IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-000719
[2015] NZHC 1382

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

Hearing:	2-3 June 2015
Appearances:	M R S Palmer QC, K R M Littlejohn, R B Enright for Applicant A R Galbraith QC, A M Adams and J C Campbell for First Respondent J A Farmer QC, D A Nolan, M R Crotty and K M Dunn for Second Respondent
Judgment:	19 June 2015

JUDGMENT OF VENNING J

This judgment was delivered by me on 19 June 2015 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:	Madison Hardy, Auckland Meredith Connell, Auckland Russell McVeagh, Auckland
Copy to:	Dr M S R Palmer QC, Wellington A R Galbraith QC, Auckland J A Farmer QC, Auckland K R M Littlejohn, Auckland/R B Enright, Auckland D A Nolan, Auckland/M R Crotty, Auckland

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Introduction

[1] Ports of Auckland Limited (POAL) sought, and was granted on a non-notified basis, resource consent by Auckland Council (Council) to extend the existing Bledisloe Wharf into the Waitemata Harbour. Urban Auckland, the Society for the Protection of Auckland City and Waterfront Incorporated (Urban Auckland) challenges the Council's decisions and the process it adopted in granting POAL the consents. It seeks to review the Council's decisions not to notify the public and to grant the consents. It also says POAL requires a further consent before it can carry out the extension.

Parties

[2] Urban Auckland was incorporated on 30 June 2000. It has as its objects to:

> 3.1 Promote and encourage the protection and enhancement of the natural and built environment and amenities of Auckland City and the Auckland Waterfront, including in particular (but without limitation) the Downtown Waterfront.
>
> 3.2 Ensure that Auckland City and the Auckland Waterfront is developed, utilised or maintained in a way that maximises its amenity value and aesthetic appeal to Aucklanders and visitors to Auckland.

[3] The Council is a territorial authority constituted under the Local Government (Auckland Council) Act 2009 and a consent authority for the purposes of Part 6 of the Resource Management Act 1991 (the RMA).

[4] POAL is an incorporated company carrying on the business of a port company under the Port Companies Act 1988 at the Waitemata and Manukau Harbours, Auckland. The Port Companies Act requires it to operate as a successful business. In conducting its business POAL occupies the common marine and coastal area (as that term is defined in the Marine and Coastal Area (Takutai Moana) Act 2011) with port and marine structures for the berthing of vessels and the loading and unloading of bulk and containerised freight.[1] In the Waitemata Harbour these port and marine structures (and associated activities) are located on the coastal edge of the Auckland City CBD and extend into the waters of that harbour. POAL's sole shareholder is Auckland Council Investments Limited (ACIL). ACIL is wholly owned by the Council.

Background

[5] POAL has had longstanding and publicly known plans to expand its port activities, including its freight handling capacity and accessory structures in the Waitemata Harbour. A component of those plans includes the expansion of Bledisloe Wharf to the north into the Waitemata Harbour by reclamation. POAL's plans have evolved and developed over time. In its port development proposals published in May 2013 it recorded:

> We've spent the past year listening to feedback from Aucklanders and advice from experts, and have come up with a new, more efficient, more compact development plan.

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[1] Pursuant to a permit under the Resource Management Act 1991, s 384A.

[6] POAL identified two options: Option 1 in which Marsden and Captain Cook Wharves were retained and Option 2 in which Marsden and Captain Cook Wharves were retired. Both options involve a combination of increasing the port working area by reclamation and berth capacity by wharf extensions to the end of Bledisloe Wharf.

[7] POAL accepts it intends to reclaim additional land around the Port in the future but has not applied for resource consent to do so. It says it will make such application at the appropriate time before any reclamation occurs.

The Bledisloe Wharf consents

[8] In 2014 POAL resolved to seek resource consents under the RMA to begin expansion of the Bledisloe Wharf by extending its eastern and western sides (referred to as B2 and B3 respectively) by building additional wharf structures on piles (Bledisloe Expansion). The B2 extension will extend the eastern wharf a further 98 metres approximately, and the B3 extension will extend the western wharf a further 92 metres approximately.

[9] The Bledisloe Expansion requires resource consents under ss 9, 12 and 15 of the RMA and the relevant provisions of the following plans:

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

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

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

[10] The parties agree that the following consents were required for the Bledisloe Expansion:

(a) Under the Coastal Plan (Rule 25.5.18):

(i) Controlled activity consent for alteration or Expansion of existing lawful structures in Port Management Area 1A (for both B2 and B3 Expansions);

(b) Under the ALW Plan (Rule 5.5.18):

(i) Restricted discretionary consent for discharge of contaminants into the (Waitemata) harbour from the activity area of a new industrial or trade activity categorised as "High Risk" in schedule 3 of the ALW Plan (for both B2 and B3 Expansions);

(c) Under the Proposed Plan:

…

(ii) Discretionary activity consent for diversion and discharge of stormwater from new impervious area where total site impervious area exceeds 5,000m²: existing site impervious area greater than 5000m² and new impervious areas totalling 6,700m² (B2 3,400m² and B3 3,300m²) (Rule H.4.14.1.1);

(iii) Controlled activity consent for discharge of stormwater from new impervious area in excess of 25m² where total impervious area on the site is greater than 10% of the total site area (Rule H.4.14.2.1); and

(iv) Restricted discretionary consent for new high risk industrial and trade activity. (Rule H.4.8.1).

[11] Urban Auckland also argues that a restricted discretionary consent for extension or alteration of an existing lawful Coastal Marine Area (CMA) structure (for both B2 and B3 Expansions) was required under r I.6.1.10 of the Proposed Plan.

The consent process

[12] POAL made four separate applications under s 88 of the RMA for the resource consents as follows:

(a) by an application and accompanying assessment of environmental effects dated 18 September 2014 for the consents required under the Coastal Plan and ALW Plan in relation to the B2 component of the Bledisloe Expansion (the B2.1 application);

(b) by an application and accompanying assessment of environmental effects of the same date for the consents required under the Proposed Plan (as noted at [10](c) above) but only for the B2 component of the Bledisloe Expansion (the B2.2 application);

(c) by an application and accompanying assessment of environmental effects dated 18 November 2014 for the consents required under the Coastal and ALW Plans for the B3 component of the Bledisloe Expansion (the B3.1 application); and

(d) by an application and accompanying assessment of environmental effects dated 18 November 2014 for the consents required under the Proposed Plan (as noted at [10](c) above) but only for the B3 component of the Bledisloe Expansion (the B3.2 application).

[13] The B2.1 and B2.2 applications were considered separately but concurrently by a consultant planner engaged by the Council, Ms Halpin, whose reports were approved for release by the Council's lead planner Ms Valentine. Four separate reports were prepared for the applications. The reports recommended that the applications be processed without public notification and be approved.

[14] The Council appointed two Commissioners from its duty panel of contracted Commissioners to consider the applications. Commissioner Macky made notification and consent decisions in relation to the B2.1 and B2.2 applications on 31 October 2014. Commissioner Mr Kaye made notification and consent decisions on the B3.1 and B3.2 applications on 23 December 2014.

[15] In each case the Commissioners adopted Ms Halpin's recommendations, determined that each of the applications was to be processed without public notification and approved each subject to the conditions recommended in the reports.

Events following the decision

[16] On 21 January 2015 POAL accepted a tender for construction of the Bledisloe Expansions.[2]

[17] On 12 February 2015 an article in the *New Zealand Herald* informed readers that resource consents had been granted for the extensions of the Bledisloe Wharves.

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2 POAL had earlier issued tender documents on 26 November 2014.

[18] On 26 March 2015 Urban Auckland's solicitors advised POAL that it intended to bring these proceedings. The proceedings were subsequently issued on 2 April 2015. Urban Auckland initially sought interim injunctive relief but did not pursue it on the basis the substantive hearing was expedited.

The application for judicial review

[19] In these proceedings Urban Auckland pleads:

(a) the notification decisions were unlawful;

(b) the consent decisions themselves are invalid;

(c) that both the notification and consent decisions were made without the exercise of independent judgment or were affected by bias; and

(d) POAL has failed to obtain all necessary consents.

[20] Urban Auckland variously seeks orders declaring the notification decision unlawful, declaring the consent decisions invalid and setting them aside, and a declaration POAL requires an additional coastal permit under the Proposed Plan. It also seeks an injunction preventing POAL from continuing with the work until it obtains the additional permit.

[21] The Council submits both the notification and consent decisions were lawful and reasonably available to the Commissioners on the material before them. While it considers the application for declaratory relief as to the need for a further consent to be misconceived, because it is more appropriately dealt with in the Environment Court, it accepts this Court can determine the matter. It submits no additional consent is required.

[22] POAL submits both the notification and consent decisions involved the exercise of a discretion which was validly and lawfully exercised in relation to all applications. POAL submits it has all necessary consents.

Practical/Procedural issues

[23] After the issue of these proceedings and following further discussion between POAL and the Council, POAL offered not to proceed with the B3 extension until the outcome of the "Port Future Study" is known, which is to be completed and finalised by 30 April 2016. POAL's concession expires by that date.

[24] Shortly before the hearing, Urban Auckland challenged aspects of the planning evidence of Ms Coombes, filed on behalf of the Council, and of Messrs Arbuthnot and Chrisp, filed on behalf of POAL. Counsel agreed the issue could be dealt with on the papers in the course of this decision.

[25] Urban Auckland also advised it intended to renew its application for interim relief. However, on the basis the Court indicated it intended to deliver judgment within a few weeks, Urban Auckland has not pursued that application.

First cause of action – Notification

[26] I address the issues raised by Urban Auckland's pleadings. The first is the challenge to the decision not to notify the applications.

[27] Urban Auckland's pleading challenged the decision not to notify on three grounds that I address in turn:

- The decision was flawed because the assessment whether to notify or not proceeded in an "unbundled" way;
- The decision-maker failed to consider relevant statutory instruments; and;
- The decision failed to consider the significant public interest and controversy about the Bledisloe Wharf – the special circumstances issue.

[28] Section 95A of the RMA provides for notification:

> **95A Public notification of consent application at consent authority's discretion**
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> (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.
>
> (2) Despite subsection (1), a consent authority must publicly notify the application if—
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> (a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or
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> (b) the applicant requests public notification of the application; or
>
> (c) a rule or national environmental standard requires public notification of the application.
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> (3) Despite subsections (1) and (2)(a), a consent authority must not publicly notify the application if—
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> (a) a rule or national environmental standard precludes public notification of the application; and
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> (b) subsection (2)(b) does not apply.
>
> (4) Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

[29] The starting point is that the decision whether to notify or not is a discretionary one: s 95A(1). Section 95A(2) then provides for circumstances when, despite s 95A(1), notification is mandatory. In the present case, s 95A(2)(b) and (c) are not engaged.

[30] Urban Auckland argues that the wharf extensions will have a number of adverse effects on the environment, all of which are more than minor so that s 95A(2)(a) applies.

[31] However, if s 95A(3) applies, then despite s 95A(2)(a), the Council must not notify the applications (subject to s 95A(4)). The extension of the Bledisloe Wharves is a controlled activity under the Coastal Plan. The Coastal Plan provides:

> Controlled Activities
>
> …

> 25.5.18 The alteration, **extension** or reconstruction of any existing lawful structure, building or slipway, required for port activities, in Port Management Areas 1A, 1B, 1C and 4B, which is not provided for as a permitted activity, subject to the standards and terms specified in Rule 25.5.19.
>
> (emphasis added)

[32] Rule 25.5.20 then identifies the issues over which the Council reserved control:

> The ARC [which is the Council as the unitary authority] will have control over the following matters in Rules … 25.5.18:
>
> a the adverse effects associated with methods of construction especially on coastal processes; and
>
> b any provision to be made for public access; and
>
> c navigation and safety; and
>
> d the duration of the consent; and
>
> e monitoring of the consent.

[33] The section on controlled activities concludes:

> Applications for controlled activities shall be considered without public notification or limited notification of the application to any affected person in accordance with Sections 95A3(a) and 95B(2) of the RMA, unless in the opinion of the ARC there are special circumstances justifying public notification in accordance with Section 95A(4) of the RMA.

[34] As the application to extend the wharf is a controlled activity under the Coastal Plan and the plan precludes public notification, the applications must not be publicly notified unless, in terms of the rule and/or s 95A(4), special circumstances exist in relation to the application.

[35] To overcome that difficulty, Mr Palmer QC argued that the applications in this case should have been bundled and dealt with together, rather than being considered separately as they were in relation to both the notification and also the consent decisions. If they had been bundled, then the most restrictive requirement for all consents, namely the discretionary activity for the diversion and discharge of storm water under the Proposed Plan would have applied to all consents, including to the physical extension of the Bledisloe Wharves under the Coastal Plan. Section

95A(3) does not apply to the discretionary activity. For a fully discretionary activity all the effects of the total activity are relevant.[3] That would lead to consideration of the broader effects of the overall project and in relation to all activities for which consents were required. Section 95A(2)(a) would have applied to require notification.

[36] Mr Palmer submitted that such notification would have enabled consideration of the actual and potential effects of the wharf extensions on:

(a) visual and coastal landscape;

(b) amenities;

(c) harbour recreation;

(d) public wharf access;

(e) cultural; and

(f) cumulative effects.

Ground one: Was bundling of the consents required in this case?

[37] As noted, POAL applied for four sets of resource consents, two each for the B2 and B3 Wharf Extensions respectively.

[38] The applications (both for the B2 and B3 extensions) presented to the Council included POAL's submission that the operative plan consents should not be bundled with the Proposed Plan consents. POAL (through its planner) also submitted that it would not be appropriate to bundle POAL's application for consent under the Coastal plan with the application for consent under the ALW Plan as the matters on which the Council retained a discretion with regard to the controlled activity under the Coastal Plan did not overlap with the matters in relation to which it

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3 *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC).

retained a discretion with regard to the ALW Plan, namely the stormwater consent (which was a restricted discretionary activity).

[39] The Council adopted a sequential but concurrent approach to the applications and in the way it considered them for notification. It processed the applications under the operative and Proposed Plans separately, and while it bundled all applications under the Proposed Plan together, it considered the application under the Coastal Plan separately from the application under the ALW Plan.

[40] As noted, the Council considered the applications and notification decision in this way at POAL's request. This was contrary to the general approach of the Council which is to tend to bundle all applications by default. However, it was consistent with the approach taken in relation to the "tug berth" application by POAL in mid-2014 which had been supported by an opinion from POAL's lawyers that it was not permissible to bundle consent applications under the operative and Proposed Plans.

[41] Urban Auckland submits the Wharf Extension structures and the stormwater discharges from them were inextricably connected and overlapped so that all the consents required under both the B2.1 and the B2.2 applications (and later the B3.1 and 3.2 applications) should have been bundled and considered together.

[42] Urban Auckland no longer pursues a further argument that both the B2 and B3 applications should have been considered together, but submits POAL's staged approach to the applications for each extension reflected its general "slice and dice" approach to the notification and consent process.

[43] POAL were obviously aware of the likely effect on the notification decision if the applications were bundled in this case and structured their applications to the Council accordingly. Urban Auckland argues that by accepting and applying the approach advanced by POAL and not bundling the consents the Council has materially misdirected itself in the way it has considered the notification issue and has failed to take account of relevant mandatory considerations in granting the consents.

[44] The practice of bundling resource consent applications for both notification and consent decisions is well established by case law. It was first identified in *Locke v Avon Motor Lodge Ltd* and has been confirmed by the Court of Appeal in *Bayley v Manukau City Council* and *Body Corporate 97010 v Auckland Council Council*.[4]

[45] The issue of bundling arises for consideration in two ways in the present case. The first is whether there should be bundling of the applications under the operative and proposed plans. The second is whether there should be bundling of the consents required for the various activities proposed.

[46] Both issues were considered in *Bayley*. Sanctuary Developments applied for land use consents related to a 57 unit terrace house development. The Manukau City Council granted the consents without notifying them. The Council had both an operative and proposed district plan. The proposal was discretionary under the operative District Plan and required one controlled and two restricted discretionary activity consents under the proposed district plan.

[47] The Court of Appeal's decision focused initially on the activities. The structure of the 57 units was almost entirely in accordance with the bulk and location requirements of the proposed plan. Only two aspects of the development required restricted discretionary activity consents. The first, relating to access arrangements, was not in issue. The second was non-compliance with a rule specifying that where a site in a business zone abutted a residential zone, a minimum yard size was required, all of it being planted and maintained in grass, trees and shrubs. Sanctuary Development's proposed structures were non compliant because they featured spiral staircases, small first floor decks and ground floor closets which intruded, in a relatively minimal way, into the yard area and thus reduced it.

[48] The Council had restricted the exercise of its discretion to:

- sunlight and daylight issues;

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[4] *Locke v Avondale Motor Lodge Ltd* (1973) 5 NZTPA 17 (SC); *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA), and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

- visual amenity values;
- site layout; and
- zone proposals.

[49] The Court of Appeal accepted that, as the Council had restricted its discretion in that way, the activity it was considering for the purposes of notification under s 94 did not consist of the whole of the proposed development, but had to be restricted to those aspects which the Council had specified as remaining for its consideration:[5]

> It would make little sense to require a consent authority to notify an application because it may involve effects which the authority must then disregard at the hearing of the application. That would provide false hope for objectors and be wasteful of time and money.

[50] However, as the criteria for assessment of the controlled activity included site layout and vehicle and pedestrian access which were matters that also fell to be considered in relation to the restricted discretionary activity consent applications, all applications should have been notified together in order to enable the proposals to be considered in a holistic way rather than in a compartmentalised basis:[6]

> To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

[51] I will return to this aspect of the decision in relation to consideration of the relationship between the various activities for which consents were sought.

[52] Importantly for present purposes, the Court also addressed the issue of the need for consents under both the operative and proposed plans. Sanctuary had applied for and been granted three consents under the proposed plan but had initially omitted to apply for the consent required under the operative plan. In the High Court Salmon J confirmed Sanctuary also needed to obtain the consent required under the operative plan. However, he accepted that the failure to obtain the consent under the

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5 *Bayley v Manukau City Council*, above n 4, at 577. See also *King v Auckland City Council* (1999) 6 ELRNZ 79, per Randerson J at [40]–[46].

6 *Bayley v Manukau City Council*, above n 4, at 580.

operative plan did not invalidate the consents obtained under the proposed plan. Sanctuary then subsequently applied for and was granted the consent under the operative plan on a non-notified basis. That was also challenged in the Court of Appeal. The Court noted:[7]

> … We can find nothing in the language of the Act to preclude [the Council validly processing an application granting a consent under the proposed plan without the dealing with the matter at the same time under the operative plan]. …. Naturally, where two such district plans coexist a consent under one will be of no immediate practical use if there is still a need for a consent under the other. But there is no good reason for adding to the complexity of the legislation a further complication. When asked what mischief it would prevent counsel was unable to refer to anything other than the desirability of considering all applications at the same time. That course may be preferable as a matter of practice, but in our view the Act does not impose any such requirement.

[53] On the basis of *Bayley* Mr Galbraith QC submitted there is no requirement to bundle between operative and proposed plans. There is nothing in the RMA to preclude separate applications under operative and proposed plans and no mischief arises from such separate consideration as all relevant matters can be taken into account in each case, albeit separately.

[54] In reliance on *Bayley* and authorities that followed Mr Farmer QC argued the Council could not bundle the assessment of its consent for the controlled activity consent under the Coastal Plan with the consents required under the Proposed Plans. Such applications should be assessed separately. Bundling across plans mixes concepts devised within different planning frameworks. It could prevent the Council carrying out the "weighting exercise" discussed in the cases when there were both operative and proposed plans.

[55] In my judgment, *Bayley* does not require the consent applications under operative and proposed plans to be considered separately as suggested in POAL's submissions. It goes no further than Mr Palmer's concession that it is authority for, (amongst other things), the proposition that it will not necessarily be a reviewable error of law for a consent authority to fail to insist that applications required under an operative and proposed plan be lodged and dealt with at the same time.

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7 *Bayley v Manukau City Council*, above n 4, at 581.

[56] In *O'Connell Construction Ltd v Christchurch City Council* Panckhurst J addressed whether the Environment Court was wrong to consider the application as if consents were required under both the transitional and proposed plans.[8] In that case the same activity was provided for by both the transitional and proposed plans, namely car parking. The focus of argument was on whether the Environment Court was required to ultimately determine which plan was to be accorded most weight. Panckhurst J confirmed that *Bayley* required consents under both plans, although the weight to be given to the outgoing plan would depend on the stage the proposed plan had reached. The Judge noted that the issue of weighting would only arise if the inclination was to grant under one plan and refuse under the other. But that is a different issue to whether bundling was required, with the relevant (but overlapping) activities being considered between both plans.

[57] It must be borne in mind that the discussion of this issue in *Bayley* (the need to consider consents under both operative and proposed plans) arose in the context that the applicant had initially omitted to seek consent under the operative plan. The issue of bundling could not directly arise because the applications were filed some time apart. But in the present case all required applications (putting Urban Auckland's point about the additional consent to one side for the moment) were before the Council. They could have been bundled.

[58] While Mr Galbraith is correct that the RMA does not require the bundling and consideration of all applications together, the concept of bundling is well established by authority. The issue is whether, in the circumstances of this case, bundling was required so that the Council was wrong not to have applied it when considering notification.

[59] I consider the appropriate question in the present case is whether the various activities for which the consents are required under both the operative Coastal and ALW Plans and the Proposed Plans can properly be said to overlap, so that they should have been bundled for both notification and consent purposes.

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8 *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216 (HC).

[60] That follows from *Bayley* and the later Court of Appeal decision of *Body Corporate 97010 v Auckland City Council*. In that case the Court cited with approval from its earlier decision of *Bayley* noting that:[9]

> The consent authority should direct its mind to this question and, *where there is an overlap*, should decline to dispense with notification of one application unless it is appropriate to do so with all of them.

[61] In that case the developer STC had purchased land without notice of an agreement between the previous owner and the body corporate to limit building heights. STC then obtained resource consent to construct a tower block of apartments. The height was within the limits set by the District Plan but outside the limits set by the agreement between the previous landowner and Body Corporate. Two aspects of the proposal required consent: the dwelling units as a controlled activity and the car parking as a discretionary activity. The application was granted on a non-notified basis. The consent was issued shortly before the proposed plan was notified. However, there was a delay in implementing the consent which meant STC had to apply for a variation to the consent. The variation application was again not notified. STC also sought a further extension of the resource consent which was granted despite apparent conflict with the proposed plan which had by then been notified.

[62] The Court held that the activity to occur within the building was the use that was to be made of it which was to be distinguished from the structural fabric of the building itself. The building defined the space within which the activity was to take place and the manner in which it was to occur. The approved activity consisted of the use of the defined space, the original building envelope for residential apartments. The details of the apartments, including their number, were conditions attaching to the approval of the activity.

[63] The Court rejected the submission that the applications should be bundled, noting that the effects of the car parking were distinct in the sense that, unlike the staircases and decks in *Bayley*, the arrangements proposed for the car parking had no consequential or flow-on effects on the matters being considered under the

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9 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [21].

controlled activity application. There was no overlap and therefore no need for a holistic approach which would have required them to be considered together.[10]

[64] In *Southpark Corporation Ltd v Auckland City Council* the Environment Court also considered the effect of *Bayley*.[11] It summarised the law as:[12]

> From those authorities, it is our understanding that while the *Locke* approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where: (a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and (b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and (c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct.

[65] In the present case the extension itself is a controlled activity so that it is necessary to consider the scope of the Council's control and whether the effects of exercising all the consents required under both operative plans and the proposed plan overlap or are quite distinct.

[66] The respondents also referred to and relied upon the case of *Vining v Nelson City Council.*[13] The Council had not notified an application to reconstruct an existing wharf. The replacement of the existing wharf was a controlled activity. However the construction also involved drilling which was a discretionary activity. Although the wharf was extended by 10 metres Gendall J treated it as a replacement of the existing wharf. He concluded that the facts were similar to those in *Body Corporate 97010*. As the replacement of the wharf was a controlled activity, the Council had limited ability to impose conditions on it. The conditions it could impose would not address the adverse effects on the applicants. Further, the effects of the drilling were transitory. There was no overlap between the temporary adverse effects of the drilling while the replacement wharf was under construction and the use of the wharf once completed. The respondents rely on that case as being similar to the present. However, as Gendall J observed, each situation is different and these

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10 *Body Corporate 97010 v Auckland City Council,* above n 9, at [22].
11 *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350.
12 At [15].
13 *Vining v Nelson City Council* HC Nelson CP23/99, 16 November 2000.

issues are fact dependent. In the present case the effect of the extension once completed, both under the Coastal Plan and the discharge consents under the ALW and Proposed Plan, will be ongoing.

[67] There was a suggestion in the Council's written submissions that the controls only related to the construction process, but Mr Galbraith realistically did not pursue that in oral submission. Plainly the only condition directed to the activity of the extension itself, as opposed to the effect of the extension, is the first (25.5.20(a)) which is directed at the adverse effects of the methods of construction. For example navigation and safety are directly relevant to the issue of the actual completed extension to the wharf (even though the use itself may be a permitted activity).

[68] In written submissions the Council also suggested that as the Coastal Plan left it with no discretion whether to grant the consent and precluded notification that application should not, for that reason alone, be bundled with the other consents. Taken to its logical conclusion, that argument would exclude bundling in almost every case involving a controlled activity. That is not supported by the authorities I have been referred to.

[69] However, I accept that the more restricted the scope and nature of the matters the Council has reserved control over in relation to the physical extension of the wharves, the less likely an overlap will occur with the restricted discretionary activity for the discharge of contaminants (under the ALW) and the discretionary activity (and related activities) for the discharge of stormwater under the Proposed Plan.

[70] I also accept the force of Mr Galbraith and Mr Farmer's point that conditions over which the Council has retained control under the Coastal Plan, namely such adverse effects associated with construction, provision for public access, navigation and safety, duration and monitoring, do not provide scope for consideration of the principal issues of concern to Urban Auckland, particularly the visual and coastal landscape, and amenities. But of course, that is why Urban Auckland argues for bundling with the discretionary activity under the Proposed Plan.

[71] On the issue of the length of the extension to the wharves, Mr Galbraith submitted that the control reserved to the Council under the conditions it could apply under r 25.5.20 did not permit it to address the length (or width) of the proposed extension. He submitted that if the Council imposed a condition restricting the length, POAL could achieve its aim by making successive applications to extend the wharves, each of which would have to be granted as controlled activities. This is an important aspect of the respondents' answer to Urban Auckland's submissions on this point.

[72] The respondents supported their submissions on this point by reference to the case of *Official Bay Heritage Protection Society Inc v Auckland City Council*. The Protection Society challenged the non-notification of an application for a restricted discretionary consent to establish a tall apartment building in Eden Crescent.[14] The matter of concern to the Society was the height of the building, in particular whether it was unsympathetic to the nearby heritage buildings on Parliament Street. Hansen J initially noted the following passage from the Court of Appeal judgment in *Body Corporate 97010*:[15]

> Because the Council had no power to impose a condition about the height or bulk of the building or materially affecting its location, any adverse effects on the persons represented by the appellant could not have been addressed if the application had been notified. No purpose would have been served by requiring notification.

Before he went on to say:[16]

> That is precisely the position of the Council in relation to the Perron development. It had no power to address the matters of greatest concern to the Society – the bulk and location of the building in relation to neighbouring heritage buildings.

[73] However, in that case, importantly, the relevant plan provisions did not retain any discretion or control over the proposal's height. To that extent and for that reason the case was on all fours with the decision in *Body Corporate 97010 v Auckland City Council.* At the time the original consent was granted, the Council's transitional district plan permitted buildings to a height of 30 metres subject to

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14 *Official Bay Heritage Protection Society Inc v Auckland City Council* HC Auckland CIV-2006-404-005947, 16 July 2007.

15 At [38].

16 At [39].

consent as a controlled activity. The building complied with the relevant height and bulk and location controls under the plan. The Council had not reserved to itself a power to impose a condition which could restrict the height or bulk. The conditions it could impose were limited to design and external appearance. It had no power to address the relevant adverse effects on view and amenity. It was for that reason the Court found no purpose would have been served by requiring notification.

[74] The controlled activity which the Council must grant a consent for is the extension of the wharves within the relevant Port Management Area. It is not for an extension up to a specified length. Put another way the relevant plan does not permit extension to any particular length. To that extent, the *Body Corporate 97010* case can be distinguished. In that case, the permitted height of the building (30 metres) was expressly provided for in the plan rules.

[75] I do not consider it is an answer for the respondents to say that the extension sought will leave the completed wharf extension within the Port Management Area and that the extension of a wharf in Port Management Area 1A is provided for by the Plan. I accept the Coastal Plan identifies as its first issue at r 25.2.1 the continued efficient operation and development of the port management areas for port activities as of strategic and economic importance to both the region and the nation. However, r 25.2.2 identifies that, while it is recognised that the environment of the Port Management Areas is already highly modified, activities associated with the use of these areas have the potential to adversely affect the environment, particularly coastal processes. General port activities are provided for within the Port Management Area but it does not follow that the controlled activity of an extension to the wharf may extend to the edge of the Port Management Area.

[76] In my view, the controlled activity in r 25.5.18 is to be interpreted as the extension of an existing lawful structure (wharf) already itself within the Port Management Area. The reference to the Port Management Area in this context identifies the siting of the existing wharf, which may be extended, but it does not follow an extension to the boundary of the area could not be controlled by a condition properly imposed under r 25.5.20.

[77] While I accept that any condition must be related to (or at least not be unrelated to) the activity requiring consent: *Waitakere City Council v Estate Homes*,[17] in the present case there could, for instance, be valid navigation or safety reasons to restrict the extension of the wharves to less than the length for which the extensions were sought for the B2 and B3 wharves.

[78] If the wharf was extended to the edge or limit of the Port Management Area, that would effectively require aspects associated with the port operations to be undertaken outside that area. If the application had been for such an extension, it must have been open to the Council to restrict the length for navigation and safety reasons.

[79] In summary, while the rule permits an extension, as there is no reference to the permitted length of the extension in the rule, I consider it must be open for the Council to impose a condition as to length if relevant to one of the matters over which it has reserved control.

[80] Nor do I accept Mr Galbraith's argument that the answer is that successive applications could be made to extend. The rule contemplates an extension to an existing wharf structure, not an extension to an extension. Further, I consider there is force in Mr Palmer's submission that the time to consider whether a condition as to length or width might negate the controlled activity is at a notified hearing of the relevant application.

[81] The issue of the length of the extension was apparently seen as relevant by POAL in its application. Information was put before the Council as to the assessment of the effects of the proposal on navigation and safety by Nigel Meek, the senior pilot at POAL. The point was made that while the proposed berth extension would project northward it was not into the main thoroughfare, the main traffic route, which is north of the line projected between the Fergusson Terminal and the Wynyard Quarter.

[82] Mr Bermingham from Navigatus also issued a peer reviewed report.

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[17] *Waitakere City Council v Estate Homes Ltd* [2007] NZSC 112, [2007] 2 NZLR 149 at [66].

[83] For the purposes of this hearing Urban Auckland has also filed evidence that relates to the issue of navigation and safety. Mr Anderson, the Commodore of the Royal New Zealand Yacht Squadron noted that while the length of the extension will not restrict the harbour width any more than the current narrowest point between Fergusson Wharf and the Devonport Wharf, it does restrict the area available for sailing. With wind against tide standing waves can be experienced that can be considered dangerous. Mr Anderson also anticipates increased cause and effect regarding tidal flows. He queries whether a single piled 98 metres extension will improve safety in navigation. It will become a further hindrance to passage up and down the harbour. In his view the extension will limit other vessels' ability to navigate. The position will be exacerbated when a ship is moored on the wharf. He says it is not possible to maintain fixed bearing courses. It is necessary to alter course for ships' manoeuvring, ferries, other vessels, stationary fishing boats, and to take account of the coastal or wharf off-set path of travel by smaller vessels. Further, kayaks, in particular, as users of the harbour, often utilise the slack and calmer waters at the edges.

[84] Mr Bermingham from Navigatus does acknowledge that a more restricted passageway has inherently greater risk to some extent. However he did not undertake a tidal impact review as he did not expect the extensions to have a noticeable tidal effect.

[85] I also note that Mr Kirk deposed that POAL regularly liaises with the harbourmaster to suspend or delay shipping to accommodate special events, such as the Auckland Anniversary day regatta and the Volvo Ocean race. The Navigatus Consulting peer report recommended a condition:

> On water construction activities should not take place on the day of the Auckland Anniversary regatta or other specially controlled harbour events where the Harbour Master deems this an essential precaution necessary to manage navigational safety.

That was not incorporated as a condition.

[86] I refer to those brief excerpts from the reports and evidence merely to show that there could be a proper interest in the length of the proposed extension to the

wharves on the issues of navigation and safety, and that such proper issues could at least lead to consideration whether the length of the proposed extension should be restricted as a condition of the grant of consent. While I accept the Council's discretion was limited, I see no reason why it could not have, in terms of its navigation and safety issues, potentially imposed a condition limiting the length of the wharf extension proposed. Whether it would be appropriate to do so, and whether that would frustrate the purpose of POAL's application must be matters for consideration at a hearing after notification and submissions by interested parties.

[87] I return to the issue of whether the matters over which the Council has retained control under the Coastal Policy overlap with the relevant considerations under the ALW Plan and the consents required under the Proposed Plan so that bundling was required.

[88] The consent required under the ALW operative plan stormwater consent was for a restricted discretionary activity. The Council was required to focus on the matters set out in r 5.5.18:

> (a) The quality of the discharge arising from the activity area … ;
>
> (b) The degree of adverse environmental effects on the receiving environment;
>
> (c) Management practices, treatment systems or devices … ;
>
> (d) The inspection and assessment regime for the Environmental Management Plan;
>
> (e) The duration of the consent; and
>
> (f) The timing and nature of reviews of consent conditions.

[89] Condition (b) at least of the considerations under the ALW Plan and the general discretionary activity under the Proposed Plan would both be affected by any change or restriction in length and consequent change in dimension of the wharf extensions as both activities follow from the extensions which are the catchments for the contaminant and/or stormwater discharges under the ALW and Proposed Plan.

[90] The restricted discretionary activity under the ALW and the discretionary activity, (and other activities) under the Proposed Plan, but particularly the diversion

and discharge of stormwater under the Proposed Plan, will be affected by the size of the wharf extensions. If the consent was granted for a lesser size to the extension for navigation and safety reasons, for example, that would necessarily affect the catchment area for the stormwater discharge and impact on consideration of that application for discharge consent.

[91] It follows that the proposal to extend the wharves involves ongoing physical effects which overlap. The need to deal with contaminants and to divert and discharge stormwater are directly related to the proposed extension to the wharf. It is in relation to those discretionary activities that the Council has the greatest scope for control.

[92] The applications for consent that are necessary for the discretionary activities only arise because of the extension to the wharf. They relate solely to the proposed extension. Consideration of those discretionary activities (quite apart from the general adverse effects of the extension argued for by Mr Palmer) will be materially and directly affected by the exact size of the extension. There is a direct connection between them.

[93] For those reasons I conclude the Council was in error in not bundling the applications for the purposes of considering whether to notify the consent applications in this case.

[94] The applications could, when considered in a bundled way with regard to the most restrictive discretionary activity, have adverse effects that are more than minor, so that the applications should have been notified to enable public submissions on those adverse effects.

Ground two: Did the decision fail to take into account the Hauraki Gulf Marine Park Act and the New Zealand Coastal Policy Statement?

[95] Urban Auckland also says the non-notification decision was flawed in that it failed to take account of the Hauraki Gulf Marine Park Act 2000 (HGMPA) and the New Zealand Coastal Policy Statement 2010 (NZCPS).

[96] The wharf extensions include activities within the Hauraki Gulf as defined in the HGMPA and the coastal environment as defined in the NZCPS. Mr Palmer submitted that important and relevant policy considerations arising from HCMPA and NZCPS ought to have been considered in the notification applications.

[97] Section 9(4) of the HGMPA directs that the consent authority must have regard to ss 7 and 8 of the HGMPA in addition to the matters contained in the RMA. Section 10(1) of HGMPA provides ss 7 and 8 are to be treated as a NZCPS under the RMA. Mr Palmer made the point that the effects based approach strongly embedded in the RMA is not reflected in the HGMPA. There is no mention of mitigation of adverse effects on the environment. The HGMPA emphasises protection and where appropriate, enhancement. Urban Auckland submits that relevant mandatory requirements directed by HGMPA were not considered.

[98] Further, the NZCPS is an instrument created as part of the hierarchy of planning instruments that give effect to the RMA. Urban Auckland submits that the nature of the B2 and B3 applications made the provisions of the NZCPS directly relevant and required them to be considered. Mr Palmer referred to the Supreme Court decision of *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* which emphasised the central role of the NZCPS in the statutory framework.[18] It has the role of achieving the purpose of the RMA in relation to the coastal environment of New Zealand. Other subordinate planning of documents must give effect to the NZCPS, which was a strong directive.

[99] Mr Palmer submitted that despite the importance of the HGMPA and NZCPS they were not considered in the notification decisions. He noted they were not expressly referred to in either of the Commissioner's notification decisions.

[100] However, while I accept in principle the points Mr Palmer makes as to the importance of the HGMPA and the NZCPS, and the need to consider them at the notification stage, the applications, officers' reports and eventual decisions all followed the analysis set out in POAL's applications and submissions. The

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[18] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [85], [88], [90].

applications, officer's reports and decisions all noted and referred to the HGMPA and the NZCPS as relevant to the assessment of the consent applications themselves under s 104 of the RMA.

[101] While the notification decisions themselves do not expressly refer to the HGMPA or the NZCPS, the decisions record that the Commissioners have read and taken into account the application, supporting documents, specialist comments and the planners' reports and recommendations on the applications.

[102] Further, both Commissioners have confirmed in their affidavits that they considered and read all the documents relevant to the applications as a package prior to making both the notification and substantive decisions. It was not strictly necessary for the Commissioners to expressly refer to and identify the detail of each plan or other relevant document considered, (including the HGMPA and NZCPS), particularly in the course of making the notification decision.[19]

[103] So even accepting for present purposes the Commissioners should have had regard to the HGMPA and NZCPS in relation to the notification decision,[20] on the evidence before the Court I am not satisfied that it can be said they did not take the HGMPA and the NZCPS into account in making the notification decisions.

[104] This aspect of the challenge to the notification decision must fail.

Ground three: Do special circumstances exist in this case?

[105] The last issue pleaded regarding notification relates to the issue of "special circumstances". If I am wrong in determining the Council erred in not bundling the applications and so notifying them, both the rule under the Coastal plan and s 95A(4) still apply. The Council had a discretion to notify the application for the extension if "special circumstances" existed. For present purposes I do not consider the difference in wording between the rule and s 95A(4) on the issue of special circumstances to be material.

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19 *Rodney District Council v Gould* [2006] NZRMA 217 at [32].

20 See the contrary discussion in *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, (2009) 15 ELRNZ 100.

The special circumstances identified

[106] Urban Auckland identified the following factors as special circumstances in this case:

(a) the ownership relationship between Auckland Council and POAL;

(b) the longstanding and publicly known plans for a further development at Bledisloe Wharf;

(c) the national significance of the locations of the B2 and B3 extensions;

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

(e) the significant public interest and controversy surrounding past proposals for the extensions to the Bledisloe Wharf.

[107] Urban Auckland pleads that the Council erred on this issue by:

(a) failing to consider the above matters as relevant to whether special circumstances existed;

(b) breaching a legitimate expectation created by the Council's hearing policy;

(c) a mistake of fact – failing to appreciate the controversy and public interest;

(d) acting unreasonably;

(e) making an error of law in considering the status determined the notification decision.

[108] In *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* the Court of Appeal summarised the law regarding special circumstances as:[21]

> … A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification. As Elias J noted in *Murray v Whakatane District Council*:
>
> > … the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.
>
> [37] … the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application. We repeat that Carrington's application to construct and use dwelling houses was, as White J accepted, a permitted activity in the Rural Production Zone. FNDC's discretion when determining the application was accordingly restricted by s 94B to those aspects of the activity which specifically remained for its consideration-compliance with the traffic intensity and vehicle access standards.
>
> (footnotes omitted)

[109] Mr Galbraith submitted that special circumstances must be unusual and would only arise where public notification would have information gathering value "despite the general provisions excluding the need" for it and they are unlikely to exist where the principles to be applied are clear and non-contentious (in the sense they are settled by an operative plan) or the adverse effects are minor. An essential question is whether notification would result in receipt of further relevant information: *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council*.[22]

[110] Mr Palmer argued that that even if the bundling argument failed special circumstances applied. The public could have made relevant submissions on the conditions to attach to the controlled activity of the wharf extension, which

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[21] *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221 at 36–37.

[22] *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2015] NZRMA 113 (HC).

supported notification under the special circumstances heading. Mr Palmer identified the following issues on which the public could have made submissions:

(a) adverse effects associated with methods of construction, especially on coastal processes;

(b) any provision to be made for public access;

(c) navigation and safety;

(d) duration and monitoring of the consent.

I address this submission first.

Methods of construction

[111] Mr Palmer suggested alternative methods of construction could be used to reduce the footprint. The visual impacts of different types of material used for construction (the degree of visibility of the water for instance) through the extensions from public viewpoints could be considered.

[112] However, such conditions would be relatively limited, and limited only to the construction aspect which would be limited in time, much like the drilling in *Vining*.[23]

[113] I agree with Mr Farmer's submission that there could be little practical input into methods of construction from the public. Reducing the footprint is not related to the method of construction. There was a full report from BECA addressing methods of construction.

Public access

[114] The respondents submit this issue was addressed in the applications. There can be no public access to the Bledisloe Wharf for safety, customs, bio-security, security and operational reasons. POAL submits that while there might a future

[23] *Vining v Nelson City Council*, above n 13.

opportunity to consider making part of Captain Cook Wharf available to the public as suggested in the application that was just a general reference and no more.

[115] While I accept the force of Mr Farmer's submission that as a working wharf public access to the Bledisloe Wharf is not a realistic option for safety considerations, consideration of public access could extend to, for instance, the inclusion of a potential consent condition providing for access to the Captain Cook Wharf. The possibility of such access was, as noted, suggested in the application by POAL's advisers. I also note that Commissioner Macky in her record sheet seemed to consider that the extension would enable Captain Cook Wharf to be used for public events and greater public access.

[116] I also accept that access by mana whenua to cultural sites within or proximate to the proposed extension could be a proper consideration. The issue of access to water space occupied by port management areas for special occasions could also be addressed more formally. Mr Farmer made the point that those issues were addressed by consultation at present and there was no need for a condition. However the fact they are issues that are presently addressed suggests they are matters members of the public have a proper interest in, might wish to be heard on, and could provide relevant submissions on.

Navigation and safety

[117] For the reasons given above at [81] to [84] I accept that conditions could be applied to limit the extent of the footprint of the B2 and B3 extensions. The impact on the extension insofar as it may affect the potential for standing waves, limit the navigation options for small craft, and generate tidal effects are all relevant considerations.

The duration and monitoring of the consent

[118] I do not consider there is any force in Mr Palmer's suggestion of the possibility of any particular input into consideration of the duration or monitoring of the consent.

[119] Overall I conclude that there are matters on which further relevant information may have been obtained from the public if the applications had been notified, which could have impacted on the conditions of the consent under the Coastal Plan. That does not, however, directly address whether special circumstances existed. I return to that issue below.

Legitimate expectation

[120] As an alternative argument, Mr Palmer submitted that the Council's Hearing Policy created a legitimate expectation that significant and/or controversial issues such as this would be considered by the Hearings Committee and notified for public comment. Mr Palmer submitted the legitimate expectation supported the special circumstances argument.

[121] For a legitimate expectation in the present context Urban Auckland would need to establish:

- a promise or commitment by the adoption of a settled practice or policy that the Council officers would act in a certain way;

- the legitimate or reasonable reliance on that promise or commitment; and

- an appropriate remedy if any that should be granted.

[122] Where the expectation is in the form of a practice or policy its existence and content must be established to the level of the commitment or undertaking. It must also be both unambiguous and settled in the sense it is regular and well established.[24]

[123] Ms Valentine gave evidence of the Council's hearing policy. If a staff member determines an application is significant or contentious as defined by the Hearings Committee Policy, it is referred to the Hearings Committee of the Mayor,

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[24] *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [142]; *Vea v Minister of Immigration* [2002] NZAR 171 (HC) at 180–181; *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [125].

Deputy Mayor, six Councillors and two independent Maori Statutory Board Members to appoint decision-makers. If it is not significant or contentious the staff member can decide on notification themselves or refer the question to a Duty Commissioner.

[124] The Hearings Committee Policy is primarily directed at deciding who the decision-makers should be. In deciding the most appropriate decision-maker the Committee takes into account:

> (a) Recommendations from staff.
>
> (b) The significance of a particular matter. A matter will be "significant" if it involves an element of policymaking and the decision has implications for large numbers of stakeholders. If the matter does not concern policy implementation and has an impact on a small number of stakeholders, it will not be significant. …
>
> (c) Whether a particular matter is contentious. For more contentious matters elected members should be involved in the decision making process. …
>
> (d) The hearings Committee may determine that a particular matter is of such significance or contentiousness or for any other reason that it should be referred to the Governing Body for all decision making.

The Council's Hearing Policy that defines significant and contentious resource consent and by-law applications also deals with the issue of what may be significant as follows:

> **Staff Practice and Guidance**
>
> The call as to whether a matter falls to be considered "significant or contentious" is for staff to make … It is most likely to apply to notified applications, however reporting officers or those who may determine non-notified consents need to consider this prior to a notification determination. …
>
> Both the "policy making" and the "large number of stakeholders" clauses will need to be met. …
>
> "Significant" can also apply to consent applications that invite attention or importance as sensed by the wider community.
>
> …
>
> b) Contentious

> … Contentious will relate to applications that will likely cause disagreement, dispute or debate. The identifiers of this may include one or more of the following:
>
> …
>
> - High profile media scrutiny. In particularly [sic] this will include situations where a difference of view is expressed publically between parties to a notified application.
>
> - High interest shown, active involvement or views expressly publically by elected members (Council or Local Board). …

[125] The explanation document concludes:

> NB Where the criteria applied to a non-notified application there will still be a need to report to the Hearings Committee for the appointment of the decision maker. The report will need to cover whether the decision maker will need to also determine notification or just the substantive matter.

[126] I consider that when read in context the significant and contentious threshold is really unconnected with the decision on notification of the consent application. The policy is essentially an internal administrative policy relating to the allocation of decision-makers. The lead planner's determination to refer the matter to duty Commissioners for decision was a wholly administrative one.

[127] The fundamental problem for Urban Auckland's submission that a legitimate expectation has been created is that the policy relied on is primarily directed at deciding who the correct decision-making body should be rather than being expressly directed at the issue of notification. The Council's Hearing Policy cannot create the legitimate expectation Urban Auckland seeks to rely on in this case.

[128] At most the policy could add to or inform the decision-making process. If there are features present that are identified as significant or contentious by the Council in its Hearing Policy then that tends to support the argument for notification. However, Urban Auckland cannot establish a legitimate expectation that applications would have been notified on the basis of the Council's hearing policy.

Mistake of fact/acting unreasonably

[129] Mr Palmer emphasised the public interest in this application and the proposal. He submitted the Council failed to appreciate the significant public interest and controversy which was a proper and relevant consideration. To fail to do so was a mistake of fact.

[130] Mr Palmer also submitted that the decision not to notify was unreasonable.

[131] Underlying Urban Auckland's submission on "special circumstances" is the general point that the extension of the Bledisloe Wharves into the Waitemata Harbour is a matter of significance and controversy to a significant number of Aucklanders as is evidenced by the public response over the years to POAL's general plans for expansion and the response to the publicity of the grant of these consents. Urban Auckland argues the Council should not have effectively shut the people of Auckland out from making submissions about the proposed extensions by way of declining to notify the application. Mr Palmer emphasised the participatory process contemplated by the RMA.

[132] The principles supporting notification were discussed by Keith J in *Discount Brands Ltd v Westfield (New Zealand) Limited*:[25]

> The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, secondly, to enhance the quality of the decision-making.

[133] In the same case Blanchard J said:[26]

> Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

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25 *Discount Brands Ltd v Westfield (New Zealand) Limited* [2005] NZSC 17 [2005] 2 NZLR 597 at [46].

26 At [116].

[134] In reply, the respondents submit the occasion for public participation and debate occurs when new plans are proposed as evidenced by the public submissions and hearings in relation to the Proposed Plan. In the present case there was public participation in relation to the relevant policies and rules when the operative plans under which the application for extension were made were settled, and when the Proposed Plan was notified in September 2013 and during the ongoing processes, including submissions, under that Proposed Plan. They submit that resource consent applications such as the present are then determined in accordance with the provisions of the relevant plan or plans settled after public participation.

[135] The comments of the Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd* and the earlier comments of Elias J in *Murray v Whakatane District Council* as to the participative process in which matters of legitimate concern under the RMA can be ventilated were made in the context of the former notification sections.[27] Amendments to the RMA's notification provisions in 2009 altered those provisions.[28] In *Coro Mainstreet Inc v Thames-Coromandel District Council* the Court of Appeal commented on the effect the 2009 amendments may have on the statements of principle in *Westfield.*[29] The Court stated, albeit obiter, that the possibility the substantial amendments to the relevant provisions of the RMA since the decision which were directed at providing greater facility for non-notification had altered the law as articulated in the *Westfield* case needed further evaluation.[30]

[136] The Council, supported by POAL, submitted the Court's role on a judicial review such as this was to ensure the decision was lawfully available to the decision-maker. Its inquiry should be limited to whether the decision-maker asked the right questions and correctly understood his or her discretion. POAL submits the Council took into account relevant considerations and considered an adequate amount of information. The weight to be afforded the relevant factors is for the decision-maker or in other words, it would be appropriate to defer to the decision-maker. Both POAL and the Council submit that the decision there were no special circumstances

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27 *Murray v Whakatane District Council* [1999] 3 NZLR 276 ELRNZ 308 at 317.
28 Resource Management (Simplifying and Streamlining) Amendment Act 2009.
29 *Coro Mainstreet Inc v Thames-Coromandel District Council* [2013] NZCA 665, (2013) 17 ELRNZ 427.
30 At [34].

that required notification is one that a reasonable decision-maker could reach. They submit Urban Auckland cannot make out any mistake of fact or establish that the Council acted unreasonably in not notifying.

[137] I accept there is a limited scope for judicial review of a decision as to whether there are special circumstances. It involves the exercise of a discretion based on the Council's assessment of the factual position and use of its expertise and judgment: *S&M Property Holdings Ltd v Wellington City Council.*[31] Concern on the part of an interested party could not of itself be said to give rise to special circumstances because if that was so every application would have to be advertised where there was any concern expressed by the people claiming to be affected.

[138] In *Royal Forest & Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* the applicant challenged the decision to issue a subdivision resource consent without public notification.[32] Simon France J considered that the notification decision could not be divorced from the earlier analysis of the effects.[33] If the impacts were not relevant adverse effects, then those effects could not drive a special considerations decision. That would be to undermine the section and be pointless because the effects were equally required to be ignored when issuing the consent.

[139] Mr Farmer also emphasised that both under the operative Coastal Plan and under the Proposed Plan the Bledisloe wharves are within Port Management Area 1A and the port precinct. POAL has occupation rights under s 384A of the RMA. As a consequence it attracts certain protection status and rights and planning objectives that differ from other parts of the plan within the general coastal zone.

[140] I also acknowledge the point made by Mr Galbraith in reliance on the observation of the Court of Appeal in *Bayley* that, just because concern is expressed by people claiming to be affected, that does not of itself make for special

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31 *S&M Property Holdings Ltd v Wellington City Council* [2003] NZRMA 193 (HC) at [48].

32 *Royal Forest & Bird Protection Society of New Zealand Inc v Kapiti Coast District Council and Anor* HC Wellington CIV-2007-485-636, 21 November 2007.

33 At [133]. On appeal the Court criticised parts of the Judge's approach, but not this aspect. The appeal was ultimately dismissed: *Royal Forest & Bird Protection Society of New Zealand Inc v Kapiti Coast District Council and Anor* [2009] NZCA 79.

circumstances. However, the fact the site may be used for certain activities is not determinative either. I note the further comments of the Court in *Bayley* that:[34]

> We … make the observation that the council might very well have considered, and perhaps ought to have considered, that the sheer size of this development alongside existing residences constituted a special circumstance, something exceptional or out of the ordinary, even though the site could be used for a business activity.

[141] The issue of whether the Council failed to appreciate the significant public interest is informed in part by the special circumstances argued for. I revert to the matters which Urban Auckland argues are special circumstances in this case.

Discussion – special circumstances

POAL's ownership

[142] Mr Farmer submitted that the only issue with regard to the relationship between the parties is the ability of the Council to make independent decisions on POAL's applications which it dealt with by the process it adopted. However, I consider there to be some force in Urban Auckland's submission that the fact POAL is owned by ACIL, which is wholly owned by the Council, is an unusual feature of these applications. On its own it is not enough, but it is a factor.

Plans for further port development

[143] The next issue is relevant. The plans for the future port development, in particular reclamation, again marks the current applications as distinctive. The proposed extension of the wharves B2 and B3 obviously provides a basis for that reclamation in the future. While any reclamation work will itself require a resource consent application, the current plans for extension of the wharves will undoubtedly have an impact on such application.

National significance

[144] I accept there is force in POAL's submission that as it has a right to occupy the area under a coastal permit it is difficult to place much weight on this issue as

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[34] *Bayley v Manukau City Council* , above n 4, at 580.

being a special circumstance. Indeed the operation of the port is recognised as of importance to Auckland and New Zealand.

The adverse effects of the B2 and B3 extensions

[145] Apart from the issues discussed above, Urban Auckland seeks to raise issues as to the visual and coastal landscape effect and amenities as special circumstances. However, this analysis of special circumstances proceeds on the basis that the Court has rejected Urban Auckland's bundling submission so those effects (visual and amenity) are not directly relevant to this issue.

Significant public interest and controversy

[146] POAL concedes that public interest can be a factor in determining whether special circumstances exist but submits it is not determinative. However, it is fair to observe that the public interest generated in POAL's plans for development in general and the broad base of interest in the proposed extensions can be categorised as outside the common run of interest shown in applications for commercial development.

[147] Ngati Whatua Orakei and other iwi in Auckland have a direct interest. They might also have expected to have further input into the footprint of B2, which exceeded 3,500m², given the evidence from Ngarimu Blair that POAL assured Ngati Whatau Orakei and other iwi that it would revert back to them to consult over whether a cultural impact assessment was required for developing more than 3,500m² impervious surface at any one time. B2 exceeds this size limit.

[148] Having regard to the above factors, I consider there are special circumstances which supported notification in this case. However, the issue remains whether the Council, through its Commissioners, was wrong in the exercise of its discretion not to notify, despite those special circumstances.

Error of law

[149] Mr Palmer next submitted that, through its duty Commissioners, the Council made an error of law by assuming that because of the controlled activity status of the

extensions to the wharf no special circumstances arose. If so, then it was not a valid reason for deciding there were no special circumstances. The respondents submit that no purpose would have been served by notifying so that supported the Commissioner's decision there were no special circumstances.

[150] I consider there is force in Urban Auckland's submission that the Commissioners erred in law by considering that, as the extension was a controlled activity, and an expected form of development, no special circumstances existed. Further, for the reasons given above, I consider there was purpose to be achieved by notification and receiving further input into the decisions on the applications from the public.

[151] Commissioner Macky's decision for non-notification under the Coastal Plan is as follows:

> Under section 95A this application for a controlled activity to alter or extend an existing lawful structure in Port Management Area 1A shall not be publicly notified because:
>
> > Pursuant to section 95A(2)(3), a rule precludes public notification of the application: Rule 25.5.24 in the ARCP:C provides that applications for controlled activities shall be considered without public notification or limited notification of the application to any affected person unless there are special circumstances justifying public notification:
> >
> > 1. The applicant has not requested public notification.
> >
> > 2. No special circumstances exist because the structure is a controlled activity under the Plan and an expected form of development in this location.
> >
> > 1. There are no specific rules which require the written approval of affected persons.
> >
> > 2. There is no identified protected customary rights group or identified customary marine title group.

[152] In his decision Commissioner Kaye gave the following reasons on notification:

> Under sections 95A and 95B this application shall not be publicly … notified because:
>
> 1. Pursuant to section 95A(2)(3), a rule precludes public notification of the application …

2. The applicant has not requested public notification.

3. No special circumstances are considered to exist because the structure is a controlled activity under the Plan and an expected form of development within this location [and noting that Rule 25.5.1 provides that port activities associated with the use of the wharf facility are permitted activities].

4. There are no customary rights group or marine title groups in the region affected by this proposal.

[153] On the face of the decision of both Commissioners, it appears that the principal reason they decided special circumstances did not exist is that the extension was a controlled activity, and an expected form of development. In coming to that view I consider the Commissioners have misdirected themselves. The relevant rule in the Coastal Plan itself contemplates that even though the activity might be controlled there may still be special circumstances justifying public notification in accordance with s 95A(4) of the RMA.

[154] Although the Commissioners both gave evidence in which they set out their reasons for deciding not to notify in more detail, the wording of the decision itself is plain. While I take into account the Commissioners' affidavits, in which they set out in more detail their reasoning on this issue, it is helpful to focus on the contemporaneous documents and decisions because they are less subject to the risk of inaccuracy and rationalisation after the event: *Mackenzie District Council v Electricity Corporation of New Zealand*.[35] That is particularly so where, as here, the consent decisions both expressly refer to the point in issue and articulate the reason for not finding special circumstances.

[155] Simon France J in *Royal Forest & Bird Protection Society of NZ Inc* rejected the suggestion the broad nature of the discretion made it immune from review so long as the decision-maker acknowledged the existence of the discretion.[36] The Judge also acknowledged that a report which says, without more, that having

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35 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 48.

36 *Royal Forest & Bird Protection Society of New Zealand Inc v Kapiti Coast District Council and Anor,* above n 33, at [131].

considered the application there were no special circumstances, leaves itself open to criticism.[37]

[156] I also note that the evidence before the Court suggests Commissioner Macky had some issues with the notification decision recommended to her. Ms Valentine asked Ms Halpin to speak to Ms Macky. There is a record of Ms Halpin reporting to Ms Valentine after speaking with Commissioner Macky that:

> I have spoken with [Commissioner Macky] and she is all good. She really appreciated being able to talk through the application with me as she was having a wee bit of concern around notification! She is feeling much more comfortable now – phew! Give me a call and I can enlighten you further.

[157] I consider that special circumstances existed which supported notification in this case. The Commissioners fell into error by considering that, just because the extension was a controlled activity and an "expected development", no special circumstances existed. For that reason also, I am satisfied that the discretion was exercised in error. The applications should have been notified.

Second cause of action – Consent decisions involved

[158] As I have found the applications should have been notified, and were not, the consent decisions cannot stand. They should not have been granted.[38] In the circumstances it is strictly unnecessary to consider the second cause of action which challenges the validity of the decisions. The consent decisions cannot stand as they followed an invalid process of notification. I say no more about them.

Third cause of action – Decisions made without exercise of independent judgment/bias

[159] Urban Auckland also argues that the Commissioners failed to undertake any independent assessment or exercise any independent judgment in relation to their decision-making so that the notification and consent decisions are consequently unlawful. For completeness I briefly refer to this cause of action.

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37 At [132].

38 Resource Management Act 1991, s 104(3)(d).

[160] They also raise the issue of bias on the part of Commissioner Macky. I can deal with that point shortly. Commissioner Macky properly disclosed in her record sheet that she had been engaged by the Parnell Community Centre Committee in relation to the Proposed Plan and in particular submissions involving POAL and its activities, but did not consider there to be a conflict of interest in the circumstances.

[161] In her affidavit Commissioner Macky said she had been professionally engaged as a barrister to help write legal submissions on behalf of the Parnell Community Centre Committee. She was not a member of the Committee and was not involved in formulating its position relating to the port and POAL's activities.

[162] There can be no question of actual bias in this case.

[163] The law as to apparent bias was settled in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd.*[39] In a judicial context the test is that a Judge will be disqualified if:[40]

> A fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[164] There must be a causal link between the relevant circumstances and the bias. Urban Auckland suggests that in this case Ms Macky may have been subject to "reverse bias" because of her involvement with the Parnell Community Centre.

[165] In the present case a fair-minded observer with full knowledge of Ms Macky's experience and background and her actual involvement as a barrister with the Parnell Community Centre would not be concerned that she might have exhibited the reverse bias suggested in this case. I accept the submission for the Council that as a barrister and experienced decision-maker in this area Commissioner Macky properly considered she was able to make the decision without bias or partiality. The fair-minded observer, fully informed would accept Ms Macky's awareness of the need to be objective and impartial.

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[39] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122, [2010] 1 NZLR 76.

[40] At [4].

[166] Urban Auckland also submits that the Commissioners failed to exercise independent judgment in the matter, as that consideration is discussed in *Videbeck v Auckland City Council*.[41] In the case of Commissioner Macky I note that she made some amendments to the recommended conditions of consent and decided the relevant rule relating to notification was different from that expressed in the planner's report and draft decision presented to her. On this aspect I also am assisted by reference to her affidavit evidence. The evidence satisfies me that Commissioner Macky exercised the necessary independent decision-making.

[167] The concerns of Urban Auckland on the issue of whether Commissioner Kaye exercised independent judgment appear at first sight to have more force. For example, the materials emailed and couriered to Commissioner Kaye on 18 December 2014 comprised 760 pages. His record sheet discloses he spent 90 minutes reading them and 30 minutes in deliberating and deciding on both B3.1 and B3.2 applications.

[168] However, against that, the written submissions for the Council noted, Commissioner Kaye requested further information and the legal opinion referred to in the planner's report. Also, importantly in his affidavit evidence he said the time recorded was less than the full amount of time he spent reaching his decision. On balance I am not prepared to find that Commissioner Kaye did not give proper consideration to the matter on the basis of the evidence before the Court. I decline this ground of review.

Fourth cause of action – Is a further consent under the Proposed Plan required?

[169] Mr Palmer submitted that POAL requires a further consent to extend or alter lawful CMA structures under r 3.I.6.1.10 in the Proposed Plan.

[170] Section 12(1) of the RMA restricts the use of the CMA unless the activity is expressly allowed by a rule. Chapter 6 of Part 3.I of the Proposed Plan provides:

> "The activities, controls and assessment criteria in the General Coastal Marine zone apply in the CMA in all the coastal zones and precincts unless otherwise specified under the relevant zone or precinct."

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41 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at [60].

The General Coastal Marine zone provided for CMA structures in r 3.I.6.1.10 (construction in the CMA). It required a restricted discretionary consent for the "extension … of existing lawful CMA structures". CMA structures are defined to include wharves.

[171] As the proposed activity was for an extension to the Bledisloe Wharf, an existing lawful CMA structure, Mr Palmer submitted a further consent application for the restricted discretionary activity was required under the Proposed Plan.

[172] However, the Proposed Plan also provides for rules within the port precinct. The phrase 'port precinct' is used in the Proposed Plan instead of the phrase Port Management Area which is used under the Coastal Plan.

[173] The Council and POAL's position is that the construction of the B2 and B3 wharf extensions would be permitted activities under the Proposed Plan. The B2 and B3 wharf extensions are located within what the Proposed Plan describes as the port precinct. That port precinct encompasses the Port of Auckland operating area and the current application.

[174] The port precinct has additional special rules that apply to activities occurring within that port precinct. Rule 3.K.3.7 Activity table provides:

> "The activities, controls and assessment criteria in the underlying General Coastal Marine Zone apply to the CMA in the Port Precinct, unless otherwise stipulated below."

Activities in the port precinct are classified in the table at r 3.K.3.7.1. That Activity table provides:

> "The activities in the General Coastal Marine zone apply to the CMA in the Port precinct unless otherwise specified in the activity table below: …

The permitted activities under the activity table – port precinct include, under "Development", Marine and port facilities. Marine and port facilities are defined as "Facilities and structures that are associated with marine and port activities and serve more than an accessory role and include wharves". The activities associated with wharves would permit the construction of wharves within the port precinct.

[175] I accept the submission for the respondents that the activity status in the precinct takes precedence over the activity status in the zone, whether more restrictive or enabling. While Mr Palmer argued the zone should take precedence as part of the hierarchal structure of resource management, the approach argued for by the Council, supported by POAL is consistent with the principle of interpretation that the specific overrides the general. The rules are to be interpreted as having the effect of regulations.[42] It also must be borne in mind that this issue arises against the background of POAL holding a coastal permit for occupation of the relevant area within the General Coastal Marine zone.

[176] It would be curious if construction of a wharf could be permitted within the port precinct but not an extension or, for that matter, the maintenance of an existing wharf. I do not consider that to be consistent with a reasonable interpretation of the proposed planning document. The approach argued for by POAL and the Council is also, in my view, consistent with the general provision of the Proposed Plan for determining activity status.

[177] Part 2, General rules and special information requirements of the Proposed Plan provides:

> 2.1 Determining activity status
>
> 1. General rule
>
> a. The most restrictive activity status determines the overall activity status of the proposal.
>
> 2. Determining activity status where same matter is controlled by more than one rule
>
> a. To determine the activity status of a proposal:
>
> i. the user must firstly review the activity status of the activity and its associated controls within the zone and any precinct, or Auckland-wide provisions applying to the site. The activity status within a precinct takes precedence over the same activity within a zone or an Auckland-wide provision, whether more restrictive or enabling.

[42] Resource Management Act 1991, ss 68(2) and 76(2).

> ii. taking the activity status resulting from clause i above, the user must then review any overlays that apply to the site. If an overlay rule applies to the same matter then the most restrictive activity status will apply.

[178] I do not consider POAL requires any further consent under the Proposed Plan. I note that it was in relation to this issue in particular that the argument concerning Urban Auckland's challenge to the admissibility of the further planning evidence of the Council and POAL arose. I have not found it necessary to rely on that evidence in coming to the above conclusions which follow from an analysis of the wording of the Proposed Plan document.

[179] For those reasons I decline Urban Auckland's application for a declaration a further consent is necessary.

Relief

[180] POAL submits that even if the Court was to conclude there was a reviewable ground made out the Court should decline to grant relief in this case. Urban Auckland delayed in commencing the proceeding to the prejudice of POAL and significantly POAL has incurred and continues to incur considerable construction costs. Any delay in continuing with the project for the extension will have a detrimental effect on the operations of the Port and will cost POAL, and through its shareholders, the Auckland Council a considerable sum of money. The sums involved are before the Court but are confidential.

[181] Mr Farmer submitted that even in the event the Council fell into error the Court could decide that notwithstanding those errors it was not appropriate to grant the relief sought by Urban Auckland.

[182] The Court clearly has a discretion whether to grant relief. In *Minister for Canterbury Earthquake Recovery v Fowler Developments* O'Regan P delivering the judgment of the Court stated:[43]

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[43] *Minister for Canterbury Earthquake Recovery v Fowler Developments* [2013] NZCA 588, [2014] 2 NZLR 587 at [164].

> Much has been said in recent years in this Court about the discretion to decline relief in judicial review cases. In *Air Nelson Ltd v Minister of Transport*, the Court recorded that public law remedies are discretionary, but added that there must be "extremely strong reasons" to decline to grant relief. However, in later cases, a more nuanced approach has been taken.
>
> (footnotes omitted)

[183] I do not accept the argument that Urban Auckland unreasonably delayed in bringing these proceedings. The first notification Urban Auckland received that resource consents had been granted for the extension of the B2 and B3 wharves was on 12 February 2015 by an article in the *New Zealand Herald*. Urban Auckland took advice and through its solicitors advised both the Council and POAL of its intention to file the proceedings on 26 March. The proceedings were then filed on 2 April 2015. In the context of two applications which in each case took six weeks approximately to be determined on a non-notified basis, I do not consider the six weeks taken to meet, take advice and prepare proceedings to be a disqualifying delay.

[184] It is also relevant that prior to the issue of consents POAL had issued tender documents for the construction contract for both wharf extensions and before the matter had been publicised on 21 January 2015 POAL accepted the tender for construction of the wharves. Indeed the tender closed on the day Commissioner Kaye issued his decision. That tender process, from issue to acceptance, took from 26 November to 21 January, an eight week period. Even if the proceedings had been issued within two or three weeks of public notice in the *New Zealand Herald*, POAL's position would not have been materially different. There is no basis to refuse the relief on the ground of delay.

[185] Mr Farmer next submitted that there had not been any substantial prejudice to Urban Auckland and there were strong reasons to decline to grant relief, including:

- the need for good administration;
- the effect on third parties;
- the commercial community or industry; and

- the utility of granting a remedy.

[186] Mr Farmer noted the comments of Lord Carnwath in *Walton v Scottish Ministers* on the issue of Urban Auckland's interests:[44]

> The courts may properly accept as "aggrieved", or as having a "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme … .

[187] Mr Farmer then made a number of submissions emphasising the cost and commercial imperative in this case and the effect on third party contractors. I accept the significance of that to the POAL. He also referred to a number of matters which have been discussed above and submitted that there would be little point achieved by notification. However, the same reasons which support notification in this case, also support the grant of relief. I accept there would be no point in setting the consents aside and requiring notification if there is no purpose to it, but for the reasons given above I consider there will be purpose. It may well be that ultimately the consents are granted but that should follow the proper process contemplated by the RMA on the facts of this case.

[188] To the extent that there will be further delay and cost to POAL it has to a degree brought that on itself in the way that it urged the Council to proceed on the non-notified basis in the knowledge of the reaction that was likely to engender. In doing so it took a commercial risk in proceeding in that way.

[189] The cost and commercial imperative in requiring notification is a significant factor, but it cannot override the legal requirement for non notification which the Court has concluded is applicable in this case.

Summary

[190] The decision to proceed without notification was flawed for two reasons:

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[44] *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 5 at [103].

(a) The applications for consent should have been bundled which would have required notification, as the most restrictive activity was a discretionary activity. The adverse effects identified by Urban Auckland will fall to be considered.

(b) Alternatively, special circumstances existed which required notification in this case. The Commissioners fell into error in determining that because the extension was a controlled activity and an expected development no special circumstances existed so that it was unnecessary to notify in any event.

Result

[191] The consents issued on a non-notified basis are set aside.

[192] I decline Urban Auckland's application for a declaration. I confirm there is no need for the POAL to obtain any further consent under 3.I.6.1.10 of the Proposed Plan.

Costs

[193] I will receive memoranda on costs.

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Venning J