

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2012] NZEnvC202

**IN THE MATTER** of an appeal pursuant to Clause 14 of the  
First Schedule of the Resource  
Management Act 1991 (the Act)

**BETWEEN** TRUSTEES OF TUHUA TRUST BOARD  
(ENV-2009-AKL-000161)  
Appellants

**AND** MINISTER OF LOCAL GOVERNMENT  
Respondent

Hearing: At Tauranga, 16 – 18 July (including site visit)

Court: Environment Judge J A Smith presiding  
Environment Commissioner H A McConachy  
Environment Commissioner J R Mills

Appearances: Mr J P Koning for the Trustees of Tuhua Trust Board (**the Trust Board**)  
Mr K J Stephen & Ms J S Andrew for Minister of Local Government  
(**the Minister**)

Date of Decision: 19 September 2012

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**DECISION OF THE ENVIRONMENT COURT**

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A. The planner for the Minister together with the planners for the Trustees and Mr Rolleston are to consult with a view to finalising the wording of the Plan to incorporate the recommendations of this Court, including

1. An introductory statement (preferably in Te Reo) identifying the Trustees as holding the kaitiakitanga for the island and holding rangitiratanga in respect of it.
2. Identifying the Trustees' ongoing involvement to reach the current natural state of the Island and the introduction of rare and endangered New Zealand flora and fauna.

And that as a result the Trust Board is to be given the maximum level of flexibility possible commensurate with health and safety obligations;

B. The plan is to provide building restrictions within the coastal setback, as follows:

1. Elsewhere than in Opo Bay, a setback of 35m from the top of the escarpment as per lines shown on diagrams.
2. At Opo Bay, to achieve a balance of the following:
  - a. General setback of no less than 20m from the top of the escarpment;
  - b. A foreshore construction zone in which buildings can be constructed between the yellow line shown on the Lysart diagram annexed, extrapolated along the Bay at the same contour and no less than 10m from the toe of the active escarpment. Buildings in this foreshore construction zone are permitted provided:
    - i. There is a minimum floor level from datum of 6.5m, and



- ii. That the building is designed to minimise wave resistance from wave run-up, while maintaining building integrity,
- OR**
- iii. otherwise by providing a specific engineered design either in Opo Bay or upon the escarpment.
- C. Making a series of minor amendments to make it clear that the rules apply over the whole island (there is no development zone).
- D. Such provisions should be finalised between the parties within 60 working days. In the event that these cannot be agreed, each party is to provide their version, together with their reasons to the Court within a further 10 working days. The Court will then issue a final decision adopting or modifying the wording.

## REASONS FOR DECISION

### Introduction

[1] Tuhua<sup>1</sup> is unusual in many respects. Not only is it unusual geographically, being a rare source of obsidian in the North Island, but it has been little modified as a result of European colonisation. It largely remained in Maori hands throughout the colonial and post-colonial period, and more recently, it has become entirely owned by Maori interests who operate through the Trust Board known as the Tuhua Trust Board.

[2] The Trustees have undertaken their duties in a diligent fashion. In partnership with DOC, they have provided a pest free island with few, if any, exotic plants. The majority of the island is rugged and accessible only by walking track, and to our knowledge this area shows little sign of human activities that were undertaken here in the past.



<sup>1</sup> Also known as Mayor Island

[3] At the southern end of the island between Tokimataa Point and Waikawa Point, from Omapu Bay to the east and Opo Bay to the west, there has been occupation for a long time. This area includes a number of fortified pas and extensive cultivation areas. The last permanent resident on the island left in 1912.

[4] Annexed hereto and marked **A** is a map showing the whole of the island, and marked **B** is a map showing a much more detailed aerial of the Opo Bay. The area to the south of Opo Bay is generally referred to as the Panui and consists of a steep escarpment of mostly rock, on top of which is a large relatively flat area, previously occupied as both pa and cultivated area.

[5] Between Opo Bay and Omapu Bay, there is a large transverse defensive ditch connecting the two beaches. The entry to this from Opo Bay is difficult and steep, but nevertheless, marks this area off.

[6] To the north of this area is an area expanding out with beach to the east and west. This area seems to be sedimentary gravels and sands, and active erosion can be seen on both coasts particularly in Opo Bay. This consists of further escarpments of these sedimentary sands, perhaps up to 35m high which are actively eroding.

[7] Behind Opo beach there are several valleys which run some distance into the surrounding land and provide an access track from Opo Bay to the balance of the island. As can be seen on Annexure B, there is a connection point between the tracks going to the east, west, and south of the island just behind Opo beach.

[8] In addition to general cultivation, there is no doubt that Maori found and worked the obsidian to create cutting surfaces which were then used and traded in pre-European times.

#### **THE HISTORY OF THE ISLAND**

[9] It is not necessary for us to traverse the history of the island in any particular detail. This was done in various Treaty of Waitangi decisions and has also been the subject of extensive information from the parties.



[10] In short, the island was originally confiscated after the NZ Wars, but then returned. There was then indirect pressure placed for the sale of portions on the island, but very few shares were sold. Eventually, after WWII, these shares were handed back to Maori. Since that time the Trust Board has operated to protect the interests of the beneficial owners and exercise kaitiakitanga in respect of the island itself.

[11] The native forestry on the island has remained entirely intact, and the southern areas which were previously cultivated have reverted largely to native species, although these are successional, with evidence of larger trees continuing to grow.

[12] In recent years a partnership with the Department of Conservation (DOC) has led to the introduction of a number of endangered or threatened species. These species have thrived on the island, and during our site visit the Court saw tui, kereru, and no less than four toutouwai within close proximity of the visiting party. The island has been predator free for some considerable time, and because of its distance from the coast re-infestation is difficult. Nevertheless, the Trust Board and DOC maintain vigilance by inspecting all boats, packs and visitors to the island to check that no vermin are re-introduced. Trapping is ongoing to detect any pests which escape into the area.

[13] The Minister of Local Government became the local authority in respect of this island from 1991. No particular steps were taken in respect of an island plan in the first decade. It appears that the reason for the Minister to consider one related to the Court's comments in relation to Motiti Island, an island also administered by the Minister. Despite the decision *Berkett & Ors v Minister of Local Government*<sup>2</sup> in 1997, no particular action seems to have been taken until well after 2000.

[14] Mr D W Riezebos gave evidence for the Minister and advised that he was the Manager of the Local Government Services Department at the department from 1997 to November 2009. He indicates in his evidence that from January 1997, the department was aware of the requirements of the Act, that a District Plan for Tuhua should be prepared.



[15] Referencing of the *Berkett* decision by the Minister is oblique, but it is clear that the department did not immediately take steps to implement a Plan. Mr Riezebos says:

It discussed with the Ministry for the Environment what type of plan might meet the needs of Tuhua and the department looked at existing plans from other districts that might be able to be used as a model as models for a plan for Tuhua e.g. those for the Chatham Islands and for the Hauraki Gulf Islands in Auckland City. An attempt was made to prepare a district plan in house with the assistance of staff member who had worked as a planner for local authorities. She was not, however, available to work on the plan on an ongoing basis and the in-house project was halted. [sic]

[16] As a result, in 2004 the department, on behalf of the Minister, put the preparation of the District Plan to competitive tender.

[17] In cross-examination before the Court, Mr Riezebos acknowledged that no consultation was undertaken either prior to the decision to contract out the preparation of the District Plan in 2004, nor to his knowledge, by the department since that time. Effectively, the Minister relied entirely upon consultation by the contractor (in this case BECA Carter) to meet the Crown obligations under the Treaty of Waitangi and consultation obligations of the RMA directly.

#### **The Need for a Plan and consultation**

[18] It is fundamental to the argument of the Trust Board that they did not consider that there was any need for a Plan, and furthermore, that the Minister did not consult with them, particularly prior to the preparation of a Plan.

[19] Section 9 of the Act controls the use of land. For national environmental standards, regional rules and district rules, land cannot be used in a manner that contravenes those rules, unless allowed by resource consent or permitted as existing use, described in more detail in Section 10 of the Act.

[20] Of course, certain activities, including subdivision of land, uses of the coastal marine areas, lakes and rivers, and of water generally, mean that for practical purposes the absence of a Plan will mean that these activities are at least innominate and therefore are a discretionary activity (or may in certain circumstances be prohibited, see Section 14(2) of the Act). However, with the exception of subdivision, land uses are generally allowed unless there is some constraint imposed by a Plan rule.



[21] Mr R J D Ake put the matter bluntly:<sup>3</sup>

[6] ... This PDP seriously impedes the ability of the owners to develop Tuhua. The PDP sets aside a small "reservation" and reserves the bulk of Tuhua for conservation purposes.

[22] Mrs M Williams, the chair of the Trust Board, states:<sup>4</sup>

58. ... the Trust has always believed that the proposed Tuhua district plan ("PDP") places limitations and restrictions on future development on Tuhua, particularly for Opo Bay. The Trust addressed these issues in its submission to the hearing Commission which is attached as Appendix L.

[23] In short, her position is:

[a] That the island is in an extremely good condition at this current stage without any pests, and with an attached marine reserve. It has achieved these sustainable management outcomes without intervention of a plan;

[b] As sole owner of the island, nothing can occur on it unless the Trustees agree and it is for long-term benefit of the owners. Given their duties of rangatiratanga and kaitiakitanga, it is most unlikely that significant development would occur unless there were significant benefits to the owners as a whole, and the proposal otherwise met the ecological and kaitiakitanga principles; and

[c] There is no issue as to the proper management of this island by the Maori owners or the Trust Board, and plan intervention is unnecessary and could be costly.

The Minister and his witnesses were at pains to point out that they acknowledged the ongoing management of the island by the Trust Board, and the excellent condition of the island.

[24] It appears that the Minister generated this Plan as a result of his view that the same was required under the Act, based upon the decision of the Court in *Berkett &*



Ake, EIC, at [6]  
Williams, EIC, at [58]

*Ngahau v Minister of Local Government.*<sup>5</sup> The case related to an application for subdivision on Motiti Island, another island under the control of the Minister. The decision itself does not seem to state any requirement for a District Plan to be introduced, but rather says:<sup>6</sup>

... Those terms of consent it will be seen are intended to be on a basis whereby reasonable time would be allowed for consideration to be afforded to whether such a plan should be introduced in promotion of the Act's purpose and for the plan's promulgation as appropriate. In the absence of environmental management rules and guidelines applicable to the island at this stage, we consider it appropriate to set limits to development on an interim footing, bearing in mind the need to have particular regard to kaitiakitanga under s.7(a) of the Act, and to recognise and provide for the matters contained in s.6(e) ...

... Mr Frenz commented that the promotion of a district plan for the island would not be anticipated to run counter to the principles of the treaty, in that those principles would be required to be taken into account. In the plan itself he cautioned, however, that "the degree of urgency (in introducing a plan) should be tempered with the need to undertake full consultation and due consideration of the other principles".

We do not consider that by granting a consent to the application on the terms later indicated, any claims of Maori interest to either the Waitangi Tribunal or to the Government directly will be prejudiced ...

[25] In this regard the requirement to promulgate a District Plan is not as clear as suggested by Mr Stephen for the Minister. Nevertheless, if one is to be promulgated, the primacy of the Treaty of Waitangi is clear, even in this decision. Where all of the land is owned and operated on behalf of the beneficiaries by a Maori Trust Board, such obligations must be paramount.

#### **The Crown's Obligation to Consult**

[26] Mr Stephen properly acknowledged that the Minister, as an entity of the Crown, does have an obligation to comply with the Treaty of Waitangi in promulgating a plan for the District. In this respect it is unique, given that other local authorities are not the Crown. In doing so, it should have been very clear to the Minister that the obligations to consult under the Treaty of Waitangi were paramount. Section 36A of the Act does not apply to plan changes or the promulgation of plans, and therefore can be discounted for current purposes.



[27] The Crown has an obligation under Section 35A(2)(a) of the Act to:

- (a) ... provide to each local authority information on—
  - (i) the iwi authorities within the region ... and
  - (ii) any groups who represent hapu for the purposes of this Act ...

[28] Clearly the Trust Board is a group that represents hapu in a district for the purposes of the Act, in this case Tuhua. In respect of whether it constitutes an iwi authority, Section 2 of the Act defines this as:

**iwi authority** means the authority which represents an iwi and which is recognised by that iwi as having authority to do so

[29] Given that Tuhua is a separate district, we tentatively conclude that the Trust Board is the iwi authority within that district, i.e. Tuhua being the subject of the plan.

[30] Nevertheless, we conclude that the Minister in exercising his obligations to prepare a Plan in this case was obliged to consult with the Trust Board as the tangata whenua of the area, and with the relevant iwi authority being the Trust Board. There was no evidence given to us that the Minister (as distinct from BECA Carter) consulted with any other Māori group or body during the preparation of the Plan. Schedule 1 Clause 3(f) is mandatory.

[31] The question for current purposes is whether or not there is an obligation to consult with the Trust Board, prior to the decision to contract out the work to prepare the Plan. It is acknowledged by the Minister that such consultation did not occur, and we felt to the extent that there was any dispute over this (which we do not believe there is) we accept the evidence for the Trust Board that there was no consultation prior to BECA Carter being selected as the contractor.

[32] In fact, it appears that prior to that, the Minister had attempted to promulgate a plan within-house. Again, this was without any consultation with relevant iwi or hapu.

#### **Information Unavailable to the Minister because of Failure to Consult**

[33] Mr S W Rolleston, who is a trustee for the Trust Board and also a senior planner, prepared an honours dissertation in respect of a project on Tuhua. This appears to have



been prior to 2004. Mr R Coles, the planner called to give evidence for the Trust Board, completed a planning project on Tuhua and the legal framework that applies to that island, as part of his 4<sup>th</sup> year papers in 1992. Either of these persons may have been able to work with the Trust Board and the Crown to consider whether a plan was necessary.

[34] We also acknowledge that the question as to whether a plan was necessary for the island is one which needed to be considered (this is noted in *Berkett*), but neither the Trust Board or its members were not consulted in any way.

[35] The Court has received detailed joint submissions on the consultation issue after the hearing. The Minister does not suggest that it delegated powers to consult with BECA Carter, but rather that it utilised a contractor in attending to its functions in respect of the plan. This included the contractor assisting the Minister in fulfilling consultation under the Treaty and the Act. The Crown asserts that all decisions were made by the Minister and that the contractor briefed the Minister.

[36] We consider that the Minister failed to consult about whether a plan was required for Tuhua. We are concerned that there may have been a duty for the Minister to meet *kanohi ki te kanohi* (face-to-face) with the representatives for the *iwi* (in this case, the Trustees) at the least. We are in no doubt that the owners and trustees of Tuhua saw this failure as a slight to their *mana*,

[37] We are not empowered or required to reach conclusions on whether there is a breach of the Treaty of Waitangi. However, we do accept that the appeal process enables us to consider the issues comprehensively, including the Treaty principles. In this case the initial disengagement by owners and some Trustees from discussion about the Plan cannot be seen as mutual respect. Both parties have a duty to engage, discourse and listen. The initial report of a meeting between some residents and Trustees to discuss a plan appears to have been interpreted by the Minister's contractor as disengagement rather than a need for the Trustees to meet the Minister face-to-face.

[38] We consider that this misunderstanding by both parties led to the late involvement of the Trustees after this appeal was filed.

[39] It is not for us to find as to whether or not these failings constitute a breach of the Treaty. For current purposes, the failure to consult prior to the preparation led to



considerable difficulty in engaging the Trust Board or its members with consultants appointed by the Minister. In particular, it seems to have led to strong opposition to there being any plan, and a view that this was a further repetition of previous offences by the Crown against the owners of the island. This made the task of BECA Carter, retained to undertake the plan preparation, particularly difficult.

[40] It is clear that BECA Carter is not the Crown. We are unclear whether the Crown can contract out all or any of the functions of consultation. To do so seems to undermine the principle of partnership and mutual benefit. If Plan changes and submissions are considered through the filter of a third party, the Crown's duties could be overlooked.

### **Consultation during the Plan Proposal**

[41] We accept the evidence of Mr Frenz and Mr Riezebos that during the process of preparing the Plan, BECA Carter sought to consult with both the Trust Board and the beneficiaries from time to time. Further, the Minister went on to pay the costs of Mr Rolleston to assist the Trust Board and Mr Coles, as a planner to also assist the Trust Board.

[42] We do not accept any suggestion that the views of Mr Frenz, or in fact the Minister, were pre-formed after the plan process commenced. It is correct that the model has moved to become increasingly more liberal as time has gone on. However, our view is that the Crown-appointed planners would have started from the general position of management and control, and have gradually accepted the Trust's position that the Plan in this case should be as enabling as possible. That is an advantage and outcome of the consultation process that has occurred since the promulgation of the Plan and subsequent to the appeal being filed. It is part of the iterative process which has resulted in a much more balanced Plan.

### **THE CURRENT POSITION**

[43] Broadly, the Trust Board and the witnesses who gave evidence to this Court accept that the Proposed Plan is now significantly more enabling than it previously was, and that some limitations in respect of construction, both within the Opo Bay area and on top of escarpments, are justified on a health and safety basis. There is a difference between the parties as to the extent of that control.



[44] We are satisfied that the removal of the development area now means that the proposals apply over the whole island and do not provide any limitation to the Trustees in the event that they decide that development is appropriate elsewhere on the island.

[45] Essentially, it is intended that the setback from the escarpment be over the entire island. In practical terms, there are many areas where construction would still be virtually impossible because of the nature of the area and its accessibility. However, that is a matter for the Trust Board.

[46] In respect of Opo Bay, it is recognised that there are some special circumstances applying here, as follows:

- [a] There are existing buildings in Opo Bay;
- [b] Some of those buildings are in poor repair, but could possibly be upgraded or replaced;
- [c] It is the most accessible area of the island and may be suitable for land-based activities if the Trust Board thought that this was appropriate;
- [d] This is also the most appropriate area to access the escarpment area behind, and in particular, the Panui headland area; and
- [e] There are several buildings on the top of the escarpment above Opo Bay.

[47] Beyond these particular issues, the Trust Board's major concern reflects the way in which the Plan was constructed. There is a failure to recognise the centrality of the Maori ownership and the Trust Board to the island and its future. We agree with this complaint and have suggested ways in which chapters could be re-addressed and new portions added to provide the linkage to the Trust Board and the terms of the Plan.

[48] In particular, all the parties accept that the Plan should be as enabling as is possible to the Trust Board, commensurate with the duties to protect health and safety.

[49] Finally, there is a general concern that the Plan is not user-friendly enough. Mr Coles however accepts that considerable effort has been put into making the document as



accessible as possible. The only suggestion that could be made to improve it might be the use of flow-diagrams and summaries to assist parties in knowing the impact of the Plan in certain circumstances.

[50] Before moving to each of these complaints, we wish to look at the overall criteria of the Act. We will firstly examine the matter under Section 32 and then Part 2 of the Act.

### SECTION 32 OF THE ACT

[51] The s 32 evaluation must examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether, having regard to their efficiency and effectiveness, the policies, rules and other methods are the most appropriate for achieving those objectives.

[52] Annexed hereto and marked **C** is a copy of the District Plan provided to the Court after the hearing with recently included changes. Some changes were agreed after hearing and were not considered by the Court at hearing. It can be seen that the Objectives generally are to maintain and enhance the established character and amenity of the island. Objective 2.1.1 its *natural values and resources* including *flora, fauna and ecosystems*, and any *adverse effects of use*. The island's pest-free character is recognised in Objective 2.2.2.

[53] Objective 4.1.1 seeks:

To maintain and enhance the relationship of tangata whenua with their ancestral land, water, waahi tapu and other taonga and resources associated with Tuhua.

[54] Objective 5.1.1 seeks to protect people and property from:

... hazard events, such as erosion, landslip ... [etc]

[55] Objective 6.1.1 seeks:

To avoid, remedy or mitigate the potential for adverse effects arising from emergency events.



[56] There is a recognition at Objective 7.1.1 for: *economic activities* which can integrate with the *natural and cultural resources of the island* and *maintain ... the significant environmental and heritage values and unique location* may be appropriate.

[57] All of these objectives clearly fit in closely with aspects of the Act, essentially, Sections 5, 6 and 7, in particular. Health and safety of the population is clearly recognised under Section 5 of the Act, and of course the natural character of the island setting, the tangata whenua values, taonga etc, are all matters recognised under Section 6 and/or Section 7 of the Act.

[58] We accept that these matters simply make explicit what is already the case in any event, given the Maori ownership and control of the island. When we look at the Policies, Rules and Methods, it can be seen that these are to enable the maximum flexibility to the Trust Board, commensurate with maintaining and enhancing the existing condition of the island.

[59] Nobody suggested further improvements to these provisions beyond the matters we have already identified. We must keep in mind that the benefits of these provisions are relatively minimal, simply making explicit what is already implicit.

[60] On the other hand, there could be significant cost if it involved the Trust Board in having to obtain consents. When we look at the Rules and Methods generally providing for permitted activities, any activity that does not meet these criteria becomes discretionary. In our view, making most activities permitted is an appropriate approach given the ownership and control of the island by the Trust Board. This keeps costs for resource consents to a minimum except where public safety issues are concerned.

[61] When we look at the risk of acting or not acting, it is clear that the actions of the Trust Board to date have preserved and maintained the island to an extremely high standard and has been extremely protective of the environment. We acknowledge that if any development was to occur, it is likely to be only in circumstances where the Trust Board was satisfied that its kaitiakitanga and ecological outcomes can be achieved, while at the same time providing economic benefits to the members.

[62] The only aspect in which the Plan provisions may require further consideration is in relation to the building setback from the escarpment and in relation to Opo Bay. There



is both the risk of not acting, the potential for erosion or sea-level rise or wave run-up, compared with the benefit in economic terms to the iwi of being able to undertake building work with minimal control.

[63] We have concluded that provided we can reach an acceptable balance in respect of these issues, then this Plan does represent an appropriate approach with the Policies, Rules and other Methods being the most effective to achieve the overall objectives.

#### SECTION 290A DECISION OF THE COUNCIL

[64] We have had regard to the decision of the Commissioners but, as we have set out under *The Current Position*, the Plan before us has undergone further changes since that decision, even after the Court hearing, and these changes have been agreed by the parties. In particular the line constraining development around the current settlement has now been removed. As a consequence further analysis of building setbacks required further discussion. Although the Decision considered the kaitiaki role and rangatiratanga of the Trustees this is not recognised in the Plan itself, and in our view it should be.

#### PART 2 OF THE ACT

[65] It is clear that the Act is intended to enable people and communities, subject to certain limitations. In this case there is a single community, although there are wider interests of ecological habitat and fauna. For example, the aims to protect and enhance these aspects are held in common by the Trust Board and the general objectives for the island.

[66] We do recognise that the natural and physical resources are to be managed in a way and at a rate that provides for not only current but future communities, and in this regard the ability to generate some income should be encouraged, provided the overall values of the island can be maintained.

[67] In doing so, we conclude that the health and safety of people who may reside on the island, or stay there, must be accommodated within reason, by avoiding areas which are prone to erosion, slip, flooding, wave run-up or sea level rise. Nevertheless, we recognise in respect of Opo Bay itself, that there are tracks leading to higher ground to provide safety, and provided the building is built above wave, splash or run-up height,



then there is unlikely to be any danger to people provided the buildings are sound and provide minimum resistance to waves.

[68] In respect of the escarpment itself, we consider that there is the need to be cautious about the distance of the buildings from the escarpment, given the ongoing erosion, particularly around the Panui/Opo Bay area. In reaching an integrated decision on this matter, we have concluded that we should adopt Mr Cole's recommendation of a 35m setback for buildings on the general escarpment, with the exception of Opo Bay itself.

[69] In respect of the Opo Bay area, we note that the escarpment behind Opo Bay is somewhat more fragmented, given the number of valleys running from the coast inland. In those circumstances, if a building was no less than 20m from the top of the escarpment (which is generally somewhat lower also), we consider that there is little prospect of erosion undermining such a building. We consider that current development and use of the bay gives less prospect that there will be significant erosion of the escarpment toe. This is because buildings constructed protective works shield the toe of escarpment in Opo Bay.

[70] We now move to consider construction in Opo Bay itself. In that regard we consider that there should be provision for buildings that are at least 10m seaward of the active toe of the escarpment, but built at an adequate height above water level and outside the active splash zone of the bay. When we review the bay, there is a clear line where sands finish and where grass and trees commence. This is shown as a yellow line on a plan by Lysarght & Co, and arguably is either 4m or 5m above Mean High Water Springs (MHWS) or datum, depending on the view of the parties. A copy of the Plan is annexed as **D** and shows the lie and current position of buildings.

[71] Buildings that are behind this line appear to have largely remained intact, although those that have a floor level at the yellow line show signs of wave run-up. Those that are higher do not. Overall, we conclude that with an appropriate floor height above either reduced datum (RL) or MHWS, that these buildings could be safely occupied. Although they may be subject to wave run-up, provided the foundations were properly installed and provided minimal resistance to wave run-up, we do not consider that there is real risk to people.



[72] As to floor levels, there was a variety of views as to whether this should be 6m above reduced datum (RL), or 6.5m above MHWS. We leave the parties to discuss that figure, but we appreciate that it will need to include reasonable allowance for climate change over the next 50 years. Presently the default height is 6.5m above datum (RL).

[73] We see that the parties have agreed to remove a floor height control in Opo Bay. We do not agree with this approach. Buildings should be constructed to a reasonable height above wave action rather than trying to prescribe the building use. We also acknowledge that there should be the ability for a specific design to overcome the problems at Opo Bay, either in the bay itself or on top of the escarpment. And to that end, we conclude that construction could also be a permitted activity, provided there was a specific engineering design for the building to avoid wave damage, slips or erosion, and maintain health and safety in high wave conditions. This would enable the permitted activity status to be retained for all but the most extreme examples.

[74] In respect of the escarpment issue, we have concluded a setback of only 10m from the toe of the active slip is necessary because it was acknowledged that the sands tended to collapse in nearly upright configurations, with small slivers being dumped to the bottom. From observation, these seem to occupy areas, mostly of a few metres, with larger ones perhaps of areas up to 5m plus trees.

[75] We therefore conclude that the escarpment setback line should be 35m for the top of the escarpment, except at Opo, where there should be a 20m setback. On Opo beach there should be a construction zone between the contour line shown in yellow and 10m from the actual toe of the escarpment, in which buildings should be permitted if they meet the requirements discussed. If not, construction would fall to discretionary activity status.

[76] We note this conclusion clashes with the redrafted provision of Rule 3.3.6. We have reflected on whether the sleeping area provision distinction is valid. We conclude that our approach is preferable, namely:

- [a] Building above 5m contour (yellow line), but not within 10m of the toe of the escarpment;



- [b] A specific engineering design to avoid wave damage and avoid obstruction run if below 6m;
- [c] OR having a suitable floor height allowing for sea level rise i.e. 6.5m above datum and avoid resistance to wave run up (i.e. piles).

## OUTCOME

[77] We consider that we should issue an interim outcome. Although we are concerned at the failure of the Minister to consult with Maori prior to the letting of the contract for the Plan preparation, we acknowledge that the consultation during the preparation itself generally identified issues, and that these have been subject to iterative change through ongoing discussions. This does not address the issue that it was the Crown delegate (BECA Carter) who consulted and not the Crown.

[78] The Minister has continued to adopt changes recommended by BECA Carter since the time of the decision. The Plan now proposed for this Court is significantly improved from that originally promulgated.

[79] We consider that there are further minor improvements that could be made, in particular, new introductions to more clearly identify the role of tangata whenua and the Trust Board, and the reasons for the Plan being in the form that it is.

[80] We also consider that there may be some possibility of improving the usability of the Plan. There is no reason why the preamble information on statutory duty and the like should not be at the back of the Plan so that it opens with the expanded version of the purpose of the Plan. *The Existing Environment* which follows could also be in Te Reo Māori as a first step to a wider adoption of Te Reo. Formatting is also in need of attention, and flow diagrams and illustrations may help readability. It would be helpful to add Orangatanga to the definitions. We also have promulgated slightly different rules to those proposed in respect of the escarpment areas and within Opo Bay, and the parties will need to consult to identify the positions of those on the relevant plans.

[81] In the circumstances, we consider that the Plan is generally appropriate with those changes, and we direct:



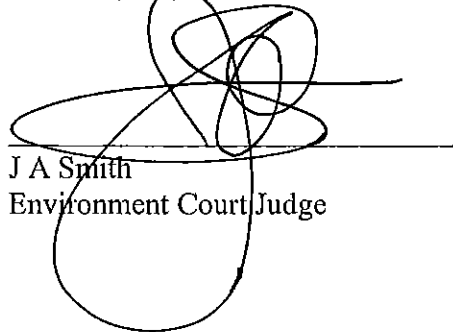
- [a] That the Minister is now to undertake consultation through its planner, with the planner for the Trust Board and Mr Rolleston to finalise those provisions over the next 60 days;
- [b] In the circumstances, our tentative view is that those costs should be met by the Minister. If not, they could constitute applications for costs in their own right;
- [c] If the parties cannot reach agreement, then each party is to forward its provisions with reasons for the differences within a further 10 working days and the Court will make a decision; and
- [d] This may be a rare case where the Trust Board costs should be met in full. Any application for costs is to be filed at the same time. Any replies, 10 working days thereafter.

DATED at AUCKLAND this

19<sup>th</sup>.

day of September 2012

*For the Court:*



J A Smith  
Environment Court Judge

