IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

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b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

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viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
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how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
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"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

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… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

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4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

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4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

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5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

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6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

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7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

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8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

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iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

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vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

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2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

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sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

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iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

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viii) The trenches constitute an adverse, causal environmental effect in themselves.

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2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

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"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

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5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
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5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

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Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

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6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

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> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

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7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

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8. CONCLUSIONS AND RELIEF SOUGHT

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N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

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1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

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c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

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iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

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2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

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2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

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2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

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iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

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viii) The trenches constitute an adverse, causal environmental effect in themselves.

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"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

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4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

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5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
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6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

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a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
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sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

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7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

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d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

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e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

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8. CONCLUSIONS AND RELIEF SOUGHT

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N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

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iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

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3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

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"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

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viii) The trenches constitute an adverse, causal environmental effect in themselves.

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… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

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i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

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4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

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5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

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6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

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7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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d) He refers to the Regional Policy Statemen part of the AUP, and notes that it includes provisions which specifically address the Hauraki Gulf and the need to manage the area in a manner which gives effect to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He notes that these provisions establish definitive "bottom lines" that must be established, including:

   i. Require applications for use and development to be assessed in terms of the cumulative effect on the ecological and amenity values of the Hauraki Gulf, rather than on an area-specific or case-by-case basis;

   ii. Ensure that use and development of the area adjoining conservation islands, regional parks or Department of Conservation land, does not adversely affect their scientific, natural or recreational values;

   iii. Provide for commercial activities in the Hauraki Gulf and its catchments while ensuring that the impacts of use, and any future expansion of use and development, do not result in further degradation or net loss of sensitive marine ecosystems.

e) Dr Mitchell also refers to Section F2.5 of AUP, which address disturbance of the foreshore and seabed, emphasising that this provision requires sand extraction to "not have a significant adverse effects on the coastal marine or near-shore environments" and a precautionary approach.

f) Dr Mitchell sets out a range of **amended conditions**, which he considers are required if consent is granted to ensure comprehensive monitoring and to enable compliance with the conditions to be assessed.

7.4 Dr Martin Single holds a hold a Ph.D. in Geography from the University of Canterbury, and specialises in coastal processes and coastal management of New Zealand ocean beaches, lakeshores, and harbours. He has undertaken a number of studies the effects of sand extraction from the coastal environment. He has experience with engagement with community groups. His evidence addresses:

a) The sediment budget for the Mangawhai-Pakiri embayment and notes that this is heavily reliant on information and monitoring data collected from McCallum Brothers as operators of the nearshore consent.

b) He concludes that:

i. the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of that activity.

ii. the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environment.

8. CONCLUSIONS AND RELIEF SOUGHT

8.1 FOPB submit that the application for consent be declined.

N.R. WILLIAMS
BARRISTER
14 May 2021

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

SUBMISSIONS ON BEHALF OF THE FRIENDS OF PAKIRI BEACH IN OPPOSITION TO THE APPLICATION

14 May 2021

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1. BACKGROUND

Introduction

1.1 These legal submissions are presented on behalf of the Friends of Pakiri Beach (**FOBP**), a submitter in opposition to the application by Kaipara Ltd (**applicant**) for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) (**application**).

FOPB's interest in the application

1.2 The Friends of Pakiri Beach represent homeowners and residents of Pakiri as well as frequent visitors who appreciate and want to protect the special environment and outstanding natural landscape that is Pakiri.

a) FOPB is an incorporated society and registered charity whose primary constitutional objectives include:

   i. "To assist either directly or indirectly in the restoration, protection and improvement of the Mangawhai-Pakiri coastal marine area".

   ii. "To assist in the maintenance, preservation and enhancement of native wildlife along the Mangawhai–Pakiri embayment."

b) FOBP is not a NIMBY organisation: none of its members are concerned about the effect of sand mining on Pakiri property prices. Its concerns are strictly about preserving the Pakiri beach environment for the benefit of all users as they consider themselves very fortunate to live in such a beautiful area with an accompanying responsibility to protect it.

c) FOPB supports and submissions made on behalf of submitter Damon Clapshaw and do not propose to repeat those, except to highlight key points made:

   i) The **precautionary approach** requires the Commissioners to treat with caution the applicant's arguments that the effects of the proposal will likely be acceptable where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent.

ii) the Commissioners are **entitled to draw adverse inferences** from the past conduct of the consent-holder and operator in this case and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter".

iii) The **gross deficiency in baseline information** means that there is a real question as to whether any conditions could be truly effective in mitigating the risk of adverse effects. The sheer size of the deficiency in baseline information means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

iv) If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the **only option is to decline consent**.

v) The application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP.

vi) The Commissioners ought to decline the application on the basis of **inadequate information and require the applicant to reapply once that information has been properly collated**.

vii) Because the evidence demonstrates a history of non-compliance with the conditions of consent by the current operator, and the undertaking of dredging in a manner quite different to what was understood at the time, until such time as the operator and consent-holder can demonstrate proper compliance with the existing consent conditions, **Kaipara Ltd should not be granted the renewal** it seeks.

viii) The trenches constitute an adverse, causal environmental effect in themselves.

2. LEGAL FRAMEWORK

2.1 The legal framework within which this application must be considered has been addressed at length by both Mr Carnie for MHRS and Mr Nolan QC for Mr Clapshaw. FOPB is content to adopt and support their analysis and submissions.

2.2 However, it is proposed to comment briefly on developments since the existing consents were granted in 2003.

2.3 Since the original dredging consents were granted there has been a complete overhaul and rewriting of the legal regime relating to coastal matters especially through the New Zealand Coastal Policy Statement 2010 (**NZCPS**).

2.4 The introduction of the New Zealand Coastal Policy Statement which is discussed at some length in *Environmental & Resource Management* Law,[1] which refers to the leading case *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38 and states the effect of the NZCPS as follows at page 321:

> *"The Supreme Court also noted that, because they are not mentioned in s 58 of the RMA, the NZCPS 2010 is not intended to include "methods", nor can it contain "rules" given the special statutory definition of "rules" in s 43AAB of the RMA). Nevertheless, the Supreme Court significantly qualified this by holding that the requirement to "give effect to" the NZCPS when considering plan change applications will be affected by what particular objectives or policies of the NZCPS must be given effect to. That is, a requirement to give effect to a policy which is framed in a directive manner may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is more abstractive.*
>
> *Accordingly, the Court held that although a policy in the NZCPS cannot be a "rule" within the special definition of the RMA, it may nevertheless "have the effect of what in ordinary speech would be a rule", where it clearly directs decision-makers towards a particular course of action. This means that those policies of the NZCPS that require any adverse effects to be "avoided" have effectively been held by the Supreme Court to be "vetos" or "rules" that trump the other less directive policies of the NZCPS and other resource management considerations."*
>
> *The Supreme Court concluded that the definition of "sustainable management" in s 5(2) of the RMA "contemplates protection as well as use and development" and that policies 13 and 15 of the NZCPS, which use the word "avoid" in respect of outstanding natural landscapes and outstanding natural character, "provide something in the nature of a bottom line". The Court went on to reason that "if there is no bottom line and development is possible in any coastal area no matter*

[1] D Nolan QC (Ed), *Environmental & Resource Management Law*, (7th Ed, 2020), Part II, The Statutory Framework for the Coastal Environment, pg 319 at [511].

how outstanding, there is no certainty of outcome …" and there is the potential "to undermine the strategic, region-wide approach that the NZCPS requires regional Councils to take to planning".

In Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council,[2] *the High Court held that, in the context of the NZCPS, "avoid" continues to mean "avoid" rather than being interpreted in a contextual way. The Court rejected the "proportionate" approach adopted by the Environment Court in interpreting the meaning of the NZCPS, considering this as an attempt to read down the Supreme Court's clear interpretation of the NZCPS and its "avoid" policies in King Salmon."*

2.5 Therefore, "the NZCPS is the principle guiding document for coastal management in New Zealand and is to be applied by all decision makers under the RMA. The primary purpose of the NZCPS 2010 is to "state policies in order to achieve the purpose of the Resource Management Act 1991 in relation to the coastal environment in New Zealand".[3]

2.6 Dr Mitchel addresses the NZCPS 2010 at [28] and [29] of his witness statement and notes that the AUP "post-dates both the NZCPS and HGMPA and therefore gives effect to them." The key relevant objectives of the NZCPS are also set out at [3.18] of the MHRS submissions.

2.7 A key provision of the NZCPA is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse…".

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School,[4] says that:

" … it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to proceed. This is often described as a reversal of the burden of proof although

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2 (2017) 20 ELRNZ 564.
3 Nolan, above note 1, at [513]
4 Dr Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, (2011) p18.

sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm".

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.

3. FAILURES OF APPLICANTS CASE

3.1 Apart from non-compliance with the consent conditions, detailed in the evidence called by Mr Nolan, there are a number of other deficiencies in the applicant's case, and its assessment by the Council, that have been identified by other submitters, as well as FOPB. It is now clear that a contributing cause of these deficiencies is an agency problem created by having a person other than the consent holder operate the consent. This agency problem is exacerbated by lack of proper monitoring and enforcement by the Council.

3.2 Some key failures include:

a) Failure to consider alternative sand supply: see Professor Andrew Jeffs and submissions made by MHRS.

b) Failure to engage with tangata whenua and Te Ao Maori and to consider important relevant cultural landscape: refer evidence of Olivia Haddon and evidence of Peter Kensington Consultant Specialist – Landscape Architect expert:

"It is clear to me, from reading Ms Haddon's evidence, that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the

seabed. It is also clearly apparent to me that the proposal to continue this activity has the potential to cause ongoing cumulative adverse effects.

… further information and evidence from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated"

If those effects cannot be mitigated the consent must be declined.

c) Council failure to properly consider noise and visual amenity:

i. Rowan Evan Smiley, 264 Pakiri Block Road (ie over 3kms (3.8kms) as crow flies to beach): "*When the wind is in the right direction, the noise of dredging late at night penetrates even our double glazing and interrupts our ability to get to sleep*."

The Council noise specialist appears to conclude that Mr Smiley is simply making this up: "*The worst-case noise is 30 dB LAeq on the beach, noise at this level is unlikely to disturb or interrupt people's sleep. It is also noted that there are no houses on beach; residential houses are located further inland and would receive still lower noise*."

Of course, there are literally no houses built on the beach, but there are many that are built at the 200m of the mean high water mark as they are permitted to do.

d) Council failure to engage with the Hauraki Gulf Forum and address its concerns including:

i. Climate change impacts and effects;

ii. Monitoring of existing consents;

iii. Lack of a joint hearing for the onshore and offshore consents (ie cumulative effects);

iv. Consideration of viable alternative sources of Pakiri sand; and

v. Consideration of Te Ao Maori.

4. CUMULATIVE EFFECTS NOT PROPERLY CONSIDERED OR ADDRESSED

4.1 Prior to this hearing, FOPB tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.

4.2 FOPB expert witness Dr Martin Single, one of New Zealand's leading coastal geomorphology and processes experts, confirms that there is clearly a strong interconnectedness between the this application and the pending application from the viewpoint of potential environmental impacts. To ensure an integrated environmental assessment of the relevant technical and environmental issues by any Hearings Panel these applications ought to have been properly heard together.

4.3 The need for a joint hearing of the two applications is made even more important by the current conduct of McCallum with respect to its renewal application. The McCallum renewal application was accepted for processing on 3 March 2020. The current consent expired on 6 September 2020 and McCallum are currently operating under section 124 protection, and the Auckland Council still has not decided on notification of that consent renewal or its new application to take sand from what it calls the "mid-shore".

4.4 McCallum Brothers have publicly stated that their nearshore application is a backup application to their "mid-shore" application. But in FOPB's submission any statement about back up consents cannot be relied on and there is a real prospect of this consent plus two others further inshore in future. The cumulative effects of all three potential consents ought to have been considered in a holistic way.

4.5 The resulting absence of such holistic assessments further supports Mr Nolan's, and FOPB's, submissions that:

a) a precautionary approach is required; and

b) there is inadequate information such that the consent ought to be declined.

5. FALLBACK POSTION: STRICT CONDITIONS

5.1 FOPB's primary submission is that the application should be declined. In the event that it is granted, rigorous and stringent conditions must be imposed, and mechanisms put in place so that those with a real stake and interest in the Pakiri area and embayment, such as Friends of Pakiri Beach, have the means to obtain real time information (tracking data) and timely extraction records to ensure consent conditions are adhered to and that any breaches can be reported to Council with limited scope for dispute about whether a condition has been breached.

5.2 Regrettably, the Council has shown itself unable properly to monitor and enforce the current consent.[5] Thus, the Commissioners can have no confidence that the Council will be willing or able properly to monitor and enforce any proposed conditions accompanying any new consent. This needs to be borne in mind when considering the imposition of conditions of any new consent.

5.3 It is also clear that the applicants are reluctant to be transparent. For example, they oppose providing an operational schedule for the operation of the William Fraser so the public will aware when the William Fraser is present in the sand extraction area.

5.4 As such, the design of any conditions must proceed on the basis that the Council is ineffective and the applicant reluctant to be transparent about its activities. Thus the onus must go on the sand miners to provide meaningful reporting and data that can be easily analysed and interpreted by those who are not necessarily experts. If experts are required to assist Pakiri stakeholders, the sand miners must bear the cost, given past failures.

5.5 The expert evidence of Dr Mitchell sets out a number of proposed conditions, in conjunction with Dr Single, which are designed to help achieve that.

Consent term

[5] Proposed condition 3 states that: "The consent holder shall pay the Council an initial consent compliance monitoring charge of $1,020 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs incurred to ensure compliance with the conditions attached to these consents." That appears woefully inadequate and may help to explain the lack of proper monitoring. The Council ought to be properly funded to allow it to perform its role effectively.

5.6 Given real issues around compliance and baseline information, as well as the precautionary principle, it is submitted that a 20-year consent term is unreasonable. Ten years should be the maximum duration of any consent.

Distance from shore

5.7 Dr Mitchell includes a condition requiring any dredging to be at least two kilometres from the mean high water springs (MHWS) and at least in 25 metre water depth, being a cumulative requirement, to reduce the risk of extraction occurring inside the depth of closure. This would appear to accord with the applicant's opening submissions where the applicant's motivation for moving from the nearshore to the farshore is outlined:[6]

> *By the late 1990s the weight of scientific evidence and Kaipara's consultation with the Ngatiwai Trust Board convinced Kaipara that* ***it must relocate offshore (i.e. beyond the Depth of Closure) in order to remain sustainable****. With the agreement of the Trust Board, Kaipara surrendered its nearshore consent in 2003, and for the past 18 years it has exclusively extracted sand offshore.*
>
> (Emphasis added)

5.8 It is submitted that this 2km/25m restriction must be a bare minimum condition, and FOPB support and encourage the Commissioners to adopt the proposal submitted by the Mangawhai Harbour Restoration Society that there should be a buffer zone so that no dredging occurs closer than 5 kilometres from the MHWS or in less than 30 metres depth of water. That is a common sense proposal that ought to be adopted following a precautionary approach.

5.9 MHWS must be certified by the Council so there is no room for dispute, by the consent holder or the Council.

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[6] Applicant opening legal submissions at [8].

Reports and Plans

5.10 Dr Mitchell has also proposed amended conditions concerning Pre-Sand Extraction Assessment Reports (**PSEAR**) and Environmental Monitoring Management Plans (EMMP), which include requiring any such PSEAR or EMMP to be submitted to FOPB as part of a Community Liaison Group (**CLG**) to provide for community consultation over the life of any consent. CLGs are addressed further in the section below.

5.11 Any PSEAR, EMMP or Sand Extraction Monitoring Report must be provided to the CLG 40 days before it is submitted to the Council to ensure effective analysis by stakeholders can take place.

5.12 FOPB submits that any CLG, and the Council, ought to be provided with extraction records and digital vessel tracking data more regularly than quarterly, particularly if real time tracking data is not made available to the CLG.

5.13 Dr Mitchell has deleted the various conditions which provide for default approval of management plans in the event Council has not certified them within 20 working days and agrees with the s 42A report writer (and FOPB) that default approval of management plans is not appropriate for this consent.

Hours of operation

5.14 Dr Mitchell proposes an amended condition 15 to require all extraction to occur only at night[7] between 10pm and 5am (for daylight saving time) and 7pm and 6am (for non-daylight saving time). Dr Mitchell correctly notes that daytime extraction is of significant concern to FOPB. He also notes the applicant's evidence of a clear intention to undertake works at night and that extraction will only occur for periods of up to 4 hours at a time. Those durations (7 hours and 11 hours) are therefore eminently sensible and will give the applicant sufficient flexibility.

Avoiding concentrated dredging and promoting use of total extraction area

5.15 Dr Mitchell suggests a number of conditions to implement proposals in Dr Single's evidence that that extraction should, as far as possible, spread over a whole

[7] Rather than the unenforceable "predominantly" at night as proposed by the applicants.

management cell, and that deflation of the seabed should not exceed 0.2 metres over any 12 month period.

5.16 Also included is the requirement for pre and post extraction bathymetric survey and benthic imaging. The Addendum to the s42 Report concurs with similar recommendations by others:

> *"Dr Mead recommends that seafloor imaging be incorporated into the monitoring and reporting to ensure that dredging of deep trenches does not occur through the implementation of the proposal. Ms Sharma supports this recommendation and recommends it be included in Sand Extraction Monitoring reporting."*

6. PUBLIC INVOLVEMENT IN RESOURCE MANAGEMENT PROCESSES – NEED FOR A COMMUNITY LIAISON GROUP IN THIS CASE

6.1 A founding principle in the Resource Management Act is that greater involvement by the public in resource management processes results in more informed decision-making and ultimately better environmental outcomes. The case law supports this proposition. The authors of *Environmental & Resource Management Law* state that "as noted by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council* it is 'the general policy of the Act that better substantive decision-making results from public participation. The Resource Management Act has, as a consequence, afforded the public a wide-scope for involvement in both the preparation of planning documents and consideration of Resource Consent applications …' ".[8]

6.2 If the application is granted FOPB will be seeking to have the Friends of Pakiri Beach involved in monitoring any consent that is granted. Since the current consent was granted, there have been several decisions by the Environment Court where, in authorising a particular and important environmental activity, a monitoring system has been introduced which enables interested parties to participate in the monitoring process.

6.3 CLGs are now a well-established means of ensuring ongoing community involvement in monitoring the environmental performance and compliance of resource consent holders.

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[8] Nolan, above n 1, at [9.3], pg 1184.

6.4 While there are a significant number of cases that refer to CLG's monitoring conditions. these conditions generally seem to be accepted by the applicants and are generally uncontested because of this. It appears to be standard practice now that a CLG condition of some kind is included in the conditions for resource consent if there is interest from parties to be involved and informed about the way the consent is being implemented.

6.5 Due to the frequent acceptance of CLG conditions, there is little substantive discussion in the case law about their conditions and the effectiveness of them. However, there are two cases which are relevant and comment on the purpose and effectiveness of a CLG condition.

6.6 In *Norsho Bulc v Auckland Council*, 9 ELRNZ 774 at 63, which concerned a landfill operation and a CLG condition that included specific reference to the local environmental protection society, and the requirement that the consent holder meet all meeting costs, the Environment Court noted:

> *"Properly constituted an operated community groups of this type can assist in identifying operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the operator to adjust where practicable to meet these concerns.*

6.7 *Puke Coal v Waikato Regional Council Puke Coal v Waikato Regional Council* [2015] NZEnvC 212 at [52] also considered a GLC appointment and the Court saw a CLG as being the key element of a proactive strategy with transparency of particular importance. That case considered the general concern that once the consent is granted, an applicant will simply ignore the conditions and carry on with their past approach. The Court considered that with the conditions that were being put in place, any dissatisfaction with the operation could be "scrutinised in a fair and objective way" and given the importance of the facility (coal mining in this case) and the significant capital investment required, the Court considered it is "nearly inevitable that this site will have to be tightly managed at all times to achieve the consent conditions ."

6.8 in a case like this where there is accepted failures in compliance, monitoring and enforcement, when a renewal comes up a CLG can and should have two roles.

a) First, to have input into drafts of proposed management plans or monitoring plans that are required to be prepared by the conditions; and

b) Second, to have an ongoing role where the GLG is provided copies of specific ongoing reporting/monitoring information that is required to be provided to the Council during the life of the consent under those approved plans, so the local community knows what is happening, and whether the reporting and other consent conditions are being complied with. Otherwise community groups like FOPB are left in the dark. Dr Mitchell's proposed conditions are intended to address this.

7. WITNESSES

7.1 FOPB will call evidence from its Chairperson, Sir David Williams and its two experts, Dr Martin Single and Dr Philip Mitchell.

7.2 Sir David Williams KNZM is the Chairperson of FOPB and will address the aims of the charitable society that he represents and its many and varied concerns about the application and why it must be declined.

7.3 Dr Mitchell is a well know resource management and planning expert. His evidence addresses:

a) **The existing environment:** he notes that area inshore of the extraction area is classified in the AUP as being a Significant Ecological Area, Outstanding Natural Feature, Outstanding Natural Landscape and High Natural Character Area, and as containing various regionally significant surf breaks.

b) He notes that McCallum Brothers Ltd adjacent nearshore activity is obviously relevant when considering the cumulative effects of the current proposal, particularly on coastal processes and he recommends that the environmental management and monitoring regime required by the conditions of any consent granted for this proposal provide for the integration of information gathered in association with the MBL activities.

c) **Provisions of the relevant planning documents**: he says that a focussed analysis of directly relevant AUP provisions is of fundamental importance when

addressing s104(1)(b), these include provisions which address natural character, outstanding natural features and landscapes, and ecological values.

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