BEFORE THE ENVIRONMENT COURT

Decision [2012] NZEnvC 1
ENV-2011-AKL-000037

IN THE MATTER	of an application for a declaration under s311 of the Resource Management Act 1991
BETWEEN	AUCKLAND YACHT AND BOATING ASSOCIATION INC Applicant
AND	C D ROSS and R W INGLIS First Respondents
AND	THE AUCKLAND COUNCIL Second Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner W R Howie
Hearing: 15 December 2011 at Auckland
Counsel: R B Brabant for Auckland Yacht and Boating Association Inc
M E Casey QC and A Davidson for C D Ross and R W Inglis
N A Farrands for M Guthrie – s274 party
J G Cox for himself, D J G Cox and P J Dew – s274 parties
J A Burns and L S Fraser for the Auckland Council

DECISION ON APPLICATION FOR A DECLARATION

Decision issued: 6 JAN 2012

Declaration made – see para [26]

Costs are reserved

Introduction and background

[1] The applicant Association (AYBA) seeks a declaration under the Act, the terms of which would answer the question:

> Is the occupation of the Coastal Marine Area (CMA) by the existing swing mooring at Woody Bay, Rakino Island ... and its maintenance and repair a permitted activity in terms of Rule 24.5.3 of the Auckland Regional Plan: Coastal?

The AYBA argues that the answer should, in brief, be 'No'. The respondents and s274 parties argue that it should be 'Yes'.

[2] The Court has dealt with this swing mooring before. In decision [2010] NZEnvC 286 it allowed an appeal against a decision of the then Auckland Regional Council to grant Messrs Ross and Inglis the resource consent necessary to establish and use it. They are the joint owners of a holiday property overlooking Woody Bay and the mooring is used when they are at the property. They have had the mooring since 1985, and the application to the Regional Council was intended to enable a legitimised continuation of that. Such a consent was considered necessary according to the advice they then had, and the apparent interpretation the then Regional Council had of its Coastal Plan.

[3] In the course of that decision, the Court said this - see para [6]:

> We should add that only very recently have the parties become aware that there is a possible argument that the use of this mooring may actually be a *permitted* activity and thus not requiring a resource consent at all. The point was not argued before us – all parties were content that we deal with the substance of the appeal as originally presented. The *permitted* activity possibility is a variant of the concept of *existing use* and relates to the interpretation of s418(6A) of the Act and Rule 24.5.3 of the Plan, but it would be highly fact dependent. The suggestion was made that if there is a wish to pursue the possibility, separate declaration proceedings might be an appropriate course and we are inclined to agree with that.

[4] We are told that Woody Bay once held about 15 moorings, historically established without any formal permit or authorisation, but in or about 2007 14 of them were removed at the requirement of the Regional Council. Only the Ross/Inglis mooring remains.

[5] Rather than pursue the possible option of seeking a declaration in this Court, Mr Ross and Mr Inglis elected to apply to the new Auckland Council (it having assumed the powers and jurisdiction of the Regional Council) for a Certificate of Compliance certifying that the Occupation of the Coastal Marine Area (CMA) by the mooring in question is a *permitted* activity in terms of Rule 24.5.3 of the Coastal Plan. The Council granted that Certificate on 18 January 2011 and it has effect as a deemed resource consent. Shortly thereafter the AYBA commenced this proceeding. It is common ground that a declaration in the terms it seeks would not overturn the Certificate of Compliance, or the 11 similar Certificates granted since – only Judicial Review proceedings in the High Court could do that.

[6] For the Council, Mr Burns advises that, for understandable reasons, there are no formal records of moorings which have not passed through a formal consenting process under the RMA. Nevertheless the Harbourmaster gives what is believed to be a fairly reliable estimate of about 385 such moorings throughout the Hauraki Gulf. As just mentioned, 12 have now been granted Certificates of Compliance, leaving about 373 which may, or may not, be permitted in terms of Rule 24.5.3 depending on the facts surrounding their origin, and possibly other factors also.

Agreed facts

[7] Counsel have advised that the following facts may be taken as agreed:

1. The mooring in question is in Woody Bay, Rakino Island and was established in 1985.
2. The physical components of the mooring are as follows: a. three railway wheels; b. admiralty chain; c. mooring lines; d. buoy.
3. The mooring has continuously occupied the CMA since it was established.
4. No licence or permit was required for the mooring under the Harbours Act 1950 as at the time the mooring was established it was outside the Harbour limits.
5. The First respondents did not subsequently obtain any permission, licence, permit or other authority under the Harbours Act 1950 or any other enactment in respect of the mooring.
6. The plan provisions which apply to moorings and pile moorings are in Chapter 24 of the Auckland Regional Plan: Coastal ("ARP:C").
7. The Permitted Activities are provided for in Rule 24.5 ARP:C.

8. The mooring is not within a Special Activity Area or a Coastal Protection Area.

The parties' positions

[8] The AYBA contends that the mooring is subject to the terms of the ARP:C and requires a resource consent to legitimise its presence. It does not agree that the ARP:C or indeed any other planning document or statute has grandfathered its lawful presence, at least since the advent of the Resource Management Act in 1991. It argues that its placement conflicts with other recreational uses of the area and that it should not be there at all.

[9] The Auckland Council and Messrs Inglis and Ross take exactly the opposite position. They contend that the mooring required no formal consent when it was first put in place, and that all subsequent statutory and planning instruments have preserved its lawful status, without requiring any formal approval, retrospective or otherwise. The s274 parties who appeared at the hearing support that view.

Auckland Regional Plan: Coastal

[10] The relevant planning document is the Auckland Regional Plan: Coastal, and we can focus on Chapter 24 of that Plan, dealing specifically with moorings. Setting out the relevant objectives and policies, and the Rule relating to *permitted* activities will be helpful:

24.3 OBJECTIVES

24.3.1 To concentrate moorings into defined locations while avoiding as far as practicable, remedying or mitigating adverse effects on the environment.

24.3.2 To avoid, as far as practicable, conflicts between moorings and other activities in the coastal marine area.

24.3.3 To ensure that efficient use is made of the coastal marine area.

24.4 POLICIES

24.4.1 The mooring of vessels within Mooring Management Areas as defined on the Plan Maps shall be encouraged by:

(a) providing for as permitted activities swing moorings and existing pile moorings within these areas; and

(b) the ARC limiting its discretion when assessing any application for a new pile mooring within the Mooring Management Areas; and

(c) requiring a discretionary resource consent for all new moorings outside the Mooring Management Areas.

24.4.2 Moorings shall be avoided where they will:

(a) result in more than minor modification of, or damage to, or the destruction of the values of any Coastal Protection Area 1 or Tangata Whenua Management Area; or

(b) modify, damage or destroy a site, building, place or area scheduled for preservation in Cultural Heritage Schedule 1.

24.4.3 The relevant provisions of Part III: Values, Chapters 3 to 9 shall be considered in the assessment of any proposal to establish moorings in the coastal marine area.

24.4.4 New moorings outside the Mooring Management Areas shall be generally considered inappropriate unless:

(a) there is no Mooring Management Area in close proximity to the proposed mooring site that has available space; and

(b) there are compelling reasons why a mooring outside a Mooring Management Area is necessary; and

(c) it can be demonstrated that short term anchorage as opposed to a permanent mooring is not a practicable option; and

(d) the mooring and any moored vessel will not adversely affect the navigation and safety of other vessels; and

(e) the mooring and any moored vessel will not adversely affect other recreational use of the coastal marine area, including the short term anchorage of other recreational vessels; and

(f) the mooring and any moored vessel will not adversely affect the operation of any existing activity or any activity that has been granted resource consent; and

(g) there are no practicable land-based storage options; and

(h) the mooring and any moored vessel will not restrict public access to and along the coastal marine area.

24.4.5 In addition to Policies 24.4.3 and 24.4.4, any proposal for a mooring shall demonstrate how visual and amenity values of the area have been maintained or enhanced to the greatest extent practicable.

24.4.6 Moorings within Special Activity Areas shall be avoided.

24.4.7 A mooring or a mooring area should be established only where it can be demonstrated that the site is suitable in terms of wave, tide, and wind conditions, particularly during storm events.

24.4.8 Sufficient provisions should be made for land-based facilities associated with new Mooring Management Areas, or extensions to Mooring Management Areas.

24.4.9 In assessing any proposals for moorings consideration shall be given to boat storage systems which avoid using space in the coastal marine area.

24.4.10 Mooring areas which are adjacent to land of high amenity and recreational value should be managed so as to maintain easy access to that land.

24.4.11 Notwithstanding Rule 35.5.1, noise associated with the mooring of vessels in the coastal marine area should as far as practicable be avoided or minimised. This includes noise from halyard slap and general maintenance and operational activities.

24.5 RULES

Permitted Activities

24.5.1 Existing and new swing moorings and their maintenance, repair and occupation within the Mooring Management Areas, provided that the number of moorings, including proposed moorings, does not exceed the maximum number of moorings for the Mooring Management Area set out in Schedule 5 to this Plan.

24.5.2 Existing pile moorings and their maintenance, repair and occupation within the Mooring Management Areas as at 25 February 1995.

24.5.3 Existing lawful swing and pile moorings outside of Mooring Management Areas and their maintenance, repair and occupation as at 25 February 1995, other than:

a. those within Special Activity Areas; and

b. those within any Coastal Protection Area 1 that require any vegetation clearance or dredging to be maintained for operational purposes.

[11] Noting point 8. of the agreed facts, the two riders in Rule 24. 5. 3 can be put aside, as can any issue of *pile moorings*. So the application essentially turns on the correct interpretation of the sentence ... *Existing lawful swing ... moorings outside of Mooring Management Areas and their maintenance, repair and occupation as at 25 February 1995* ... and of that, the word requiring particular attention is ... *lawful* ... .

RMA transitional and savings provisions

[12] The relevant portions of s418, which is headed *Certain existing permitted uses may continue*, are these:

(6A) For the purposes of this Act, where, in respect of any mooring existing before the 1st day of October 1991, no licence or permit was held which could be deemed to be a coastal permit under section 384(1), then section 12(2)(a) shall not apply to that mooring until one year after a regional coastal plan provides otherwise.

(6B) For the purposes of this Act, section 12(1) and (2) shall not apply in respect of any activity lawfully being carried out in the coastal marine area, before the 1st day of October 1991, which did not require any licence or other authorisation relating to such activity under any of the Acts, regulations, or bylaws, or parts

> thereof, amended, repealed, or revoked by this Act, until a regional coastal plan provides otherwise.

For completeness, s12(2)(a), referred to in (6A), (s12 deals with *Restrictions on use of coastal marine area*) provides:

> (2) No person may, unless expressly allowed by a national environmental standard, a rule in a regional coastal plan or in any proposed regional coastal plan for the same region, or a resource consent,—
>
> (a) occupy any part of the common marine and coastal area; or ...

Subsection (6A), obviously enough, was intended to provide a transition from a previously unregulated situation, and gave mooring occupiers a 12 month period of grace from the time a Plan provision gave effect to s12(2)(a) within which to seek an RMA consent under s12, if the Plan so required. It is Mr Casey's submission that the Regional Council dealt with moorings that did not have or require a formal licence or permit under earlier legislation by adopting Rule 24.5.3 – ie by allowing the moorings to continue after the period of grace. Even if that were not so, it is argued that subsection (6B) applies also, in that the mooring and its use was an activity being lawfully carried out before 1 October 1991 (ie the date the Resource Management Act came into force) and, again, the Regional Plan did not provide otherwise, by making those existing moorings subject to the granting of a permit under s12.

[13] We might add that we see subsection (6B) as important in the argument because it makes it plain that the legislators knew and accepted that there were activities being carried on in the CMA that had never had, or required, the positive sanction of a formal permit of some kind, but were nevertheless perfectly *lawful*.

[14] For completeness we note that s384 RMA is also a transitional provision, allowing positive permissions or permits issued under the Town and Country Planning Act 1977 or the Harbours Act 1950 (or its predecessors) to continue in force as deemed coastal permit granted under the RMA, according to their terms. It obviously does not apply here because no such permit ever existed.

The approach to interpretation

[15] We see no complexity in settling the approach to be taken – s34 of the Interpretation Act 1999 says as much as need be said:

> 34 *Meaning of words and expressions used in regulations and other instruments*
> A word or expression used in a regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant, or other instrument made under an enactment has the same meaning as it has in the enactment under which it is made.

[16] There is no doubt that the ARP:C is an ... *instrument made under an enactment*; viz the RMA. In the RMA the term *lawful* is used in the provisions relating to existing uses, of which *grandfathered* activities in the CMA is undoubtedly a subset. Section 20 RMA, as it stood between 1991 and 1993, dealt with existing uses in the context of regional planning documents. Relevantly, it provided:

> 20 Certain existing lawful activities allowed
> ... (2) Where, as a result of a rule in a regional plan or a change to a regional plan becoming operative, an activity that formerly was a permitted activity or which otherwise could have been lawfully carried out without a resource consent, becomes a controlled, discretionary, or non-complying activity, the activity may continue to be carried on after the plan or change becomes operative, if—
>
> (a) The activity was lawfully established before the plan or change became operative; and
>
> (b) The effects of the activity are the same or similar in character, intensity, and scale to those which existed before the plan or change became operative; and
>
> (c) The person carrying on the activity has applied for a resource consent from the appropriate consent authority within 6 months of the plan or change becoming operative and the application has not been decided or any appeals have not been determined.
>
> (3) Nothing in this section limits section 10.

Section 20A, which replaced it , is to the same effect. The importance of both sections is that they use the term *lawful[ly]* in a context which makes it plain that the concept of something being *lawful* can exist outside of a granted resource consent or other positive formal sanction.

[17] In his argument to the contrary, Mr Brabant submitted that, following lines of authority such as *Beach Road Preservation Soc v Whangarei DC* [2001] NZRMA 176 and *Powell v Dunedin CC* [2005] NZRMA 174, we should look to the context of the planning document as a whole – and its Objectives and Policies in particular - in interpreting the term *lawful* if there was otherwise obscurity or ambiguity in what the true meaning of the term might be.

Discussion

[18] We have set out the Objectives and Policies in para [10]. Read as a whole, they disclose a plain desire to encourage the concentration of moorings into Mooring Management Areas, and in Policy 24.4.4ff a discouragement of new (our emphasis) moorings outside Mooring Management Areas. We see absolutely nothing in the Objectives and Policies which would lead us to think that the Regional Council intended to *grandfather* only existing moorings that had, for instance, the sanction of a permit issued under the Harbours Act.

[19] Mr Brabant's argument relies rather heavily upon the record of the Regional Council's decisions in settling the terms of the Coastal Plan. In its original draft of what became Rule 24.5.3 the term *authorised* had been used, rather than *lawful*. The record of decisions is not an entirely easy document to follow – there are obvious gaps in places; terms are used inconsistently in others and, without wishing to sound unkind, parts have the distinct air of a document put together in some haste rather than an attempt to capture concepts in precise drafting. That seems to have been left until the final document and what stands out as unarguable and important is that in the final and definitive draft of the Rule the Council deliberately chose to replace *authorised* with *lawful* – a term that appears in the savings and transitional context in the parent document, the RMA. We must take that as a significant, indeed decisive, choice of words.

[20] As Mr Casey points out, to adopt Mr Brabant's argument as being correct in the face of that choice of words we would have to say that the Council deleted the word *authorised* and replaced it with the word *lawful*, but still meant it to be read as *authorised*. The gloss that Mr Brabant attempted to put on the term *lawful* in his closing submissions by referring to s384(1) does not get around the point that *lawful* is plainly wider in meaning than a specific permission granted under some statute. Applying the plain direction of the Interpretation Act must mean that we should give the term *lawful* in Rule 24.5.3 the same meaning as it has in the Act, unless it produces an absurd or unworkable result, which it does not.

[21] That rather under-utilised authority on the meanings of words in legal documents, the Concise Oxford Dictionary, defines *lawful* as ... *conforming with, permitted by, or recognised by law; not illegal*. On the basis of the agreed facts, there was no pre-RMA

law in place in 1985 when the mooring was first put down, or later, that required any formal permit, licence or any other kind of official approval to do so. The effective position seems to have been that so long as the location was outside the Harbour limits you could have a mooring where you pleased. In short, such a mooring was *permitted by* the law and was not *illegal*. It was, in short, *lawful*.

[22] The Concise Oxford gives the meaning of *authorise* as ... *give official permission for or approval to*. That is, some formal and positive sanction is required to be given by a body with the power to do so. That draws the distinction between the two terms.

[23] Finally on that issue, we have to say that we do not find the meaning of *lawful* to be obscure or ambiguous, or that reading it as wider than meaning sanctioned by some specifically issued permit or licence, will lead to an absurd result.

[24] We do not regard the difference between transitional and savings provisions to be significant. The Council chose to *grandfather* lawfully established moorings by means of the Rule, in response to the option provided by s418(6A).

Result

[25] For those reasons we find that on the plain and ordinary meaning of the word the Council chose to use – a meaning that coincides with the meaning given to the same word in the parent statute – the mooring in question continues to lawfully occupy its space in the CMA, and lawfully used for its purpose. We see no reason why, given that clear view, we should not make a declaration to that effect. Whether that finding will also apply to other moorings will of course depend on the factual background of each of them.

[26] There will be a declaration in these terms:

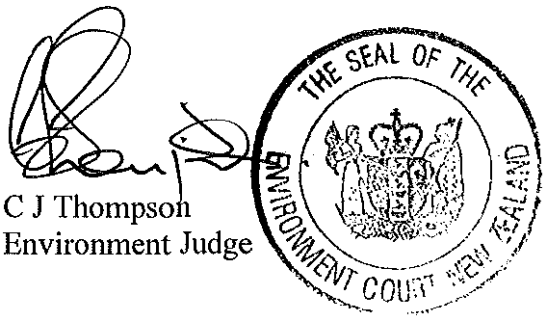
> The occupation of the Coastal Marine Area by the existing swing mooring at Woody Bay, Rakino Island (located at latitude 36.42.934S, longitude 174.56.629E) and its use, maintenance and repair is a permitted activity in terms of Rule 24.5.3 of the Auckland Regional Plan:Coastal.

Costs

[27] Costs are reserved. Any application should be lodged within 15 working days of the issuing of this decision, and any response lodged within a further 10 working days.

Dated at Wellington the 6th day of January 2012

For the Court



C J Thompson
Environment Judge