

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2020] NZEnvC 070

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s 120 of the Act

BETWEEN AUCKLAND COUNCIL
(ENV-2017-AKL-190)
Appellant

AND AUCKLAND COUNCIL
Respondent

AND I INGLIS, M G GREEN & P SIMUNOVICH
DR P H MITCHELL & P MITCHELL
D & S HUNT
P & S LYNESS
G SHAW
P & J STANSFIELD
P KIBBLEWHITE
Section 274 Parties

Court: Environment Judge D A Kirkpatrick
Environment Commissioner K Prime
Special Advisor R Howie

Hearing: at Auckland on 6 – 10 May 2019

Appearances: J C Campbell and R J Wilson for Auckland Council as Applicant /
Appellant
D H Hartley and A F Buchanan for Auckland Council as Respondent
and for I Inglis, M G Green and P Simunovich
Dr P H Mitchell on behalf of himself, P Mitchell, D & S Hunt and P &
S Lyness
G Shaw on behalf of himself
P Stansfield on behalf of himself and J Stansfield
P Kibblewhite on behalf of himself
A G Webb as *amicus curiae*



Date of Decision: 27 May 2020

Date of Issue: 27 May 2020

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appeal is allowed and resource consents are granted to the Auckland Council in respect of its amended proposal.

B: The Applicant and the Respondent are directed to confer and then file and serve a set of draft final conditions **by 12 June 2020**, either as agreed between them or with any remaining disputed matters identified and explained in an accompanying memorandum, together with the relevant plans and drawings referred to in those conditions.

C: Any other party may file and serve their comments on the draft final conditions **by 26 June 2020**.

D: The Court will review the draft final conditions and any comments, and will then either issue a final decision or convene a conference to discuss how any disputed matters may be resolved.

E: Costs are reserved.

REASONS

What this case is about

[1] The esplanade reserve in the middle section of Ōrewa Beach is badly affected by erosion from storm events. Public use of the esplanade reserve is hindered or even prevented by this erosion. This case is about a proposal to construct a seawall to protect the reserve and to provide a formed walkway along it. The issues arising from the application for resource consents in respect of the proposal include whether such a seawall is the most appropriate method of responding to the erosion and whether the designs of the seawall and of the pathway are suitable taking into consideration their effects on users of the beach and the reserve and on owners and occupiers of properties



adjoining the reserve.

Introduction

[2] The Auckland Council (through its Community Facilities department) (the **Applicant**) applied for resource consent for works associated with a walkway on, and the protection of, the portion of the esplanade reserve which runs between Kohu Street and Marine View at Ōrewa Beach. This included the construction of a walkway, an adjacent sea wall and associated access structures. The proposal also relied on utilisation of an existing coastal permit for sand transfer from the southern end of the beach to maintain average sand levels in front of the seawall.

[3] The Auckland Council (by its hearing commissioners) (the **Respondent**) heard the application and submissions both for and against the proposal and refused to grant consent. The Council as Applicant then filed an appeal under s 120(1)(a) of the Resource Management Act 1991 (**RMA**) against its decision as Respondent.

[4] Ōrewa Beach is a dominant part of the environment at Ōrewa and makes a significant contribution to its amenity values. The proposed walkway and associated seawall is accordingly of concern to a number of residents of Ōrewa: some support the proposal and some oppose it. After the refusal of consent by the Respondent and the lodging of the appeal by the Applicant, notices under s 274 RMA to become party to the appeal were lodged by a number of people who are owners of and residents at properties adjoining the esplanade reserve along this portion of Ōrewa Beach.

[5] After the processes of mediation and conferencing of expert witnesses and consequential amendments to the proposal, as described in detail below, the positions of these parties coalesced into those in support of the amended appeal, being Messrs Green, Simunovich and Inglis; Dr and Mrs Mitchell; Mr and Mrs Lyness; and Mr and Mrs Hunt; and those in opposition, being Mr and Mrs Stansfield; Mr Shaw; and Mr Kibblewhite.

Background

[6] The region of Auckland is subject to a combined plan under s 80 RMA called the Auckland Unitary Plan (**AUP**). This plan includes the Auckland Regional Policy Statement, the Auckland Regional Coastal Plan, the Auckland Regional Plan and the Auckland District Plan. Notwithstanding the combined nature of the plan, the provisions



of the document that are the regional policy statement, the regional plan, the regional coastal plan, or the district plan, as the case may be, must be clearly identified so that users of the plan and consent authorities know which provisions may apply to which parts of the region.

[7] The site on Ōrewa Beach starts in the south at Marine View (previously named Florence Avenue) which is at about the mid-point of the Beach and ends about 580 metres to the north just beyond Kohu Street. Most of the land is vested in the Respondent as local purpose (esplanade reserve) and zoned, for the purposes of that part of the AUP which is the district plan, as Open Space – Conservation, with portions at Kinloch and Remembrance Reserves zoned Open Space – Informal Recreation and Open Space – Sport and Active Recreation respectively. To the east, for the purposes of that part of the AUP which is the regional coastal plan, the coastal marine area (**CMA**) is zoned as General Coastal Marine.

[8] The boundary between the district and the CMA, as those terms are defined in s 2 RMA, is the line of mean high water springs (**MHWS**). In a case like this it is important to bear in mind that this line is not fixed but movable as a result of geophysical forces and, in more recent times, climate change. In fact, the line of MHWS in this area runs within the area zoned open space by the district plan provisions of the AUP, bringing that area below MHWS into the CMA so that the provisions of the Regional Coastal Plan apply to it.

[9] Ōrewa Beach is exposed to easterly storms and subject to erosion, or at least to littoral movement of sand, particularly in storm events. It is also subject to the effects of climate change and sea-level rise. As well, various things have been done by people directly to this environment over many years which have had substantial effects on the environment. These include alterations to the mouth of the Ōrewa River estuary to reduce the rip in that area and subsequent construction of a groyne at the southern end of the beach to stem sand migration into the estuary.

[10] There is now an annual programme of relocating sand which has moved down and along the beach. This programme is the subject of an existing resource consent to take 25,000 m³ of sand each year from the southern part of Ōrewa Beach and use 10,000 m³ to replenish the beach in front of Ōrewa Reserve (to the south of the subject area). The balance of 15,000 m³ is available for replenishment of other parts of the beach and would be available to replenish the subject area.



[11] The Respondent and its predecessor, the Rodney District Council, have developed a management strategy called the Orewa Beach Esplanade Enhancement Project (**OBEEP**). The strategy includes different solutions for different parts of the beach depending on the particular challenges and opportunities in different locations. The strategies range from hard protection structures to soft options including, to a limited extent, managed retreat of structures and activities from the sea.

[12] The Hibiscus and Bays Local Board of the Respondent considers that the problem of erosion of the existing esplanade reserve between Kohu Street and Marine View is among its highest priorities. It is also concerned that pedestrian access along this part of the beach is inadequate at all tides and for people with limited mobility. It has previously sought and been refused consent for works in this area. Impetus was added following a severe storm in December 2013.

Scope of Application

[13] In 2017 the Applicant prepared, with expert advice and assistance, a plan to create a concrete walkway along this portion of the esplanade reserve, above and protected by a grouted rock revetment seawall, with further sand transfer. The seawall structure was proposed to straddle the line of MHWS. This plan formed the basis of an application to the Respondent as consent authority for the resource consents which the proposed works required under certain district and regional rules in the AUP.

[14] The proposed works are described in the hearing commissioners' decision as being:

- construction of a formed footpath along the esplanade reserve including landscaping;
- an undulating seawall along the length of approximately 600m of coastline from Kohu Street to Marine View with a short interruption at Kinloch Reserve;
- a ramp and stairs leading to the beach at the end of Kohu Street.
- two sets of stairs located on both the northern and southern sides of Kinloch Reserve;
- replacement of the existing footbridge over the channel at Kinloch Reserve and construction of a timber groyne at the mouth of the channel;
- naturalisation of the dune at Kinloch Reserve;



- a ramp and stairs at Remembrance Reserve;
- maintenance of the current access arrangements to the beach at Marine View (via the existing boat ramp);
- extension of the existing stormwater outfalls through the seawall at Kohu Street and Remembrance Reserve; and
- allowance for increasing the height of the seawall as sea level rise occurs.

[15] As originally applied for, the proposal required resource consents under ss 9, 12 and 15 RMA and the relevant parts of the AUP in respect of:

- buildings and working areas in open space zones;
- earthworks in open space zones and within historic heritage overlays;
- sediment protection areas and significant ecological areas;
- works on and within the root zones of protected trees and removal of vegetation in open space zones;
- exceeding permitted noise standards;
- establishing a hard protection structure in an area subject to natural hazards and flooding;
- establishing erosion and sediment controls structures, including associated reclamation and diversion, in a stream;
- establishing a bridge on piles in a stream bed;
- structures in and occupation of the CMA; and
- diversion and discharge of stormwater.

[16] At the time of application, the Regional Coastal Plan in the AUP was not fully operative and so the previous Auckland Regional Coastal Plan still applied, but that jurisdictional factor did not substantially alter the nature of the resource consents required. We understand that the Regional Coastal Plan section of the AUP is now operative so we will not refer to the prior plan any further.

[17] As a single proposal where the elements requiring resource consents have common or overlapping effects, the application was considered on a bundled basis and assessed in the round rather than split up, possibly artificially, into pieces.¹ On that basis, the most stringent class of activity for which any consent was required was as a

¹ *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 579 – 580; *King v Auckland City Council* [2000] NZRMA 145 at [47] – [50].



discretionary activity and that was the overall activity class of the proposal..

Respondent's Decision

[18] The application was publicly notified and attracted 25 submissions, eight in support, 15 in opposition and 2 neutral. The application was heard by three hearing commissioners appointed by the Respondent and given delegated authority under ss 34 and 34A of the Act to make the Respondent's decision on the application. After a hearing, the hearing commissioners decided to decline consent for the reasons set out in their decision.²

[19] Those reasons, in summary, were:

- a) That Ōrewa beach is of key importance to the Ōrewa community in terms of its recreational and amenity value and of the social and economic wellbeing of the Ōrewa community and those who visit and use the beach.
- b) The premise for the Council's application is that a walkway/cycleway along the beach is necessary and that a seawall is required to protect that investment by providing long term protection for it and the esplanade reserve.
- c) On the basis of expert analysis, there is no urgent need for a seawall to protect the esplanade reserve but that there is an urgent need for the seawall to protect the proposed walkway/cycleway if that were to be constructed.
- d) There are other short and medium term solutions which would provide appropriate means of maintaining access to the CMA and which should be pursued before opting for measures such as the seawall with the inherent risk of major social and economic loss to the Ōrewa community as a result of damage to the beach.
- e) The proposal is inconsistent with the relevant objectives and policies of the statutory planning provisions including the clear policy directions of preserving the natural character of the coastal environment, seeking where practicable to rehabilitate and restore that character, and treating intervention by hard protection structures as a last resort given the risks associated with interference in coastal processes and the potential damage that can such interference can cause.

²

The decision does not appear to be with the hearing documents on the Council's website (as most resource consent decisions usually are) but is available at:

https://cdn.newsie.co.nz/files/localmatters/Env_Seawall_Orewa_Beach_Esplanade_Reserve_Decision_30_November_2017.pdf



- f) The proposal, while having some positive effects in terms of improved recreational opportunities and for some people improved access, would generate a number of adverse effects including on coastal processes, public access, natural character, landscape and visual and amenity values.
- g) The Council's proposal to build a walkway/cycleway along the esplanade reserve requires the space for and construction of a seawall which would be a hard protection structure for which there is no urgent need and which would have adverse effects now and in the future and would be, overall, inconsistent with the NZCPS, the AUP and Regional Coastal Plan and therefore would not promote the purpose of the RMA.

Applicant's Appeal

[20] The Applicant lodged an appeal against that decision. The grounds for the appeal were:

- a) The decision fails to recognise and provide for matters of national importance in terms of s 6 RMA, including, in particular, public access to and along the coast and the management of significant risks from natural hazards.
- b) The decision fails to have particular regard to matters under s 7 RMA, including the efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the maintenance and enhancement of the quality of the environment, and the effects of climate change.
- c) The decision is not consistent with the principle of sustainable management as set out in s 5 RMA, amplified by Part 2 and given substance and specificity by the New Zealand Coastal Policy Statement and the relevant regional and district plans.
- d) The works proposed by the application will achieve the principle of sustainable management as articulated in the policy and planning documents described above in that they will appropriately manage and protect against the risks of climate change in a manner that preserves and enhances public access to and along the coast while avoiding, remedying and mitigating the adverse effects commonly associated with works of this kind such as on amenity and landscape values.

[21] In response to a direction made on 29 May 2018 to provide further particulars of its grounds of appeal, including any disputed factual findings and specific reference to provisions on which it relied, the Applicant filed further particulars of its grounds of appeal



on 27 June 2018. Those particulars included that the decision:

- a) did not state key findings of fact on issues in contention or specify the plan provisions relied on;
- b) framed the task as assessing whether the rationale of the proposal was sound and attempted to identify the Applicant's motivation, contrary to law;
- c) dismissed or discounted the adverse effects anticipated to be addressed, including the risks of natural hazards, and the positive effects to be achieved, including the avoidance of mitigation of such risks and the improvement of the future environment;
- d) mistakenly recorded that a significant portion of the seawall would be in the CMA when only part of the toe of the wall, and no part of its above-ground structure, was to be in the CMA, and then relied on that mistake to misapply and give undue weight to the relevant plan provisions applicable in the CMA;
- e) wrongly concluded that the seawall would be vulnerable to or increase the risk of harm from coastal hazards and that the relevant plan provisions discouraged the use of hard protection structures;
- f) wrongly conflated risks due to storms and sea-level rise which the proposal was designed to mitigate and the effects of the proposed structure on coastal processes;
- g) wrongly concluded that the proposal would provide fewer access options to the beach than if the seawall were not present;
- h) wrongly prioritised private rights of access over public rights of access to the beach;
- i) wrongly concluded that the natural character of this part of the coastal environment would not be maintained by, among other things, placing undue weight on perceptual values and not taking into account values;
- j) wrongly concluded that the Applicant had not satisfactorily addressed alternative options, including by misunderstanding the evidence about alternative options; and
- k) erred in giving disproportionate weight to evidence of adverse effects on amenity values without taking account of the amenity values of the wider environment.



Pre-hearing processes

[22] A preliminary issue arose as to whether a local authority which is both the applicant for resource consent and the consent authority could lodge an appeal against its own decision. An *amicus curiae* was appointed at that stage to assist the Court by testing the issues arising in these circumstances. After full argument, the Court determined that the appeal could proceed.³

[23] While the Applicant remained steadfast in its position that the Respondent's decision was not correct, it participated in negotiations, including through Court-assisted mediation. As well as those negotiations, the experts engaged by the parties participated in conferencing facilitated by an Environment Commissioner. Real progress in narrowing or agreeing on issues was made by the experts on coastal processes through four conferences, culminating in broad agreements on a number of matters. These agreements led to amendments to the proposal as described below, including reducing the area covered by the proposed structure, significantly by pulling its location back so that it no longer straddled the line of MHWS and therefore no longer occupied any part of the CMA. These amendments were proposed by the experts to reduce or mitigate the adverse effects which such structures could have on coastal processes.

[24] As a consequence, consent under the Auckland Regional Coastal Plan and the Regional Coastal Plan part of the AUP were no longer required. As we will explain below, this not only changed the requirements for resource consent from those that had to be considered at first instance but also significantly altered the policy framework in which the remaining matters requiring land use consent under the district plan provisions are to be considered. Associated with that altered planning framework, the issues between the other groups of expert witnesses in the fields of landscape, recreation and planning were also substantially reduced.

The amended proposal

[25] The principal amendments to the original proposal, as presented to the Court, were:

- a) deletion of the rock revetment with a corresponding reduction in the area of the beach occupied by the seawall;

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Auckland Council v Auckland Council [2018] NZEnvC 56.



- b) increasing the sand levels in front of the seawall and requiring the levels to be topped up at regular intervals and if they fall below 1.8 m RL;
- c) inclusion of four additional monitoring points for determining the levels of sand on the beach and triggering placement of additional sand;
- d) redesign of the structure in accordance with design principles agreed on by the expert landscape architects during conferencing;
- e) removal of a 600 mm high upstand on the seawall to improve its appearance and decrease its effects on views;
- f) limiting the term of the land use consent to 35 years in recognition that the seawall may be an interim solution;
- g) including a condition for review of the consent conditions 3 years after the commencement of the consent and annually thereafter to address any erosion caused by the consent, any safety effects and the security of sand supply;
- h) adding a condition to adopt measures to manage conflict between different users of the pathway.

[26] As a further consequence of the amendments to the proposal and the reduction in the extent of differences among the experts, the Respondent changed its position in relation to its decision and ceased to oppose the amended application. Its counsel explained to us that in light of the outcomes of conferencing among expert witnesses and agreements among those experts, including those advising the Respondent, officers of the Respondent with delegated authority in respect of its position in this appeal had determined that the amendments adequately addressed the reasons for the decision, particularly in relation to adverse effects on coastal processes, landscape and recreation. Further, the Respondent considered that the amended proposal was consistent with the relevant planning framework and that it did not preclude the development of holistic adaptive management strategies for the whole of the beach.

[27] A consent authority may change its position in litigation in the same manner as any litigant, including in relation to an appeal from one of its decisions. While it is *functus officio* once it has made its decision on an application for resource consent and cannot change or undo its decision by itself, if there is an appeal it may change its position and present a case based on that changed position to the Court.⁴ If it does so, it should be

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Canterbury RC v Christchurch CC Decision C 113/2000 at [34], *Staufenberg Family Trust No 2 v Queenstown-Lakes DC* [2011] NZEnvC 383 and *J B Farms Ltd v Dunedin CC* Decision C 006/06.



transparent in its approach, provide reasons for its change of position at an early opportunity and make available as a witness any author of any report provided to the hearing of submissions or to the Council in reconsidering its decision. These things are necessary to assist interested persons to understand the change, to ensure that a satisfactory evidential basis for the change is available and to promote confidence in the consistent administration of the statutory planning documents. The Court does have the power to change or undo the decision as it has all the powers of the consent authority and may confirm, amend, or cancel a decision to which an appeal relates.⁵

[28] *Amicus curiae* advanced no concern about the Respondent's change of position. The Court is satisfied that the change in this case has been made in reasonable time, in a transparent manner and in a way which enables its position to be challenged by other parties.

[29] Notwithstanding this change in the position of the Respondent, other opponents of the proposal remained opposed and sought a hearing, as they were entitled to do. None of the parties who were opposed to the proposal were represented by counsel. In the absence of a represented contradictor, the Court retained the assistance of the *amicus curiae* who had participated in the earlier procedural hearing. Mr Webb discharged his duties as counsel in this role in an appropriate manner, calling expert witnesses who assisted us in understanding the effects of the amended proposal in terms of the relevant statutory planning documents.

Scope for amendment

[30] Mr Shaw, in his statement of evidence, raised the issue that a number of the differences between the proposal as applied for and considered by the Respondent's commissioners and as presented to us at the hearing of the appeal went beyond the scope of the application as publicly notified and therefore meant that the Court had no jurisdiction to consider them. Mr Stansfield supported this objection, submitting that the changes were neither trivial nor positive, would adversely affect beachfront residents and users of the esplanade reserve and had not been communicated to the public. He argued that, taken as a whole, the changes amounted to a change in the scope of the proposal which ought to have been the subject of public consultation. In the absence of that, the application should be declined.

⁵

Section 290 RMA.



[31] The amendments identified included:

- a) An increase in the depth of the foundations of the structure by 200mm;
- b) The addition of planting along the walkway and consequential movement of the walkway approximately half a metre landward;
- c) The addition of one or two sets of stairs and ramps;
- d) A timber groyne;
- e) A longer construction period;
- f) Greater construction costs; and
- g) Increased frequency of sand transfers.

[32] The Applicant accepted that the scope of a proposal is limited to the extent of what has been applied for and that it could not be granted more than that. Amendment of a proposal is only possible within that scope, which may be assessed by the application of the test stated by the High Court in *Atkins v Napier City Council*:⁶

whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:

- The scale or intensity of the proposed activity, or
- The altered character or effects/impacts of the proposal.

[33] A way of applying or answering the test is to ask whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, but it is not the test itself.⁷

[34] The Applicant submitted that each of the amendments identified by Mr Shaw was within the scale or intensity of the proposal as applied for or had lesser effects or both. Counsel disputed that all the changes that had been identified were in fact sought and submitted that the physical extent was generally smaller and that some increases, such as the depth of the foundations, were not material changes to the nature of the proposal or its effects. Counsel asserted that it was implausible to say that more submissions would have been lodged had the increased depth of the foundations been notified.

[35] Counsel for the Applicant also relied on case law where it was held that increases

⁶ *Atkins v Napier City Council* [2008] NZHC 2077; [2009] NZRMA 429 at [20].

⁷ *Ibid.* at [21].



in the size of a proposal which were otherwise permitted under the development controls of the relevant plan and therefore did not require resource consent did not take a proposal outside the scope of the application.⁸

[36] Counsel for the Respondent referred to other case law to the same effect⁹ and noted that while some amendments had been made, the revised proposal still lay within the footprint of the original application, the essential elements remained the same and the effects would be reduced rather than exacerbated, so that there was limited potential for prejudice to any party or the public.

[37] Mr Webb, as *amicus curiae*, accepted the position of the Applicant and did not address the issue of scope further.

[38] Applying the test stated in *Atkins*, we find that the identified amendments do not amount, individually or cumulatively, to a proposal which is significantly different in the scale or intensity of the activity or the character of its effects to the proposal as publicly notified. The nature and extent of the proposal was clearly notified in a manner that could have been expected to attract the attention of any person who might be interested in proposed works on Ōrewa Beach. To the extent that some of the amendments are generally permitted under the AUP or relate to matters which are not otherwise controlled under the RMA, we observe that there is an approach in this jurisdiction, well-established by case law, which holds that immaterial variations to an authorised proposal do not render it unauthorised, where materiality may be determined by considering whether the variation contravenes a rule in the relevant plan.¹⁰ To the extent that some of the amendments may not be within that allowance, we find that they could not be said to be significant to the scope or ambit of the proposal.

[39] We accept the submissions of counsel for the Applicant and the Respondent and conclude that the amended proposal is within the scope or ambit of what was originally applied for.

⁸ *Shell New Zealand Ltd v Porirua City Council* [2005] NZCA 113 at [8].

⁹ *Re Waiheke Marinas Ltd* [2015] NZEnvC 066 at [10], referring to *HIL Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45 at [42], which in turn refers to *Atkins* (fn 6) and *Shell* (fn 8).

¹⁰ *Cooke v Auckland City Council and Goldfinch* [1996] NZRMA 511; *Lever Finance v Westminster London Borough Council* [1971] 1 QB 222; [1970] 3 All ER 496 (EWCA) at 230; 500.



Legal framework

[40] In reaching our decision on this appeal against the grant of consent the Court must have regard to the same considerations as does a consent authority when making a decision under s 104 RMA.¹¹ Section 104 relevantly provides:

- (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
 - (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.

...

[41] As a discretionary activity, under s 104B RMA the consent authority had, and on appeal this Court has, an overall discretion to grant or refuse the application and, if the application is granted, to impose conditions under s 108 RMA.

Relevant planning provisions

[42] Section 104(1)(b) RMA lists the statutory planning documents to which regard must be had. No national environmental standards, other regulations or national policy statements were identified by anyone as being relevant to this proceeding.

[43] The NZCPS is certainly relevant. The NZCPS first came into effect in 1994 but was substantially revised in 2010. Its purpose is to state objectives and policies to achieve the purpose of the RMA in relation to the coastal environment of New Zealand. It has

¹¹ Section 290 RMA.



seven objectives and 29 policies. The coastal environment is not limited to the CMA and includes, in terms of Policy 2, areas where coastal processes are significant and areas at risk from coastal hazards.

[44] A regional policy statement,¹² regional plan¹³ or district plan¹⁴ must give effect to the NZCPS. The expert planning witnesses in this case were agreed that the AUP, which includes all three of those planning documents, gives effect to the relevant provisions of the NZCPS with no inconsistencies. On that basis they did not present evidence on the provisions of the NZCPS. We are satisfied that their assessment in this regard is sound. Nonetheless, for the purposes of clearly identifying the basis on which we are making our decision and for ease of reference by readers who may not be familiar with it, we consider it is desirable that we set out the relevant provisions of the NZCPS.

[45] The provisions of the NZCPS most relevant to this case are:

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

...

Objective 4

To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:

- recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;
- maintaining and enhancing public walking access to and along the coastal marine area without charge, and where there are exceptional reasons that mean this is not practicable providing alternative linking access close to the coastal marine area; and
- recognising the potential for coastal processes, including those likely to be affected by climate change, to restrict access to the coastal environment and the need to ensure that public access is maintained even when the coastal marine area advances inland.

Objective 5

To ensure that coastal hazard risks taking account of climate change, are managed by:

- locating new development away from areas prone to such risks;

¹² Section 62(3) RMA.

¹³ Section 67(3)(b) RMA.

¹⁴ Section 75(3)(b) RMA.



- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- ...
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and
- ...

Policy 4 Integration

Provide for the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment. This requires:

- ...
 - (c) particular consideration of situations where:
 - (i) subdivision, use, or development and its effects above or below the line of mean high water springs will require, or is likely to result in, associated use or development that crosses the line of mean high water springs; or
 - (ii) public use and enjoyment of public space in the coastal environment is affected, or is likely to be affected; or
 - (iii) development or land management practices may be affected by physical changes to the coastal environment or potential inundation from coastal hazards, including as a result of climate change;
 - ...
 - (v) significant adverse cumulative effects are occurring, or can be anticipated.
- ...

Policy 6 Activities in the coastal environment

- (1) In relation to the coastal environment:
 - (a) recognise that the provision of infrastructure, ... are activities important to the social, economic and cultural well-being of people and communities;
 - ...
 - (h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;
 - (i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment; and



...

- (2) Additionally, in relation to the coastal marine area:
 - (a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, ...
 - (b) recognise the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
 - (c) 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;
 - (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; and
 - (e) promote the efficient use of occupied space, including by:
 - (i) requiring that structures be made available for public or multiple use wherever reasonable and practicable;
 - (ii) requiring the removal of any abandoned or redundant structure that has no heritage, amenity or reuse value; and
 - (iii) considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay.

Policy 7 Strategic planning

- (1) In preparing regional policy statements, and plans:

...

- (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
 - (i) are inappropriate; and
 - (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;

and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

- (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

...

Policy 13 Preservation of natural character

- (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

- (c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
- (d) ensuring that regional policy statements, and plans, identify areas where preserving



natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

- (a) natural elements, processes and patterns;
- (b) biophysical, ecological, geological and geomorphological aspects;
- (c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
- (d) the natural movement of water and sediment;
- (e) the natural darkness of the night sky;
- (f) places or areas that are wild or scenic;
- (g) a range of natural character from pristine to modified; and
- (h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

...

Policy 18 Public open space

Recognise the need for public open space within and adjacent to the coastal marine area, for public use and appreciation including active and passive recreation, and provide for such public open space, including by:

- (a) ensuring that the location and treatment of public open space is compatible with the natural character, natural features and landscapes, and amenity values of the coastal environment;
- (b) taking account of future need for public open space within and adjacent to the coastal marine area, including in and close to cities, towns and other settlements;
- (c) maintaining and enhancing walking access linkages between public open space areas in the coastal environment;
- (d) considering the likely impact of coastal processes and climate change so as not to compromise the ability of future generations to have access to public open space;

and

- (e) recognising the important role that esplanade reserves and strips can have in contributing to meeting public open space needs.

Policy 19 Walking access

(1) Recognise the public expectation of and need for walking access to and along the coast that is practical, free of charge and safe for pedestrian use.

(2) Maintain and enhance public walking access to, along and adjacent to the coastal marine area, including by:

- (a) identifying how information on where the public have walking access will be made publicly available;
- (b) avoiding, remedying or mitigating any loss of public walking access resulting from subdivision, use, or development; and
- (c) identifying opportunities to enhance or restore public walking access, for example where:
 - (i) connections between existing public areas can be provided; or
 - (ii) improving access would promote outdoor recreation; or
 - (iii) physical access for people with disabilities is desirable; or



- (iv) the long-term availability of public access is threatened by erosion or sea level rise; or
- (v) access to areas or sites of historic or cultural significance is important; or
- (vi) subdivision, use, or development of land adjacent to the coastal marine area has reduced public access, or has the potential to do so.

(3) Only impose a restriction on public walking access to, along or adjacent to the coastal marine area where such a restriction is necessary:

- (a) to protect threatened indigenous species; or
 - (b) to protect dunes, estuaries and other sensitive natural areas or habitats; or
 - (c) to protect sites and activities of cultural value to Māori; or
 - (d) to protect historic heritage; or
 - (e) to protect public health or safety; or
 - (f) to avoid or reduce conflict between public uses of the coastal marine area and its margins; or
 - (g) for temporary activities or special events; or
 - (h) for defence purposes in accordance with the Defence Act 1990; or
 - (i) to ensure a level of security consistent with the purpose of a resource consent; or
 - (j) in other exceptional circumstances sufficient to justify the restriction.
- (4) Before imposing any restriction under (3), consider and where practicable provide for alternative routes that are available to the public free of charge at all times.

...

Policy 25 Subdivision, use, and development in areas of coastal hazard risk

In areas potentially affected by coastal hazards over at least the next 100 years:

- (a) avoid increasing the risk of social, environmental and economic harm from coastal hazards;
- (b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;
- (c) encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;
- (d) encourage the location of infrastructure away from areas of hazard risk where practicable;
- (e) discourage hard protection structures and promote the use of alternatives to them, including natural defences; and
- (f) consider the potential effects of tsunamis and how to avoid or mitigate them.

Policy 26 Natural defences against coastal hazards

- (1) Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards.
- (2) Recognise that such natural defences include beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands.

Policy 27 Strategies for protecting significant existing development from coastal hazard risk



- (1) In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes:
 - (a) promoting and identifying long-term sustainable risk reduction approaches including the relocation or removal of existing development or structures at risk;
 - (b) identifying the consequences of potential strategic options relative to the option of 'do-nothing';
 - (c) recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations;
 - (d) recognising and considering the environmental and social costs of permitting hard protection structures to protect private property; and
 - (e) identifying and planning for transition mechanisms and timeframes for moving to more sustainable approaches.
- (2) In evaluating options under (1):
 - (a) focus on approaches to risk management that reduce the need for hard protection structures and similar engineering interventions;
 - (b) take into account the nature of the coastal hazard risk and how it might change over at least a 100-year timeframe, including the expected effects of climate change; and
 - (c) evaluate the likely costs and benefits of any proposed coastal hazard risk reduction options.
- (3) Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.
- (4) Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.

[46] These objectives and policies of the NZCPS particularly relate to the protection of the natural character of the coastal environment, the importance of public access to and along the coast and the need to identify and plan for coastal hazards. The issues arising from them that are particularly important considerations in this appeal broadly include:

- (i) The extent to which development ought to occur in the coastal environment and, in particular, in the vicinity of MHWS;
- (ii) The balance to be set between preserving the natural character of the coast and maintaining or enhancing public access to it;
- (iii) The management of coastal hazards and, in particular, the effects of sea level rise.

[47] These issues are also directly related to matters of national importance listed in s 6 RMA that we must recognise and provide for. We note that the management of significant risks from natural hazards was included as s 6(i) from 19 April 2017 and so, strictly, is not a stated matter of national importance for the purposes of this proceeding



as the application was lodged before then. Even so, as a significant effect on the environment at Ōrewa Beach, this subject is clearly an important consideration in this case.

[48] The expert planning witnesses agreed that the proposal is generally consistent with the relevant provisions of the Auckland Regional Policy Statement relating to a quality built environment, open space and recreation facilities, use and development, public access and open space, and natural hazards and climate change. We consider that the relevant guidance that could be drawn from the Auckland Regional Policy Statement is adequately expressed in the objectives and policies of the NZCPS which we have already quoted, and so we will not extend this decision further by also quoting those regional provisions.

[49] On the basis that the amended proposal is not located in the CMA, the expert planning witnesses were mostly agreed the provisions of Auckland Regional Coastal Plan, which form part of the AUP, are of little or no relevance to this proceeding. Mr Robert Scott, the expert planner called by the Respondent, opined that the provisions of Chapter F2.16 relating to structures in the general coastal marine zone remained a relevant consideration under s 104 RMA. In his opinion, even though the seawall would not be in the CMA, it would still be in the coastal environment and so those provisions of that chapter would assist in assessing whether its effects would be appropriately avoided, remedied or mitigated.

[50] We understand that Mr Scott's opinion is based on the general guidance in the RMA and the NZCPS to assess activities and their effects in a manner that promotes sustainable management of resources on an integrated or holistic basis. Policy 4 of the NZCPS is explicit about this, and is expressed to apply to the coastal environment and is not limited to the CMA. In broad terms this is an appropriate starting point, not least in order to ensure that all district plans are prepared in an integrated way by looking beyond the boundary of the district in a number of respects and, in considering applications for resource consent, that all relevant planning provisions are identified.

[51] For jurisdictional purposes, however, the RMA provides for plans to be made in respect of districts and regions. The boundaries of a *district* do not include any area in



the CMA.¹⁵ A regional coastal plan is made for the CMA within a region¹⁶ and is subject to approval by the Minister of Conservation.¹⁷ Where a regional plan includes a regional coastal plan, the Minister's approval applies only to that part which relates to the coastal marine area.¹⁸ Where, as in Auckland, a combined plan is prepared, the RMA requires clear identification of plan provisions that are the regional policy statement, the regional coastal plan, the regional plan, or the district plan.¹⁹ In the AUP this is done by putting the whole of the regional policy statement in Chapter B and then by abbreviated notations in the section headings of other chapters, being *[rcp]*, *[rp]* and *[dp]*. This approach and these notations are explained in section A1.4 in the Introduction to the AUP.

[52] Chapter F2 in the AUP is entitled *Coastal*. In Section F2.16 Structures, the sub-sections containing the objectives and policies both have the notation *[rcp]*. The provisions in Section F2.16 all refer to the coastal marine area rather than the coastal environment. We are satisfied that these provisions of the Auckland Regional Coastal Plan do not relate to a proposal which is wholly located outside the CMA. We therefore agree with the opinion of the other expert planners that the provisions of the Auckland Regional Coastal Plan are not relevant to our consideration of this proposal. As a consequence of that conclusion, the objectives and policies in Chapter F2 which indicate or direct that hard protection structures are to be avoided in the CMA, which were a significant influence in the reasons of the Hearing Commissioners, do not have that role in our consideration.

[53] Under the Auckland District Plan, the expert planning witnesses identified the following objectives and policies as being relevant to this proposal and to the exercise of the discretion under s 104B RMA whether to grant or refuse the application and, if it is to be granted, imposing conditions under s 108 RMA:

- a) In Chapter E 18 – *Natural character of the coastal environment*, objective E18.2(2) to restore and rehabilitate the natural character of the coastal environment, where practical, and policy E18.2(3) to manage the effects of use and development in the coastal environment taking a broad range of matters into account;
- b) In Chapter E 19 – *Natural features and natural landscapes in the coastal*

¹⁵ Section 2 RMA, definition of *district*.

¹⁶ Section 64(1) RMA.

¹⁷ Schedule 1 to the RMA, clauses 18 and 19.

¹⁸ Section 64(3) RMA.

¹⁹ Section 80(8)(a) RMA.



environment, objective E19.2(1) to maintain the characteristics and qualities of natural landscapes and features that have particular values, provide a sense of identity or have high amenity value while providing for use and development, and policy E19.3(2) to manage the effects of use and development in the coastal environment taking a broad range of matters into account;

- c) In Chapter E 36 – *Natural hazards and flooding*, objective E36.2(6) to use, where appropriate, natural features and buffers in preference to hard protection structures to manage natural hazards, and policies E36.3(3) to consider a risk assessment of proposals to use and develop land that is subject to natural hazards, including any exacerbation of an existing hazard or emergence of a new hazard, E36.3(4) to control use and development so as not to increase and where practicable reduce risks associated with natural hazards, E36.3(11) to consider hard protection works only where natural features will not provide protection and enhancement of them is not practicable, and E36.3(12) to require hard protection works above MHS to be designed and located to address a range of adverse effects; and
- d) In Chapter H 7 – *Open space – conservation zone*, objectives H7.4.2(1) to enhance and protect a range of values of the zone from adverse effects of activities and development and (2) that use and development complements and protects conservation values and natural qualities, and policies H7.4.3(1) to enable appropriate use and development that protects the values of the zone, H7.4.3(5) to locate and design new structures to complement the context, character and values of the zone and ensure minimal disturbance to existing landform, vegetation and habitats, and H7.4.3(7) to require landscaping around structures to mitigate visual impacts.

[54] The issues emerging from the evidence of the expert planning witnesses and their joint witness statement are mainly to do with the adequacy of the proposal in responding to coastal processes rather than any dispute about the relevance or meaning of the policy framework. In particular, Mr Scott expressed concerns about the extent to which the proposal goes as far as the policy framework intends. This is an issue best addressed in the context of assessing the evidence about coastal processes.



Coastal processes

[55] Matters relating to coastal processes formed a significant part of the cases presented to us. In particular the Court was greatly assisted by the evidence of three very experienced experts in the field, being Mr Richard Reinen-Hamill (called by the Applicant), Dr Shaw Mead (called by the Respondent) and Mr Jim Dahm (initially retained by a number of s 274 parties opposing the proposal and subsequently called by Mr Webb, the *amicus curiae*).

[56] These three witnesses conferred on a number of occasions, including twice during the application process at first instance. At the third and fourth conferences, convened after this proceeding had commenced and facilitated by Environment Commissioner Hodges, they were joined by Mr Shaw and Mr Kibblewhite who are s 274 parties but who have engineering qualifications and experience. Ordinarily, expert conferencing is to be conducted only by expert witnesses who must acknowledge and act in accordance with the Court's code of conduct for expert witnesses, which requires them to demonstrate professional independence. In this special case the Court allowed participation by unrepresented parties who were not calling expert witnesses to provide a level of transparency appropriate to a judicial proceeding.

[57] Four joint witness statements were produced to the Court, the first two of which had also been produced before the Hearing Commissioners. Mr Reinen-Hamill and Mr Dahm were involved in all four; Dr Mead became involved for the final two. The set provided us with a comprehensive overview of the issues and clarified a great deal. We record our gratitude for the way in which these witnesses worked together to produce expert evidence to assist us in understanding this complex field, at least in the context of this proposal.

[58] As well as reviewing the proposal, the experts also considered whether there were any alternatives available to remedy or mitigate the coastal hazard to this area, including any soft engineering works. This assessment was undertaken on the basis that it would be required by Policy F2.16.3(14)d of the AUP if the works were to occur in the CMA.

[59] After the third conference on 30 November and 5 December 2018, the experts recorded a number of matters in relation to alternatives:

- (i) Doing nothing alone or managed retreat (within the reserve) alone or sand transfer alone would not be adequate.



- (ii) Potentially viable options included alternative alignments to the proposed seawall, managed retreat allowing for an overall soft solution and a long-term “whole of beach” solution combining a number of elements.
- (iii) While agreeing that works in the mouth of the estuary at the southern end of the beach some 70 years ago had resulted in a net transfer of sand to the south end of the beach at the expense of other areas, they could not assess the benefits and risks of restoring the estuary entrance without significant modelling and disagreed as to whether attempting to restore the mouth of the estuary would address the current problems.
- (iv) The experts all considered the alternatives as being interim options, but for differing reasons.

[60] Considering the situation as a whole, the experts agreed that Ōrewa Beach is a closed system with no new sand entering it. Natural shoreline changes are dominated by dynamic fluctuations in response to storm events moving sand offshore and post-storm recovery moving sand onshore. These fluctuations are affected by decadal-scale climatic factors and it is likely that the east coast of Auckland is currently in an erosive phase. The frontal dune and the land behind the dune have been highly modified by human development, which has affected natural sand exchange between the dune and the beach. Seawalls immediately on either side of the subject area have been effective in preventing erosion but also have had the effect of reducing the width of the beach, particularly the dry area at high tide. Seawalls on other parts of the beach have been removed or are no longer effective.

[61] The regular transfer of sand by the Council under its existing resource consent appears to be maintaining the beach profile in a dynamic equilibrium, but this may be a masking of net erosion by the transfer. Even so, the experts generally agreed that the existing level and programme of sand transfers should be sufficient for the next few decades. This involves up to 10,000m³ for the original transfer and then around 5,000m³ before each summer and around 6,000m³ after storm activity that lowers the beach profile level to 1.8m at Beach Profile 04 between Kinloch and Remembrance Reserves, being the most frequently surveyed location. Future sea level rise is likely to lead to permanent net erosion, but the rate of that is uncertain. The width of esplanade reserve, according to a survey in 2013, varies along the subject area. Immediately to the north of Kinloch Reserve the width can reduce to less than 2m after a storm event, with vertical drops exceeding 1m and requiring the reserve to be closed for safety reasons. Erosion is



exacerbated in three locations where there are stormwater outfalls onto the beach.

[62] The experts disagreed on the extent to which any hard structure should be used to protect the edge of the reserve. While agreeing that the proposal, including sand placement, would protect the reserve and maintain the beach level along its length, they also agreed that it would not provide a solution much beyond the proposed 35-year term of consent and that in the longer term additional sand placement would be required.

[63] The fourth conference was held on 18 February 2019 and followed the amendment of the proposal, including the following:

- a) Replacing the sloping rock armour revetment and flat crest with a sloping grouted rock seawall and angled top, resulting in a more landward location and increasing the extent of dry upper beach.
- b) An additional ramp for access to the beach to the south of Remembrance Reserve and an additional set of stairs between Kohu Street and Kinloch Reserve.
- c) A vegetation barrier on the seaward side of the path as a buffer and deterrent to access.

[64] As previously noted, an important result of the design of the replacement wall was that the structure was moved further landward and clear of the level of MHWS at Ōrewa as defined by NIWA and according to surveys undertaken in 2013 and 2016. While this did not affect the assessments of physical effects by the experts, it did confirm that the structure did not cross the jurisdictional boundary of the district. The result is that the provisions of that part of the AUP which is the Auckland regional coastal plan no longer being relevant regulatory considerations.

[65] Mr Dahm expressed the view that the defined location of MHWS is inappropriate and that a more accurate position would reflect where high water actually reaches on the beach. As we understand this opinion about accuracy, it means that in a functional sense the foreshore should be understood to include more of the beach and foredune than might be included based on the surveyed location of MHWS. He noted that adopting a lower level of MHWS could mean that seawalls might be subject to less stringent controls where they are located outside the CMA but still have significant effects on the beach. In this case, all three experts agreed that the boundary of the CMA made no difference to the effects of this proposal on coastal processes.



[66] While we appreciate Mr Dahm's general concern, we think it reflects one of the inherent difficulties in fixing a boundary based not on notional points in space but on a natural process in a dynamic environment. It is certainly a matter that should be considered by a territorial authority when preparing district plan provisions for any parts of its district which is adjacent to the sea. For our part, we must apply the law on the basis of the evidence. We therefore must determine whether the proposal will occupy any part of the CMA as that has been defined at Ōrewa. On the basis of the evidence, we are satisfied it will not do so and we will apply the planning provisions that are relevant accordingly. We add that we are relieved that this jurisdictional issue did not affect the consideration of the effects of the proposal by the experts.

[67] The remaining issues among the expert witnesses on coastal processes and the other parties may be summarised as:

- a) Whether a package of responses including a hard structure is needed now or in 10-20 years;
- b) Whether a different combination of hard and soft responses would be a better alternative;
- c) Whether the proposed seawall should be located even further landward.

[68] Mr Reinen-Hamill supported the amended proposal, which he was largely responsible for designing, and did not consider that there was a satisfactory alternative using shorter lengths of wall. He considered that shorter lengths would increase the risk of erosion on adjacent parts of the shoreline. He did consider that a comprehensive coastal management plan should be prepared for Ōrewa.

[69] Mr Dahm considered that a combination of soft options with short lengths of hard structures could be done, but did not advance that as being necessarily preferable to the amended proposal. He questioned whether the extent of reserve to be provided for access purposes was necessary, while acknowledging that this was not within his expertise. His point was that a narrower reserve area might still fulfil its functions while allowing the structure to be moved further back.

[70] Dr Mead generally agreed with Mr Reinen-Hamill, but also advanced an alternative soft solution based on continued sand transfer for the next 10 years or so. Mr Shaw and Mr Kibblewhite supported this approach.



[71] Mr Dahm and Dr Mead suggested that investigation and development of a long-term strategy should precede this proposal, as there is time to do so and this would ensure wise use of resources. Mr Dahm expects a suitable strategy will be a combination of retreat and nourishment with a backstop wall further landward. In saying that, he acknowledged that this would require stakeholders to be aware of the costs of holding the shoreline in its present location. Mr Shaw and Mr Kibblewhite supported Dr Mead on the basis that sufficient sand is available to protect the reserve for the next ten years.

[72] Mr Reinen-Hamill did not consider that the proposal would preclude the development of a holistic adaptive management strategy for the whole of the beach, and Mr Dahm and Dr Mead did not disagree with that. Mr Reinen-Hamill considered that the proposal presented a balance between maintaining the esplanade reserve and managing beach nourishment.

[73] Mr Shaw observed that once sand had been placed, the sea would start moving it, so that the goal of a flat dry area at the top of the beach would become a sloping wet beach and remain that way until the next replenishment. He also expressed concern about traffic effects on the beach if sand is imported using trucks and trailers, with consequent loss of amenity for users of the beach for up to a month. He submitted that the quantities of sand available under the existing consent was insufficient to meet the need. He noted Dr Mead's comments about importing very large quantities of sand, of the order of 150,000 – 200,000m³ along the entire beach or 48,000 – 80,000m³ on the subject area, potentially lasting 30 years rather than requiring annual transfers and repairs.

[74] Mr Stansfield accepted that the esplanade reserve could be lost to coastal erosion in 40 – 50 years' time and does not want to see that happen, but does not accept that a hard structure is required in the short term. He would prefer that the current transfer of sand continue for the next 10 years or so, and that any damage following a severe storm be remedied as it occurs. This approach would give time for the identification and implementation of a long-term whole of beach strategy. He submitted that this approach is what the Act strongly indicates should be preferred.

[75] Mr Stansfield said that the wall would reduce public access to the beach and that improved access could be achieved without a wall and formed pathway. If consent were to be granted, then the pathway should be a boardwalk for all of its length or at least for the section which pass over the roots of protected trees. He also sought that the concrete



be decorated rather than bare. The planting should be restricted to 700mm high for safety purposes, but not higher. He opposed any provision for a further safety fence on the basis that it would materially reduce amenity values and be unacceptable to residents.

[76] Dr Mitchell did not oppose a soft option per se, but observed that the assumptions underpinning it should be demonstrated to be true. He expressed concern about leaving things to the last minute, observing that doing so had resulted in difficult situations elsewhere, citing Haumoana on Hawke Bay as an example. He submitted it is preferable to reduce the risk at this stage. He observed that while certain options such as moving the wall landward might be preferable in engineering terms, they would not achieve a good result in terms of maintain amenity values.

[77] From his perspective as a resident he gave evidence that the existing reserve is problematic and at times very difficult for anyone to use. Enhancement of the reserve would provide great public benefit.

[78] In our evaluation from considering all the evidence, we note that the issues and the debate about them largely follow from the dynamic nature of coastal processes and the potential mismatch in the coastal environment between the activities that people may want to undertake (and the structures or works that they build to do so) and the natural forces at play. The position at Ōrewa is complicated by past and existing development, both at the mouth of the estuary and along the beach, which has generally sought to control parts of this environment.

[79] We accept the evidence of the experts on coastal processes that in light of the purpose of maintaining the utility of the esplanade reserve there is no real scope in this case for the basic options of doing nothing, managed retreat beyond the reserve or sand transfer alone. Those options might be included in a temporary plan, but they would not be sufficient in the longer term. We express our support for the view that there should be comprehensive coastal management planning at Ōrewa, as there should be at many places around the New Zealand coastline. In saying that, we recognise that simply seeking to maintain the status quo in a dynamic coastal environment is unlikely to be sustainable in the longer term and therefore would be unlikely to give effect to or have adequate regard for Objective 5 and Policies 24 and 25 of the NZCPS relating to dealing with coastal hazards.

[80] In real terms, the experts accept the guidance issued by the Ministry for the



Environment that envisages a range of sea level rise over the next 100 years of around 0.6 to 1.4m, and broadly agree with an analysis which estimates that some 56m of erosion could occur at Ōrewa for every metre of sea level rise. Building walls or raising the dune may delay erosion but not prevent inundation, as the beach has waterways at both ends and stormwater outfalls along its length. The experts noted that there will need to be extensive consultation in the next few years about these matters and the range of approaches that will be required, and that it will likely take 5 to 10 years to implement a strategy.

[81] Longer-term possibilities, such as importing much greater volumes of sand, would require another application and its own assessment, covering coastal processes and engineering requirements, and be the subject of separate financial considerations. We do not have the scope in this appeal to consider a proposal of that kind or to require it to be considered. It is something which might be considered as part of a long-term strategy.

Landscape, natural character and visual amenity

[82] We had the benefit of expert evidence from two experienced landscape architects: Mr Brad Coombs called by the Applicant and Mr Stephen Brown called by the Respondent. As well as their statements of evidence, they also engaged in expert conferencing and produced two joint witness statements.

[83] We also heard from other parties who are resident along the beach in relation to matters relating to the appearance of the proposed works and their effects on the coastal environment and their amenity values.

[84] The expert witnesses agreed that there is a very marked contrast between the more natural qualities of Ōrewa Beach and the sea and the more developed margins of the town, even with a close interaction between the beach and the adjoining residential areas. The existing reserves, including the esplanade reserve, provide limited mediation between these landscapes. Even so, the proximity of the town enabling ready access to the beach contributes to the significant amenity values and aesthetic appeal of the beach.

[85] These experts were of the shared view that in the short term (up to 10 years), while these landscape and natural character qualities would remain substantially intact, erosion would place pressure on the interface and in the medium (10 – 35 years) to long (beyond 35 years) term, parts of the land will be subject to significant erosion with loss of the



beach front and significantly reduced levels of amenity.

[86] Should the proposed works proceed, these experts agreed that they would, for the life of the proposal, reduce the level of natural character of the beachfront by creating a much harder and more clearly defined interface and diminish the soft progression from the beach, across the esplanade reserve and onto residential properties. Assessing likely effects in the long term would be speculative given the range of possible outcomes.

[87] The proposal would, in the opinion of these experts, maintain amenity values relating to public access and the utility and attractiveness of the reserve, but the height of the proposed wall would create a substantial barrier that would impede views from the beach to the land and from residential properties to the beach. The wall would change the aesthetic of the beach front and diminish its appeal and coherence. The amended proposal was considered preferable to the original version because it would occupy less of the beachfront and its form was less regular, although it would be steeper and could increase scouring in storm events. These experts were agreed that the combination of reserve and pathway should be no less than 5m wide, given the spatial relationships of the beach, the wall, the requirements of a shared pathway and the frontages of residential properties.

[88] Assessing the degree of adverse effects, the expert witnesses used a seven-point scale of effects on natural character, landscape and visual amenity as recommended in a best practice note issued by the NZ Institute of Landscape Architects. The scale relates to the degree of change which a proposal causes to the existing environment. In those terms, the experts used the term *significant* as amounting to *high* or *very high* at the top end of that scale.

[89] The expert witnesses considered the effects on natural character and visual amenity to be adverse but not significant given the character of the existing environment. While Mr Coombs expressed the same opinion in relation to effects on the natural landscape, Mr Brown considered that the effects on the beachfront would be significant, being exacerbated by the proposed upstand which creates greater separation between the beach and the land and imparts a more artificial character on the landscape. The absence of any detailed alternative proposal made it impossible to assess what the effects of an alternative might be.



Recreation effects

[90] In light of the purpose of the esplanade reserve as a key asset providing for people's recreation on and along the beach, we received expert evidence from two experienced recreation planners, Mr Rob Greenaway called by the Applicant and Dr Shayne Galloway called by the Respondent.

[91] As we did for landscape and amenity effects, we also heard from the parties who are resident about their use and enjoyment of the esplanade reserve and the beach generally.

[92] The two expert witnesses on this subject conferred, with assistance from Environment Commissioner Hodges. In their joint witness statement they agreed that Ōrewa Beach is the primary recreation amenity and that the esplanade reserve is secondary to it. They regarded the maintenance and enhancement of both the availability and the quality of public access along the beach and the reserve as important to recreation and considered the proposal to be consistent with those matters.

[93] They noted that the proposed seawall would restrict access to the beach to the formed ramps and steps and considered both the safety issues of the design and the utility of unrestricted access. They considered the positive effects to include sustaining all-tide access along the beach and generally providing for a dry beach above high tide, while the negative effects included changes to visual amenity values and potential safety issues from falling from the wall. They agreed that use of the reserve would increase if the proposal is implemented.

[94] Mr Shaw raised a number of issues with the design of the pathway and associated works. His submissions included that the proposed planting and vegetation might not support the purposes of a pathway for pedestrians and cyclists by narrowing its width, interfering with wheels and not providing an adequate safety barrier. He also noted that the planting would impede views across the pathway and wall.

[95] We note the potential for one person's recreation to impinge on another's amenity. The proposed seawall with a path on top will enable people to pass along the frontages of the residents at the same level, where previously, at least for some portions of the reserve, they would usually pass on the beach and below the level of the property frontage. That effect, which may be subjectively adverse for property owners, is



objectively consistent with providing for the maintenance and enhancement of public access to and along the coastal marine area as a matter of national importance under s 6(d) of the Act and is among the purposes of an esplanade reserve under s 229 of the Act, which are both beneficial matters.

Evidence about the proposal and its other effects on the environment

[96] As well as the effects discussed in the three preceding sections of this decision, we also heard evidence on several other matters relating to the proposal and its effects on the environment.

[97] Mr Paul Klinac is the head of specialist delivery in the Engineering and Technical Services Unit of the Council. His responsibilities include the management of coastal matters for the Council, including planning (he led the project reviewing OBEEP), asset management and hazard assessments. He has worked in this field for the Council and its predecessor, the Rodney District Council, since 2002. He holds the degrees of Bachelor and Master of Science with first class honours, his thesis being a study of the sediment dynamics and coastal processes of the sheltered east coast beaches of Auckland. He did not seek to give evidence on those matters.

[98] Mr Klinac's evidence provided an overview of the Council's management of Ōrewa Beach within the framework of the management of its coastline overall. He provided helpful background information to the existing environment and its management, including the existing resource consent for sand transfer and work done under it.

[99] Ms Julia Parfitt is the chairperson of the Hibiscus and Bays Local Board and has extensive experience in local government. Her evidence outlined the approach of the Board to the governance of its area and its role in considering and approving the proposal. She described the proposal as necessary to respond to severe and advancing coastal erosion at the Ōrewa beachfront and appropriate to protect public property.

[100] Mr Martin van Jaarsveld is the manager of community parks and places for the Council. He holds the degree of Bachelor of Planning and a diploma in infrastructure management and has 27 years' experience in open space planning and park management, the last 14 of those with the Council and its predecessor, the North Shore City Council. His evidence was about the significance and value of the esplanade reserve and the need to protect it. He said that the proposal would address the poor condition of



the reserve and ensure retention of functional open space, especially for wheeled apparatus (prams, bicycles and wheelchairs). He referred us to a number of the Council's policy documents as being generally supportive of such a proposal as this.

[101] The evidence of these three representatives of the Council as applicant set out the basis on which the Council had made its decisions in relation to the proposal, including issues of need, community consultation and the consideration of alternatives. As might be expected, a number of aspects of this evidence was subject to cross-examination and challenged by the parties opposed to the proposal and by *amicus curiae*. The questions and the answers to them tended to confirm the complexity of the issues and the extent to which the planning policy framework offered support for a range of approaches to dealing with those issues. Those opposed to the proposal did not accept the reasoning of these witnesses. In our role as an appellate court we must consider the application in terms of the decision of the Council as respondent. It is not our role under the RMA to review the administrative decisions of the Council as applicant and we therefore will not do so.

[102] Mr Alasdair McGeachie is a senior engineer specialising in transportation with 15 years' professional experience, specialising in the effects of construction traffic and management methods to address them. He gave evidence about the transportation effects of constructing the seawall, including use of an off-site storage yard at Victor Eaves Reserve about one kilometre from the site. He concluded that appropriate traffic management would ensure generally safe conditions.

[103] Mr John Cooper is a civil engineer specialising in the design and construction of civil infrastructure, particularly earthworks and including coastal structures. He gave evidence on the works necessary to construct the proposal and the proposed draft construction management plan for the works. He said the works would be constructed on a staged approach over two consecutive years during the period between April and October when the use of the beach is reduced. Construction would be during two 20-week periods, with working hours of 7 am to 6 pm on weekdays and 7 am to 1 pm on Saturday, with rock haulage further limited to reduce noise. He estimated a total volume of material for transport to be 6,000m³. Final plans, including the management plan, would be drafted once the terms of consent were known and detailed design had been completed. He relied on the evidence of other witnesses as to the most appropriate methods of management of construction-related effects.



[104] Mr Cooper also addressed the safety of the pathway and noted the design measures that had been taken to reduce risk of falling including the requirement to meet the “acceptable solution” standard in Clause F4 of the Building Code.

[105] Ms Siri Wilkening is an acoustic engineer who holds the degree of Master in Environmental Engineering and has 21 years’ experience in investigating and reporting on the environmental noise effects of large projects. She noted that the amended proposal would use smaller rocks to build the grouted wall and consequently there would be less vibration generation as no large rocks would be tipped off of trucks onto the ground. This change also will result in less noise because more manual labour will be used to build the wall, rather than large machines, but the construction period would be increased. The staging approach to construction would mean that noise effects would be localised and for a limited period of the overall construction period.

[106] Ms Wilkening supported the use of a management plan for construction noise and vibration. She expressed the opinion that a suitable plan, as required by the draft conditions of consent, would ensure that noise would be appropriately controlled in accordance with the New Zealand Standard for such noise (NZS6803:1999) and that vibration would be controlled in accordance with the German industrial standard for such vibration (DIN4150-3:1999) which is commonly used in this country in the absence of a domestic standard.

[107] Mr Leon Saxon is a consultant arborist holding a diploma in arboriculture and having 20 years of experience. He gave evidence about the effects of the proposal on trees. There are 19 identified trees which could be affected, 11 on the esplanade reserve, seven on private property and one on the boundary. Eight of these are listed as notable trees in Schedule 10 to the AUP. Two small trees in Kinloch Reserve are in the path proposed for construction traffic and will be removed and replaced. Mr Saxon had considered each tree and considered that adverse effects on them from being in or near the construction area could be adequately minimised by the use of load distributing mechanisms. Mr Saxon also noted that if erosion in the area continued, several of these trees would be undermined.

[108] Dr Matthew Baber gave evidence on effects on terrestrial ecology and Ms Justine Quinn gave evidence on freshwater ecology. There were no questions for them.

[109] Mr John Mckensey gave evidence on the design of pathway lighting for the



proposal and its effects. There were no questions for him.

[110] The details presented by these expert witnesses were generally not in contention. The evidence of particular effects on the ecology of the site was that these would be low and able to be managed by appropriate conditions of consent. The evidence about how the proposal would be constructed also was that the effects generally would be low and readily manageable using standard techniques. The evidence about lighting on the pathway was that suitable lighting could be designed in keeping with the character of the area and to avoid glare or other unwanted effects for residents and people on the beach.

Planning

[111] To assist us in our assessment of the planning regime applicable to the site and the proposal and in our understanding of the statutory planning documents, we heard evidence from four experienced planning consultants: Ms Sarah McCarter called by the Applicant, Mr Robert Scott called by the Respondent, Mr Brian Putt called by the *amicus curiae* and Dr Phil Mitchell, a s 274 party.

[112] These planners met for conferencing facilitated by Environment Commissioner Hodges and produced a joint witness statement. Dr Mitchell sought and obtained leave from the Court to participate on a similar basis to that of Mr Shaw and Mr Kibblewhite in relation to coastal processes.

[113] The planners agreed on the identification of the key planning issues and generally on the relevant plan provisions. They agreed that the class of activity for the proposal, on a bundled basis, is a discretionary activity.

[114] As noted above, Mr Scott considered that the objectives and policies of the coastal plan remained relevant even though the works were amended so that no structure would be located in the CMA. We have explained why we do not accept this opinion as being correct in jurisdictional terms. As we have noted in relation to the evidence of the experts on coastal processes, we are relieved to note that they did not consider that the jurisdictional issue affected their assessment of those effects.

[115] On that basis, the objectives and policies of Chapter F2.16 of the AUP relating to the General Coastal Marine Zone do not have any directive effect on the assessment of the proposal, as no coastal permit is required for the structures. The provisions of Chapter



E36 in relation to natural hazards and flooding are relevant and we refer to those below.

[116] A full list of the relevant reasons for resource consent as now required for the amended proposal, including the applicable rules in the AUP and the Auckland Regional Coastal Plan, is **attached** as Appendix A.

[117] The effects of the proposal are generally:

- (i) in relation to natural hazards and coastal processes, addressing erosion of the beach and reserve, addressing sea level rise and maintaining a higher level of the beach;
- (ii) in relation to landscape values and natural character values, principally those of the seawall which require addressing the top of the seawall, particularly the upstand;
- (iii) in relation to public access and recreation values, maintaining the primary amenity of the beach and the secondary amenity of the esplanade reserve, maintaining access to the beach, maintaining access along the reserve together with separation from private land and appropriate landscaping; and
- (iv) in relation to amenity values, principally those of the upstand on the seawall.

[118] The expert planners identified relevant planning provisions as being Part 2 of the Act, sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (which are to be treated as a New Zealand coastal policy statement), the NZCPS and the AUP. They were of the view that the AUP appropriately gives effect to Part 2 of the Act and the two coastal policy statements so that separate consideration of those higher-order provisions is not required. We accept that opinion.

[119] Under the AUP the expert planners identified a number of provisions of Chapter B, the RPS and of Chapters E18, E19, E36 and H7, as previously described in this decision.

[120] Notably, Objective E36.2(6) in relation to natural hazards states: *Where appropriate, natural features and buffers are used in preference to hard protection structures to manage natural hazards.* Key policies identified as relevant to that objective are the following:

- a) E36.3(3) – Consider all of the following, as part of a risk assessment of proposals to subdivide, use or develop land that is subject to natural hazards:



- (a) the type, frequency and scale of the natural hazard and whether adverse effects on the development will be temporary or permanent;
 - (b) the type of activity being undertaken and its vulnerability to natural hazard events;
 - (c) the consequences of a natural hazard event in relation to the proposed activity;
 - (d) the potential effects on public safety and other property;
 - (e) any exacerbation of an existing natural hazard risk or the emergence of natural hazard risks that previously were not present at the location;
 - (f) whether any building, structure or activity located on land subject to natural hazards near the coast can be relocated in the event of severe coastal erosion, inundation or shoreline retreat;
 - (g) the ability to use non-structural solutions, such as planting or the retention or enhancement of natural landform buffers to avoid, remedy or mitigate hazards, rather than hard protection structures;
 - (h) the design and construction of buildings and structures to mitigate the effects of natural hazards;
 - (i) the effect of structures used to mitigate hazards on landscape values and public access;
 - (j) site layout and management to avoid or mitigate the adverse effects of natural hazards, including access and exit during a natural hazard event; and
 - (k) the duration of consent and how this may limit the exposure for more or less vulnerable activities to the effects of natural hazards including the likely effects of climate change.
- b) E36.3(4) – Control subdivision, use and development of land that is subject to natural hazards so that the proposed activity does not increase, and where practicable reduces, risk associated with all of the following adverse effects:
- (a) accelerating or exacerbating the natural hazard and/or its potential impacts;
 - (b) exposing vulnerable activities to the adverse effects of natural hazards;
 - (c) creating a risk to human life; and
 - (d) increasing the natural hazard risk to neighbouring properties or infrastructure.
- c) E36.3(11) - Consider hard protection works to protect development only where existing natural features will not provide protection from the natural hazard and enhancement of natural defences is not practicable.
- d) E36.3(12) - Require hard protection works involving the placement of any material, objects or structures in or on any area located above mean high water springs to be designed and located to avoid, remedy or mitigate adverse environmental effects including all of the following:
- (a) location of structures as far landward as possible to retain as much natural beach buffer as possible;
 - (b) any likely increase in the coastal hazard, including increased rates of erosion, accretion, subsidence or slippage;
 - (c) undermining of the foundations at the base of the structure;



- (d) erosion in front of, behind or around the ends or down-drift of the structure;
- (e) settlement or loss of foundation material;
- (f) movement or dislodgement of individual structural elements;
- (g) offshore or long-shore loss of sediment from the immediate vicinity;
- (h) long-term adverse visual effects on coastal landscape and amenity values;
- and
- (i) effects on public access.

[121] We note that these four policies appear to provide a basis on which the appropriateness of works within a district and adjacent to the CMA may be assessed in a holistic manner, as Mr Dahm would want. The expert planners, relying on the evidence of other expert witnesses in their fields of expertise, generally considered the proposal to be consistent with all of the relevant objectives and policies.

[122] In relation to Policy E36.3(11), while the planners were mostly of the view that the evidence of the experts on coastal processes was that enhancement of natural defences was not practicable, enabling consideration of hard protection works, Mr Scott opined that this policy requires consideration of Dr Mead's soft option for enhancement of the beach and so the proposed seawall may be inconsistent with it. In relation to Policy E36.3(12), Mr Scott considered that the seawall had not been moved *as far landward as possible* but acknowledged that other listed considerations, especially effects on amenity values and public access, might temper that requirement. Notwithstanding those concerns, Mr Scott considered the proposal not to be inconsistent with the relevant provisions.

[123] No other effects were regarded by the expert planners as being significant. They acknowledged the visual and amenity effects associated with the upstand on the top of the seawall, but considered that could be addressed by suitable conditions or by removing the upstand from the proposal, which might then require some other barrier in its place to meet the requirements of Clause F4 of the Building Code.

[124] Ms McCarter also presented copies of cultural impact assessments prepared on behalf of Ngāti Manuhiri and Ngāi Tai ki Tāmaki and an archaeological assessment. No issue was taken by any party with the Court receiving this material as evidence and no aspect of these reports was the subject of argument before us.

[125] In our evaluation, the objectives and policies of the AUP must be read so that there



is a fair appraisal of the objectives and policies read as a whole.²⁰ While directive provisions should be given effect according to their tenor, care must be taken where lists of requirements are set out, especially where the items in the list may, when applied to particular facts, produce internal inconsistencies or other issues. We accept that Policy E36.3(12) starts in directive terms, requiring hard protection works to be located as far landward as possible, but after dealing with a number of design matters it concludes by also requiring effects on amenity values and public access to be addressed. As the expert planners noted in their joint statement, these are competing demands. This case is an example of circumstances where those three requirements cannot all be given maximum consideration and some degree of optimisation or compromise is necessary. The relevant objectives and policies are clear and we are satisfied that the proposal is consistent with them.

[126] It was apparent that the option of widening the esplanade reserve landward, by acquiring private land along the beachfront, had not been considered to any extent. This approach is sometimes called managed retreat. It is a difficult subject, especially where it may involve the compulsory acquisition of land under the Public Works Act 1981. We raise it here only for completeness: as we acknowledged during the hearing, it is not for the Court to advance an option of such difficulty and complexity where the issue is not raised by any party and need not be addressed to determine any issue on appeal.

[127] Mr Shaw characterised the design of the proposal as compromise on top of compromise, with successive changes being made without full cognisance of the consequences, resulting in the proposal lacking overall effectiveness. In his view, the proposal involved numerous interwoven issues. He characterised the use of hard structures as old thinking and a knee-jerk reaction in this case.

[128] Mr Shaw submitted that the wall and walkway are infrastructure and therefore should not be located where they will be subject to erosion or inundation. This submission appears to rely on Policy 25(d) of the NZCPS which guides decision-makers in areas potentially affected by coastal hazards over at least the next 100 years to encourage the location of infrastructure away from areas of hazard risk where practicable. It does not take into account that Policy 27(1)(c) requires decision-makers, in areas of significant existing development likely to be affected by coastal hazards, to recognise that the range of options for reducing coastal hazard risk that should be assessed includes hard

²⁰

Dye v Auckland Regional Council [2002] 1 NZLR 337 at [25] (CA); *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].



protection structures that may be the only practical means to protect existing infrastructure of regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations.

Conditions

[129] The Applicant's expert planner, Ms McCarter, presented a draft set of conditions of consent, with a further amended version attached to her rebuttal evidence. There was limited debate about these, the principal issues being about the strategy for the beach and the esplanade reserve rather than the details of any consent.

[130] One issue that did involve contested evidence and debate revolved around whether the pathway would be safe, and in particular how its seaward edge should be treated to reduce the risk of falling. Options such as a wall of dense vegetation would have consequences for the scale of the structure and the extent to which it would impede views from the beachfront properties, which are a significant element of the amenity values of these properties. Alternatives such as railings might still impede views while not providing adequate assurance that falls would be prevented. Mr Shaw expressed concern that any planted barrier should be inspected monthly to keep it effective as a barrier and to manage its appearance for amenity purposes.

[131] Safety from falling from structures is a matter regulated by the Building Act 2004 and in particular by Clause F4 of the Building Code, which is contained in Schedule 1 to the Building Regulations 1992. Section 23(1) of the RMA provides that compliance with the RMA does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law, recognising that other regulatory mechanisms may apply as well as or in place of any resource management method. In relation to the control of building work, there is an important jurisdictional separation between the Building Act and the RMA. Section 18 of the Building Act provides that a person who carries out building work is not required to achieve performance criteria that are additional to or more restrictive than those prescribed in the Building Code unless that is expressly provided for in another Act. The RMA only makes such express provision in sections 68(2A) and 76(2A) in relation to the protection of other property (that is, other than the site on which the building work occurs) from the effects of surface water.

[132] We heard evidence about discussions with officers of the Respondent who manage building consent processes and received submissions about what the requirements



would be to meet the standards set in Clause F4 of the Building Code for safety from falling. For the reasons set out above we cannot reach any determinations about those processes other than to observe that if greater provision needs to be made to meet those standards, then we expect that the Respondent as the territorial authority will require that to be done.

[133] On that basis, we should approach our assessment of the effects of the seawall, pathway and any associated elements of planting or railings as if the greatest extent of required protection may be placed there to prevent falling. That would appear to be, without ruling on it, an upstand of 600 mm from the level of the pathway. Such an addition to the structure would have the adverse visual effects identified by Mr Brown. In any contest between a safe structure and one which is less visually obtrusive, the winner must either be the safe structure or no structure at all: granting consent for an unsafe structure to achieve a good visual outcome is not an approach this Court could follow. Our decisions must promote the purpose of the RMA, including enabling people and communities to provide for their health and safety.

[134] Special provision is proposed for the frontage of the private property at 393 Hibiscus Coats Highway, so that planting in front of it should be limited to plants with a mature height of not more than 700mm and no handrail or upstand shall be constructed along that part of the seawall. This appears to be the basis on which the Applicant and the owners or occupiers of this property have reached some agreement. That is all very well, but even if we were to accept the appropriateness of such conditions, any requirements under the Building Act 2004 would prevail over them.

[135] Mr Shaw observed that the proposed review condition enabled a review of the conditions of consent to address any issues about safety after a period of 3 years and submitted that any such effect should be dealt with immediately. We understand his concern but expect it will be dealt with by the processes under s 124 of the Building Act by which the Respondent may at any time take preventive action to protect people from a dangerous building.

[136] Mr Shaw sought that the construction hours exclude work at weekends. As proposed, construction work could occur on Saturdays between 7 a.m. and 1 p.m. This issue often arises in case involving construction and presents a choice between less intrusion at weekends and a shorter overall construction period. Given the amendments to the proposal which Ms Wilkening considers will also reduce noise and vibration, we



consider that it is more appropriate to allow for construction work for 6 hours on Saturdays and so reduce the overall construction period.

[137] Issues also arose in relation to the use of the pathway and the potential for conflict between pedestrians (including those with prams or strollers and wheelchairs) and wheeled vehicles (including bicycles, scooters, mobility scooters and skateboards). Such issues are matters of reserve management and are for the Council to determine using its powers under other legislation. To the extent that this Court may have a say, we would suggest the erection of clear signage that pedestrians have the right of way and that users of wheeled vehicles must give way to them.

Evaluation

[138] Two matters of national importance arise in this case: the preservation of the natural character of the coastal environment and the protection of it from inappropriate development, which in both national and regional policy includes hard structures, and the maintenance and enhancement of public access to and along the coastal marine area, which includes maintaining esplanade reserves for that purpose.

[139] We accept the conclusions of the analysis by the expert witnesses in coastal processes that doing nothing alone or managed retreat (within the reserve) alone or sand transfer alone would not be adequate to protect the esplanade reserve and provide for suitable public access along it. Potentially viable options include alternative alignments to the proposed seawall, managed retreat allowing for an overall soft solution and a long-term “whole of beach” solution combining a number of elements. We note that these options would involve different timeframes and that permutations can be identified, as the expert witnesses did, depending on whether one is dealing with the immediate effects of storms and erosion or the longer term issues associated with climate change and sea level rise.

[140] The relocation of the seawall so that it is outside the CMA is undoubtedly a significant factor in our assessment. Notwithstanding that, we acknowledge that there is force in Mr Dahm’s expert opinion that this legal boundary is not necessarily a natural boundary and that the wider implications of constructing a seawall close to MHWS must be taken into account. The sea will on occasions, through storm surges and wave run-up, extend landward of MHWS. When that happens, the seawall will affect the wave patterns, erosion and sand transport. Even though the proposed works are not to be



located in the CMA, they will have effects there which are relevant to our decision, as identified in the district plan policies quoted above. A complicating factor is that there is other existing development along Ōrewa beach which must be taken into account and which limits the extent to which the current proposal could be further re-located. That factor will certainly require fuller consideration in the near future, at Ōrewa and in many other places around the coast of New Zealand.

[141] Against the adverse effects of a sea wall, we acknowledge the numerous benefits of the proposal, including protection of the esplanade reserve from risks of natural hazards, securing public access, enhancing recreational values, other amenity values including coastal vegetation and trees, and avoiding or mitigating adverse effects on coastal processes and landscape and natural character values.

[142] Considering the adverse effects and the benefits or positive effects comprehensively, there is some irony in using hard engineering methods to avoid or mitigate effects on natural character in terms of the policies for its protection in the NZCPS, and this was the essential basis of the commissioners' decision. The complexity of this environment does not offer much room for any binary treatment of these policies. While one may criticise a process which has seen a series of compromises made, that reflects the range of relevant factors and the differing concerns of various affected persons. A compromise is not necessarily a bad outcome, as long as the final form of the compromise is assessed fully in terms of how well it can fulfil its purpose and what adverse effects may remain.

[143] On that approach, we agree with *amicus curiae* that the central issue is whether the need or desire for a more formalised pathway on the esplanade reserve justifies the use now of a hard seawall, with consequential issues relating to whether the seawall can be located further landward or alternatively a soft option for the whole of the beach should be pursued. As counsel noted, there is no formal proposal for such a soft option before the Court so we cannot substitute that, but if we considered that the evidence established that such an option would be more appropriate in these circumstances, we could decline consent to the proposal before us and indicate that such an alternative, if it were to be pursued by the Applicant, may be more appropriate. We do not come to that conclusion.

[144] In our view, this appeal should be allowed and the Applicant should be granted consents in respect of the amended proposal. This will address the current issues effectively and so be a better course than the other short-term options presented to us.



In particular, moving the wall further inland would diminish the esplanade reserve, contrary to its purpose. We are satisfied that the amended proposal appropriately responds to both the risks associated with coastal hazards and the desirability of public access and recreation in relation to the beach, while reasonably mitigating the adverse effects on natural character and amenity. It does not mean that the longer-term issues will go away or even that they may be pushed back. We endorse the advice and warnings from the expert witnesses that the Council, both as Applicant and as Respondent, must face and plan for the longer-term issues now.

[145] The draft conditions, being the tracked-change version attached to the rebuttal evidence of Ms McCarter, need to be finalised. We have addressed some of the issues raised in submissions but are concerned that a full review of the text should now be done in light of our decision. Opportunity must be given to the s 274 parties to participate in that review but they in turn must be mindful that this will not be a further opportunity to argue the case. To that extent, this is an interim decision.

[146] This complex case would have been difficult in any circumstances. Some added complexity arose from the procedural issues addressed in our interim decision and the need to ensure a transparent process in which the Council, in both of its roles, was able to be held to account. While we will reserve the matter of costs, we do not encourage applications.

Interim Decision

[147] The appeal is allowed and resource consents are granted to the Auckland Council in respect of its amended proposal.

[148] The Applicant and the Respondent are directed to confer and then file and serve a set of draft final conditions by 12 June 2020, either as agreed between them or with any remaining disputed matters identified and explained in an accompanying memorandum, together with the relevant plans and drawings referred to in those conditions.

[149] Any other party may file and serve their comments on the draft final conditions by 26 June 2020.

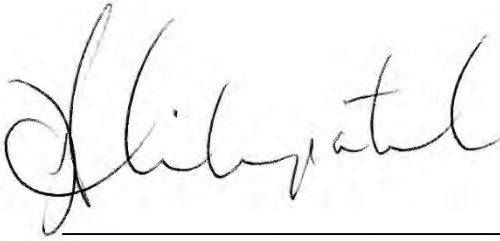
[150] The Court will review the draft final conditions and any comments, and will then either issue a final decision or convene a conference to discuss how any disputed matters



may be resolved.

[151] Costs are reserved.

For the Court

A handwritten signature in black ink, appearing to read 'D A Kirkpatrick', written over a horizontal line.

D A Kirkpatrick
Environment Judge



Appendix A
Resource Consents Required

Topic	Rule No.	Rule	Activity Proposed	Status
District land use (s 9(3)) – LUC60067306				
Open Space- Informal Recreation Zone	H7.9.1 (A25)	Parks depot, storage and maintenance	Construction laydown area in Kinloch Reserve	RD
Open Space- Conservation Zone	H7.9.1 (A39)	New buildings that do not comply with one or more standards	Seawall, stairs, ramps and outfall above MHWS	D
Open Space- Conservation Zone	C1.9(2)	Recreational trails which do not comply with permitted activity standards for Rule H7.9.1(A49)	Walkway and cycleway which exceeds the maximum impervious area	RD
Earthworks	E12.4.1 (A6)	Land disturbance over 2,500m ² within the Open Space Conservation zone	Land disturbance associated with construction of the seawall, walkway and cycleway	RD
	E12.4.1 (A10)	Land disturbance over 2,500m ³ within the Open Space-Conservation zone	Land disturbance associated with construction of the seawall, walkway and cycleway	RD
	E12.4.2 (A29)	Land disturbance greater than 5m ² up to 50m ² within the Historic Heritage overlay	Land disturbance associated with construction of the seawall, walkway and cycleway	RD



	E12.4.2 (A33)	Land disturbance greater than 5m ³ up to 250m ³ within the Historic Heritage overlay	Land disturbance associated with construction of the seawall, walkway and cycleway	RD
Vegetation/ Trees	D13.4.1 (A9)	To undertake works in the root zone of trees listed in the Notable Tree overlay not otherwise provided for	Works associated with construction of the seawall, walkway and cycleway	RD
	E15.4.1 (A21)	To undertake vegetation alteration or removal of greater than 25m ² of contiguous vegetation or tree alteration or tree removal of any indigenous tree over 3m in height within 20m of mean high water springs	Vegetation alteration or removal associated with construction of the seawall, walkway and cycleway	RD
	E16.4.1 (A8)	Works within the protected root zone in the Open Space - Conservation Zone that do not comply with Standard E16.6.3 (that are not in the notable tree overlay)	Works associated with construction of the seawall, walkway and cycleway	RD
	E16.4.1 (A10)	To undertake tree removal of a tree greater than 4m in height or greater than 400mm in girth.	Removal of two pohutukawa trees at Kinloch Reserve	RD
Noise and Vibration	E25.4.1 (A2)	To undertake activities that do not comply with a permitted activity standard.		D
Natural Hazards and Flooding	E36.4.1 (A4)	Buildings and structures on land in the coastal erosion hazard area	Seawall, stairs, ramps and outfall above MHWS	D
	E36.4.1 (A9)	Buildings and structures on land in the coastal storm inundation 1 per cent annual exceedance probability (AEP) area	Seawall, stairs, ramps and outfall above MHWS	RD
	E36.4.1 (A22)	To establish a hard protection structure not otherwise provided for.	Seawall, stairs, ramps and outfall above MHWS	RD



Regional land use (s 9(2)) - LUC60067306				
Earthworks	E.11.4.1 (A9)	To undertake earthworks greater than 2,500m ² within the Sediment Control Protection Area	Construction of the seawall, stairs, ramps and outfall.	RD
	E11.4.1(A28), (A30)	To undertake earthworks within a Significant Ecological Area greater than 5m ² and 5m ³	Construction of the seawall, stairs, ramps and outfall.	RD
Streamworks	E.3.4.1 (A34)	To establish a new erosion control structure, including the associated reclamation and diversion of a stream, located within a significant ecological area	Construction of the timber groyne at Kinloch Reserve including associated disturbance and diversion of the stream, and for the seawall on the opposite side of the stream in this location.	D
	E.3.4.1 (A44)	To establish a new bridge which will require piles within the stream bed and therefore does not comply with activity standard E3.6.1.16	Construction of the new pedestrian bridge at Kinloch Reserve	D
Stormwater permits (ss14 & 15) - DIS60067668				
	E8.4.1 (A9)	The diversion and discharge of stormwater from the new impervious area is greater than 1,000m ² but less than 5,000m ² within an urban area	Construction of the pathway.	C
Coastal permits (s12) - CST60067667				
	F2.19.4 (A37)	Coastal marine area disturbance that is not otherwise provided for	To allow construction access from the CMA for works above MHWS.	D

