

*Hearing Before:  
Greater Wellington Regional Council, and  
Hutt City Council*

## **Resource Consent Applications**

Being in relation to the proposed construction of a 4.4km long Shared Pathway along the seaward edge of Marine Drive, including reclamation of the Coastal Marine Area (CMA), disturbance and discharges to the CMA, demolition, construction and alteration of structures in the CMA, earthworks, and ongoing beach renourishment

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### **DECISION REPORT OF INDEPENDENT HEARING PANEL**

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**Dated:** 5 March 2021

**Result:** The consents are granted subject to the conditions in Attachment 1.

**Approved** for release and publication on the websites of Hutt City Council and Greater Wellington Regional Council by Robert Schofield (Chairperson) while reserving the power to make minor corrections and amendments to the grant of resource consent if required under the Resource Management Act s133A. If that occurs the corrections will be published and circulated.

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**Attachment 1** Consent Conditions

<b>Acronym/Term Definition</b>	<b>Definition</b>
BNP	Beach Nourishment Plan
BPP	Bird Protection Plan
BSUDPs	Bay Specific Urban Design Plans
CEMP	Construction and Environmental Management Plan
CIA	Cultural Impact Assessment
CMA	Has the same meaning as ‘coastal marine area’ in section 2 of the RMA
EIANZ	Ecological Impact Assessment Guidelines New Zealand
GWRC	Greater Wellington Regional Council
HCC	Hutt City Council
LUDP	Landscape and Urban Design Plan
MHWS	Mean High Water Springs
MOP	Main outfall sewer pipeline
MWSG	Mana Whenua Steering Group
NZCPS	New Zealand Coastal Policy Statement
PNBST	Port Nicholson Block Settlement Trust
PNRP	Proposed Natural Resources Plan (Notified Version)
RCP	Operative Regional Coastal Plan
RMA	Resource Management Act
RPS	Regional Policy Statement
SLUR	GWRC Selected Land Use Register (SLUR)
SNR	Significant Natural Resource
SRHP	Seawall and Revetment Habitat Plan
SNR	Significant Natural Resource
TMP	Traffic Management Plan

# 1 Overview

## 1.1 Introduction

- 1.1.1 Our decision is to grant consent subject to conditions.
- 1.1.2 This report concerns a proposal to construct a 4.4 km Shared Pathway along Marine Drive in two sections; between Point Howard and the northern end of Days Bay, and the southern end of Days Bay (Windy Point) to Eastbourne (Muritai Road / Marine Drive intersection). The proposal includes reclamation and the construction of new structures in the Coastal Marine Area (CMA), and additions and/or alterations, replacement, and removal and demolition of existing structures (including seawalls, revetments, boat ramps, beach access structures and stormwater pipes). The proposal also includes beach nourishment to maintain the existing hightide beach that will be partially lost to enable development of the Shared Pathway.
- 1.1.3 The Project requires resource consents under the RMA, from both the Hutt City Council (HCC) and the Greater Wellington Regional Council (GWRC).
- 1.1.4 The statutory aspects of the proposal are initially outlined in Section 4 below. The granting of resource consents is a process under the Resource Management Act (“the Act” or “RMA”).
- 1.1.5 Our reasoning and conclusions are contained in this report (also see Section 1.3 for an outline of the report structure).
- 1.1.6 To assist in our understanding of the environment and the Project, we undertook site visits on 26 November 2020 and on 27 January 2021. For both visits, we commenced at the Seaview wharf entrance and walked substantial parts of the coast, taking note of existing and proposed features along the way. We had information and equipment with us which enabled us to visualise and understand the proposed extent of encroachment of works onto the existing shoreline. We took particular note of aspects such as the presence of seagrass in Lowry Bay, existing bus shelters, the currently available existence and width of walking / cycling routes along Marine Drive, and presence / habitats of shoreline foragers and penguins. Our January site visit included time at the Days Bay Penguin Haven.

## 1.2 Roles and responsibilities of the parties

- 1.2.1 The roles and responsibilities of the parties, other than submitters in opposition or support, were set out within various application and hearing documentation. It is, however, useful to repeat these here for the sake of clarity.
- 1.2.2 The Applicant is the HCC, with Stantec being the Applicant’s agent.
- 1.2.3 Regional consents are required for the Project as the proposal breaches rules in relevant regional plans pertaining to Sections 9, 12, 14 and 15 of the Act. GWRC is the consent authority that must determine whether to grant or decline regional aspects the resource consent application. GWRC’s consent responsibilities in this case generally relate to works in the area seaward of the line of mean high water springs (MHWS).

- 1.2.4 District consents are required for the Project as it breaches rules in the relevant District Plan pertaining to Section 89 of the Act. As well as being the Applicant, HCC is also the consent authority that must determine whether to grant or decline the resource consent application. HCC's consent responsibilities in this case relate to works in the area landward of MHWS.
- 1.2.5 Because many aspects of the Project physically cross MHWS we have taken a practical approach and considered them as an integrated whole.
- 1.2.6 The circumstance of a council (in this case HCC) being both the Applicant and the consent authority is not unusual in New Zealand's RMA system. To avoid perceived or real conflicts of interest created by the interrelationships between the parties and their statutory responsibilities, it is typical for independent commissioners to be used. As independent commissioners, our remit provides us with full autonomy to make the necessary decisions and impose conditions of consent.

### **1.3 Report structure**

- 1.3.1 Resource consent applications require a decision to be made, either granting consent (with or without conditions), or declining consent.
- 1.3.2 Statutorily, many of the matters we must consider are the same or similar with respect to both resource consent applications, and they concern physical works which straddle the boundary between district and regional responsibilities. For those reasons, we have taken an integrated approach to some aspects of the assessment, and a separate approach where that is necessary to recognise differences between the two consents. In most situations, our report refers generically to the 'proposal', 'project', 'works' or similar variations, rather than distinguishing between the district and regional resource consents.
- 1.3.3 At various places we include references to the consent conditions. These references are typically in brackets and use a shorthand alpha-numeric system agreed between the Applicant and the consent authority planners, which breaks the conditions into subject matter groups. As an example (MW.1) refers to Mana Whenua Condition 1.

## **2 Location and Proposed Works**

### **2.1 Location and Existing Environment**

- 2.1.1 The proposed location of the works is set out in the Application documents, and Section 3 of the GWRC's s42A Officer's report prepared by Mr Watson. In summary, the Project focuses on the coastal edge of Marine Drive, between Point Howard and Eastbourne, terminating at the Muritai Road/Marine Drive intersection. There is a 'gap' in the Shared Pathway where no works are proposed, that being between the northern end of Days Bay and the southern end of Days Bay.
- 2.1.2 The Project length, excluding the gap at Days Bay, is 4.4km, with approximately 3.14km requiring works along the foreshore. A detailed bay-by-bay break down of the extent of structures can be found in table 2.1 of the Applicant's AEE.

- 2.1.3 A description of the existing environment can be found in full within Section 10 of the Applicant's AEE.

## 2.2 Environmental Characteristics

- 2.2.1 Marine Drive has been widened several times through small seaward enlargements, with the majority of the coastal fringe across the Project footprint (87%) being supported by engineered concrete and rock defences. These defences typically comprise concrete or rock revetment and gabion baskets in small sections.
- 2.2.2 Over time, the existing hard protection structures have disrupted the natural sediment transport regime within each bay. Historical reclamation of the coastal fringe has reduced sediment supply on beaches and has led to a slow loss of sand volume, reductions in beach width, the coarsening of beach material and a gradual change in the overall shape of the beaches.
- 2.2.3 Vegetation habitats in the Project area are intertidal and subtidal, beach gravels and sands, rocky islets, rocky headlands and promontories, landscape plantings and open space habitats. The intertidal habitats of the Eastern Bays area comprise moderately to very sheltered rocky reef, with a mix of substrate dominated by either bedrock, pebbles and boulders, or sand.
- 2.2.4 The proposed path passes by the Skerrett Boatshed in Days Bay which is listed in the Regional Coastal Plan (RCP), the Proposed Natural Resources Plan (PNRP) and the Heritage Chapter of the District Plan.
- 2.2.5 The Sunshine Service Station that is located on the opposite side of Marine Drive from the Shared Path at Sunshine Bay. The site is registered by the GWRC Selected Land Use Register (SLUR) as (SN/03/188/02) having a verified history of hazardous activity or industry (i.e., the service station).

## 2.3 Ecology

- 2.3.1 Red-billed gull, black-backed gull and variable oystercatcher are the primary avifauna of the intertidal zone on beaches, while rocky intertidal habitats are also the domain of oystercatchers and reef heron. Shallow offshore waters with rocky subtidal reefs provide feeding habitat for the red billed gull, southern black-backed gull, and little shag, little black shag and black shag. Fluttering shearwater, giant petrel, Australasian gannet, spotted shag, Caspian tern and white fronted tern are found in deeper offshore waters.
- 2.3.2 Little penguin / Kororā (*Eudyptula minor*) are found in the Project area. There are an estimated 42 breeding sites, with six breeding sites inland of Marine Drive. The predominant habitat of existing Kororā breeding sites is artificial rock, many of which are less than one metre above sea level and are at current risk of inundation by storms. With storms predicted to increase there is increasing inundation risk and threats to penguins in general.
- 2.3.3 Three occurrences of seagrass (*rimurēhia*, *Zostera muelleri* subsp. *novazelandica*) of varied densities are found in the intertidal and subtidal zones at south Lowry Bay (total area 1,940 m<sup>2</sup>). This is the only known occurrence of seagrass remaining in Wellington Harbour.

## 2.4 Eastern Bays Communities

- 2.4.1 Each bay has a distinctive character which is the cumulative product of many factors. These include settlement pattern; bay landform including its curvature; steepness of the hills and proximity to the coastline; orientation of the bay; and exposure to prevailing winds and the coastal edge.
- 2.4.2 South of the Project site is a large area of flat land behind the foreshore that has been densely developed and known collectively as Eastbourne (including Muritai), which has a small local commercial area consisting of cafes, restaurants and retail stores.
- 2.4.3 There are three local Primary schools within the wider Project area: Muritai School, San Antonio School and Wellesley College.
- 2.4.4 Although the Eastern Bays area is a collection of communities, we heard from submitters that foot and cycle connectivity between those communities is not well catered for, and there are associated safety concerns. There is no continuous footpath or dedicated cycleway along Marine Drive.
- 2.4.5 The beaches of the Eastern Bays area are highly valued for their recreational amenity, both by residents of those communities and by people from throughout the wider Wellington region.

## 3 The Project

### 3.1 The Problem Being Addressed

- 3.1.1 The intention of the Project is to develop a safe and integrated walking and cycling facility along Marine Drive to connect communities along Hutt City's Eastern Bays. The Project will also provide links to other parts of the network for recreation and tourism purposes. The Shared Pathway will form a key part of the Te Aranui o Pōneke or the 'Great Harbour Way' around Te Whanganui-a-Tara, the Wellington Harbour.
- 3.1.2 Currently, connectivity around the Eastern Bays for cyclists and pedestrians is low due to the lack of dedicated facilities and the constrained nature of Marine Drive. Cyclists and pedestrians use the road shoulder which is narrow and non-existent in some sections.
- 3.1.3 Marine Drive provides the only road access to and from the Eastern Bays suburbs and is therefore a crucial transport route for the locality. Key infrastructure services, including the main outfall sewer pipeline (MOP) serving the entire Hutt Valley, are located within the road corridor. The Project seeks to provide immediate protection of that infrastructure, although it would be a limited 'window' of time in the face of projected sea level rise / climate change. It also aims to provide built outcomes that are adaptable and resilient, with the potential for greater protection to be added beyond the initial window.
- 3.1.4 To date, coastal protection structures along the seaward edge have been developed in an ad hoc manner over time. Those structures are vulnerable to failure and do not provide effective storm mitigation. In the face of ongoing sea level rise, the proposed seawalls will, for a time, reduce the frequency and extent of overtopping and the resultant debris on the

road, and occasional road closures. The Project will also provide a consistent seawall design that can be added to in the future.

- 3.1.5 The Application documents and Mr Watson's s42A report both point out that the Project is not a permanent solution to the effects of sea level rise, and instead provides the first step in potentially incremental upgrades that would assist in providing protection to the road. The proposed seawalls do not preclude future options and have been designed to enable additional protection to be added in the future if considered appropriate.

## 3.2 General Description of the Proposal

- 3.2.1 The proposed works are set out in the Application documents and Section 4 of the GWRC s42A Officer's report. Physical works during the construction of the Shared Pathway will involve:

- 1) Removal and demolition of the existing seawall as necessary to allow for the construction of the new wall. Wherever there is adequate space on the road, these works will be undertaken from the roadway. Demolition waste (concrete, non-native bulk fill, reinforcing) will be taken to an appropriate landfill site for disposal.
- 2) Excavation work within the CMA, for some sections of the seawall, to embed the seawall toe into the substrate. Subsequent dewatering will be undertaken to allow for foundations to be poured. Once the foundations have been completed, the seawall form will be cast in situ.
- 3) Rock revetment<sup>1</sup> in some areas to protect the proposed Shared Pathway on the foreshore at certain vulnerable headlands. The revetment will be constructed by preparing the site, where necessary, by excavating a trench to build a reinforced cantilevered wall. Concrete will then be poured in situ to form the cantilevered wall. Backfill will be placed behind the cantilevered wall on the roadside to form the base of the Shared Pathway. Rock will be placed against the supporting cantilevered wall consistent with revetment design standards.
- 4) Beach nourishment at Point Howard, Lowry Bay and York Bay to remedy the loss of high-tide beach and associated recreation amenity at these locations. Sand will likely be sourced from the Hutt River, and a total of approximately 6,000m<sup>3</sup> of material will be needed for beach nourishment, distributed across the respective bays.

- 3.2.2 Generally, the Application reflects a preliminary design for consenting. Section 6 of the Applicant's AEE indicates that the construction methodology and design is indicative and provides measures to avoid, remedy, or mitigate any adverse effects of activities on the environment. In essence, it is a worst-case scenario which establishes an 'envelope of effects'.

- 3.2.3 Construction is likely to be completed in stages over a six-year period. Each bay will be constructed in full before moving on to the next one. This is to provide consistency in design throughout each of the Bays. It is proposed that works on the Windy Point section of the

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<sup>1</sup> A constructed slope of large rocks



Shared Pathway will be constructed first, followed by (in order): Howard Bay, Sorrento Bay, and Lowry Bay/Whiorau Bay. These will be then followed by the remaining Bays.

- 3.2.4 Each section is likely to take approximately 3-6 months to complete, depending on the extent of the particular works. A more detailed construction programme for the Project will be developed during the detailed design stage. This programme will be incorporated into the Construction and Environmental Management Plan (CEMP) which is required via a condition of consent.
- 3.2.5 The CEMP will be prepared to support and guide the construction of the Project, including the environmental management and monitoring procedures that will be implemented during the Project's construction phases. The CEMP will be developed in consultation with the relevant Project experts including ecologists, landscape architects and coastal engineers, and will incorporate or refer to the following management plans:
- Landscape and Urban Design Plan (LUDP)
  - Bay Specific Urban Design Plans (BSUDPs)
  - Beach Nourishment Plan (BNP)
  - Traffic Management Plan (TMP)
  - Bird Protection Plan (BPP)
  - Seawall and Revetment Habitat Plan (SRHP)
- 3.2.6 All management plans will provide overarching principles, methodologies and procedures for managing the effects of the construction of the Project to achieve the environmental objectives, outcomes and performance standards required by the respective management plans.

## **4 Regional and District Consents**

### **4.1 Regional Consents Required**

- 4.1.1 The Applicant seeks resource consent from GWRC under the notified version of the Proposed Natural Resources Plan (PNRP), and the Operative Regional Coastal Plan (RCP).
- 4.1.2 In line with Section 9 of the Act, Land Use Consent is required for earthworks above MHWS that exceed the permitted activity threshold in the PNRP. Under Section 12 of the Act, Coastal Permits are required for proposed construction work in the CMA, including reclamation, demolition and placement of new structures, and other construction related activities. Under Section 14 of the Act, Water Permits are required for the take, use, damming, or diversion of coastal and groundwater, with respect to dewatering for seawall foundation works. Section 15 of the Act requires Discharge Permits for the discharge of sediment associated with construction related activities.
- 4.1.3 Mr Watson's s42A report (Tables 6 and 7) lists the specific rules to which the application is subject to. For clarity, these rules are summarised below:

4.1.4 Operative Regional Coastal Plan

- 1) Rule 4 (Discretionary) - Reclamation; demolition and placement of new structures; and other construction related activities pertaining to the reclamation of the CMA
- 2) Rule 14 (Controlled) - Removal or demolition of structures
- 3) Rule 16 (Controlled) - Occupation by structures of land of the Crown or any related part of the CMA
- 4) Rule 18 (Discretionary) - Structures more or less parallel to mean high water springs
- 5) Rule 25 (Discretionary) - All remaining activities involving the use and development of structures outside any Area of Significant Conservation value
- 6) Rule 45 (Controlled Activity) - Beach nourishment
- 7) Rule 61 (Discretionary Activity) - Other activities involving discharges to land and water outside Areas of Significant Conservation Value
- 8) Rule 83 (Restricted Discretionary) - Motor vehicles, motorcycles, trailers and land yachts on beaches

4.1.5 Proposed Natural Resources Plan (Notified Version)

- 1) Rule R68 (Discretionary) - All other discharges
- 2) Rule R142 (Discretionary) - Any other take and use of water
- 3) Rule R101 (Discretionary) - Earthworks and vegetation clearance
- 4) Rule R153 (Restricted Discretionary) - Removal or demolition of a structure
- 5) Rule R155 (Restricted Discretionary) - New temporary structures
- 6) Rule R161 (Discretionary) - New structures, additions or alterations to structures outside sites of significance
- 7) Rule R198 (Non-Complying) - Motor vehicles inside sites of significance
- 8) Rule R208 (Discretionary) - Deposition outside sites of significance

## 4.2 **District Consent Required**

4.2.1 The Applicant seeks resource consent from HCC under the Hutt City Council District Plan.

4.2.2 Land use consent is required for the construction, alteration (including widening the road in some areas) and diversion of Marine Drive to create the Shared Pathway in accordance with Section 9 of the Act, and Land use consent for the construction and operation of the Shared Pathway within a Significant Natural Resource (SNR) site, being SNR 44<sup>2</sup>.

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<sup>2</sup> Melicytus obovatus ssp 'coast', at Point Howard beach, being a coastal shrub with 'At Risk – Relict' status

## 5 Process Before Hearing

### 5.1 Consultation

- 5.1.1 Consultation regarding the proposed works began in early 2016 in the form of Iwi engagement. Further public consultation was undertaken in late 2016 when the Project team sought views from members of the public at a community open day. Section 25 of the Application summarises the consultation plan and outcomes, and Appendix I of the Application describes (in detail) the ‘Stakeholder and Engagement Plan’ and provides a ‘Stakeholder Engagement and Consultation Report’.
- 5.1.2 Stakeholder engagement and consultation is a key component of the Eastern Bays Shared Pathway Project. The Eastbourne Community Survey (2014) revealed that the top two issues for residents were completion of the Eastern Bays walk/cycleway and climate change (and extreme weather events). The general consultation process adopted a ‘bay-by-bay’ approach, with dedicated sessions for individual bays, focussing on the key issues faced by each bay along the Project length. The design was refined during the early part of 2017 and a series of community meetings were held in August 2017 to obtain input from the community on the design.
- 5.1.3 There are three iwi groups who are identified as exercising kaitiakitanga within the area affected by the proposal:
- Taranaki Whānui ki te Upoko o te Ika (Taranaki Whānui)
  - Te Ātiawa ki Whakarongotai (Te Ātiawa)
  - Ngāti Toa Rangatira
- The Wellington Tenths Trust and PNBST are the relevant Iwi authorities for Te Ātiawa and Taranaki Whānui.
- 5.1.4 The Applicant also engaged with Te Ātiawa ki te Upoko o te Ika a Māui Pōtiki Trust as a mandated Iwi authority for fisheries. The outcome of consultation with these parties is discussed further in Section 7 of our decision.
- 5.1.5 The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) deals with Māori customary rights in the coastal marine area. The Applicant notified and sought the views of the groups that have applied for recognition of customary marine title in the area. A copy of this correspondence can be found in Appendix I of the Application.
- 5.1.6 The Applicant identified a number of key stakeholders in accordance with the ‘Stakeholder Engagement Plan’. These key stakeholders included; the Department of Conservation (DOC), GWRC, CentrePort Limited, NZ Transport Agency/Waka Kotahi, HCC, private landowners (James Robert and Janette Thomas), Residents’ Associations and Community Representatives and Interest Groups. The Applicant undertook consultation with each of these parties following their ‘Stakeholder Engagement Plan’. The issues arising from consultation can be found in Section 25.3 of the Application.

## 5.2 Public Notification and Submissions

- 5.2.1 The Application was publicly notified in the Hutt News on 29 October 2019 and the Eastbourne Herald on 17 November 2019. Signs advertising the consent application were erected at the entrance to Point Howard and within the carpark adjacent to the intersection of Muritai Road and Marine Drive in Eastbourne during the week beginning 4 November 2019. In addition, notice of the application was directly served to 21 identified stakeholders.
- 5.2.2 There were 192 submissions received. Eight submissions were received after the statutory submission timeframe but were accepted by the Councils. Of the 200 submissions received, 179 were in support of the application (either in full or in part), 16 were in opposition (in full or in part) and 5 submissions were neutral.
- 5.2.3 Submissions covered a wide array of issues and expressed overall views both for and against the Project. A common theme of submissions in support was the prospect of improved safety for pedestrians and cyclists, and increased resilience from natural hazards. Issues raised in opposition to the application ranged from the design and width of path, to concerns about marine ecology, and non-compliance with relevant policy documents.

## 5.3 Pre-hearing Meeting

- 5.3.1 No formal pre-hearing meeting was held between the Applicant and the two consenting authorities. However, in the interests of resolving concerns about effects on coastal birds and penguins, the Applicant arranged a meeting with local penguin specialists and regulatory stakeholders on 2 March 2020 to discuss mitigation and options. This meeting was to inform the Applicant's further thinking about Project design, mitigation measures, and the content of any management plan to address effects on penguins and shorebirds.

## 5.4 Commissioners' Minutes

- 5.4.1 We issued four Minutes, as follows:
- Minute 1 (18 December 2020) concerned a legal opinion received from Counsel for the Applicant in relation to interpretation of the New Zealand Coastal Policy Statement (NZCPS), in particular Policy 11a which relates to the avoidance of effects on threatened or at-risk indigenous species. This minute posed a series of questions to legal Counsel for the consent authorities.
  - Minute 2 (21 December 2020) outlined the remaining steps in the decision-making process for the hearing on the resource consent applications.
  - Minute 3 (29 January 2021) requested clarifications from the Applicant in response to matters arising from the Right-of-Reply and its associated appendices that were received 22 January 2021.
  - Minute 4 (12 February 2021) advised all parties of the close of hearing.

## 5.5 Expert Conferencing

- 5.5.1 No formal expert conferencing was undertaken before the hearing. However, a series of memoranda were sent to the consent authorities prior to the hearing. The purpose of these

were to provide a response (in part) to a request for further information under s92(1) of the Act.

5.5.2 The memoranda were as follows:

- Memorandum 1 (22 July 2019) responded to and resolved concerns around herpetofauna (the environment does not support lizard habitat); effects on marine mammals; relevant provisions of the NZCPS in respect of natural character and landscape matters; management of pests and rodents during construction; the methodology for assessing fish presence; and monitoring conditions related to coastal processes.
- Memorandum 2 (20 August 2019) included a report on Avifauna and Little Penguins prepared by Dr John Cockrem of Kororā Ornithology Ltd and a memorandum from Dr Fleur Matheson from NIWA related to the Applicant's approach to the management of seagrass beds in Lowry Bay. We note that this memorandum did not resolve concerns around effects on coastal birds and penguins.
- Memorandum 3 (18 September 2019) did not concern matters relating to the s92(1) request. This memorandum included a revised assessment of the relevant objectives and policies for the purposes of the substantive assessment under s104 of the RMA, and the gateway test<sup>3</sup> under s104D of the Act.
- Memorandum 4 (19 September 2019) responded to outstanding concerns about the need for safety barriers and concerns over the path from an operational safety perspective, as raised in the technical review of the application.
- Memorandum 5 (15 June 2020) responded to the position statements of the consenting authorities on outstanding matters of concern and included a revised suite of consent conditions.
- Memorandum 6 (22 October 2020) was the final pre-hearing response of the Applicant regarding outstanding concerns about effects on penguins and coastal birds, and all other matters raised in Response to Memorandum 5.

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<sup>3</sup> The 'gateway test' under section 104D RMA allows consent to be granted to a non-complying activity if the proposal passes through either of two gateways. Those gateways are either: the absence of any effects that are more than minor, or that the proposal is not substantially inconsistent with relevant objectives and policies of a regional or district plan.

## 6 Hearing Overview

### 6.1 Hearing Schedule

6.1.1 The hearing was held over 15 to 17 December 2020 at the Hutt City Events Centre. The hearing was formally closed on 12 February 2021 via Minute 4, after we received further information that had been requested in the previous Minute.

### 6.2 Appearances

6.2.1 We record the following appearances on behalf of the various parties.

<b>For the Applicant</b>	<b>Expertise</b>
• Ihakara Puketapu-Dentice	• Strategic overview and engagement
• Simon Cager	• Project overview and engagement
• Michael Allis	• Coastal processes
• Richard Reinen-Hamill	• Beach nourishment
• Shelley McMurtrie	• Intertidal and subtidal ecology
• Robert Greenaway	• Recreation and amenity values
• Dr Fleur Matheson	• Seagrass
• Morris Love	• Cultural effects and values
• Dr Alexander James	• Freshwater Ecology
• Dr John Cockrem	• Avifauna
• Michael Copeland	• Economics
• Julia Williams	• Landscape and visual effects
• Jamie Povall	• Project Design, Transport and Safety
• Caroline van Halderen	• Planning
<b>For Greater Wellington Regional Council</b>	<b>Expertise</b>
• Dr Megan Oliver	• Seagrass and Marine Ecology
• Dr Iain Dawe	• Hazards and Coastal Processes
• Dr Roger Uys	• Terrestrial Ecologist
• Shannon Watson	• Planning
<b>For Hutt City Council</b>	<b>Expertise</b>
• Catherine Hamilton <sup>4</sup>	• Landscape Architect
• Jeremy Head <sup>5</sup>	• Landscape Architect
• David Wanty	• Transport
• Dan Kellow	• Planning
<b>Submitters</b>	<b>Position</b>
• Virginia Horrocks (Eastbourne Community Board)	• Support
• Graeme Hall (Te Aranui o Pōneke/Great harbour Way Trust)	• Support

<sup>4</sup> Also appeared on behalf of GWRC

<sup>5</sup> Also appeared on behalf of GWRC

• Robert Ashe	• Support
• Amelia Geary (Royal Forest and Bird Protection Society NZ Inc.)	• Oppose
• Kate Wilson	• Support
• Michael Rumble	• Oppose <sup>6</sup>
• Fiona Christeller	• Support
• Felicity Rashbrooke (East Harbour Environmental Association Incorporated)	• Oppose
• Geoff Rashbrooke	• Oppose
• Dave Le Marquand (Z Energy, BP Oil Ltd, Mobil Oil Ltd)	• Support (conditional)
• Steve Bielby	• Support
• John Morgan	• Support
• Derek Wilshere	• Support
• Dr Dave Tripp (Doctors for Active, Safe Transport)	• Support
• Belinda Moss (Lowry Bay Residents Association)	• Support
• Peter Healy	• Support

6.2.2 We heard from the Applicant and most of their expert witnesses on the first day of the hearing. Two witnesses, Mr Povall and Ms van Halderen, presented on the second day.

6.2.3 On the final day of the hearing, we heard from the Council Reporting Officers and their supporting expert witnesses.

### 6.3 Submitter Appearances and Overview

6.3.1 To facilitate the hearing process, we heard from individual submitters on each day of the hearing.

6.3.2 Safety improvements was a theme commonly cited by submitters. Virginia Horrocks, Robert Ashe, Steve Bielby, Belinda Moss and John Morgan all discussed the existing road and the dangers presented by the lack of a designated cycle and pedestrian path.

6.3.3 Fiona Christeller supported the proposal. However, she considered that the Landscape and Urban Design Plan and the Bay Specific Urban Design Plans (required by conditions LV.1-LV.7) are critical to the successful outcome of the Project. Ms Christeller also raised concerns regarding the removal of the ‘Atkinson Tree’ stating that there were over 9 submissions to keep it there.

6.3.4 Kate Wilson supported existing and proposed enhancements of the region’s cycle trails. However, she stated that the Project needs to ‘front foot issues’ and that the ‘target should

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<sup>6</sup> This submission stated opposition to the application, but requested that GWRC grant consent

be to ensure the path provides for the needs of the interested and concerned'. Ms Wilson called for elements such as water fountains, toilets, bike parking and bike chargers to be included in the design.

6.3.5 Both Geoff Rashbrooke and Felicity Rashbrooke raised concerns about the loss of beach space and the loss of access to certain beaches (particularly in York Bay, Mahina Bay and Point Howard). Ms Rashbrooke considered that if the Shared Pathway were sited landward of Marine Drive, coupled with a reduction in its width, it would be possible to avoid beach loss. Both submitters also raised concerns about the position of the bus shelters at Mahina and York Bays, citing safety concerns about the shelters' proximity to the Shared Pathway.

6.3.6 Amelia Geary, on behalf of Forest & Bird Incorporated, opposed the application due to potentially adverse effects on indigenous at risk or threatened species, namely seagrass, little blue penguins and oystercatchers. Ms Geary raised the following points in opposition to the Project:

- 1) Effects on seagrass beds adjacent to the Shared Pathway have not been adequately considered during construction or in the longer term;
- 2) Management of Little Blue Penguins during the construction phase of the Project is inadequate. Ms Geary requested more clarity about actions to be taken if penguins are detected at the time of construction;
- 3) The proposed mitigation of providing new areas of penguin habitat is not sufficient to compensate for habitat loss along the pathway; and
- 4) Insufficient consideration has been given to effects of the Shared Pathway as a whole, relating to foot traffic, dog walkers, and cyclists using it once the path is operational.

6.3.7 Mr David le Marquand, a Planning expert, presented on behalf of the oil companies<sup>7</sup>. He stated that although they support the Project, they have reservations in relation to implications for the oil companies' own resource consents, and safe access to and from Seaview Wharf.

6.3.8 Mr Michael Rumble's presentation focused on concerns relating to Little Blue Penguins (LBP). He stated that there was a 'need to give penguins more consideration' as a whole. Mr Rumble's concerns included matters such as the specific location of the proposed LBP habitat enhancement zones, and the lack of proposed LBP monitoring during and after the completion of the project.

6.3.9 We acknowledge Mr Rumble's significant experience of penguins and the work that he undertakes, including that at the Days Bay Penguin Haven. We regard him as an expert by virtue of experience, as opposed to qualifications. However, in appearing on his own behalf in support of his submission, we cannot fully accept him as an impartial expert in the sense intended by the Environment Court Code of Conduct. Notwithstanding that fact, we consider that the information he presented to us was useful.

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<sup>7</sup> Z Energy, BP Oil Ltd, Mobil Oil Ltd



## 6.4 Matters Out of Scope

6.4.1 This section of our report identifies matters that we consider are ‘out of scope’ in terms of our mandate, RMA law, or practice. We cover those matters here for completeness. We also do so for the particular purpose of helping any submitters to understand why we have reached conclusions they may consider unfavourable to their case.

6.4.2 There were matters raised within submissions that fall outside the ambit of the relevant planning documents and the consents being applied for. These matters included:

- Concern about use of ratepayer funding and funding mechanisms
- Failure to include Days Bay and Point Howard sections of path
- Changes to the naming conventions (and associated signage) of respective bays
- Changes to road speed limits and associated signage, and
- Provision of additional pedestrian crossing places.

As a consequence, we are not able to make any decisions based on those matters.

## 7 Mana Whenua

7.1.1 We consider it important to record issues relevant to Mana Whenua. This is not required to resolve issues, but to explain that the Project is located within a coastal environment that is highly significant to Mana Whenua as detailed in the Cultural Impact Assessment (CIA) which formed part of the Application.

7.1.2 There are three Iwi groups who are identified as exercising kaitiakitanga within the area affected by the proposal; Taranaki Whānui ki te Upoko o te Ika (Taranaki Whānui), Te Ātiawa ki Whakarongotai (Te Ātiawa) and Ngāti Toa Rangatira.

### Taranaki Whānui ki Te Upoko o Te Ika (Taranaki Whānui) of the Te Whanganui-a-Tara area

7.1.3 Taranaki Whānui are those people who descend from one or more of the recognised tipuna of:

- Te Āti Awa;
- Taranaki;
- Ngāti Ruanui;
- Ngāti Tama;
- Ngāti Mutunga; and
- Other Iwi from the Taranaki area.

7.1.4 The Iwi that comprise Taranaki Whānui migrated to the Wellington area in the 1820s through to the 1830s and have maintained permanent occupation since that period. The “rohe” (tribal area) of Taranaki Whānui is centred around Te Whanganui-a-Tara including the Harbour and its surrounding environs. The Project traverses areas with strong associations to the Te Āti Awa people where kainga and papakāinga, māra kai and mahinga kai were established, albeit they have now been subsumed by urban development.

- 7.1.5 The Wellington Tenths Trust and PNBST are the relevant Iwi authorities for Taranaki Whānui. Taranaki Whānui cultural associations with the area have been formally recognised in their own Deed of Settlement set out in the Port Nicholson Block (Taranaki Whānui ki te Upoko o te Ika) Claims Settlement Act 2009.

Ngāti Toa Rangatira

- 7.1.6 Ngāti Toa Rangatira (Ngāti Toa) descend from the Tainui waka which made landfall at Kawhia on the West Coast of the North Island in around 1350. Ngāti Toa remained domiciled there for centuries before migrating to Cook Strait in the early 1820s. Ngāti Toa's area of interest spans Cook Strait, the lower North Island from Rangitikei in the north (including Kāpiti Coast, Hutt Valley and Wellington and Kāpiti and Mana Islands), large areas of the Marlborough Sounds and much of the northern part of the South Island. The traditional interests and associations of Ngāti Toa include Te Whanganui-a-Tara, as has been formally acknowledged by the Crown in Treaty settlement legislation.
- 7.1.7 Ngāti Toa Rangatira cultural interests and associations with the area have been formally recognised in their own separate Deed of Settlement set out in the Ngāti Toa Rangatira Claims Settlement Act 2014.

Cultural Impact Assessment

- 7.1.8 The Applicant has provided (as part of the Application) a CIA, prepared by Raukura Consultants (Mr Morrie Love), on behalf of The Wellington Tenths Trust and Port Nicholson Block Settlement Trust (PNBST). The two major concerns cited by the CIA are:
- the damage and destruction of sites of cultural significance, and
  - effects on customary fishing.
- 7.1.9 The CIA states that there are no known sites of Māori significance that will be directly affected by the proposed Shared Pathway or associated earthworks, however taonga (carved stone and bone items) have been found within the area in the past.
- 7.1.10 The CIA concludes by stating that the Shared Pathway should have only minor cultural impacts largely related to the rocky coastline of the area and perhaps on some sites around the harbour. The CIA concludes that the provision of a safe Shared Pathway for pedestrians and cyclists would be a welcome addition to the area for all.
- 7.1.11 The Applicant's partnership approach to consulting and engaging with Mana Whenua throughout the initial phase of the Project has, in the Panel's view, been successful. Mana Whenua have a holistic and deep relationship to all aspects of the environment (water, land and air) and in this case are particularly concerned to ensure that their traditional relationship with Te Whanganui-a-Tara is recognised and provided for especially through the design and implementation phases of the Project.
- 7.1.12 The Panel takes comfort in knowing that, while some adverse environmental and cultural effects on the Harbour are unavoidable, the Applicant has worked with Mana Whenua to enable the prioritisation and understanding of issues of significance, such as access to the foreshore, to be translated into the design.

### Mana Whenua Steering Group

7.1.13 The Applicant, importantly, has committed to working with Mana Whenua through the Mana Whenua Steering Group (MWSG) which is a condition of consent. The purpose of the MWSG (MW.1) is to:

- 1) Facilitate ongoing engagement with Mana Whenua in respect of the activities authorised by these resource consents;
- 2) Provide an opportunity for Mana Whenua to provide kaitiaki inputs into the Project as set out in Condition MW.3; and
- 3) Ensure appropriate tikanga and kawa (customary practices and protocols) are being applied throughout the development and implementation of the Project.

7.1.14 Throughout the development of the detailed design stage of the Project, we were informed that Iwi will be invited to participate in various aspects such as the formulation of storyboards and signage and the ecological management and bird protection measures along the Shared Pathway. We also note that through conditions of consent, the Landscape Urban and Design Plan (LUDP) must be prepared in consultation with local Iwi and that this process (together with the others mentioned) provides an opportunity for their input into the design features of the Shared Pathway. The currently 'broad brush' nature of path design presents a significant opportunity for Iwi to contribute to the bay-by-bay design process and ensure continuity of design (with respect to cultural elements) along each of the Bays.

## **8 Effects and Findings**

### **8.1 Overview**

8.1.1 This section of our report presents our findings related to:

- Benefits and Positive Effects
- Project Design
- Ecology
- Coastal Processes
- Construction Effects
- Heritage Effects

Our consideration under section 104(a) of the Act excludes any matters we note as being out of scope in Section 6.4.

### **8.2 Project Benefits and Positive Effects**

8.2.1 We were advised that the Project's benefits are many and varied, including:

- 1) A 'transport mode shift' to active modes, and the subsequent health benefits;
- 2) Improved connectivity to the water and throughout Eastbourne, Hutt City and the wider Wellington region;

- 3) Improved resilience from wave overtopping and a response to ongoing sea level rise; and
  - 4) Economic benefits for the region resulting from improved tourism and recreation.
- 8.2.2 A full evaluation of the Project benefits and positive effects of the proposal can be found within Section 23 of the Application, Section 12.15 of GWRC's s42A report, and Section 2 of the 'Reply on Behalf of the Applicant' submitted to the Panel dated 22 January 2021.
- 8.2.3 As described in the evidence of Simon Cager, the Applicant aims to create a safe and integrated walking and cycling facility which will improve connectivity and community health and wellbeing. At the same time, it is intended to provide improved resilience (through the proposed replacement seawalls and revetment structures) – thereby commencing a response to climate change and sea level rise effects along the Eastern Bays.
- 8.2.4 The evidence of Mr Povall addressed key benefits of the project. Mr Povall summarised the current vulnerability of Marine Drive and its susceptibility of inundation and failure due to the effects of sea level rise and large storm events. Mr Povall went on to highlight benefits that the Project will have in terms of health and safety, stating the various health benefits of promoting the use of active travel and highlighting the decreased perceived risk of separating a Shared Pathway from the live carriageway on Marine Drive. Mr Povall further stated that accessibility to the beach will be improved and more formalised through the provision of steps, small/mini steps and boat ramps.
- 8.2.5 The evidence of Rob Greenway, a recreation expert, was that the project would induce demand by cyclists and pedestrians.

#### Council Expert Evidence – Benefits and Positive Effects

- 8.2.6 The consenting authorities' experts generally agreed with the Applicant's evidence in terms of Project benefits and positive effects. The only matter which generated additional discussion was the width of the path in certain locations. Here David Wanty (HCC) considered that the transport related effects are overall positive due to the proposal promoting active transport modes and the seawall increasing the protection of Marine Drive.
- 8.2.7 The key issue of uncertainty between the experts was in relation to the safety of path users where the path narrows to 2.5m. We note that the Applicants' safety audit of the preliminary plans did not raise concern about user safety in these narrower locations, nor did the Applicants own transport and recreation experts or Mr Wanty consider the 2.5m sections to be unacceptable. The Panel's view is that 2.5m sections are acceptable from a safety perspective.
- 8.2.8 The Panel highlights here that Ms Hamilton was not able to come to the same conclusion. She believed that 2.5m was too narrow and that 3.5m would be more appropriate, especially where a safety barrier was also constructed. She described the 'shy-away effect', being the tendency of cyclists to avoid getting too close to edge barriers. In effect, this can reduce the active width of a path.

### Submissions – Benefits and Positive Effects

- 8.2.9 Health and/or safety appeared in most submissions (171 out of 200); of those 171 submissions, the vast majority (159) were in support. The key themes of the submissions included the Project encouraging more people to walk and cycle the route, where many consider this too dangerous to currently do.
- 8.2.10 Health and safety also came across strongly within the oral submissions, Robert Ashe stated his vision was ‘for kids to be kids’ where they can safely ride to school or visit their friends. John Morgan presented the hearing with photos displaying narrow footpaths and buses passing close by, he stated that the existing pathway ‘is not only narrow but in need of repair’ and went on to say that the as a resident he embraces the proposed pathway.
- 8.2.11 The Panel notes that Geoff Rashbrooke expressed scepticism about the extent to which the Shared Pathway would get people out of cars and onto their bicycles.

### Findings – Benefits and Positive Effects

- 8.2.12 Overall, we find that the Project benefits and positive effects are a significant driver of the Project and concur with the Applicant. We note that there are no major points of difference between the Applicant and the consenting authorities. In reaching our overall conclusion, we consider the project would include the following benefits:
- Transport mode shift - away from vehicles to active modes
  - Safety Benefits - particularly for cyclists and pedestrians
  - Health and environmental benefits - primarily through reduced motor vehicle dependency and increased walking and cycling
  - Recreation and tourism - making the Eastern Bays more attractive to visitors, and
  - Environmental and cultural awareness – such as through signage.
- 8.2.13 In summary, we accept the evidence of Messrs Cager, Greenaway and Povall for the Applicant and concur with all the Project benefits outlined in their briefs of evidence, and by the Application documents. This finding is, however, subject to the environmental management and design requirements imposed through resource consent conditions.
- 8.2.14 During the hearing we raised the matter of accessibility for less able members of the community, particularly to the beach, as were not satisfied that this issue had been adequately identified. We have revised condition GC.29 to have regard to accessibility as part of the independent auditing process.

## **9 Project Design**

- 9.1.1 The intent of the Project is to develop a safe and integrated walking and cycling facility along Marine Drive. The Applicant has presented an overarching design which is sufficient to enable assessment of the Project's effects; however, it is proposed that the detailed design will be progressed and finalised in line with the proposed conditions, and in particular the Landscape and Urban Design Plan (LUDP) and Bay Specific Urban Design Plans (BSUDPs).
- 9.1.2 The proposed design has been developed bay-by-bay on a site-specific basis, through an iterative design process, responding to a range of issues including, but not limited to:

- desirable path width
- safety of pathway users
- the structural condition of the existing walls
- current and future resilience to the effects of climate change
- the width of the existing road reserve
- coastal processes
- ecology
- presence of penguins
- community feedback

9.1.3 Mr Povall's statement of evidence on behalf of the Applicant detailed the design philosophy of the Project, the assessment of alternatives, a high-level description of the design features, and provided responses to submissions.

9.1.4 The following paragraphs summarise key design issues that were raised during the hearing.

#### Path Width – Project Design

9.1.5 The proposed Shared Pathway varies in width depending on the physical constraints of the bay environments. The majority (83%) of the path width is 3.5m, with a minimum of 2.5m being applied in the most constrained locations. The Applicant has stated that the Shared Pathway has been sensitively designed to fit in within the environment (bay-by-bay) and is not a 'one size fits all' approach. It would be wider at the more popular beaches, catering to a greater movement of bikes/people and community preferences.

9.1.6 The path width is discussed in detail within Appendix K of the Application documents (Recreation Assessment, prepared by Rob Greenaway & Associates). The report discusses various published path width standards and concludes that 3.5m is the recommended minimum standard for a Shared Pathway. The report highlights that the Shared Pathway will be a compromise between a preference for a 3.5m standard width and 2.5m where there are potential for adverse effects on beach amenity or ecological values. We note that within his report, Mr Greenaway states the following: *"The bikeable speed of the Shared Pathway will limit its use by experienced commuting cyclists when recreational use is high, and high-speed commuting will be unlikely on a 2.5m wide Shared Pathway at any time"*.

9.1.7 HCC commissioned Ms Hamilton of WSP-Opus to review the Recreation Assessment prepared by Rob Greenaway and Associates. Ms Hamilton contended that the reliance on the consent condition process to review the detailed design plans are concerning and could result in 'ad hoc' outcomes. Ms Hamilton further stated that it would be worth simulating the design parameters to better understand behaviour associated with the proposed design and to alleviate any unintended consequences on recreation use and enjoyment and safety in areas where the path is proposed to be narrower than 3.5m.

9.1.8 We note that there are several submissions that supported a narrower path although there was no clear and obvious theme throughout the submissions in relation to path width. The Panel acknowledges Ms Hamilton's comment that the adequate sizing of a path is a matter for expert analysis. She also expressed a concern that a staged design process could result in

ad hoc outcomes and the loss of overall cohesion and unity. It was suggested by Ms Hamilton that full design up-front with staged construction could avoid this problem.

#### Bus Stops – Project Design

- 9.1.9 The Application notes that the potential conflict between Shared Pathway users and pedestrians at bus stops will be managed. At most locations, the Shared Pathway will be diverted behind the bus shelters. Where the Shared Pathway is not to be diverted behind the shelters, line marking and signage will be used to highlight areas of potential conflict in order to enhance safety and minimise risk.
- 9.1.10 A number of submitters expressed concerns regarding the width of the pathway around the bus stops. Felicity Rashbrooke’s oral submission commented that bus stops need to be in areas where they can be accessed safely with no footpath between them, as bus patrons would be endangered. Submitters Mr Ashe and Ms Horrocks did not consider this potential conflict to be a significant risk due to people’s ability to adapt behaviours quickly and exercise common sense in sharing the space.

#### Traffic Monitoring – Project Design

- 9.1.11 The Application includes a Transport Assessment in Appendix L of the AEE. The Transport Assessment and wider application was peer reviewed on behalf of HCC Resource Consents and GWRC by Mr David Wanty. Page 33 of the Transport Assessment sets out the potential adverse effects on the local road network.
- 9.1.12 In a draft brief of evidence, Mr Wanty (for HCC) recommended additional conditions which were provided to the Applicant. As reported to us by Mr Wanty, in response to our questions during the hearing, the conditions sought:
- 1) The undertaking of an independent road safety audit at the detailed design stage and at the pre-opening/post-construction stage.
  - 2) That the HCC as Applicant review the posted speed limit along the Project route within ‘x’ years of a convenient start point. Mr Wanty suggested that Council propose what the start point might be and associated ‘x’ years.
  - 3) That HCC regularly monitor and report usage of and safety/incidences along the Shared path within the first ‘y’ years of operation. Mr Wanty suggested that ‘y’ might be 1 to 3 years.
- 9.1.13 The Panel notes that HCC concurred with Mr Wanty that the recommended conditions will potentially assist the consent holder to ensure the Shared Pathway is appropriately designed and operating as anticipated especially in terms of safety. The Applicant rejected the conditions. As a result, Mr Wanty did not include them in his final evidence.

#### Barriers – Project Design

- 9.1.14 At various locations along the pathway, the potential for barriers (fences of an as yet undefined design) has been indicated by the Applicant. The intention of those barriers is to avoid the risk of pathway users falling over edges where there would be a drop of more than 1 metre. In other locations where the fall height is reduced, a low-level wheel stop is

proposed to prevent inadvertent roll over from path users. The approximate total length edge barriers in the Project could be up to 800m in locations where the fall height between the path level and the adjacent beach or headland would be close to 1.0m vertical height or greater.

- 9.1.15 Both Ms Hamilton and Mr Wanty commented on the potential 'shy away' effect from barriers. This could have the outcome of reducing the perceived available width of pathway beside barriers. Some submitters referred to the potentially adverse visual effect of barriers, which would depend on their design.
- 9.1.16 Other types of barrier could be introduced along the Shared Pathway as outcomes of the bay specific design process. An example referred to in the hearing was a barrier to shield bird nesting areas from view. We understand that all barriers, for whatever purpose, would need to pass through the BSUDP process.

### Findings – Project Design

- 9.1.17 We find that the submitted Project design, and its future detailed expression through bay-by-bay specific design, is intended to achieve a balance between competing environmental and community factors. We accept that the conditions will be effective in achieving that outcome. In reaching our overall conclusion we have had regard to the following matters:
- 1) Path width – The Panel agrees with the Applicant in that a path width of 3.5m through the majority of the Project is acceptable. We acknowledge that there must be a compromise when considering the path width in some sensitive locations, and find that a 2.5m width is acceptable to minimise the loss of beach space and associated recreational values.
  - 2) Bus Stops – The Panel has some concerns about the interaction between the pathway and bus stops, and considered that specific attention needs to be focused on the width of the path around bus stops to enhance safety and minimise risk. The Panel considers that specific reference to bus stops needs to be included within condition LV.7.
  - 3) Traffic Monitoring – The Panel considers that traffic monitoring is important and the pre and post construction road safety monitoring will inform the subsequent bay-by-bay design process. The Panel adopts the view of HCC and contends that there needs to be longer term involvement with respect to traffic monitoring. We therefore recommend that condition GC.29 (as recommended by Mr Wanty and contained within the original set of conditions) be re-introduced.
  - 4) Barriers – The Panel accepts that barriers may be a necessary component of the design in some locations of the Project, but the affected length will not be significant. We consider that the effects of barriers will be no more than minor and can be addressed through the BSUDP process.
- 9.1.18 In summary we accept the evidence of the Applicant and acknowledge the expertise of the designers that have contributed to the Project, we are satisfied that the bay-by-bay design process will result in positive outcomes. This finding is however subject to the environmental management restrictions imposed through resource consent conditions.



## 10 Ecology

10.1.1 The Project's potential effects on marine ecology are of critical importance to the Panel's assessment.

10.1.2 The Applicant's information on this issue was included in the Application Documents and included a specific Assessment of Effects for Intertidal Ecology contained in Appendix A of the Application and additional information received as part of further information requests post lodgement.

### 10.2 Little Blue Penguins – Kororā

10.2.1 The little blue penguin (little penguin) is classified as a 'Nationally At Risk: Declining' species. In the Wellington Region: however, this species has been assessed by experts to be 'Regionally Threatened: Vulnerable'.

10.2.2 Memorandum 6 described that two penguin nesting sites have been identified within the footprint of the Shared Pathway and will be destroyed. A further 17 penguin nesting sites have been identified on the landward side of the path, access to which will be affected by the construction and ongoing use of the path.

10.2.3 Potential effects on little penguins during construction include removal or displacement of a nest, moulting or other occupational sites, disturbance and destruction of adults, chicks, and eggs, and penguin injury or mortality through interaction with machinery.

10.2.4 The Applicant has proposed measures that seek to avoid or mitigate the temporary adverse effects on shoreline foragers and little penguins during design and construction activities. These measures are discussed within Section 12.1.3 of GWRC's 42A report. The measures were assessed by Dr Uys who was satisfied and agreed the effects on little penguins during construction can be managed, such that they are no more than minor.

10.2.5 Reclamation of the CMA will contribute to permanent habitat loss along the Project footprint. To mitigate the effects of this loss, the Applicant has proposed habitat enhancement (or protection areas) at Whiorau Reserve, north of Bishops Park and in HW Shortt Park. The proposed areas of habitat enhancement are larger than the area lost to construction of the Project.

10.2.6 The Applicant has also proposed a number of other measures included as conditions of consent including;

- Seeking dog control measures (EM.2)
- Forming a pest management strategy (EM.5)
- Undertaking rubbish and waste management (EM.7)
- Undertaking a public education awareness programme for avifauna (EM.9)

10.2.7 The Panel notes the GWRC s42A report statement that Dr Uys remained concerned that the measures proposed by the Applicant to address the effects of the ongoing use of the path will expire after 10 years, while the ongoing effects of the Project will endure for the life of the Shared Pathway. Dr Uys recommended a condition of consent requiring the

development of Pest Management Plan, which has been adopted by the Applicant under condition EM.5.

- 10.2.8 During the hearing we heard from submitter Michael Rumble who has had extensive involvement in the management of little blue penguins and has been instrumental in setting up the Days Bay Penguin Haven. Mr Rumble expressed dissatisfaction with the Applicant's proposed protection and minimisation measures relating to Kororā / little penguins and sought a number of additional measures including keyholes in the rip-rap, a 300-400 mm vertical wall above the rip-rap, one-way flaps on drains, signage and long-term monitoring.

#### Findings on Little Blue Penguins - Kororā

- 10.2.9 Overall, we find that the effects on little blue penguins will be acceptable. In reaching our overall conclusion, and imposing conditions on the resource consent in relation to such effects, we have had regard to the following matters:
- 1) We recognise the extensive interest of the community in the management of effects on little penguins. We acknowledge Mr Rumble's dissatisfaction with the proposed mitigation measures. However, we find that the community's involvement in developing the Bird Protection Plan (BPP) required by condition EM.3 will allow parties (including Mr Rumble) to have meaningful input into the design of the proposed habitat enhancement areas.
  - 2) We note that a key objective of the BPP is to maintain or enhance habitat for Little Penguins and Shoreline Foragers along the Eastern Bays coast.
  - 3) The Panel accepts the expert evidence of the Applicant and Dr Uys, and considers that the temporary and long-term effects on little penguins can be appropriately managed. We also note that the mitigation areas (bird protection areas provided by Conditions EM.6 to EM.6E) provide for more habitat than that lost due to the Project's footprint.
  - 4) The Panel also recognises that dog exclusion measures require a bylaw to be implemented, which is a separate statutory process outside the scope of the resource consents. We recognise and endorse the contingency measures proposed by the Applicant if the bylaw sought is unsuccessful (EM.2).

### 10.3 Effects on Oystercatchers

- 10.3.1 Variable oystercatchers are the shoreline feeding bird species most likely to be impacted by loss of feeding habitat. The species is 'At Risk' nationally and is Vulnerable in the Wellington Region, which makes it a regionally Threatened species. Oystercatchers are territorial and therefore any reduction of oystercatcher territories (or loss of habitat) may be sufficient to adversely affect breeding success.
- 10.3.2 Within the national planning framework, the level of effect on 'Threatened' and 'At Risk' species with indigenous biological diversity values in the coastal environment is of significance. Policy 11 of the NZCPS states that activities must **avoid** adverse effects on indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists. The Applicant's opening submissions adopted the meaning of 'avoid' as set out in Memorandum 6 and Ms van Halderen's evidence which is that minor or transitory effects are acceptable within the context of an avoidance policy. Following the

hearing, the Panel sought an opinion from the Council’s legal advisers about the meaning of ‘avoid’. The opinion provided to us supported the Applicant’s position.

- 10.3.3 As identified in the Applicant’s opening legal submissions, a critical issue that remained unresolved between the Applicant and GWRC was the Project's effects on variable oystercatchers. The Applicant’s expert, Dr Cockrem, was satisfied that the effects of the Project on oystercatchers would likely be less than minor, while GWRC’s expert Dr Uys considered that the adverse effects may be more than minor.
- 10.3.4 Following the hearing, the experts continued to engage on this issue and agreed further amendments to the conditions. A joint statement of evidence from Dr Roger Uys and Dr John Cockrem was provided to the Panel on 22 January 2021. They have agreed that the amended conditions attached in the Applicant’s right-of-reply will ensure that the effects of the Project on birds (with a focus on Kororā / little penguins and oystercatchers) will be, in Dr Cockrem's opinion, less than minor, and in Dr Uys' opinion, no more than minor. The conditions appropriately address the matters set out in paragraph 44 of Dr Uys' evidence of 17 December 2020.
- 10.3.5 Mitigation measures proposed by the Applicant include the development of the BPP, which seeks to maintain or enhance the level of habitat and species diversity after Project construction, by comparison to the diversity existing pre-construction. The BPP includes a number of measures to avoid or minimise adverse effects including: measures to limit disturbance to birds during construction (EM.4-EM.4D); the development of a Pest Management Strategy (EM.5); development of Bird Protection Areas (EM.6 -EM.6E); and developing a framework for a public education programme about avifauna (EM.9).

#### Findings on Variable Oystercatchers

- 10.3.6 We find that the effects on variable oystercatchers will be acceptable. In reaching our overall conclusion, and imposing conditions on the resource consent, we have had regard to the following matters:
- 1) The Panel has carefully considered the effects the proposal will have on variable oystercatchers. We agree with the findings of Dr Uys and Dr Cockrem that the actual or potential effects on variable oystercatchers will be either no more than minor, or less than minor.
  - 2) We consider that the mitigation measures proposed by the Applicant provide a robust framework for avoiding and minimising adverse effects on variable oystercatchers.

## 10.4 Seagrass

- 10.4.1 Three occurrences of seagrass (*rimurēhia*, *Zostera muelleri subsp. novazelandica*) of varied densities exist in the intertidal and subtidal zones at south Lowry Bay (total area 1,940 m<sup>2</sup>). A small number of flowering shoots of seagrass were found, an indicator of good seagrass health. Seagrass has a threat status of “At Risk-Declining” and the seagrass occurrence at Lowry Bay is the only known location remaining in Wellington Harbour.
- 10.4.2 The Applicant proposed mitigation measures to avoid and minimise effects on the seagrass beds. The measures include (but are not limited to) disposing of silts and clays from

excavation works off site; using coarser material during beach renourishment; and depositing imported beach sediment along the entire designated placement area, rather than in one discrete location.

- 10.4.3 We note the agreement of the GWRC s42A report with the assessment of the Applicant. The GWRC report concludes that potential effects on seagrass can be avoided or otherwise minimised, such that adverse effects are likely to be less than minor.
- 10.4.4 The Panel heard evidence from Dr Fleur Matheson on behalf of the Applicant and Dr Megan Oliver on behalf of the consent authority. During Dr Matheson's presentation the Panel requested an assessment of the Project against the Ecological Impact Assessment Guidelines New Zealand (EIANZ) tables. This is a methodology for assigning ecological value and describing the magnitude of effect and overall level of effects. Using the EIANZ assessment guidelines, seagrass was assigned a High ecological value and Dr Matheson assessed (conservatively) the magnitude of effect as Negligible and the overall level of effects as Very Low. Dr Oliver agreed with her assessment.
- 10.4.5 The Panel heard a presentation from submitter Amelia Geary (on behalf of Forest and Bird) who expressed concerns that not enough consideration was been given to seagrass. Her concerns included effects potentially arising from beach nourishment, and the need for ongoing monitoring of seagrass for unforeseen effects. As discussed above, both Dr Matheson and Dr Oliver have confirmed that in their expert opinion, the Project as currently proposed will avoid adverse effects on seagrass.
- 10.4.6 The Panel queried the Applicant (within Minute 3) about conditions EM.11(c) and EM.11(e). We were concerned that the process described in EM.11(e) would not facilitate a rapid response if it becomes apparent that adverse effects are occurring during the construction process. The Applicant accepted our concerns and amended the relevant conditions to:
- 1) Clarify that there can be no smothering of any part of the seagrass beds (Condition EM.11(c) - (e));
  - 2) Make it clear that no construction works are permitted occur within 2m of any seagrass bed (Condition EM.11(c)(v));
  - 3) Provide for monitoring and remedial actions to be undertaken if required (Condition EM.11(d) and (e)); and
  - 4) Reflect changes to the beach nourishment processes proposed, as discussed during the hearing (Condition EM.14(f) and (g)).

#### Findings on Seagrass

- 10.4.7 We find that effects on seagrass will be acceptable. In reaching our overall conclusion, and imposing conditions on the resource consent, we have had regard to the following matters:
- 1) Conditions have been designed to avoid effects on seagrass beds (EM.11 and EM.14);
  - 2) An adaptive management approach will be undertaken when managing the works, based on monitoring results and experience on the ground; and
  - 3) Adaptive management requires a good degree of trust in the system of data collection, monitoring and reporting - that said, we note that the Council will have general

oversight over the recommendations and implementation of any necessary remedial actions on seagrass (EM.11(e)).

## 11 Other Ecological Effects

### Intertidal Ecology

- 11.1.1 Long-term effects on intertidal ecology within the Project area include permanent loss of habitat due to additional encroachment into the intertidal area, and permanent changes arising from the seawall surface. The proposal will result in the permanent loss of up to 3,000 m<sup>2</sup> (0.3 ha) of intertidal habitat and an additional 2,500 m<sup>2</sup> (0.25 ha) of backshore habitat above MHWS.
- 11.1.2 The Applicant has worked to minimise the extent of encroachment into the CMA through iterative design of the seawalls and types of treatments used in certain locations, and by orientating beach access steps and ramps parallel to the seawall. The Applicant proposes to further mitigate the loss and modification of intertidal habitat by providing texture and habitat complexity on the surface of the seawalls and revetments to facilitate colonisation by intertidal biota post-construction. These measures will be detailed in a proposed Seawall and Revetment Habitat Plan (SRHP) (EM.19).
- 11.1.3 The Panel heard from Dr Megan Oliver with respect to intertidal ecology. Dr Oliver stated that her main concerns were satisfied with regard to the Applicant's evidence. Dr Oliver also stated that ecology could improve due to the new seawall structures. Additional intertidal habitats may also be formed, such as rock pools which will help to mitigate any loss of habitat.

### Freshwater Ecology

- 11.1.4 Throughout the Project length there are many stormwater and piped stream outlets that discharge to the intertidal zone. Several of these have relatively high-quality open stream channels that are known to, or are highly likely to have, freshwater fish present. Effects on fish passage attributed to the Project works are related to the potential for beach nourishment material to block stream outlets and for culvert extensions through the seawalls to create a perched overhang, thereby preventing or inhibiting fish passage.
- 11.1.5 The Applicant has proposed a number of measures to ensure fish passage is at least maintained or enhanced. These measures include avoiding initial placement of beach nourishment material within 10 m of existing outlets, monitoring and clearing stream outlets where necessary and designing outlets to ensure fish passage to be maintained or improved at the existing level.
- 11.1.6 Dr Evan Harrison was engaged by GWRC to review the application. In summary, he stated that the avoidance and mitigation measures proposed are appropriate and he supports the need for a freshwater ecologist with fish passage experience to be involved in the detailed design of the outlets. Dr Harrison also recommended that the culverts be monitored by way of a Monitoring Plan. GWRC's s42A report concludes that subject to the effective implementation of recommended conditions of consent, the effects on fish passage can be appropriately managed.

### Findings on Intertidal Ecology and Freshwater Ecology

- 11.1.7 Overall, we find that the effects on Intertidal Ecology and Freshwater Ecology will be acceptable. In reaching our overall conclusion, and imposing conditions on the resource consent, we have had regard to the following matters:
- 1) Conditions of consent which require a Seawall and Revetment Habitat Plan, which includes the provision of creating additional habitat within constructed hard protection structures (EM.19);
  - 2) Conditions that ensure fish passage at key culverts is maintained or enhanced, both when undertaking culvert reconfiguration and beach nourishment (EM.12 and EM.14(h)); and
  - 3) The Panel's satisfaction that the effects are sufficiently addressed and agreed by the experts.

## **12 Coastal Processes**

- 12.1.1 As noted previously, the Project is situated in the coastal environment, albeit in an environment that has been extensively modified, particularly by the construction of Marine Drive. Notwithstanding the work to be undertaken in the CMA (including the seawalls and rock revetments), through the evidence of Dr Richard Reinen-Hamill, the Applicant asserted there will only be minor changes to the coastal physical processes in and around the Project area.
- 12.1.2 In addition to this, the structures have been designed to be resilient to sea level rise, although the Applicant has acknowledged that this is not a long-term solution but simply buying some time. The Applicant considers that if the package of design proposals is implemented, the adverse effects from the construction and operation of the Project on coastal and physical processes will be negligible to minor.
- 12.1.3 The Project's assessment is endorsed within Dr Iain Dawe's (GWRC) review of the proposal. Dr Dawe did however recommend a number conditions to ensure that effects on coastal processes will be avoided and minimised to an acceptable level. All conditions recommended by Dr Dawe have been incorporated into the Applicant's proposed conditions.

### Findings – Coastal Processes

- 12.1.4 We find that the effects on coastal processes will be no more than minor and acceptable. In reaching our overall conclusion, and imposing conditions on the resource consent, we have had regard to the following matters:
- 1) The relevant conditions cover a variety of matters including: construction techniques, types of materials, and the location of structures associated with works in the CMA;
  - 2) Mitigation measures including beach nourishment at York Bay, Lowry Bay and Point Howard; and
  - 3) Our satisfaction that the effects were sufficiently addressed and agreed by the experts.

## 13 Construction Effects

13.1.1 The Design Features Report (Appendix J) in the Application outlines the design details and construction methodology for the design features. The construction period is estimated at 6 years, taking a staged approach that will complete each bay in totality – with each section expected to take 3-6 months. In places, the Shared Pathway will be constructed opposite dwellings and in these locations, residents will be highly aware of the construction activity. In other locations, construction impacts will essentially be limited to traffic delays on Marine Drive.

### Noise and Vibration – Construction Effects

13.1.2 Potential construction effects associated with the proposal include increased noise, vibration and dust during excavation of old seawalls and construction of the new seawalls. If not appropriately managed these effects have the potential to impact on residential and recreation amenity values.

13.1.3 The Applicant has proposed a condition which requires noise to be measured and assessed in accordance with NZS 6803:1999 *Acoustics – Construction Noise*. Both GWRC and HCC agreed that the noise and vibration effects of the proposal will be less than minor.

13.1.4 The Panel was concerned that the recommended resource consent conditions did not require any response should the noise thresholds be broken during construction. Given the proximity to sensitive residential properties, we recommended that the Applicant provide wording that requires the CEMP to incorporate or refer to a Monitoring Plan, primarily to cover ecology matters – but also noted the usefulness of this approach for matters such as noise and construction traffic. The Applicant made amendments to condition GC.7, but we have further refined this by including a reference to considering the need for noise and construction traffic monitoring (GC.7(cc)).

### Stormwater – Construction Effects

13.1.5 During the construction phase, disturbance of the seabed, dewatering discharges and discharges from land-based earthworks may result in increases in suspended sediment and turbidity of the water column.

13.1.6 Increased turbidity reduces light penetration and consequently visibility in the water column, impacting primary production of benthic biota and thus reducing a key food source of suspension feeders, herbivorous benthic grazers and deposit feeders. Decreased visibility can also impact on the ability of predators to find their prey.

13.1.7 The Applicant assessed the impact of construction related activities on water quality, based on the construction methodology presented in the Design Features Report. The construction methodology includes a number of measures to reduce construction effects relating to the release of sediment and other contaminants that may affect water quality. These measures are summarised within Section 12.6.2 of GWRC's s42A report.

13.1.8 GWRC's s42A report details additional measures to avoid and minimise sediment release, including conditions of consent requiring the Applicant to report and remedy any sediment release events and requiring the Applicant to abide by certain sediment thresholds.

- 13.1.9 The Panel notes that Dr Oliver reviewed the application and the supporting Intertidal Ecology Assessment with regard to the impacts of sedimentation and other contaminants on marine ecology (including seagrass) during construction and was satisfied with the proposed mitigation measures.

#### Contaminated Land – Construction Effects

- 13.1.10 Potential effects on human health and the environment may occur if contaminated land is disturbed and/or used during the construction of the Project in the vicinity of the Sunshine Bay Garage. The garage is on the landward side of the road against the base of the hill so is well separated from the proposed Shared Pathway.
- 13.1.11 However, the Application states that once the detailed design is complete it may be necessary to undertake a detailed assessment of the contaminated site. Subject to the findings of that assessment, it may then be necessary to seek a resource consent for managing soil contamination.
- 13.1.12 Due to the proximity of the works to the Garage, the Panel considered that an accidental contamination discovery protocol should be incorporated into the conditions of consent. We have added this as new condition GC.15.

#### Findings – Construction Effects

- 13.1.13 We find that the construction effects will be acceptable, subject to imposing conditions on the resource consent. In reaching our overall conclusion, we have had regard to the following matters:
- 1) We acknowledge that construction activity will be occurring continuously from later 2021 for approximately 6 years. Construction has the potential to create significant ongoing nuisance to residents.
  - 2) The Panel recognises the mitigating factors in determining the level of effects, which include only constructing short sections at certain times (approximately 20m at a time).
  - 3) There is a suite of conditions regarding construction management. The CEMP includes a comprehensive list of matters to be addressed (refer condition GC.7 for example Erosion Sediment Control (ESC), rubbish, machinery, noise, contaminated land).
  - 4) We agree with the Applicant and accept Dr Oliver's review in that the construction effects are likely to be no more than minor, and consider that the monitoring and contingency plans provided by the Applicant via the CEMP will be sufficient.

## **14 Heritage Effects**

#### Atkinson Tree – Heritage

- 14.1.1 The project requires the removal of a planted pōhutukawa within York Bay beach known as the Atkinson Tree. The Atkinson Tree appears to be located close to the middle of the proposed Shared Pathway with little ability to deviate around the tree or to narrow the pathway at this point.



- 14.1.2 In Mr Kellow's s42A report, he notes that the Atkinson tree is not protected by the general district wide provisions or by regional plans, and resource consent is therefore not required to remove the tree. Nevertheless, the BSUDP process may be an opportunity to further explore any options that exist for retaining or replacing the tree.
- 14.1.3 The Panel acknowledges the value that the tree holds for some members of the community. We make no finding on the value of Atkinson tree and adopt Mr Kellow's findings in this regard. We further acknowledge that the BSUDP process may find an opportunity to retain the tree.

#### Skerrett Boatshed – Heritage

- 14.1.4 The listed historic Skerrett Boatshed (1906) at Lowry/Whiorau Bay is located beside the Shared Pathway. This structure is a historic building (Category 2: Heritage Listing #3580) and is identified in Appendix 4: Features and buildings of historic merit in the RCP and Schedule E1 Historic heritage structures of the PNRP (and Map C6 of the District Plan).
- 14.1.5 The Shared Pathway will narrow at this location and the boatshed will not be directly impacted. The Panel did note that the narrowing of the pathway around this location may need to be addressed in the BSUDP. The Panel subsequently determined that there will be no effect on heritage values with respect to the Skerrett Boatshed.

#### Findings – Heritage

- 14.1.6 We find that effects on the Skerrett Boatshed will be acceptable. In reaching that conclusion, and imposing conditions on the resource consent, we accept that the BSUDP process will provide the ability to consider an appropriate path width in this location.
- 14.1.7 We make no specific finding on the Atkinson tree and again accept that the BSUDP process will provide the ability to consider options.

## **15 Section 104(1)(b) Consideration of Statutory Instruments**

We accept that relevant provisions from the following statutory instruments have been appropriately identified by the planning experts. We have had regard to these in reaching our decision and making our recommendation.

### **15.1 New Zealand Coastal Policy Statement (NZCPS)**

- 15.1.1 Mr Watson's Section 42A report provides a thorough assessment of the proposed activities against the RPS provisions. We adopt his recommendations in a general sense, subject to the comments made below.
- 15.1.2 In Mr Watson's opinion, the proposal is partly inconsistent with Objective 1, and inconsistent with Policy 11. This matter is discussed in detail by the following paragraphs.
- 15.1.3 The Panel also considers it necessary to provide further commentary on NZCPS Policies 5 and 10.

NZCPS Policy 11 – Indigenous Biological Diversity

- 15.1.4 This policy aims to protect ‘Threatened’ and ‘At Risk’ species with indigenous biological diversity values in the coastal environment. The following species affected by the proposal require consideration under Policy 11:
- 1) Little penguin, variable oystercatcher, red-billed gull, black shag, little black shag and pied shag and their habitat;
  - 2) Seagrass beds in Lowry Bay; and
  - 3) Small gravel beaches in all five bays that are classified as an endangered, historically uncommon ecosystem (shingle beaches).
- 15.1.5 As noted in section 10.3 of our decision, case law confirms that minor or transitory effects are acceptable within the context of an avoidance policy.
- 15.1.6 GWRC’s reporting officer suggested broad consistency with the NZCPS subject to reservations about potential effects on variable oystercatchers. Since that time, the avifauna experts have agreed a mitigation package that will render effects on variable oystercatchers to a level that is no more than minor.
- 15.1.7 Accordingly, the Panel concludes that the Project sufficiently ‘avoids’ effects on ‘Threatened’ and ‘At Risk’ species with indigenous biological diversity values in the coastal environment and is therefore consistent with NZCPS Policy 11.
- 15.1.8 Given the potential effects on coastal ecology, and given also that the Panel may decline the Applications if they are “inconsistent with” a National Policy Statement (NPS) with or without conditions, the Panel has considered carefully how the phrase “inconsistent with” should be interpreted and applied.
- 15.1.9 Here the Panel adopts the findings of the decision made on the Te Ara Tupua - Ngā Ūranga Ki Pito-one Shared Pathway released on 11 December 2020, and proceeds on the basis of the meaning given by the Court of Appeal and the Environment Court which essentially adopts the dictionary definition as “not in keeping; discordant; or incompatible”. In adopting this position, the Panel is aware of the statutory obligation under Section 5 of the Interpretation Act 1999 that the Act must be read in the light of its purpose.

Policy 10 - Reclamation

- 15.1.10 This policy sets out a framework for assessing whether reclamation of land in the CMA is a suitable use of the CMA and, where it is suitable, things to consider in the form and design of the reclamation.
- 15.1.11 Policy 10(1) of the NZCPS requires reclamation in the CMA to be avoided unless the tests in clauses (a) - (d) of that Policy are met.
- 15.1.12 The Marine Drive coastal edge is currently constrained by the CMA, the live road carriageway and existing built development on the landward side. We are satisfied that, without significant property purchase and earthworks, there is no land outside the CMA that could accommodate the Shared Pathway. In this respect, the Panel considers that the proposal meets clauses (a) - (c).

- 15.1.13 When considering (d) we agree with the Applicant in that the Project will connect the Eastern Bays to other regional and nationally significant cycle routes including the Great Harbour Way and the Remutaka Cycle Trail. This is likely to have significant economic and tourism benefits, at a regional scale and potentially the national scale. The Shared Pathway also provides additional protection for Marine Drive from coastal hazards in the short-medium term and provides an additional buffer between coastal hazards and the MOP outfall pipeline. The Panel therefore considers that the Project also provides significant regional resilience benefits from coastal erosion and sea level rise.
- 15.1.14 Policy 10(2) of the NZCPS requires that where a reclamation is considered to be a suitable use of the CMA, particular regard is to be given to a number of matters. The Panel considers that the proposal has had sufficient regard to each clause and provides for each where applicable.
- 15.1.15 Policy 10(3) of the NZCPS requires that regard must be given to the extent to which the reclamations intended purpose would provide for the efficient operation of specified infrastructure. We consider that all elements of this clause have been sufficiently addressed and note that the reclamation will provide greater resilience to the road and the sewer pipeline that it is in part protecting.
- 15.1.16 Overall, we agree with the Applicant and consider the proposal consistent with Policy 10 of the NZCPS.

Policy 5 - Land or waters managed or held under other Acts

- 15.1.17 Policy 5 focuses on considering and managing effects on coastal land or waters that are held or managed under other Acts (i.e. not the RMA) for conservation or protection purposes.
- 15.1.18 The Panel notes that a portion of the footprint of the proposal will encroach into reserve land (with respect to Whiorau/Lowry Bay), we consider that any activities in those reserves are considered consistent with the intention of those reserves.

**15.2 Wellington Regional Policy Statement**

- 15.2.1 Mr Watson's Section 42A report provides a thorough assessment of the proposed activities against the RPS provisions. We generally adopt his recommendations, subject to comments made below.
- 15.2.2 Chapter 3.2 of the RPS is particularly relevant to this application. Mr Watson noted that the proposal was inconsistent in part with Policies 35 and 37 with respect to the potential adverse effects on oystercatchers. Since the hearing, amendments to proposed mitigation package have been made and the relevant experts have concluded that the effects will be no more than minor or less than minor.
- 15.2.3 With appropriate mitigation measures and the recommended conditions of consent, we are satisfied that the proposed activity is consistent with the policies in the RPS.

### **15.3 Proposed Natural Resources Plan and Operative Regional Plans**

- 15.3.1 Mr Watson's Section 42A report provides a thorough assessment of the proposed activities against the provisions of the RCP and PNRP. We adopt his recommendations in a general sense, subject to comments made below.
- 15.3.2 Mr Watson noted that the proposal was inconsistent in part with Policy P31(e) and Objective O35, and may be contrary to Policy P39A and Policy P40 of the PNRP. Mr Watson also noted that the proposal may be inconsistent (either in full or in-part) with Objectives 4.1.2 and 5.1.3 and Policies 4.2.10, 5.2.5 and 6.2.2 of the RCP. Since the hearing, amendments to proposed mitigation package have been made and the relevant experts have concluded that the effects will be no more than minor or less than minor.
- 15.3.3 With appropriate mitigation measures and the recommended conditions of consent, the Panel is satisfied that the proposed activity is consistent with the policies in the PNRP and the RCP.

### **15.4 Hutt City District Plan**

- 15.4.1 Mr Kellow's evidence and s42A report respectively, provided a thorough identification of relevant district plan provisions, and assessments against those provisions.
- 15.4.2 Mr Kellow noted broad consistency with most aspects of the district plan, we adopt his recommendations in a general sense, subject to comments made below.
- 15.4.3 The Panel notes that Mr Kellow's s42A report does not make a conclusion on whether the proposal is consistent with Objective 7A 1.2.1 of the Hutt City District Plan, stating that due to the lack of detailed design, a firm conclusion cannot be reached with respect to (a) of Objective 7A 1.2.1. While we largely agree with Mr Kellow's assessment, we consider that the Landscape and Urban Design Plan (LUDP) proposed by the Applicant will ensure that the any adverse effects on the amenity values of adjoining residential areas that are no more than minor. To that end, we are satisfied that the proposal is not inconsistent with Objective 7A 1.2.1.

## **16 Section 104(1)(c) Consideration of Other Matters**

- 16.1.1 Section 14 of Mr Watson's s42A report noted a number of other relevant matters under s104 (1)(c) of the RMA. These included; The Government Policy on Land Transport 2018, Regional Land Transport Plan, Sea Level Rise Guidance, Marine and Coastal Area (Takutai Moana) Act 2011, and the Draft Hazard Management Strategy for the Wellington Region 2016.
- 16.1.2 We also consider these to be relevant matters and agree with Mr Watson's comments and adopt these.
- 16.1.3 We also note that the Applicant is relying on regulatory processes outside the RMA to secure dog control measures (EM.2). If these processes fail, however, then the Applicant has provided contingency measures. We are satisfied with these measures and are comfortable with this approach.

## 17 Section 104D – Non-Complying Activity

- 17.1.1 Following accepted legal and planning practice, the consent activities that make up the Project have been ‘bundled’ with respect to activity status. As noted in sections 4.1 and 4.2 of our decision, the status of the various activities include those which are controlled, restricted discretionary, discretionary, and non-complying. When bundled, the overall activity status of a proposal must adopt the most restrictive activity status – which in this case is non-complying.
- 17.1.2 The single non-complying activity, which is subject to Rule R198 of the PNRP, is the use of motor vehicles within foreshore or seabed, if the site is inside a habitat identified in any of the various Schedules listed by the Rule. In this case, the foreshore and seabed areas are within Schedule F2c (birds – coastal) of the PNRP. The motor vehicles in this case will be construction vehicles necessary for works such as the seawalls, rock revetments, and beach nourishment.
- 17.1.3 As the application falls for consideration as a non-complying activity, pursuant to Section 104D of the Act a ‘gateway test’ is required to be met before a decision on whether consent can be granted. Section 104D prescribes that the consent authority may proceed to the substantive assessment (s104), and make a decision on whether to grant a resource consent application for a non-complying activity, only if it is satisfied that either:
- 1) the adverse effects of the activity on the environment will be minor; or
  - 2) the application is for an activity that will not be contrary to the objectives and policies of the relevant plan (in this case, the operative RCP and the PNRP).
- 17.1.4 The Panel notes that Mr Watson’s s42A report did not make a finding on whether the application can pass through the gateway test due to uncertainties regarding effects on variable oystercatchers.
- 17.1.5 Mr Watson’s s42A report states that if the Applicant can demonstrate that effects on variable oystercatchers will be appropriately managed, then he considers the proposal will be consistent with both parts of the ‘gateway test’. That is, the proposal is not contrary to the objectives and policies of the PNRP or the RCP and the effects will be no more than minor (or less than minor).
- 17.1.6 As discussed within Section 10 of our decision, the Applicant has proposed a suite of mitigation measures that will ensure the effects on variable oystercatchers and penguins will be managed to a level that is less than minor or no more than minor, in the respective expert opinions of Dr Cockrem and Dr Uys. Their advice is based on the overall package of proposed mitigation which includes new bird protection areas that are intended to mitigate the extent of the effects on seabirds.
- 17.1.7 Based on that evidence we are satisfied that the proposal can meet both gateway tests under s104D. We therefore find that we are in the position of being able to grant resource consent if we so wish. The fact that the only non-complying activity element of the project is the presence of motor vehicles within the foreshore or seabed, the effects of which will be transitory, has also influenced our decision-making in this matter.

## 18 Sections 105 and 107 – Discharge and Reclamation

18.1.1 With regard to discharges, the Act requires us to consider certain matters. These are set out by sections 105 and 107. Section 105(2) also requires us to consider reclamation, which we briefly address in paragraph 18.1.7 below.

### *105 Matters relevant to certain applications*

- (1) *If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*
  - (a) *the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
  - (b) *the Applicant's reasons for the proposed choice; and*
  - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment.*
- (2) *If an application is for a resource consent for a reclamation, the consent authority must, in addition to the matters in section 104(1), consider whether an esplanade reserve or esplanade strip is appropriate and, if so, impose a condition under section 108(2)(g) on the resource consent.*

### *107 Restriction on grant of certain discharge permits*

- (1) *Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—*
  - (a) *the discharge of a contaminant or water into water; or*
  - (b) *a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*
  - (ba) *the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant —*  
*if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:*
    - (c) *the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
    - (d) *any conspicuous change in the colour or visual clarity:*
    - (e) *any emission of objectionable odour:*
    - (f) *the rendering of fresh water unsuitable for consumption by farm animals:*
    - (g) *any significant adverse effects on aquatic life.*
- (2) *A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—*
  - (a) *that exceptional circumstances justify the granting of the permit; or*
  - (b) *that the discharge is of a temporary nature; or*
  - (c) *that the discharge is associated with necessary maintenance work—*  
*and that it is consistent with the purpose of this Act to do so.*

(3) *In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.*

18.1.2 The relevance and implications of these Sections of the Act are set out in Mr Watson's s42A report and noted in the evidence of Ms van Halderen. In summary, the Project elements that must be considered in light of Sections 105 and 107 are:

- The discharge of sediment-laden water (from construction)
- The reclamation of the CMA to provide for a Shared Pathway

18.1.3 As noted by Mr Watson, drawing on the advice of Dr Oliver and subject to the effective implementation of recommended conditions, the potential effects on water quality during construction works can be kept within an acceptable level. We consider that the conditions proposed by Mr Watson will limit effects, such that any conspicuous changes in colour or clarity will be only temporary on any individual occasion, and well capable of management over the life of the construction project.

18.1.4 In making our findings, we have had regard to the matters set out by Section 105(1) of the RMA. We have also taken into account the opinions of the marine ecology experts who are satisfied that the works, including discharges, will not have a significantly adverse effect on coastal and marine life.

18.1.5 We accept that the specific nature of the Project works area influences the need for a discharge permit. Discharging to a different receiving environment, such as land, is not a feasible option.

18.1.6 Section 105(2) of the Act states that for resource consent applications for reclamation, the consent authority must also consider whether an esplanade reserve or esplanade strip is appropriate.

18.1.7 Regarding reclamation, Mr Watson's assessment states that as:

- 1) public access to the CMA is already provided, and
- 2) the Project seeks to enhance that access, and that
- 3) once constructed the Shared Pathway would become part of the road reserve.

He therefore considers an esplanade strip would serve no useful purpose.

18.1.8 The Panel agrees with Mr Watson, in that there is no need for an esplanade reserve because the reclamation is becoming road reserve and will provide at least equivalent access outcomes.

## **19 Part 2 RMA Assessment**

### **19.1 Part 2 Analysis**

19.1.1 In making a consent decision, Section 104(1) of the RMA requires our consideration to be subject to Part 2 of the Act (being Sections 5 to 8).

- 19.1.2 In their assessment and expert evidence, the planners provided robust analyses of the application against Part 2 of the RMA.
- 19.1.3 RMA Section 6 identifies matters of national importance including natural character, significant indigenous vegetation and relationships of Māori with their culture and traditions. The expert planners all considered the proposal is consistent with the relevant Section 6 provisions, provided the potential adverse effects on oystercatchers can be managed to an appropriate level. As previously discussed, a resolution has been sought and the effects on oystercatchers are now considered to be less than minor or no more than minor. The Panel therefore considers that the proposal is consistent with Section 6 of the RMA.
- 19.1.4 RMA Section 7 'other matters' requires the consideration of the proposal relating to the management, use, development, and protection of natural and physical resources. This includes maintenance and enhancement of amenity value, intrinsic value of the ecosystem, quality of the local environment and the effects on climate change.
- 19.1.5 RMA Section 8 identifies the principles of the Treaty of Waitangi. All three expert planners considered the approach taken by the Applicant to directly engage with the two relevant Iwi groups who have statutory recognition was appropriate.
- 19.1.6 All expert planners considered that, in relation to Part 2 matters, any relevant effects will be avoided, remedied or mitigated to an acceptable level provided that the consent conditions are adopted.

## 19.2 Status of Planning Instruments

- 19.2.1 Although parts of Hutt City's District Plan have been updated over time, many of its provisions are essentially unchanged from the original. We understand that a fully reviewed district plan is expected to be notified late this year. Given its age, the District Plan could be considered as 'out of step' with the RPS (among other planning documents), changes to the RMA, and relevant case law which affects the development and interpretation of policy. However, following the review and analysis by Mr Kellow and Ms van Halderen, we are satisfied that the District Plan's policy framework presents no obstacles to the consent sought by the Applicant.
- 19.2.2 We have reached a similar conclusion in relation to regional documents and Mr Watson's analysis, having regard to the operative plans and the status of the PNRP. That is, regional policy and plan frameworks present no obstacles to the resource consents. The Panel accepts the findings of Mr Watson's s42A report.

## 20 Conditions and Duration

### 20.1 Conditions

- 20.1.1 The Applicant's closing legal submissions / right of reply provided tracked changes versions of draft conditions for the resource consents. These condition sets included changes agreed between the expert planners on behalf of the parties they represent, and some instances of differing or disputed conditions or wording.



20.1.2 We have accepted the draft conditions provided to us with refinements agreed to by the expert planners on behalf of the parties they represent. We have also made revisions to some conditions as indicated elsewhere in our decision. The conditions are issued as a separate document (Appendix 1 to the decision).

## 20.2 Duration

20.2.1 The Panel adopts the recommendations of Mr Watson, and these are repeated below for clarity.

20.2.2 Pursuant to Section 125 of the Act and at the request of the applicant, the Panel recommends a lapse date of ten (10) years from the date of the commencement of this resource consent. We consider this is an appropriate lapse period as it allows sufficient time for the works to commence, with contingency in the event that there are delays.

20.2.3 Section 123(a) of the Act allows for a coastal permit in respect of reclamation [36233] to be granted in perpetuity, unless otherwise specified in the consent. We consider granting the consent for the reclamation of the foreshore in perpetuity to be appropriate, as the reclamation is effectively permanent.

20.2.4 Section 123(c) of the Act allows for a coastal permit to do something other than reclamation to be granted for a period not exceeding 35 years. We recommend that a duration of 35 years is appropriate for the consent related to permanent structures [36233], as the structures are permanent. This duration is consistent with other consents for permanent coastal structures granted by GWRC.

20.2.5 In relation to the construction-related consents [37298; earthworks and associated discharges], [37299; discharge permit] and [37300; water permit] under Section 123(d), the maximum duration the consents could be granted for is up to 35 years. We recommend a duration of 10 years for the construction-related permits. This duration will allow sufficient time for the works to be completed, with contingency in the event that the works are delayed.

## 21 Decision

21.1.1 We consider after having regard to all relevant matters that the single purpose of the RMA is best served by GWRC and HCC granting the resource consents on terms set by the conditions contained in Attachments 1 and 2.

21.1.2 Key reasons for our decision include:

- 1) Agreement between technical experts that, collectively and together with the proposed mitigation measures, the adverse effects of the Project will be no more than minor or transitory. This is especially pertinent when considering effects that policy documents (such as the NZCPS) seek to 'avoid'.
- 2) Legal opinions provided to us by the Applicant and counsel acting for GWRC confirmed that use of the word 'avoid' in planning policy documents can be construed to exclude situations where effects are no more than minor, or where they are transitory.

- 3) Significant engagement by the Applicant with Mana Whenua and the community in general. This has influenced general design concepts, and there will be ongoing engagement with Mana Whenua through the MWSG and the community in general to refine the design through avenues such as the BSUDPs.
- 4) Significant mitigation related to seabird habitats has been proffered by the Applicant to the point that the experts agree the proposal will have minor or no more than minor adverse effects on seabirds.
- 5) The range of community benefits that will accrue from the Project. These include safety, connectivity, recreational amenity and infrastructure resilience.

## 22 Acknowledgements

22.1.1 We would like to thank the participants for their constructive engagement in the process. Although the outcomes of our decision and recommendation may not be what some submitters sought, we acknowledge the significant effort that they have put into engaging with the process. We also acknowledge all individual written submissions and personal appearances which we found valuable in providing additional context for the issues we needed to consider.

22.1.2 The careful assessment, investigation and response to individual issues and environmental effects by the Applicant and other parties was appreciated.

22.1.3 We would also like to acknowledge the collaborative work of the technical experts and planners involved in this matter. Finally, we gratefully acknowledge the assistance to the Panel provided by the hearing administrators before, during and after the hearing.

Robert Schofield (Chairperson)



Mark Ashby



Elizabeth Burge



Date: 5 March 2021