IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-0000719

IN THE MATTER OF	an application for judicial review under Part I of the Judicature Amendment Act 1972
BETWEEN	**URBAN AUCKLAND, THE SOCIETY FOR THE PROTECTION OF AUCKLAND CITY AND WATERFRONT INCORPORATED**
	Applicant
AND	**AUCKLAND COUNCIL**
	First Respondent
AND	**PORTS OF AUCKLAND LIMITED**
	Second Respondent

FIRST AFFIDAVIT OF

CEDRIC OWEN BURN FOR APPLICANT

Sworn 1 May 2015

Solicitor Acting:

Mr Geoff Hardy
Madison Hardy
Level 6, Wherescape Towers
Cnr Wyndham and Albert Streets,
PO Box 630 Shortland Street,
AUCKLAND 1140
Ph: (09) 970 9569
Email: geoff@madisonhardy.com

Counsel Instructed:

Mr Julian Miles, QC
Richmond Chambers
Level 5, General Buildings
33 Shortland Street
PO Box 1008
AUCKLAND 1140
DDI: (09) 600 5504
Email: miles@richmondchambers.co.nz

I, **Cedric Owen Burn**, of Auckland, Planner, swear:

Introduction

1. My name is Cedric Owen Burn. I am a planning consultant and a director of Green Group Limited, a resource management consultancy specialising in infrastructure and statutory planning. I hold a Masters Degree in Geography and a Diploma in Town Planning from the University of Auckland. I am a full member of the New Zealand Planning Institute and a past Councillor of this Institute. I am also a member of the Resource Management Law Association and a certified hearing commissioner.

2. I have over 25 years' experience in resource management planning. Prior to joining Green Group as a Director, I was a Principal of and the New Zealand Planning Leader at Connell Wagner Limited (now Aurecon) a multi-disciplinary consulting firm. During my career at Connell Wagner Limited and latterly at Green Group Limited I have had extensive experience in the consenting processes for large-scale developments, energy and infrastructure projects.

3. My experience includes leading teams engaged in the consenting processes and the preparation of assessments of environmental effects necessary for a variety of major infrastructure projects. These include rollout of nationwide mobile telecommunications networks (BellSouth and Vodafone New Zealand), submarine fibre optic cables (CLEAR communications), satellite stations (British Telecom) and power stations and major facilities for Refining New Zealand.

4. Throughout my career I have also been involved in the route selection, and designation and consenting processes required for a number of large State highway projects undertaken by the NZ Transport Agency. These include consenting new bridges included a bridge over the upper Waitemata Harbour at Greenhithe and most recently the Waterview Connection project. This project requires the connection of the existing section of State Highway 20 with the Northwestern motorway (State Highway 16) via a tunnel

passing under the suburb of Waterview. In addition the project required the enlargement of the State Highway 16 causeway by way of reclamation within the Motu Manawa Marine Reserve and at other locations within the upper reaches of the Waitemata Harbour as well as new bridge structures within the Coastal Marine Area.

5. I was the co-leader of the consenting team for the Waterview project which required the granting of 54 resource consents and 6 designations pursuant to the provisions of the Resource Management Act 1991 (the RMA). The Waterview project is the largest roading project undertaken in New Zealand having a total project cost of $2 billion.

6. I have also provided strategic planning and policy advice and expertise to infrastructure and energy industry providers included input into plan reviews, plan changes and variations to district and regional plans for Auckland. Accordingly I am familiar with the provisions of the Auckland Council's Operative Regional Plan: Coastal; Regional Plan: Air, Land and Water and Proposed Auckland Unitary Plan as these apply to these proceedings.

7. I most recently inspected the site subject of these proceedings in March 2015.

8. I confirm to the Court that I have read the High Court Code of Conduct for expert witnesses and that I agree to comply with that Code. I also confirm that to the best of my knowledge I have not omitted any material facts known to me that may alter or detract from the opinions expressed in this evidence.

Background/Scope of Evidence

9. My affidavit sets out the background to these proceedings, the consent applications required, and the decisions in relation to public notification and substantive grant of approval. I then consider the processes that were followed and provide my professional opinion on the efficacy of them from a planning perspective.

10. I have read the application documents and the decisions from the Council. I am also generally familiar with the contents of the files disclosed by the Auckland Council on 24 April 2015.

11. Where I refer to documents in this affidavit that are part of the public record and intended to be included within a common bundle for hearing, I do not exhibit them. Rather, I provide a cross reference which can be updated subsequently once the Common Bundle is produced.

Background Facts

12. In 2014 Ports of Auckland Limited (**POAL**) made a series of resource consent applications to the Auckland Council (**Council**) under the Resource Management Act 1991 (**RMA**) to enable it to construct two extensions to Bledisloe Wharf.

13. Bledisloe Wharf is a substantial container wharf that lies between Jellicoe Wharf and Marsden Wharf on the Waitemata Harbour adjacent to the CBD of Auckland City. The proposed extensions - B2 and B3 - lie on either side of the existing wharf and when constructed will extend out as two 'fingers' beyond the end of the existing wharf to the north and further into the Waitemata Harbour.

14. The background to the wharf extensions as part of POAL's well-known plans to expand its operations on the Waitemata Harbour by increasing the footprint of the Bledisloe Wharf are discussed in the affidavit of Mr Cayford. From that material, and my own general understanding of POAL's aspirations, I understand that its long term plan is to reclaim the area between the extended B2 and B3 wharves once constructed. That reclamation would require further consents from the Auckland Council in due course.

15. The first application (made 18 September 2014) sought to extend the existing Bledisloe B2 Wharf (**B2**) by approximately 4,290m^2 (310 metres in length x 33 metres in width) to enable the berth to accommodate vessels up to 220 metres in length. The wharf extension also required consent to discharge contaminants from an 'industrial or trade activity' (**ITA**). The consent application

incorporated stormwater collection and treatment via drains and a treatment device prior to discharge into the harbour.

16. The second application (made 18 November 2014) sought to extend the existing Bledisloe B3 Wharf (**B3**) by approximately 3,300m^2 (116 metres in length overall x 33 metres in width). The wharf extension also required consent to discharge contaminants from an ITA. The proposal incorporated stormwater collection and treatment via drains and a treatment device prior to discharge into the harbour.

17. The applications were made two months apart by POAL by its consultant Bentley & Co. (**Bentley**). The second application was made approximately 3 weeks after the first one was approved without notification.

Consent Requirements

18. The proposed wharf extensions required resource consents under ss 9, 12 and 15 of the RMA and relevant provisions of the following resource management plans for Auckland:

    (a) Auckland Council Regional Plan: Coastal (**Coastal Plan**);

    (b) Auckland Council Regional Plan: Air, Land and Water (**ALW Plan**); and

    (c) Proposed Auckland Unitary Plan (**Proposed Plan**).

19. By reference to those plans the following specific consents were required:

    (a) Under the Coastal Plan (Rule 25.5.18) – a consent for alteration or expansion of existing lawful structures in Port Management Area 1A (for both B2 and B3) – classified as a controlled activity under that plan;

    (b) Under the ALW Plan (Rule 5.5.18) – a consent to discharge contaminants into the Waitemata harbour from the activity area of a new industrial or trade activity categorised as “High Risk” in schedule 3 of the ALW Plan

(for both B2 and B3) – classified as a restricted discretionary activity under that plan;

(c) Under the Proposed Plan:

(i) a consent for the extension or alteration of existing lawful CMA structures (for both B2 and B3) (Rule I.6.1.10) – classified as restricted discretionary;

(ii) a consent to divert and discharge stormwater from new impervious area where total site impervious area exceeds 5,000m^2: existing site impervious area greater than 5000m^2 and new impervious areas totalling 6,700m^2 (B2 3,400m^2 and B3 3,300m^2) (Rule H.4.14.1.1) – classified as discretionary;

(iii) a consent to discharge stormwater from new impervious area in excess of 25m^2 where total impervious area on the site is greater than 10% of the total site area (Rule H.4.14.2.1) – classified as controlled;

(iv) a consent for new high risk industrial and trade activity (Rule H.4.8.1) – classified as restricted discretionary.

20. I understand that there is a disagreement as to whether or not the B2 and B3 wharf extensions required restricted discretionary consent under Rule I.6.1.10 in the Proposed Plan (paragraph 19(c)(i) above). The issue is a legal one of plan interpretation and accordingly I venture no opinion on it.

21. Regardless of that issue, if the consents required for each of the B2 and B3 extensions had been lodged and processed simultaneously, then they would have been considered and assessed overall as discretionary. I return to my reasons for that view below.

22. A similar consent status position would have followed if both extension applications had been lodged and processed simultaneously.

The Applications Submitted

23. However, the applications were not submitted or processed on that basis. Rather four separate applications were made under s 88 of the RMA as follows:

    (a) Application and assessment of environmental effects (**AEE**) dated 18 September 2014 for the consents required under the Coastal Plan and ALW Plan, but for B2 extension only (**B2.1 Application – CB Document [ ]**);

    (b) Application and AEE dated 18 September 2014 for the consents required under the Proposed Plan (excluding the consent referred to at paragraph 19(c)(i) above), but for B2 extension only (**B2.2 Application – CB Document [ ]**);

    (c) Application and AEE dated 18 November 2014 for the consents required under the Coastal Plan and ALW Plan, but for B3 extension only (**B3.1 Application – CB Document [ ]**);

    (d) Application and AEE dated 18 November 2014 for the consents required under the Proposed Plan (excluding the consent referred to at paragraph 19(c)(i) above), but for B3 extension only (**B3.2 Application - CB Document [ ]**).

24. As noted above, POAL did not apply for the consent referred to in paragraph 19(c)(i) above.

25. The consent applications were made on the Council's version of Form 9 of the Forms Regulations to the RMA. Bentley describe the proposed activity at paragraph 7 of that form simply as "B2 Extension". From this brief description of the proposal I understand that it was proposed to extend the B2 wharf rather than construct a

new wharf. The plans attaching to the application show B2 being extended out further from the existing Bledisloe Wharf.

26. Bentley repeat the description of the proposal (apart from the use of B3) for the proposed extension works to B3.

27. The B2 and B3 wharf extension applications were thus separated into two proposals, with two separate applications made under the different applicable plans for each extension proposal (i.e., the Coastal Plan and ALW Plan on one hand and the Proposed Plan on the other). Within the B2.1 and B3.1 applications, the consent requirements under the Coastal Plan and ALW Plan were also further segregated.

28. Bentley's covering letters to the Council (included within the B2.1 and B3.1 applications (**CB Documents [ ]**), set out its argument as to why it considered this approach to be appropriate. I return to the assertion that the operative plan consents could be dealt with in an 'un-bundled' or segregated manner below, as it is a key concern I have with the manner in which these consents were processed.

29. In terms of the separation of the operative plan consent requirements from the Proposed Plan consent requirements, the covering letters advise: *"…consistent with the manner in which the tug berth facility was processed, Council cannot "bundle" the assessment of POAL's applications for [B2/B3] extension made under the operative planning framework, with the consent applications made under those rules of the PAUP that have immediate legal effect*". However, it continues and notes that: "*To facilitate the efficient processing of the resource consent applications, POAL have made separate, but concurrent applications under the ARPC/ALWP and the PAUP. This will enable Auckland Council to undertake separate assessments and decisions in respect of the applications (one assessment and decision under the provisions of the PAUP, and one assessment and decision under the "operative" regional plan provisions)*."

30. I note that at the time of preparing this affidavit I have not seen the 'tug berth facility' application or consent, nor any material on that

file, and thus have no understanding of the basis on which POAL asserts that the Council "cannot 'bundle'" the respective plan consents together. It is not a position I have ever encountered in practice, with applicants and consent authorities generally progressing all requisite consents together as an integrated application. I return to this issue below.

Council Processing

31. The Council received and processed the four applications in the same format that they were lodged as follows:

    (a) B2.1 Application and B2.2 Application together but separately and concurrently by a consultant planner engaged by the first respondent (Sally Halpin) whose reports were "approved for release" by a lead planner (Jennifer Valentine) employed by the Council;

    (b) B3.1 Application and B3.2 Application together but separately and concurrently also by Sally Halpin whose reports were again "approved for release" by Jennifer Valentine.

32. Four separate reports (**Reports**) were prepared for the four applications (pursuant to s 42A of the RMA) as follows:

    (a) B2.1 Application (R/REG/2014/3851 and R/REG/2014/4198) – 29 October 2014 (**CB Document [ ]**);

    (b) B2.2 Application (R/LUC/2014/3852 and R/REG/2014/3853) – 29 October 2014 (**CB Document [ ]**) ;

    (c) B3.1 Application (R/REG/2014/4851 and R/REG/2014/4850) – 17/18 December 2014 (**CB Document [ ]**);

    (d) B3.2 Application (R/LUC/2014/4848 and R/REG/2014/4849 – 17/18 December 2014 (**CB Document [ ]**).

33. Each of the Reports made simultaneous recommendations that the applications they related to should be processed without public or limited notification (ss 95A and 95B RMA) and approved (ss 104, 104A, 104B and 104C of the RMA).

34. To assess the applications, Ms. Halpin had the following material: an assessment of construction methodology prepared by Beca - a consulting engineering company, who also provided advice on the effects associated with ITA and stormwater discharges; an assessment of effects on navigation and safety prepared by Nigel Meek a Senior Pilot; and the effects of construction noise in a report prepared by Marshall Day Acoustic consultants and engineers. These reports formed part of the application documentation for all of the applications submitted by Bentley.

35. Although presented in one report, Ms Halpin prepared in essence two assessments for each of the applications – one on the matter of public notification, and the other on the activity and its effects having regard to the framework for assessment provided by the Plan(s) and the RMA.

36. She concluded on the matter of notification that: "*No persons are considered to be adversely affected*" because "*the physical effects of the activity having regard to the ITA were of a low risk and that standard operating procedures would be maintained with respect to discharges from vessels.*"

37. Ms Halpin did not consider that there were special circumstances warranting notification of the applications given that additions and alterations to existing port related infrastructure and the discharges from these new structures are "*relatively common place and an expected development within this busy commercial port environment in order to improve on-going efficiency and safety within the port. As such, the making of applications for structures relating to marine and port activities and their related discharges cannot be described as out of the ordinary*".

38. When it came to reporting on the applications required under the Proposed Plan, unlike the applications made under the operative plans, Ms. Halpin considered that these applications should be

'bundled' as "*the activities for which consent is sought under the PAUP are linked both physically and operationally it is difficult for the activities to be considered in isolation of one another*."

39. Ms Halpin's processing of the B3 applications consistently followed that adopted by her in assessing the B2 applications. She proposes the unbundling of the consents under the operative plans, and (for the same reasons as B2) concludes that there are no special circumstances, and that the application is one that could be processed without public notification. When it came to the Proposed Plan consent requirements for B3, Ms Halpin considered again that these consents should be bundled and reached the same conclusion as to notification and approval.

Decisions on Applications

40. Eight separate decisions were required in relation to the applications: four as to notification and four as to their substantive approval/refusal.

41. The Council appointed two commissioners from its panel of contracted independent commissioners to make the required decisions as follows:

    (a) B2.1 Application – Duty Commissioner Rebecca Macky – notification and substantive decision – 31 October 2014 (**CB Document [ ]**);

    (b) B2.2 Application – Duty Commissioner Rebecca Macky – notification and substantive decision – 31 October 2014 (**CB Document [ ]**);

    (c) B3.1 Application - Duty Commissioner Barry Kaye – notification and substantive decision – 23 December 2014 (**CB Document [ ]**);

    (d) B3.2 Application - Duty Commissioner Barry Kaye – notification and substantive decision – 23 December 2014 2014 (**CB Document [ ]**).

42. The commissioners adopted the recommendations in the Reports and determined that:

    (a) each of the applications were to be processed without public notification under section 95A of the RMA or limited notification under section 95B of the RMA;

    (b) each of the applications were approved subject to the conditions recommended in the Reports.

43. "Duty Commissioner record sheets" were submitted to the Council by the respective commissioners with their decisions (**CB Documents [ ]**). These sheets set out a variety of details about the timeframe the commissioners were required to meet with their decision making, the scope of their discretion and the time they spent considering the materials and preparing their decisions. The Council has also disclosed various email communications involving the reporting officers, other consultants who were providing advice and the duty commissioners themselves. These communications provide a candid 'picture' of the pressures and time constraints the Council and its commissioners were subject to in processing and determining the applications (**CB Documents [ ]**), for the most part arising from POAL's demands for strict compliance with statutory timeframes.

The Bundling Issue

44. It is my experience that the conventional approach accepted by the Environment Court when assessing resource consent applications that may require a multiplicity of consents is that all consents should be considered contemporaneously and the most restrictive consent status dictates how the application should be assessed overall. This approach is known as 'bundling'.

45. For the purposes of notification, councils have to decide whether to treat a proposal as a number of separate activities or as one overall activity (a 'bundle').

46. Where more than one activity is involved and those activities are inextricably linked, the general rule is that the activities should be bundled and the most restrictive activity classification applied to the overall proposal.

47. Splitting the proposal into its separate applications for the purposes of notification and assessment of effects could lead to the unsatisfactory outcome that the Council fail to look at a proposal in the whole and do not consider possible interrelated or cumulative effects. Integrated management (looking at all consents jointly) is especially important in the coastal environment from my experience.

48. In this case a number of resource consents are required under three separate regional plans: two operative and one proposed.

49. The applications have been separated out by POAL into separate applications, not just in terms of different aspects of the activity under the Coastal Plan and ALW Plan, but also in respect of the operative regional plans (Coastal Plan and ALW Plan) and the Proposed Plan.

50. The most restrictive of these consents requirements is that of a discretionary activity. However, this consent status is effectively 'siloed' from the other consent requirements for the same structure by the approach requested by POAL (via Bentley), and acceded to by the Council processing officers. I refer here to the splitting of the B2 application into the separate B2.1 and B2.2 applications. The same approach is also adopted for the B3 application.

51. In my experience the separating of these consent requirements in the manner promoted by Bentley is unusual. The conventional approach, and one typically required by Auckland Council, has been to require an application that recites all matters requiring consent under all planning instruments (operative and proposed) and then assess these collectively to enable the best holistic assessment to be made. Indeed, the novelty of the approach was commented on (but apparently not questioned) by Ms Halpin in her internal communications with the Council processing team (**CB Documents [ ]**).

52. As noted above, Bentley refer only to an earlier consent and a request for consistency to support the approach they contend for.

53. The section of the RMA that is concerned with the making of decisions on applications (s 104) refers to consideration being given to plans or proposed plans (104(1)(b)(vi) and does not separate the two. I know of no provision in the RMA that supports the segregation and processing of the applications in the manner requested by Bentley.

54. As I have stated above (paragraphs 44 et seq) this approach accords with the practice endorsed by the Environment Court. Ms Halpin clearly appreciated the conventional wisdom on such matters and observed in her reports that: "*The accepted practice under the Act for multiple consents is that the more stringent planning status should apply to the entire proposal. However in some circumstances the different aspects of a proposal may be unbundled. Generally, it is accepted that where an activity that requires consent is integral to another activity that also requires consent, they should be bundled.*" (**CB Document [ ]**).

55. I accept that exceptions to the 'bundling' principle apply in practice, and in this case, were applied by Ms Halpin (at POAL's insistence) to treat the operative plan consent requirements as separate. However, that principle would not support the separation of consent requirements for the same activity, but under different plans, into separate applications. I see no good planning reason for undertaking this artificial separation of matters requiring consent.

56. Ms Halpin's reasoning for 'unbundling' the various operative plan consent requirements in the B2.1 and B3.1 applications is as follows: "*In the case of controlled activities and restricted discretionary activities where there are no overlapping matters of control or discretion it may be appropriate to unbundle the consents. In relation to the consents applied for under this application there are no matters of overlap between the controlled activity consent for a new port structure and the restricted discretionary consent for the discharge of contaminants. Thus it is appropriate to unbundle the consents and to assess the application*

as controlled (in part) and restricted discretionary (in part)." (**CB Document [ ]**).

57. Notwithstanding that there may not be any overlapping matters of 'control or discretion' to be considered, obtaining consent to both of these matters remains – to use her words - 'integral to each other' in ultimately obtaining consent to extend the wharf in the manner for which consent is sought overall.

58. If one element requiring consent fails to achieve the consent it requires then the proposal overall fails. The matters are intertwined. The wharf extension structures and the stormwater discharges from them are inextricably connected and overlap. The latter are a consequence of the former and cannot reasonably be separated from them.

59. It is artificial in my opinion to separate the consents out even though the assessment of the effects of each may necessitate the consideration of possibly unrelated and at best parallel effects, as they each ultimately contribute to enabling the whole.

60. I consider that the matters for consent for each of B2 and B3 should have been 'bundled' across and between the applicable plans, such that they would have been assessed overall as a discretionary activity having regard to the provisions of both plans.

61. If the correct approach had been adopted then the Council was required to have regard to all effects of the activity when forming a view in terms of s.95A of the RMA. Subsection 95A(2) – subject to s.95D, requires the Council to notify an application where the effects of the activity on the environment are more than minor.

62. The following environmental effects (actual and potential) were either not assessed or were assessed by Ms Halpin in a cursory or 'blinkered' manner only:

- visual and coastal landscape;
- amenity;
- harbour recreation;

- public wharf access;
- cultural; and
- cumulative.

63. In relation to cumulative effects, once Council had approved resource consent for the B2 wharf, then in processing the subsequent B3 application, B2 would fall to be considered as part of the existing environment. POAL had indicated it intended to proceed with construction of B2, meaning that it would be implemented. Council, having separated out processing of B2 and B3, should have undertaken an assessment of the cumulative effects of B2 in combination with the proposed B3. It did not.

64. The above effects may have a more than minor effect on the environment, but were not considered by Ms. Halpin in her notification assessment as that assessment confined itself to matters such as water quality, traffic movements, installation of stormwater filters, the berthing of larger vessels.

65. There is in my view a far wider assessment of effects that should have been undertaken and for which a discretion was afforded to the Council, which included the matters I have referred to above and other matters that may have required consideration such as the effects of the extensions on the historic heritage values of the adjacent Queens wharf.

66. Such an assessment would necessarily have occasioned a wider assessment of 'special circumstances' well beyond that undertaken by Ms. Halpin and may have led to the view that the effects of the activity were more than minor and that the application needed to be publicly notified.

67. In relation to the s104 RMA assessment, Ms Halpin stated that:

> *"Any visual effects will be barely perceptible given this highly modified large working port environment" (pp15)*

followed by:

"I concur with the applicant that the life supporting capacity and environmental amenity of the Hauraki Gulf will not be affected." (pp15)

68. Two issues arise from this analysis. First, that visual and amenity effects were relevant (arising under s 104) – if they weren't, why were they even mentioned. And, second, that the assessment undertaken by Ms Halpin was inadequate to assess those effects. I would have expected a much fuller analysis of the impact B2 (and especially B3) would have on public views from relevant land-ward and sea-ward positions. An analysis of the impact to Queens Wharf should have been undertaken. The recent assessment provided by Mr Lister, and supported by Graeme Scott, emphasises this issue, and the concern I have with the inadequacy of the assessment of this effect.

69. No visual assessment of increasing the area of the wharf by 4290m^2 and 3300m^2 respectively is made in any of the application materials or the planning reports. That area when considered in the overall context of POAL's operations may be small, but is still a significant increase in area and projects some distance into the harbour beyond the current wharf with the potential, in Mr Lister and Mr Scott's opinion, for more than minor adverse visual effects.

70. In essence the Council has not made a decision based on all of the effects that are likely to arise and should have been assessed. They have excluded a number of effects from consideration, and sought no information in relation to them, as a direct consequence of the unbundled and segregated consenting processes they have followed at POAL's insistence.

Other Statutory Instruments

71. The chosen approach also led to an inadequate assessment for notification purposes of other relevant statutory instruments. It was abundantly clear that the applications proposed activities within:

(a) the Hauraki Gulf (as that term is defined in the Hauraki Gulf Marine Park Act 2000 (**HGMPA**)) and;

(b) the coastal environment (as that term is defined in the New Zealand Coastal Policy Statement (**NZCPS**)).

72. Section 9 of the HGMPA requires consent authorities considering applications within the Hauraki Gulf to have regard to ss 7 and 8 of HGMPA.

73. The applications also proposed activities in a significant coastal environment and the provisions of the NZCPS were directly relevant to their assessment and consideration.

74. There is no evidence of any consideration of ss 7 and 8 of the HGMPA or the NZCPS in the assessment of the applications for notification purposes.

Special Circumstances

75. A Council may notify an application in terms of s.95A if it decides that special circumstances exist in relation to the application.

76. In her reports on the B2.2 and B3.2 applications to discharge stormwater Ms Halpin considers that there are no special circumstances that apply. She bases her argument on the notion that "*new structures to support port related activities and the discharges from these new structures are relatively common place and an expected development within this busy commercial port environment*." In relation to the controlled activity consents under the Coastal Plan, similar comments are made. The reasoning in relation to special circumstances is adopted by the commissioners in their decisions.

77. I agree that the port area is a dedicated commercial port largely controlled by a single entity in the form of POAL, but I do not agree with the proposition that "*new structures are relatively common place*" and therefore the applications did not give rise to any special circumstances.

78. Extensions to wharfs as contemplated by the present array of consents are not so commonplace as to be trite and dismissed as the norm. If that were the case then I doubt that the level of public interest that these applications have generated would have arisen.

79. If nothing else the level of public interest suggests that there are special circumstances surrounding the progressive creep into the perceived public domain of utilitarian port structures.

80. In the last 20 years, commencing with the refurbishment of the Prince's Wharf in 1997, the Auckland public has taken an interest in providing for enhanced public access to the Auckland waterfront.

81. There is an implicit tension between the continuation and extension of purely port related activities and the public's desire to retire such structures and enhance public access and recreational activities adjacent to the water.

82. In my opinion there were other obvious relevant special circumstances warranting public notification of the applications, namely:

    (a) The ownership relationship between the Council and POAL (refer affidavit of Ms Stout);

    (b) The long standing and publicly known plans for further port development at Bledisloe Wharf (refer affidavit of Mr Cayford);

    (c) The national significance of the location of the proposed B2 and B3 wharf extensions;

    (d) The adverse effects of the B2 and B3 extensions properly assessed.

83. I surmise that such factors did not enter into the reporting officer's assessments or even the commissioners' minds, because by that stage they had constrained their processing and consideration of the applications in accordance with POAL's wishes.

84. By reference to my paragraph 82(c) above, I maintain that an assessment of the proposal should have had regard to the various policies contained in the NZCPS and HGMPA. I note that these matters are touched upon in Ms Halpin's reports but she does not appear to have dealt with all the matters that are relevant to the matters she was assessing.

85. I have extracted several policies that I consider relevant to such an analysis by way of example.

New Zealand Coastal Policy Statement

86. Policy 1 "Extent and characteristics of the coastal environment" refers:

"*(1) Recognise that the extent and characteristics of the coastal environment vary from region to region and locality to locality; and the issues that arise may have different effects in different localities.*

(2) Recognise that the coastal environment includes:

(a) the coastal marine area;

(b) islands within the coastal marine area;

(c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;

(d) areas at risk from coastal hazards;

(e) coastal vegetation and the habitat of indigenous coastal species including migratory birds;

(f) elements and features that contribute to the natural character, landscape, visual qualities or amenity values;

(g) items of cultural and historic heritage in the coastal marine area or on the coast;

(h) inter-related coastal marine and terrestrial systems, including the intertidal zone; and

(i) physical resources and built facilities, including infrastructure, that have a modified the coastal environment."

87. I observe that consideration of elements and features that contribute to natural character, landscape visual qualities or amenity values are matters that are specifically referred to in this policy. It is not enough in my view to assert that "any visual effects

will be barely perceptible given this highly modified large working port environment" with no reference to matters of wider amenity.

88. Policy 4 "Integration", also states:

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

(a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:

(i) the local authority boundary between the coastal marine area and land;

(ii) local authority boundaries within the coastal environment, both within the coastal marine area and on land; and

(iii) where hapū or iwi boundaries or rohe cross local authority boundaries;

(b) working collaboratively with other bodies and agencies with responsibilities and functions relevant to resource management, such as where land or waters are held or managed for conservation purposes; and

(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; or

(iv) and use activities affect, or are likely to affect, water quality in the coastal environment and marine ecosystems through increasing sedimentation; or

(v) significant adverse cumulative effects are occurring, or can be anticipated."

89. The policy requires consideration of the effects of an activity on the use and enjoyment of public space in the public environment. There is no explicit recognition in the report that the Waitemata Harbour is in fact a public space albeit one that the Ports have rights to currently make use of.

90. Policy 6 "Activities in the Coastal Environment" states;

"(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;

(c) encourage the consolidation of existing coastal settlements and urban areas where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth;

(d) recognise tangata whenua needs for papakāinga3, marae and associated developments and make appropriate provision for them;"

91. The Policy requires that regard be had to the rate at which built developments such as port extensions should be enabled to provide for the reasonably foreseeable needs of population growth with the caveat of such development not compromising the other values of the coastal environment.

92. Such other values may include the rights of the wider public to use and enjoy the existing harbour and considerations as to matters of visual amenity and ultimately how such space is used.

Hauraki Gulf Marine Park Act 2000

93. The HGMPA - legislation specifically created to manage the waters of the Hauraki Gulf Islands - states in its preamble at (7) "*The Gulf, its islands and catchments have complex interrelationships that need to be well understood and managed....*" and states at s 3 its purpose as being to "*Integrate the management of the natural, historic and physical resources of the Hauraki Gulf, its islands, and catchments*".

94. The HGMPA also recognises the Hauraki Gulf as having national significance. At s 8 it notes as a further purpose: "*To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands and catchments: …(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its Islands and catchments to the social and economic well-being of the people and the communities of the Hauraki Gulf and New Zealand."*

95. In my opinion, whilst the language of this act is broadly cast and has many similar qualities to the Resource Management Act, the fact that it is particular to the Hauraki Gulf, within which the Bledisloe Wharf lies, makes it a matter to which specific regard should be had when assessing the merits of a proposal such as this.

96. The HGMPA is also deemed to comprise a statement of national policy in terms of various other pieces of legislation, which further

reinforces that it is a matter that should be had careful regard to as a matter of some significance in the current context.

Auckland Regional Plan: Coastal (Coastal plan)

97. Having regard to the Coastal Plan, that plan contains the following objectives and policies, which in my opinion constitute matters that regard should be had regard to when assessing the current proposal.

98. These include objective 10.3.3, which states: "To maintain where appropriate the open space nature of the coastal environment." And:

> *"4.4.3 In those areas of the coastal environment not identified in this plan as Outstanding or Regionally Significant Landscapes, any subdivision use and development in the coastal marine area shall be of a scale, design and location, and undertaken in a manner which avoids, where practicable, remedies or mitigates adverse effects on landscape elements, features and patterns."*

And 4.4.5, which states: "*In assessing the effects of subdivision, use and development, including cumulative effects in the coastal marine area on landscape values regard shall be had to:*

> *a. ensuring where practicable that it is of a scale, location and design which encourages its integration with the type and intensity of development in the adjacent areas of the coastal marine area and with the pattern of subdivision use, and development above Mean High Water Springs."*

And:

> *"4.4.6 in assessing the effects of subdivision, use and development in the coastal marine area, regard shall be had to other relevant landscape matters such as design guidelines prepared for land above Mean High Water Springs."*

And;

> *"10.3.3 to maintain where appropriate, the open space nature of the coastal marine area."*

99. The analysis of the proposal does not in my opinion furnish the assessment of these various values that was necessary in my view to a balanced and holistic analysis of these applications.

Promise of Access to Captain Cook Wharf

100. In its description of the proposal the B2.1 and B2.2 applications stated (at paragraph 4.2) that:

> "*The extended "B2" berth will also enable POAL to move ships berthed at Captain Cook Wharf to the west during the summer peak cruise season, which in turn provides POAL with the opportunity to consider making the western side of Captain Cook Wharf available to the public for much of the time during this season"*.

101. The subsequent reports for these two applications both considered greater public access to Captain Cook Wharf as a positive effect of the B2 wharf extension (page 11 of B2.1 Report and page 9 of B2.2 Report). It was stated: "*I concur with [POAL] that the proposal will … enable greater public access and use in respect of the surrounding downtown wharves (Captain Cook in particular) during the summer cruise ship period*."

102. The decisions on the B2.1 and B2.2 also both specified the enablement of greater public access, particularly during the summer cruise ship season, to Captain Cook Wharf as a reason for the granting of consent to those applications.

103. However, despite these statements, my understanding is that there is no obligation on POAL to provide greater public access to Captain Cook Wharf. In relying on the offer of greater public access to Captain Cook Wharf as a reason to grant consent to the B2 wharf extensions, the Council has therefore been misled. In my

opinion, by not imposing a condition to require a certain public access outcome the positive benefits of greater public access to Captain Cook Wharf could not have been relied on as a reason to grant consent to the B2 wharf extension.

104. In my view, this outcome could have been avoided if the B2 applications had been publicly notified and properly tested, including as to the imposition of appropriate conditions.

Conclusions

105. I have reviewed the documents forming the various applications and the Council's reporting officer's reports, and the various attachments to the reports that were put before the commissioners, and the commissioner's decisions. In my opinion these materials were deficient as a consequence of the manner in which the applications were submitted and processed. The assessment and consideration of the applications both for notification and substantive determination is flawed as a result.

106. The extensions to Bledisloe wharf in reality comprise 'Stage 1' of a single, publicly known project (the Bledisloe Wharf expansion - with 'Stage 2' comprising the reclamation of the seabed between the extended wharves), which required multiple consents under the Coastal Plan, ALW Plan and Proposed Plan.

107. As noted above, in their letters dated 18 September 2014 (for the B2.1 and B2.2 Applications) and 19 November 2014 (for the B3.1 and B3.2 Applications) Bentley asserted that the applications were being advanced this way "to facilitate the efficient processing" of them. That may be so, but a consequence of Council adopting that process without question was that effects on the environment of the extensions were not able to be assessed in an integrated and holistic fashion for the purposes of notification and substantive assessment and decision-making.

108. Importantly, as well, the overall discretionary status of each wharf structure (for assessment and decision-making purposes) was confined only to the consents required under the B2.2 application and B3.2 application and not each wharf as a single proposal.

109. I accept that in practice there is a tension between the provision of perfect knowledge on a matter and furnishing sufficient information upon which to produce an informed and meaningful judgment on the effects of an application and matters such as whether or not it is appropriate to exercise the discretion to not notify an application.

110. In my opinion, for the reasons I have outlined, the Council's commissioners assessing the applications did not have the benefit of considering these proposals holistically, nor were they provided with an assessment of all effects that would follow.

SWORN at Auckland this day of May before me:		
		Cedric Owen Burn
A Solicitor of the High Court of New Zealand		