Marlborough DC*¹⁸ the Court noted that:

... it is not efficient in terms of s.5 to require applicants to submit a full application in 10 years for a structure designed to last 50 years, when there is nothing to suggest the proposed jetty requires re-evaluation from an RMA perspective at the end of the decade.

[109] The Regional Council submitted that it is difficult to understand what would be gained by requiring TBM to go through a further process of seeking to renew its controlled activity consent (which must be granted) within a shorter time period when any improvements in environmental management over time (such as those arising from the mauri monitoring) can be implemented through adaptive management processes embedded in the conditions. The Regional Council submitted that the Court should apply the Newbury tests¹⁹ which apply to duration conditions like any other condition. These require that any condition must:

- (a) Be for a resource management purpose, not for an ulterior one;
- (b) Fairly and reasonably relate to the development authorised;
- (c) Not be so unreasonable that no reasonable planning authority could have approved it.

[110] In this case the Regional Council submitted that it would be difficult to argue that either the 35-year duration imposed by the Commissioners, or the shorter duration of 15-20 years proposed by Mr Carlyon, meets the threshold of any of those tests.

¹⁸ *Brooke-Taylor v Marlborough District Council* fn 16 at [69].

¹⁹ *Newbury DC v Secretary of State for the Environment* [1981] AC 578, as applied in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, [2007] NZRMA 137.

[111] Ngāti Kuku's position is that a shorter duration is appropriate on the following grounds:

- (a) A 35-year consent will harm the relationship between the hapū and Te Pātaka kai a Taiaho, and will continue an intergenerational affront to hapū tikanga and their relationship with their Pātaka kai.
- (b) A 35-year consent will challenge Ngāti Kuku's ability to exercise their customary rights and interests in the relatively near future, while a shorter duration would be more consistent with them being able to exercise their rights as an owner of the CMA when a CMT order is made under the MACAA.
- (c) A shorter duration is a better outcome where the future of the regulatory framework is unknown.
- (d) A shorter duration should be imposed that is consistent with Ngāti Kuku's desire for the managed retreat of industrial activities currently surrounding the marae.

[112] In response to Ngāti Kuku's position on duration and in support of the 35-year duration TBM and the Regional Council made the following submissions:

- (a) There must be a resource management reason for imposing a shorter duration. This requires something more than a desire to reclaim customary ownership, which are not resource management matters.
- (b) Uncertainty as to what will happen in the future is not a valid reason for imposing a shorter duration. The way to deal with uncertainty arising during the duration of the consent is through review conditions in accordance with ss 128-132 of the RMA.²⁰
- (c) This is not a new and unknown activity. The Marina has a proven record of environmentally responsible operations at this location for the past 26

²⁰ *Golden Bay Marine Farmers v Tasman District Council* EnvC W019/03.

years. TBM's proposed conditions of consent will ensure mitigation or avoidance of residual adverse effects.

- (d) The review conditions allow for cultural monitoring and unforeseen climate change or cultural effects.
- (e) Investigation of managed retreat of industrial activities in the vicinity of the marae is currently at the scoping stage and is a recommendation of the Tauranga Moana Advisory Group (**TMAG**). The TMAG is a partnership between three Tauranga Moana iwi (Ngāti Ranginui, Ngāti Pūkenga, and Ngāi Te Rangi) and the three local authorities (Tauranga City Council, Western Bay of Plenty District Council and Bay of Plenty Regional Council). Its purpose is to “*continue building strong working relationships to support and enhance the health of our harbour and catchment.*”²¹ It relates to polluting industries on Totara Street south of Hewletts Road/State Highway 2 in proximity to Whareroa marae, and includes the sites occupied by Balance Agri-Nutrients, NZ Oil Services and Lawter NZ. It is not intended to include the Port's operations at Mount Maunganui or Sulphur Point, or in the Stella Passage, or to the marina.
- (f) There is no evidence to suggest that the marina itself has given rise to material adverse effects, whether hydrological, ecological or visual, which might justify a shorter duration.
- (g) There is no evidence that allowing the marina to remain for another 35 years will give rise to materially different effects than currently exist.
- (h) A 35-year duration will create certainty for the consent holder and the berth holders. Conversely this will create certainty in relation to the financial investment and financial commitment needed to make the marina viable.
- (i) Without the certainty of a 35-year duration, the applicant will have no

²¹ TMAG Statement of Purpose, From BOPRC Governance Structure and Terms of Reference, Adopted 26 November 2019.

means of requiring the vast majority of berth holders to fund the breakwater, which is required to protect the marina asset.

- (j) TBM requires a 35-year consent so that it can secure funding for the construction of the much-needed new pile and panel and rock breakwater, consented after a lengthy consenting process in 2014. All berth holders will need to fund the \$8.4 million development costs. Without the certainty of a 35-year duration, it is unlikely the breakwater can be financed and constructed.
- (k) For the upkeep and protection of the marina and its structure a wave attenuator is required. Without a 35-year duration, the costs of the attenuator are prohibitive due to uncertainty of tenure of the berth licence.
- (l) A 35-year duration is consistent with the durations applied to other marinas. Typically consents for marinas are granted for 35 years to allow certainty of occupation rights for berth holders. In this case a 35-year duration is consistent with the duration of the Sulphur Point which was granted a discretionary activity consent by the Regional Council with a 35-year duration in 2015.

Evaluation

Duration

[113] Under s 290(1) of the Act, the Court has the same power, duty, and discretion in respect of the decision appealed against as the consent authority against whose decision the appeal is brought. It follows that the Court is obliged to grant consent to an application for a controlled activity under s 104A after considering the relevant matters in s 104. These include having regard to Policy 4 of the NZCPS which calls on decision-makers to provide for the integrated management of natural and physical resources in the coastal environment which requires co-ordinated control of activities.

[114] The existing environment includes the marina and the various consents in relation to it, both those that have been implemented and those that have not yet, but

are expected to be, implemented.

[115] These consents are:

- (a) Current occupation permit (40148) – ends in 2030;
- (b) Maintenance dredging permit (68440) – ends in 2031;
- (c) Stormwater and washwater discharge permit (65854) – ends in 2039;
- (d) New breakwater (not yet implemented) (66504) – ends in 2024;
- (e) Proposed occupation permit – which might end sometime between 2034 – 2059.

[116] There is an unimplemented consent for the new breakwater which expires in 2024. We accept that the proposed breakwater will have a positive effect on the marina and its investment and the grant of that consent was supported by Ngāti Kuku. From the evidence before us there is clearly both an intention to implement it and ongoing work towards its implementation. We therefore consider it likely that consent will be implemented.

[117] The current occupation permit, amended so that it can accommodate that breakwater, expires in 2030. The proposed occupation permit would also accommodate the breakwater. While these occupation permits do not themselves provide for the breakwater or address the effects of it, they enable it: without an occupation permit, the breakwater would serve no useful purpose.

[118] The consents for the marina have some bearing on the duration of an occupation permit. The existing works established under those consents are physical resources to be managed together with natural resources under the RMA. Section 124(2A) of the RMA requires us to have regard to the value of the investment of the existing consent holder when considering an application for a new consent for the same activity as that for which consent is due to expire. That provision reflects the requirement for us to have particular regard to the efficient use and development of

physical resources under s 7(b). The decision in *Brooke-Taylor v Marlborough DC*²² is an example of that principle in action.

[119] In the context of using methods to achieve integrated management of resources, which is a function of the Regional Council and also a type of efficiency, it is regrettable that the evolution of the marina has led to a rather disjointed arrangement of its consents, with their durations spread out over different timeframes. As things stand, this does not readily allow for the activities of the marina and their effects to be considered in an integrated manner or for any conditions of consent, including those which address cultural impacts to be considered in an integrated way, including by allowing for matters which may arise over time.

[120] Generally, the conditions of a resource consent are required to address the adverse effects of that consent.²³ However, where more than one consent relates to a single activity and there is a consent which fundamentally enables the activity, such as an occupation permit for an activity in the CMA, it may be appropriate to achieve some overall management of the cumulative effects of all of the specific consented activities as part of that fundamental or principal consent. This is an example of how the “planning unit” analysis used in the United Kingdom may be implemented in a manner consistent with the consenting processes under the RMA.²⁴ On that basis, in the present case, conditions imposed as part of the occupation permit, including its duration, could address integrated management issues.

[121] It is difficult to determine exactly how the duration of occupation might adversely affect cultural matters. Ideally, it may be best to have all the consent durations align so as to enable a comprehensive review of all matters relating to the principal activity could be undertaken. In a practical sense in this case, for example the 16- year duration of the stormwater and washwater consent could provide for a term that would allow the implementation of the construction of the breakwater and

²² Fn 16.

²³ *Newbury DC v Secretary of State for the Environment and Waitakere City Council v Estate Homes Ltd*, fn 19.

²⁴ *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207; [1972] 3 All ER 240 (QBD); *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 at [142] – [147].

a period of time for it to settle in and be understood in the context of the occupied area and the surrounding environment.

[122] We have carefully considered the issues raised before us relating to the application for a CMT order under the MACAA. The prospect of obtaining such an order is not a relevant consideration as it does not involve any particular resource management issue which is reasonably necessary to determine this appeal, within the scope of s 104(1)(c) of the RMA. Broadly, ownership of a resource is normally not a relevant consideration under the RMA. A resource consent is neither real nor personal property.²⁵ If property in the area of occupation should change, then the consequences of that will need to be determined when the time comes.

[123] The particularly relevant resource management issue in this case is recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Resource consents and their conditions should work in concert to promote that relationship. We found the evidence of Mr Carlyon both compelling and challenging in this regard. While we accept his evidence that review conditions have limitations, we acknowledge that we are limited in this case by the status of coastal occupation as a controlled activity which cannot be declined. We consider that the shortcomings of the statutory review process may be ameliorated by the clarity and detail of a particular condition providing for review.

[124] We conclude that the duration of the coastal occupation permit should be 35 years.

[125] We also decide that the review condition of the consent is to provide the opportunity for review of its conditions under s 129 of the RMA on additional identified occasions which may change the context of that duration. These occasions are:

- (a) When a change to the RECP is notified proposing any change to the

²⁵ Section 122, RMA.

provisions of that plan relating to the marina or the port;

- (b) When an order is made under the MACAA affecting the seabed of Te Awanui at or in the vicinity of the area occupied by the marina;
- (c) On the coming into force of any enactment replacing the RMA;
- (d) On the publication of any statutory policy document in relation to the managed retreat of industrial development in the vicinity of the marina or Whareroa Marae.

[126] Acknowledging the discretion held by the Regional Council under s 128(1) of the RMA, we think that there would need to be a very significant reason not to review these conditions if such an event were to occur.

Other conditions

[127] The conditions proposed by TBM in its counsel's closing submissions provided much greater certainty as to how the concerns raised by Ngāti Kuku in its appeal could be addressed than those before us at the start of the hearing. These include:

- (a) provision for a mana to mana relationship;
- (b) the ability of Ngāti Kuku to make recommendations on management decisions; and
- (c) provisions for review under particular circumstances if those recommendations are not followed.

[128] In our view, those further proposed conditions appropriately address the relevant objectives and policies in the RCEP. In the circumstances of this case and in the context of a resource consent for a coastal occupation permit, it is difficult to see what more TBM could offer to address the planning issues better.

[129] In relation to the conditions, we consider that the following further amendments should be made to the proposed conditions:

- (a) An accurate map or plan of the occupation permit area should be included. The current consent does not correctly define the area of the marina in condition 5.5. This appears to have been corrected in condition 4.1 to be 11.74ha. A scale map of the defined area will assist interpretation of the defined area of the consent.
- (b) The interim review triggers in condition 7.3 shall include a reference to condition 14.7 and the making of a recommendation under the Cultural Management Plan for measures to be implemented to address cultural effects, and the consent holder does not accept the recommendations.
- (c) If it is agreed that cultural experts are to be engaged to undertake cultural monitoring, any costs of that should be additional to the annual payment of \$8,500 provided for in condition 8.10.
- (d) Condition 9.4 regarding the marina management plan preparation reads:

9.4 Prior to the submission of the Marina Management Plan to the Regional Council for certification in accordance with conditions 9.1 and 9.2, the consent holder shall present a draft Marina Management Plan to the Kaitiaki Group for consultation and feedback on the provisions. The Kaitiaki Group shall respond with 10 working days. Should any disputes arise, these must be noted in the Review Report presented to the Regional Council for consideration in the certification of the Marina Management Plan.

Given the consent holder is to provide a written invitation to the members of the Kaitiaki Group at least ten working days before a proposed meeting is to be held, we consider that the requirement for a response within 10 working day response is unreasonable. This should be increased to a minimum of 20 working days.

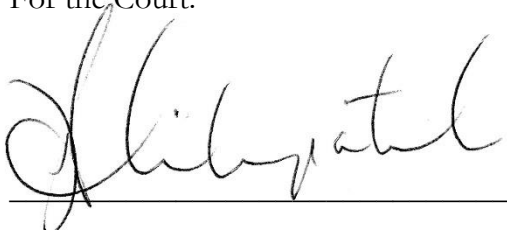
- (e) Condition 14 should be further amended to explicitly recognise the right of tangata whenua to express their own preferences and apply mātauranga Māori in coastal management within their tribal boundaries and coastal waters as required by RCEP Policies IW 1 and IW 7 which requires the incorporation of the use of mātauranga Māori based methods or cultural indicators to be considered.

- (f) The events listed in condition 20 giving rise to an opportunity for the consent authority to review the conditions of consent shall include the following (continuing the numbering):
- h) When a change to the RECP is notified proposing any change to the provisions of that plan relating to the marina or the port;
 - i) When an order is made under the MACAA affecting the seabed of Te Awanui at or in the vicinity of the area occupied by the marina;
 - j) On the coming into force of any enactment replacing the RMA;
 - k) On the publication of any statutory policy document in relation to the managed retreat of industrial development in the vicinity of the marina or Whareroa Marae;
 - l) If a report required under the Cultural Management Plan recommends measures to be implemented to address cultural effects, and the consent holder does not accept the recommendations and or implement them.

Direction

[130] The parties are directed to confer and file a joint memorandum within 20 working days setting out the conditions in their amended form, including amendments set out in this decision, for confirmation by the Court.

For the Court:



D A Kirkpatrick
Chief Environment Court Judge



Appendix 1

**REPLY SET Consent Conditions****Dated 05 December 2022****Resource Consent****Resource Consent RM20-0629-AP**

Tauranga Bridge Marina Limited

Consent(s) to:

RM20-0629-CC.01
2056

Occupy Coastal Space

Expiry 1 October



The consent(s) are subject to the conditions specified on the attached schedule(s) for each activity. Advice notes are also provided as supplementary guidance, and to specify additional information to relevant conditions.

Fiona McTavish
Chief Executive

Consent Number: **RM20-0629-CC.01**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under section 12(2)(a) of the Resource Management Act and Rule PZ 6(2) of the Bay of Plenty Regional Coastal Environment Plan to undertake a controlled activity, being the occupation of space in the Coastal Marine Area**

subject to the following conditions:

1 Purpose

- 1.1 The occupation of space in the Coastal Marine Area for the existing marina structure as identified on BOPRC Consent Plan RM20-0629-01;
- (a) The Resource consent application received by the Bay of Plenty Regional Council on 24 September 2020, provided by Shearer Consulting; and
- (b) The further information received referred to as 'Iwi Letter Consultation' received by Bay of Plenty Regional Council on 7 April 2021, provided by Shearer Consulting.

2 Location

- 2.1 The activity authorised by this resource consent shall be located:
- (a) At or about map reference NZTM 1879317; 5827011 (centre of the site); and
- (b) On the sea bed of Tauranga Harbour to the east of the Tauranga Harbour Bridge Causeway as shown on plan RM20-0629-01.

3 Legal Description

- 3.1 Tauranga Harbour (Crown Land), Tauranga SD (Tauranga District).

4 Occupation of Space

- 4.1 The Marina shall occupy an area no larger than 11.74 hectares.
- 4.2 As resource consent 40148 and RM20-0629 (this consent) relate to the same site and activities and cannot operate concurrently, the consent holder must

provide notice under s138 of the Resource Management Act of the surrender in full of Consent 40148 prior to the commencement of this consent.

5 Notification

- 5.1 No less than five working days after the commencement of this consent, the consent holder shall request (in writing) a site meeting between the consent holder and/or a representative and the Bay of Plenty Regional Council. This request shall include details of who is to be responsible for site management and compliance with consent conditions (see Advice Note 2 and 3).

6. Rangatira ki te Rangatira Relationship

- 6.1 The consent holder shall invite representatives of Ngāti Kuku to meet with the Tauranga Bridge Marina Board twice annually to discuss strategic issues relating to the marina and surrounding area.

- 6.2 Prior to the bi- annual board meetings, the Tauranga Bridge Marina Board shall undertake a review of any upcoming construction contracts, employment and/or educational opportunities for local Ngāti Kuku Hapū members including but not limited to; opportunities within the Marina such as for construction of the breakwater, maintenance, marine studies, employment or apprenticeships or support towards nautical marine industry courses offered at local institutions. The review shall be included as one of the Board agenda items for discussion.

Advice note: This condition was offered by the Applicant and they have agreed to be bound by it in accordance with the principle in Augier.

7. Interim Review

- 7.1 Within 6 months of either of the Review Triggers set out in Condition 7.3 (below) occurring, the Consent Holder shall engage an independent planning expert to undertake a review of the conditions of this consent. The Consent Holder must consult with the Kaitiaki Group before appointing the independent expert in relation to a suitable expert.

- 7.2 The purpose of the review is to consider whether there are any changes in the wider regulatory and policy context for the Marina operations since the commencement of the consent and to make recommendations, if necessary, for any changes to the conditions of consent to ensure that they continue to adequately recognise and provide for the relationship of Ngāti Kuku with the common marine and coastal area occupied by the Marina.

- 7.3 The Review Triggers are:

- (a) A planning document being lodged with the Bay of Plenty Regional Council, by a Customary Marine Title Group, in relation to Te Awanui (Tauranga Harbour); and / or

- (b) A Natural and Built Environment Plan (or similar plan, under replacement legislation to the Resource Management Act 1991) being made operative.

- 7.4 The Consent Holder shall ensure that the independent planning expert engages with the Kaitiaki Group as part of the review process and that the report prepared by the expert provides a summary of this engagement and all feedback and recommendations (if any) made by the Kaitiaki Group.
- 7.5 The Consent Holder must provide the independent planning expert review report within 18 months of either Review Trigger occurring.
- 7.6 If the independent planning expert report includes recommended amendments to the consent conditions, the report must also identify what, if any, of the recommendations made that the consent holder has or has not sought to implement (whether through a section 127 application or other method) and provide reasons why any recommendation has not been adopted.

Advice note:

This condition was offered by the Applicant and they have agreed to be bound by it in accordance with the principle in Augier.

Upon receiving reasons provided by the Consent Holder for not accepting any recommendations made, the Regional Council will consider whether or not to notify an intention to review any conditions of the consent under s128 RMA. Refer to condition 20 Review Conditions.

8 Kaitiaki Group

- 8.1 Within six months of the commencement of this consent, the consent holder shall engage with Ngāti Kuku Hapū and the Whareroa Marae Committee to invite them to establish a Kaitiaki Group to liaise and meet for the following purposes in relation to the activities authorised by this consent:
- (a) To collaborate with the consent holder in the development of the cultural monitoring plan under condition 12 of this consent;
 - (b) To receive and distribute the technical review and monitoring outcomes of this consent to their respective groups;
 - (c) To allow the Kaitiaki Group to make recommendations to the consent holder regarding actions to be taken in response to monitoring reports, marina management plan and mitigation plans and any section 128 RMA review matter if appropriate; and
 - (d) To discuss any other relevant matters that may be agreed by the Kaitiaki Group.
- 8.2 The consent holder shall arrange for a meeting with the Kaitiaki Group within 6 months of commencement of this consent and from there on annually, or as required by the Kaitiaki Group.

- 8.3 The consent holder shall provide a written invitation to the members of the Kaitiaki Group at least ten working days before a proposed meeting is to be held.
- 8.4 The meetings shall be held at a convenient location as agreed by the Kaitiaki Group. The costs of the meetings relating to venue, facilities and food, tea and coffee, shall be borne by the consent holder.
- 8.5 The minutes of the meetings of the Kaitiaki Group shall be provided to all attendees and to the Regional Council by the consent holder promptly following each meeting.
- 8.6 The consent holder shall cease to convene any further meetings of the Kaitiaki Group if the majority of the members of the Kaitiaki Group agree the Group is to be disbanded. The consent holder shall give written notice of this to the Regional Council.
- 8.7 The consent holder shall provide the Kaitiaki Group with a copy of the Marina Management Plan annually for the first five years of the consent, including any updates as a result of reviews required by condition 9(below) , and every five years thereafter, as well as copies of the Structural Integrity Reports every two years (condition 12.3).
- 8.8 The consent holder shall report to the Kaitiaki Group any biosecurity dive investigations undertaken within the Marina. Any subsequent findings and detail of any remedial actions undertaken by the consent holder shall be provided to the Kaitiaki Group.
- 8.9 The consent holder shall provide any original seabed and/or beach profile reports (required by condition 9.4) to the Kaitiaki Group within 3 months of its establishment. The purpose of this is to provide the Kaitiaki Group a starting baseline for the purposes of cultural monitoring required under condition 12.
- 8.10 In addition to costs payable for any meetings under condition 8.2, the consent holder shall contribute a total of \$8500 per annum (exclusive of GST if any, payable by 31 March and subject to any annual CPI adjustment). The compensation sum is to be paid into a nominated bank account upon receipt of invoice from Whareroa Marae Committee.

Advice note: This condition was offered by the Applicant and it has agreed to be bound by it in accordance with the principle in Augier.

This sum is offered by the Consent Holder to be payable directly to Ngāti Kuku for the term of this consent for providing cultural services through engagement in Marina meetings, observations, reports and monitoring as outlined in these conditions of consent . If the consent holder and Ngāti Kuku agree, this sum can be apportioned other than once yearly, for example biannual invoices and payments made over the term of the consent (to be paid every six months).

9. Marina Management Plan

9.1 The consent holder shall within six months of the commencement of this consent prepare a management plan for the Marina, which includes but is not limited to (refer to Advice Note 7 below):

- (a) The berth contract provisions (Marina agreement) which are directed at ensuring berth holders act in an environmentally appropriate manner. The agreement which should include controls, restrictions and management methods for:
 - i. Fuel storage and usage;
 - ii. Boat maintenance in the Marina;
 - iii. Waste management;
 - iv. Sewage management;
 - v. On-board stays within the Marina;
 - vi. Noise;
 - vii. Penalty provisions for inappropriate actions should also be included;
 - viii. Protocols regarding the management of harmful organisms (biosecurity measures); and
 - ix. Any other relevant matters requiring control or required by conditions of this consent.
- (b) A description of the facilities provided and their management, including, but not limited to the refuelling berth and waste disposal systems, to ensure that the natural environment is not contaminated by the operation of the Marina which should include:
 - i. A description of their operation (including but not limited to waste and sewage management);
 - ii. Their maintenance requirements;
 - iii. Contingency measures associated with their operation (e.g. Spill/Fire Response Plan);
 - iv. Those responsible for their operation including any training required; and
 - v. Any other facility or service provided on-site identified by the Regional Council.
- (c) A Tier 1 Site Oil Response Plan as per the requirements of the Maritime Transport Act 1994.

- 9.2 The Marina Management Plan shall be submitted to the Regional Council for written certification by the Chief Executive of the Regional Council or delegate that it includes, as a minimum, the matters required by condition [9.1].
- 9.3 The Marina Management Plan must be reviewed every five years as well as upon occurrence of either or both of the following Trigger Events. That review must involve preparation of a report (Review Report) prepared by or on behalf of the consent holder which identifies any matters in the Marina Management Plan which require updating as a result of the review, and attaches an updated Marina Management Plan. The Trigger Events are:
- a) within 6 months of any planning document being lodged by a Customary Marine Title Group for Te Awanui (Tauranga Harbour) in order to respond to any matters raised in that document that are relevant to the operation of the marina; and/or
- b) within 6 months of receiving a report on the environmental and/or cultural monitoring undertaken under Conditions [13 and/or 14] of this consent in order to implement any recommendations made to address environmental and / or cultural effects that are accepted by the Consent Holder.
- 9.3 Following a review under condition [9.3], which has caused the Marina Management Plan to be updated, the updated Marina Management Plan must be submitted to the Regional Council for certification that the matters set out in the Review Report have been included in the updated Marina Management Plan.
- 9.4 Prior to the submission of the Marina Management Plan to the Regional Council for certification in accordance with conditions 9.1 and 9.2, the consent holder shall present a draft Marina Management Plan to the Kaitiaki Group for consultation and feedback on the provisions. The Kaitiaki Group shall respond with 10 working days. Should any disputes arise, these must be noted in the Review Report presented to the Regional Council for consideration in the certification of the Marina Management Plan.
- 9.5 All activities on the Marina shall be undertaken in accordance with the Marina Management Plan, certified under condition 9.2, or any subsequent plan that has been certified by the Chief Executive of the Regional Council or delegate.
- 9.6 The consent holder shall report to the Regional Council and Kaitiaki Group any breach of the Marina Management Plan by users of the marina and any remedial actions undertaken, within 24 hours within the week or on a Monday following a breach occurring on a weekend, unless the breach is significant and requires Regional Council intervention, in which case the Regional Council pollution hotline should be contacted.

10 Sewage Pump Out Facility

- 10.1 The consent holder shall provide general public access to use facilities for sewage pump-out, handling and disposal to service boats. This facility shall be provided at a suitable location in the marina.
- 10.2 The consent holder shall ensure the sewage pump-out facilities are designed and operated at all times to ensure the risk of spillage from operations is avoided.
- 10.3 Appropriate equipment to contain and remove spillages of sewage shall at all times be kept stored in a convenient position near the facility and be available for immediate use.
- 10.4 Management of the sewage pump out facility, including maintenance, inspection and contingency measures shall be detailed in the Marina Management Plan required by condition 6.1.

11 Fuelling Facilities

- 11.1 The consent holder shall provide general public access to use the facility for vessel refuelling.
- 11.2 As a minimum requirement, the provision of fuel facilities in this marina shall comply with:
 - (a) the Hazardous Substances and New Organisms Act 1996 and relevant regulations; and
 - (b) the most current revision of the oil industry "Code of Practice for Design, Installation and Operation of Underground Petroleum Storage Systems".
- 11.3 Fuel facilities shall be designed and operated at all times to ensure the risk of any fuel spill from refuelling operations is avoided.
- 11.4 Appropriate equipment to contain and remove spillages of fuel shall at all times be kept stored in a convenient position near the fuel station and be available for immediate use.
- 11.5 An automated system shall be used and maintained, which correlates fuel sales with fuel tank levels to ensure there is no leakage, over-filling or accidental release of fuel products to the harbour.
- 11.6 The automated fuel measuring system shall be monitored and recorded on a weekly basis; records shall be available for inspection by Regional Council staff at all times.
- 11.7 Management of the fuel facility, including maintenance, inspection and contingency measures shall be detailed in the Marina Management Plan required by condition 6.1.

12 Structural Monitoring

- 12.1 The consent holder shall ensure that the entire structure is inspected within 72 hours of any significant storm event for any structural damage. Should any damage be identified through inspection or be reported to the Marina the Regional Council and the Kaitiaki Group shall be notified of the extent of the damage and any proposed action plan or repairs (See Advice Note 2).
- 12.2 All facilities provided for users of the marina as identified in condition 9.1, shall be maintained in a functional capacity at all times to ensure that users of the marina have appropriate facilities to avoid discharges to the harbour.
- 12.3 The consent holder shall undertake an independent structural integrity survey of the structures authorised by this consent every two years to ensure that it does not represent a danger to the public. The consent holder shall invite nominees of the Kaitiaki Group to be present at the marina when these surveys are taking place. Within 30 working days of the survey being completed, the consent holder shall submit to the Regional Council and the Kaitiaki Group a report, signed by a suitably qualified engineer that certifies that the structure/s are structurally sound and fit for purpose.

13 Environmental Monitoring

- 13.1 The following monitoring shall be undertaken by the consent holder:
- (a) The consent holder shall undertake annual beach profile monitoring of the foreshore and seabed at three locations spaced 50 m apart fronting the Whareroa Marae for a period of five years following the completion of the construction of the northern breakwater structures.
 - i. The monitoring methodology and programme shall be agreed with the Kaitiaki Group and Ngai Te Rangi Iwi prior to implementation.
 - ii. A copy of the agreed monitoring methodology and programme shall be provided to the Regional Council prior to its implementation (see Advice Note 2 and 5).
 - iii. The consent holder shall invite nominees of the Kaitiaki Group to attend when this monitoring is taking place.
 - (b) A bathymetric survey, by an independent registered surveyor of the seabed adjacent to and under the Aerodrome Bridge (Whareroa Point) in sufficient detail to identify any scour holes around the piers and abutments at the following times:
 - i. Prior to construction of the breakwater.
 - ii. Two months following the completion of construction of the breakwater.

- iii. Six months following the completion of construction of the breakwater.
 - iv. Twelve months following the completion of construction of the breakwater.
 - v. Two years following the completion of construction of the breakwater.
 - vi. Five years following the completion of construction of the breakwater.
- (c) Within 90 days of the construction of the northern breakwater structures, sufficient tidal velocity measurements to confirm the accuracy of the results predicted by the hydrodynamic modelling presented in the Tonkin and Taylor resource consent application RC66504 for the breakwater (T&T Ref: 25762).

13.2 The following reporting and interpretation shall be undertaken by the consent holder:

- (a) The results of the beach profile monitoring required by condition 13.1 above shall be provided to the Bay of Plenty Regional Council, the Kaitiaki Group and Ngai Te Rangi Iwi within six weeks following completion of each annual monitoring exercise.
- (b) No later than one month following the completion of each survey of the seabed adjacent to and under the Aerodrome Bridge the consent holder shall submit the results of the survey to the Bay of Plenty Regional Council, the Kaitiaki Group, and to the New Zealand Transport Agency. The submission of results shall include an interpretation of the survey results with respect to measured scour depths and the design scour for the bridge.
- (c) The tidal velocity measurements undertaken, to confirm the accuracy of the results predicted by the hydrodynamic modelling presented in the Tonkin and Taylor resource consent application RC66504 for the breakwater (T&T Ref: 25762), shall be reported to the Bay of Plenty Regional Council and the Kaitiaki Group within one month of the measurements being completed.

13.3 Should the analysis required by condition 13.1(b) indicate scour depth greater than the design scour depth for the piles or abutments of the Aerodrome Bridge the consent holder shall, within six months of the submission of results to the Bay of Plenty Regional Council under condition 13.2(b), submit a mitigation plan to the Chief Executive of the Bay of Plenty Regional Council or delegate for certification. The mitigation plan shall include:

- (a) Calculations of the required depth of founding to prevent structural instability or failure due to scour over a 100 year planning period.
- (b) Details of proposed mitigation works to prevent structural instability or failure due to scour over a 100 year planning period.
- (c) Proposed construction methodology and measures to avoid, remedy or mitigate any actual or potential effects.
- (d) Feedback from the New Zealand Transport Agency (NZTA) and the Kaitiaki Group on the proposed mitigation plan and comment on how their feedback has been taken into account.

13.4 The consent holder shall implement the mitigation plan required by condition 13.3 within six months of the mitigation plan being approved by the Chief Executive of the Bay of Plenty Regional Council, or delegate.

13.5 Following receipt of any of the monitoring results or mitigation plan required by conditions 12 and 13 above, the Bay of Plenty Regional Council may serve notice on the consent holder under Section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of this resource consent for the following purposes:

- (a) To ensure that the monitoring regime is appropriate and can if necessary be extended.
- (b) To ensure that the conditions of this consent are adequate to deal with any increases in tidal velocity (beyond those predicted by the hydrodynamic modelling presented in the Tonkin and Taylor resource consent application) that could result in adverse effects on other harbour users or the coastal environment.
- (c) To ensure adverse effects from erosion of the beach fronting Whareroa Marae and/or scour of the bed of Tauranga Harbour and any consequential deposition of sediment on the bed of Tauranga Harbour are suitably mitigated or avoided through an appropriate mitigation plan.

14 Cultural Monitoring

14.1 The Consent Holder must prepare a Cultural Monitoring Plan (CMP) and invite the Kaitiaki Group to participate in the preparation of the CMP. The objectives of the CMP are to:

- a. Monitor the effects of the occupation of space in the Coastal Marine Area by the Marina authorised under this consent on identified cultural indicators and/or values; and
- b. Identify circumstances in which measures may need to be implemented to avoid, remedy or mitigate any adverse cultural effects identified.

14.2 As a minimum, the CMP shall identify:

- a. The Cultural Values/indicators to be monitored and any thresholds for actions to be taken to avoid, remedy or mitigate effects resulting from the exercise of this consent;
- b. The role and responsibilities of the persons who are to conduct the cultural monitoring;
- c. Details of the monitoring methodology and frequency;
- d. A reporting mechanism for results of the cultural monitoring and of any measures recommended to address cultural effects if these are identified, to the Consent Holder, who shall provide them to the Bay of Plenty Regional Council.

14.3 The CMP shall be provided to the Bay of Plenty Regional Council within 18 months of the commencement of this consent, for certification. Certification shall be limited to ensuring that the CMP complies with this condition, including that the monitoring is within the scope of this consent.

14.4 The CMP can be amended from time to time with the agreement of the Kaitiaki Group.

14.5 The consent holder shall permit access to the site to undertake the monitoring specified in the CMP. Access shall only be withheld for health and safety reasons. Records of any such restriction of access shall be kept along with the reasoning and provided to the Bay of Plenty Regional Council on request.

14.6 The consent holder must implement the CMP.

14.7 In the event that the reporting required under the CMP recommends measures to be implemented to address cultural effects, and the Consent Holder does not accept the recommendations, the Consent Holder must provide a report to the Regional Council and the Kaitiaki Group with the reasons for not accepting the recommendations.

14.8 Records of the cultural monitoring shall be kept for the duration of the consent and provided to the Bay of Plenty Regional Council within 5 working days of it requesting them.

15 Control of Discharges

15.1 The consent holder shall ensure that no food, waste, debris or rubbish is discharged to the Tauranga Harbour as a result of the activities carried out under this permit.

15.2 The consent holder shall provide a facility for rubbish disposal to be used by the berth holders.

15.3 The consent holder shall supply and maintain sufficient public rubbish receptacles around the facilities associated with the marina. The consent

holder shall further take all practicable steps to ensure that birds are not attracted to the Marina by inappropriate rubbish disposal.

- 15.4 The consent holder shall supply a receptacle for the collection of waste oil and ensure that this receptacle is emptied to an approved recycling area on a regular basis.

16 Noise

- 16.1 The consent holder shall ensure that the Marina uses rules which include noise limits and that the following noise limits are placed on berth holders:

- (a) Shall not exceed 55 dBA between 7:00 am and 10:00 pm.
- (b) Shall not exceed 45 dBA between 10:00 pm and 7:00 am.

- 16.2 The noise levels shall be measured and assessed in accordance with the requirement of the New Zealand Standards NZS 6801 (Methods of Measuring Noise) and NZS 6802 (Assessment of Noise in the Environment). The noise shall be measured with a sound level meter complying at least with the Standard TCE 651 (1979) Sound Level Meters Type 2.

17 Public Access

- 17.1 The consent holder shall allow free access to the car parking areas, promenade to rock wall, picnic and beach areas. Further, the consent holder shall not restrict access to the south-western wave attenuator or to the walkways, except where required for purposes of public safety.
- 17.2 The consent holder shall make available free of charge one berth within the marina for visiting waka associated with Ngāti Kuku, Ngāi Te Rangi and Ngāti Ranginui upon request (see Advice Note 4).

18 Mitigation

- 18.1 The consent holder shall provide a dinghy storage and launching area for use by the mooring holders on the south-western breakwater with sufficient mooring cleats and accessibility.
- 18.2 The consent holder shall provide public access on one of its pontoons for public fishing and recreation.
- 18.3 The consent holder shall provide a minimum of five berths suitable for long term stay by visiting craft (see advice note 4).
- 18.4 The consent holder shall at the first meeting with the Kaitiaki Group consult with them to incorporate features within the Marina facilities to recognise the cultural history and Mana Whenua and Mana Moana relationships to this area such as place names, te reo signage, pou, and/ or cultural kōrero boards. These features shall be developed and installed in consultation with representatives of Ngāti Kuku and the Kaitiaki Group.

- 18.5 Tauranga Bridge Marina will establish a Tauranga Bridge Marina Te Awanui Educational Scholarship and employment Programme (or alternative title) for students who whakapapa to Ngāi Te Rangī Iwi, with preference to be given to those from Ngāti Kuku and Ngāi Tukairangi hapū. The employment opportunities shall be related to the Marina and its related businesses, and the educational scholarships shall be awarded to rangatahi intending to undertake study in the fields of marine studies, fisheries, seafaring, environmental science or environmental management through an approved tertiary provider.

The scholarship donation will:

- i. Comprise a payment of \$1,500 per year for the 35 year term of the consent (CPI adjusted);
- ii. This scholarship payment may be awarded between one or more students per year, at the discretion of the Kaitiaki Group who shall administer the educational scholarship and determine the recipients, in consultation with the Consent Holder.

Conditions 18.4 – 18.5 have been offered by the Applicant and it has agreed to be bound by them in accordance with the principle in Augier.

19 Decommissioning

- 19.1 In the event that the consent holder does not apply for replacement consent, at least six months prior to expiry of this consent, for the continued occupation of space in the Coastal Marine Area for the Marina then the consent holder shall provide to the Bay of Plenty Regional Council a decommissioning plan for certification by 1 May 2056 and apply for consents for the disturbance of the CMA due to decommissioning (see Advice Note 5).

20 Section 128 Review of Conditions

- 20.1 The Bay of Plenty Regional Council may, any year, within three months of the anniversary of this consent, serve notice on the consent holder under s128(1)(a)(iii), and/or s128(1)(b) and/or s128(1)(ba) of the Resource Management Act 1991 of its intention to review the conditions of this consent. The purpose of such a review is to assess whether or not the conditions of consent need to change (and if so how) in order to:
- (a) Respond to cultural monitoring reports under condition 7 that indicate that the occupation of the CMA by the marina (including the breakwater) is causing adverse cultural effects, including to require the implementation of further mitigation, having regard to any recommendations made by the Kaitiaki Group;

- (b) Respond to or significant changes to beach morphology, as per the requirements of the annual beach profile monitoring required by condition 11;
- (c) Respond to matters raised as part of the independent planning review undertaken pursuant to condition 7 ;
- (d) Respond to and address any structural integrity issues identified in the five yearly surveys required by condition 12.3 and to provide for the ongoing maintenance of the Tauranga Bridge Marina; and/or
- (e) Respond to and address any unforeseen effects of changes in hydrodynamics and scour; and/ or
- (f) Respond to any unforeseen adverse effects on taonga, sites, areas, features or resources of significance or special value to tangata whenua, which may arise from the exercise of the consent and/or
- (g) Respond to any breach of the conditions of this consent and provide additional mitigation for any effect arising from such a breach of the consent conditions.

The fair and reasonable costs associated with any such review shall be recovered by the Bay of Plenty Regional Council from the consent holder.

Advice Note: Conditions 20 1. (a) and (c has been offered by the Applicant and it has agreed to be bound by them in accordance with the principle in Augier.

21 Term

This consent shall expire **35 years** from the date of commencement of this consent.

22 Resource Management Charges

The consent holder shall pay the Bay of Plenty Regional Council such charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

23 The Consent

The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Advice Notes

- 1 The consent holder offered Augier conditions which have been included in this consent following an Environment Court hearing process. These have been identified in advice notes relating to each condition. For the avoidance of

doubt, it is noted that all of the Augier conditions were offered by the Applicant on the basis that they are non-severable from Condition [21], being the consent term of 35 years.

- 2 The consent holder is advised that under the provisions of section 64A of the Resource Management Act 1991, this consent may become subject to charges for the occupation of Crown seabed and/or foreshore. At the time of issuing this consent there is no charging system in place however this consent may be affected by any charging regime implemented in the future, including any regime relevant to the grant of customary marine title or protected customary rights under Part 3 of the Marine and Coastal Area (Tukutai Moana) Act 2011.
- 3 Notification and reporting required by this consent should be made in writing to the Manager Regulatory Compliance, Bay of Plenty Regional Council, PO Box 364, Whakatane 3158 or email notify@boprc.govt.nz and should include the consent number RM20-0629.
- 4 The consent holder is responsible for ensuring that all contractors carrying out works under this consent are made aware of the relevant consent conditions, plans and associated documents.
- 5 The consent holder should advise visiting iwi and Hapū to give notice of their intended date and time of arrival and departure to the Marina management so a berth location can be confirmed prior to arrival.
- 6 The consent holder shall be liable for all reasonable costs incurred by the Regional Council under S36(1)(c) of the RMA associated with the implementation of the conditions of this consent.
- 7 The consent holder is advised to refer to the policies governing marinas, outlined in the proposed Coastal Environment Plan, when drawing up its Marina Management Plan. Policies include, but are not limited to Policy SO6, SO11, SO12, CD6, CD7, CD 12 and CD13.
- 8 DEFINITIONS OF TERMS within these conditions refer to definitions within the Regional Coastal Environment Plan (2020).

Appendix 2

Relevant Provisions of Statutory Planning Documents

Regional Policy Statement

2.2.3 Use and allocation of coastal resources Coastal use and development can also result in conflict and competition for space, where uses and activities are not compatible or are not managed proactively and effectively. Management of coastal space to avoid conflicts, protect the rights of existing and lawfully established uses, retain amenity values and meet safety and navigation 28 Bay of Plenty Regional Policy Statement requirements is crucial and requires direction on which activities take priority, as well as guidance on managing the cumulative effects of coastal development. This can be achieved by providing direction (including in resource management planning documents) on the appropriate location and form of use and development within the coastal environment, encouraging development in areas where the natural character has already been highly compromised (except where areas and opportunities for restoration and rehabilitation have been identified) and constraining development on undeveloped land (except where land has been identified as an appropriate location of future urban growth within Appendix D and E). The coastal marine area is public space, managed by regional councils, just as national parks are public space managed by the Department of Conservation. Unfortunately the Act does not have mechanisms to support the management of this common space in a way that sends fair economic signals to potential users. This can result in incentives to develop and effectively privatise public space. Poor integration with other marine resources legislation compounds the problem. It is important therefore that the Statement provides direction to enable the appropriate location of activities with a functional need to locate in the coastal marine area such as ports and supporting infrastructure as well as recreational facilities. Direction is also required to minimise the amount of public space occupied by avoiding ‘unnecessary’ activities that could locate elsewhere, efficient use and sharing of space and discouraging speculation and the locking up of public space.

2.2.5 Regionally significant coastal environment issues

...

(3) Managing the allocation of space for a range of competing uses within the coastal marine area Providing for aquaculture, recreation, wild catch fishing, Māori customary activities, regionally significant infrastructure and marine access ways in a manner that avoids conflict and considers the cumulative impacts of these activities on the public space of the coastal marine area and the adjacent shore is challenging.

Objective 3	Equitable and sustainable allocation of public space within the coastal marine area
Objective 22	The coastal marine area, lakes and rivers are generally accessible to the public
Policy CE 3A	Identifying the key constraints to use and development of the coastal marina area
Policy CE 11B	Allocating public space within the coastal marine area
Method 69	Mitigate the environmental impact from the use of public space within the coastal marina area.

Regional Coastal Environment Plan

Policy RZ 5

Provide for activities that are consistent with the purpose of the Port Zone, which is to:

- (a) Enable efficient use of existing port area, so that the regional community may meet its social and economic needs;
- (b) Concentrate major new structural development in an area already modified, so that development is guided away from other coastal areas of higher natural character, natural landscape, recreational value, and cultural value;
- (c) Minimise potential conflict between port activities or port related activities and other activities; and
- (d) Enable efficient and ongoing storage of vessels in the Tauranga Bridge Marina.

Port Related Activities means:

Industrial and commercial activities that for operational purposes require a location near the Port, including:

...

- (b) Marine berthage and storage, construction, repair, servicing and maintenance facilities – including the Tauranga Bridge Marina;

Rule PZ 6(2)

The following is a controlled activity

...

- (2) The occupation of the common marine and coastal area by structures and

activities in the Port Zone that were lawfully established at the date this Plan became operative.

The matters over which Council has reserved its control are identified in PZ 6 as:

- (a) The duration of the consent having regard to the role of the Port as one of the Region's most significant pieces of infrastructure.
- (b) Measures to avoid, remedy or mitigate adverse effects associated with maintenance and use of the structure including on indigenous biodiversity or cultural values under ss 6(e) or 7(a) of the RMA.
- (c) Measures to avoid, remedy or mitigate adverse effects on hydrodynamics and geomorphics.

Policy 5.2 Zoning and overlays

This Plan utilises zoning to recognise those areas where there is a high level of existing modification and where new uses, and development may have a relatively low impact. Within the Bay of Plenty coastal marine area there are two zones: the Port Zone and the Harbour Development Zone. These are marked on the maps of this Plan, and there has been no change in effects to justify a change to this.

Objectives 13–16 and 18 and Associated Policies IW1–IW8, IW10 and IW11

- Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of tangata whenua in management of the coastal environment when activities may affect their taonga, interests and values.
- Objective 14 Tangata whenua are able to undertake customary activities in the coastal marine area, and access to sites used for cultural practices, gathering kaimoana, mahinga mātaītai and areas of cultural significance is maintained or enhanced.
- Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tangata whenua (where these are known).
- Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaītai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.
- Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tangata whenua

or the relationship of tangata whenua and their customs and traditions with the coastal environment.

- | | |
|----------------|--|
| Policy IW 1 | <p>Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:</p> <ul style="list-style-type: none"> (a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaītai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori; (b) The role and mana of tangata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga; (c) The right of tangata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and (d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by tangata whenua and substantiated by pūkenga, kuia and/or kaumatua; and. (e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments. |
| Policy IW 2 | <p>Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.</p> |
| Advisory notes | <p>(1) This policy may apply to specific resources or areas of significance or special value to Maori in the coastal environment which are identified under method 19A(b) as those which require protection through the avoidance of significant adverse effects.</p> <p>(2) The Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS.</p> |

- Policy IW 3 To recognise the sensitivity associated with identifying sites, areas and resources of significance to Māori.
- Policy IW 4 The following shall be taken into account during decision-making:
- (a) The consistency of the proposal with any iwi or hapū resource management plan recognised by an Iwi Authority and lodged with the Regional Council that applies to the area affected;
 - (b) Recognition provided under any other legislation – including but not limited to: Treaty of Waitangi settlements; gazetting of Rohe Moana and Mātaitai under the Kaimoana Customary Fishing Regulations 1998 and the customary rights recognitions available under the Marine and Coastal Area (Takutai Moana) Act 2011 and
 - (c) The principles of Te Tiriti o Waitangi (the Treaty of Waitangi), recognising that these will continue to evolve and be defined.
- Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.
- Policy IW 6 Applications for coastal permits should include sufficient evidence of consultation with tangata whenua likely to be affected by the proposed activity or those who otherwise have tribal jurisdiction over the location of the proposed activity. Tangata whenua that may be affected by a proposal include those:
- (a) That have mana moana or mana whenua over an affected area;
 - (b) That are ahi kā;
 - (c) That are landowners;
 - (d) Groups that have recognition under other legislation; or
 - (e) Tangata whenua who have lived in an affected area for a long time.
- Policy IW 7 Where proposals are likely to have an adverse effect on the mauri of the coastal environment, then (where it is appropriate for consent to be granted) the consent authority shall consider imposition of consent conditions that

incorporate the use of mātauranga Māori based methods or cultural indicators that recognise and express Māori values to monitor the effects of the activity on the mauri of the natural and physical resources of the coastal environment.

- Policy IW 8 Tangata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).
- Policy IW 9 With regard to Policy IW 8, recognise that appropriate mitigation, remediation and offsetting may include, but is not limited to, the following:
- (a) Restoring and protecting areas identified by tangata whenua as being of significant cultural or biodiversity value; habitat for taonga flora and fauna; or that are mahinga kai sites; or
 - (b) Contributing resources (financial or otherwise) to environmental, social or cultural enhancement and improvement programmes run by affected tangata whenua; or
 - (c) Providing structures associated with customary activities or access to resources of cultural value.
- Policy IW 10 Include a review condition in coastal permits where necessary, to address unforeseen adverse effects on taonga, sites, areas, features or resources of significance or special value to tangata whenua, which may arise from the exercise of the consent.
- Policy IW 11 To avoid use and development which would restrict the access of tangata whenua to sites used for cultural practices, gathering kaimoana and areas of cultural significance in the common marine and coastal area, unless: (a) The restriction is consistent with one or more of the clauses (a) to (k) listed in Policy RA 4; or (b) Alternative access can specifically be provided for; or (c) The effects of the loss of access can be adequately remedied or mitigated.

Tauranga District Plan

13A.6.1.1 Policy – Recreation and Leisure Scheduled Sites

By ensuring that identified Recreation and Leisure Scheduled Sites at Mount Maunganui Golf Course, Papamoa Top 10 Holiday Resort, Mayfair Holiday Park, Tauranga Bridge Marina, Tauranga Marina, Tauranga Race Course and Tauranga Golf Course, Mauao Recreation Reserve, the Papamoa Domain, Elizabeth Street and 10 Salisbury Avenue are developed in a comprehensive manner in accordance with the Scheduled Sites Outline Development Plan (where applicable) while ensuring that all developments are sited and designed so that the adverse effects on the amenity values of the

surrounding environment are avoided or mitigated, including:

...

(d) Land scheduled as the Tauranga Bridge Marina, Tauranga Marina and Marine Park has regard to:

- i. The provision for limited commercial and non-commercial activities opportunities that relate to recreational marine activities;
- ii. The provision for recreation and leisure opportunities;
- iii. The retention of public access to and along the margins of the Tauranga Harbour;
- iv. Landscape planting to ensure the mitigation of visual effects on the surrounding environment, including the site's interface with the State Highway network;
- v. Traffic management measures to ensure the safe and efficient use of the transport network.

Annexure C Schedule 11 of the RCEP

Schedule 11 – Financial Contributions

- Para 1 The term ‘financial contribution’ is defined in section 108(9) of the RMA.
- Para 2 The RMA requires the Regional Council to specify in the Plan the circumstances when a financial contribution may be imposed, the manner in which the level of contribution that may be imposed will be determined, and the general purposes for which the contribution may be used.
- Para 3 Where the Regional Council grants a resource consent under the rules in this Plan, it may impose a condition requiring that a financial contribution be made for the purposes specified in the Plan. The Regional Council does not require financial contributions as ‘development impact fees’ as is the case with city and district councils. Financial contributions will not automatically be applied to any activity where a resource consent is required. Financial contributions are available to remedy, mitigate or offset the adverse effects on natural and physical resources that cannot otherwise be avoided, remedied or mitigated. Section 108(10)(a) of the RMA states that a financial contribution may be for the purposes specified in the plan, including the purpose of ensuring positive effects on the environment to offset any adverse effect.
- Para 3A If adverse effects can be appropriately avoided, remedied, mitigated or, offset, and this is identified in a resource consent application, then financial contributions will not be required. However, the Regional Council may require financial contributions or a contractual agreement if mitigation or offsetting is dependent on a third party.
- Para 4 The following provisions reflect the requirements of the RMA and set out:
- (a) The circumstances when financial contributions may be imposed.
 - (b) The purposes for which financial contributions may be required and used.
 - (c) The manner in which the amount of the contribution will be determined.
 - (d) Matters that the Regional Council will have regard to when deciding whether to:
 - (i) Impose a financial contribution,
 - (ii) The type of contribution, and
 - (iii) The amount of any contribution, and the general provisions that would apply.

Circumstances and purposes

Table 1 Circumstances and Purposes of Financial Contributions.

	Circumstance	Purpose
1	Protecting Aquatic Habitats of Indigenous Species Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on any ecosystem values (aquatic habitats of indigenous fish species and spawning areas).	To restore or enhance aquatic habitats at the site, or to provide an offset or environmental compensation by restoring or enhancing aquatic habitat characteristics at another suitable location where avoiding, remedying or mitigating adverse effects at the site is not practicable or effective. To provide for research and/or protection to enhance marine habitats.
2	Protection of Wetlands Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on any ecosystem, water quality, water quantity, soil conservation or flood mitigation values of a wetland.	To: 1 Offset effects by enhancing another suitable wetland of similar habitat where such a wetland is available; 2 Offset effects by creating a new wetland at an appropriate site; or 3 Enhance another part of the wetland that is adversely affected, including if appropriate, cost associated with maintaining the original size of the wetland.
3	Protection of the Environment from Stormwater Discharges Where a resource consent is granted for an existing stormwater discharge that does not meet environmental standards in this Plan, where it is not cost-effective or practicable to upgrade existing stormwater system, and the discharge is likely to cause or contribute to adverse effects on any ecosystem, or water quality of the receiving environment.	To provide on-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the stormwater discharge.
3A	Protection of water quality for public use and kaimoana gathering Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on public use of the CMA or on kaimoana and related ecosystems.	To provide on-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the discharges.
4	Protection, Restoration or Enhancement of beds or margins of harbours and estuaries Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on the bed or margins of a harbour or estuary.	To mitigate or offset the adverse effects of the activity by protecting, restoring or enhancing harbour or estuary beds and margins, including, but not limited to, maintenance and planting of vegetation, sediment replenishment, erosion protection works, fencing, and including contribution to such measures elsewhere in the same general locality.
4A	Protection, Restoration or Enhancement of beds in the open ocean Where the activity for which a resource consent is granted is likely to mine the seabed or cause or contribute to adverse	To provide off-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the disturbances.

	Circumstance	Purpose
	effects on the benthic environment and/or water quality.	
5	Public access to and along the coastal marine area (CMA) Where the activity for which a resource consent is granted will restrict or prevent existing legal or lawful public access to or along the CMA, except where such restrictions are necessary in accordance with Policy 19(3) NZCPS.	To provide for alternative public access in the vicinity of the activity or at another similar location.
5A	Exclusive occupation of space	To enhance public access or facilities in another similar location.
6	General Works Where the activity for which a resource consent is granted will cause or contribute to adverse effects on the environment which will not be adequately mitigated by any of the types of contribution described elsewhere in this section.	To provide works for the purpose of offsetting the adverse effects of the activity, including protecting, restoring or enhancing natural and physical resources elsewhere in the same general locality.
7	Structures in the coastal marine area Where the structure may cause a risk to navigational safety or public health and safety or cause adverse effects on the environment if abandoned, damaged or derelict.	To provide for: 1 The removal of abandoned or derelict structures; 2 The reinstatement of the environment; and 3 Any emergency repairs or rescue undertaken by the Regional Council on behalf of the consent holder in the event of any part of the structure breaking loose or causing a potential navigational hazard.

Amount of contribution

Para 1 The amount of financial contribution must be an amount determined on a case-by-case basis by the Bay of Plenty Regional Council to be fair and reasonable. The amount must not exceed the reasonable cost of funding positive environmental effects required to offset the net adverse effects caused directly by the activity.

Para 2 For the purposes of this section, 'net adverse effects' means a reasonable assessment of the level of adverse effects after taking into account:

- (a) The extent to which significant adverse effects will be avoided, remedied or mitigated by other consent conditions;
- (b) The extent to which there will be positive environmental effects from the activity which may offset any or all adverse effects; and
- (c) The extent to which other environmental compensation is offered as part of the activity which may offset any or all adverse effects.

Matters to be considered for financial contributions

- Para 1 In deciding whether or not to impose financial contributions, the types of contribution and their value, Bay of Plenty Regional Council will have particular regard to the following matters:
- (a) Financial contributions shall be for the purpose of avoiding, remedying, mitigating or offsetting adverse effects on natural and physical resources.
 - (b) Financial contributions must be used to avoid, remedy, or mitigate or offset adverse effects of the same type as those caused or potentially caused by the activity for which consent is sought.
 - (c) Preference shall be given to the use of financial contributions at, or close to, the site of the activity for which consent is sought. This shall not prevent the use of financial contributions at other locations when appropriate or agreed between parties to the application.
 - (d) Financial contributions will only be required when:
 - (i) The avoidance, remedy or mitigation of adverse effects could not be practically achieved by another condition of consent, or
 - (ii) A financial contribution would be more efficient than another condition of consent in achieving the avoidance, remedy or mitigation of adverse effects, or
 - (iii) A financial contribution is agreed by parties to the application to be the best outcome to avoid, remedy, mitigate or offset adverse effects on the environment.
 - (iv) The financial contribution is for the purpose of mitigating or offsetting adverse effects on natural and physical resources.
 - (e) An assessment as to whether a financial contribution is appropriate to the activity will be made on a case by case basis.
 - (f) Preference will generally be for a financial contribution of money, except where land may be more appropriate.
 - (g) The value of the contribution will be the actual and reasonable costs of measures required to offset the residual adverse effects that are unable to be avoided, remedied, or mitigated.

General Provisions

- Para 1 In imposing a financial contribution, the following general provisions will apply:
- (a) All financial contributions shall be GST inclusive.
 - (b) Where the financial contribution is, or includes, a payment of money, the Regional Council may specify in the condition:
 - (i) The amount to be paid by the consent holder or the methods by which the amount of the payment shall be determined;

- (ii) How payment is to be made, including whether payment is to be made by instalments;
 - (iii) When payment shall be made;
 - (iv) Whether the amount of the payment is to bear interest and, if so, the rate of interest;
 - (v) If the amount of the payment is to be adjusted to take account of inflation and, if so, how the amount is to be adjusted;
 - (vi) Whether any penalty is to be imposed for default in payment and, if so, the amount of the penalty or formula by which the penalty is to be calculated.
- (c) Where the financial contribution is, or includes, land, the value of the land shall be determined by a Registered Valuer mutually agreed upon by the Regional Council and the resource consent applicant. In granting a consent, the Regional Council shall give reasons in its decision for its assessment of the value of the land.
- (d) Where the financial contribution is, or includes, land, the Regional Council may specify:
 - (i) The location and the area of the land;
 - (ii) When and how the land is to be transferred to, or vested in the Regional Council.