

**BEFORE THE GREATER WELLINGTON REGIONAL COUNCIL AND HUTT CITY  
COUNCIL  
EASTERN BAYS SHARED PATH PROJECT**

Under the Resource Management Act 1991

In the matter of applications for resource consents by Hutt City  
Council under section 88 of the Act, to carry out  
the Eastern Bays Shared Path Project

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**OPENING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT**

14 December 2020

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## SUMMARY

1. The application is for resource consents to construct a 4.4km shared path ("**Shared Path**") along the seaward side of Marine Drive between Point Howard and Sunshine Bay, and a further section at Windy Point (the "**Project area**"). The Shared Path, together with further built components including replacement seawalls and revetment structures in the Project area, comprise the "**Project**".
2. The Project will create a safe and integrated walking and cycling facility which will improve connectivity and community health and wellbeing, while at the same time providing improved resilience to commence the response to climate change and sea level rise effects along the Eastern Bays.
3. Marine Drive provides the only road, infrastructure and utilities connection to the Eastern Bays community and accommodates the main Hutt Valley sewer line servicing some 146,000 people. As Marine Drive predominantly runs between the houses and the coast it also provides coastal protection to those properties.
4. Marine Drive is vulnerable to wave overtopping and closure or reduced operation, requiring maintenance following storm events. The present ad hoc seawall does not provide effective storm mitigation, and around 33% of the seawall has been assessed as having less than 15-20 years remaining life, with over 20% of the length considered to be at risk of imminent failure (less than five years remaining life).
5. Sea level rise will increase the frequency of inundation and overtopping of the existing structures, with a 16cm rise in sea level predicted between 2030 to 2040. The effects of sea level rise are significantly compounded by climate change resulting in greatly increased storm events. Between 2030-2040 the present 1 in 100-year storm tide event is predicted to become a once per year storm tide event on average. Storm events increase tidal height as well as wave height, and the combined effects result in significantly greater overtopping, inundation and wave effects.
6. It is predicted that without the Project (or comparable works) such storm tide events between 2030-2040 will considerably increase temporary closures of, and potentially result in the compromise of, ever larger sections of Marine Drive; resulting in an increasingly marginal level of service into the future. That will in turn result in reduced access (including utility connections) to the Eastern Bays and potential severed infrastructure.

7. While the Project itself will not provide full protection against such events it significantly increases the resilience and functionality compared to the existing seawalls and provides a design to be adapted in future. In doing so it buys time for long-term solutions to be considered and, if required, provides a foundation on which additional resilience measures can be constructed in the future.
8. Presently there is little cycling and pedestrian usage along Marine Drive. This is a significant lost opportunity for the Eastern Bays community which identified completion of the Project as its most important issue, with climate change and extreme weather event concerns next.
9. Marine Drive, with its narrow or non-existent road shoulders and footpaths, does not provide a clear and comfortable environment for cycling or pedestrian usage. The Project will improve cyclist and pedestrian safety by providing a dedicated path, separated from vehicles, and lead to improved connectivity:
  - (a) between and within the Eastern Bays for recreation, access and commuting;
  - (b) to Lower Hutt and beyond for work, education and recreation; and
  - (c) to other regional cycle trails, such as the Remutaka Cycle Trail, the Great Harbour Way / Te Aranui o Pōneke and the Beltway cycleway.
10. Further, enhanced connectivity provided by the Project will result in significant social, cultural, economic and recreational benefits and enhanced connection with the coast along the Eastern Bays. Improved safety will also encourage the uptake of active modes of transport, providing health and wellbeing benefits, reducing congestion and CO<sub>2</sub> emissions and most importantly providing sustainable travel choice which aligns with the Government Policy Statement for Transport.
11. However, the Project will result in a change to the local environment and some adverse effects. It is the latest in consistent human modifications to the coastline within the Project area over the last 100 plus years. The coastline in the Project area is already highly modified and heavily used by humans. That said, and despite the extensive change, the Project area retains many important values, including ecological. Through extensive efforts (and supported by robust conditions) the Project's adverse effects have been avoided, mitigated or remedied (as required by the various relevant planning provisions) to a level where remaining effects are minor

or less, are appropriate and are consistent with the relevant planning documents and the purpose of the Resource Management Act 1991 ("**RMA**").

12. The critical remaining adverse effect in issue, and unresolved between the two experts, relates to oystercatchers. Dr Cockrem's opinion is that given the context of the area, the effects of climate change and the proposed avoidance measures, the effects of the Project on oystercatchers are likely to be less than minor. Dr Uys' opinion is that the adverse effects of the Project may be more than minor.
13. A key diver for this dispute is whether oystercatchers are territorial. In his Memorandum dated 12 November, while Dr Uys accepted the Applicant's approach to avoiding effects for all other shorebirds he rejected it for oystercatchers on the basis they are territorial (so would not get the same benefits).
14. In his evidence-in-chief ("**EIC**") Dr Cockrem set out that oystercatchers are territorial only during the breeding season. He identified one breeding pair with a territory located at Sorrento Bay.
15. In his Addendum report Dr Uys clarifies his position agreeing with Dr Cockrem that oystercatchers are only territorial during the breeding season. That is an important change as it means that Dr Uys' rationale for differentiating oystercatchers to other shorebirds only applies during the breeding season.
16. In relation to the breeding Dr Uys retains his position that despite only the one territory based at Sorrento Bay the Project's loss of habitat to create territories is "*likely to affect the natural behaviour of the species.*"<sup>1</sup> Dr Cockrem's EIC and rebuttal evidence (counsel will address this orally at the hearing) is that:
  - (a) oystercatcher natural behaviour *may* be affected by the presence of people but that depends on what the people are doing (as Dr Cockrem explains if people are non-threatening oystercatchers will continue with their natural behaviour in very close quarters); and
  - (b) natural behaviour is already affected by the significant human modification to, and use of, the Project area and the behaviours those people display.

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<sup>1</sup> Addendum report at [23]. He elaborates on this issue at paragraphs [20] and [21].

17. There is one oystercatcher breeding pair (and territory) in the Project area despite there being potential habitat for more (the area is 4.4km long). Dr Cockrem's opinion is that this is due to high levels of existing human interference. That is likely why the sole nest within the Project area is on a rock slightly offshore so harder to access (but still vulnerable as shown by its recent abandonment due to a fisher using the rocks to fish). Given the nest is not within the Project footprint, and there are no other nests in the Project area, Dr Cockrem's opinion is that this shoreline does not presently provide nesting opportunities for variable oystercatchers. But, as Dr Cockrem states in his EIC the new protection areas at Bishops Park and HW Shortt Park "*will provide breeding habitat and roosting areas for oystercatchers that will be safe from dogs and not subject to inundation by storms*".<sup>2</sup> Therefore, Dr Cockrem's opinion is that if oystercatchers decide to nest in the new protected areas the Project would benefit potential breeding of oystercatchers within the Project area by providing additional habitat that does not presently exist.
18. In addition, Dr Cockrem:
- (a) notes from his literature review that the population of oystercatchers in Wellington region, and Te Whanganui-a-Tara / Wellington Harbour have been increasing since the 1970s and that Mana, Matiu/Somes, and Mākaro/Ward Islands are likely to be highly productive 'source populations' of variable oystercatchers for the region;
  - (b) notes that only a small part of the Project area (Eastbourne to the southern end of Day's Bay) has been included in Appendix Two of the Wildlife Management International 20 August 2019 report's list of coastal habitats of significance for indigenous birds (this report was commissioned by GWRC);
  - (c) recognises Dr Uys concerns about the cumulative loss of shorebird habitat that has occurred over the last 150 plus years around Te Whanganui-a-Tara / Wellington Harbour but notes that in respect to oystercatchers the numbers are increasing since the 1970s;
  - (d) considers that it is likely the proposed Sorrento Bay oystercatcher protection area will be of benefit to that breeding pair and their chicks; and

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<sup>2</sup> Evidence of John Cockrem at paragraph 96.

- (e) considers that potential effects of climate change on oystercatchers in the Project area will place pressure on oystercatchers (and other shorebirds) irrespective of the Project occurring. By providing protection areas higher up on beaches (and above storm tide effects) the Project provides protected habitat for oystercatchers to inhabit (and nest) that will not exist otherwise. This is an important benefit of the Project for oystercatchers.
19. Given the existing effects of human interference on oystercatchers in the Project area, and the ability for oystercatchers to continue their natural behaviours in close proximity to people who are well behaved, Dr Cockrem recommends, and the Applicant accepts, a public education programme for oystercatchers to raise awareness and by doing so change in behaviours.
20. Relying on Dr Cockrem's EIC and rebuttal evidence the Applicant's position is that the evidence of Dr Cockrem should be favoured and, therefore, it is likely that the Project will have a less than minor effect on oystercatchers and may in fact have a positive effect on them.
21. The application is accompanied by a detailed set of largely agreed and robust conditions.<sup>3</sup> With those conditions in place the Project promotes the sustainable management purpose of the RMA and is consistent with the relevant planning documents. The purpose of the RMA is promoted by granting the consents as sought by the Applicant.

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<sup>3</sup> Appended to the evidence-in-chief of Caroline van Halderen.

## **MAY IT PLEASE THE HEARING PANEL:**

### **1. INTRODUCTION**

- 1.1 These legal submissions support Hutt City Council's (the "**Applicant**") applications under section 88 of the Resource Management Act 1991 ("**RMA**") for resource consents to construct a 4.4km shared path along the seaward side of Marine Drive (the "**Shared Path**") between Point Howard and Sunshine Bay, and a further section at Windy Point (the "**Project area**"). The Shared Path, together with further built components including replacement seawalls and revetment structures in the Project area, comprise the "**Project**".
- 1.2 These opening submissions explain, against the relevant factual, legal and policy background, why granting the applications required for the Project will accord with the Regional Coastal Plan for the Wellington Region ("**RCP**"), the City of Lower Hutt District Plan ("**LHDP**") and the Proposed Natural Resources Plan for the Wellington Region ("**PNRP**"),<sup>4</sup> and will promote the sustainable management purpose of the RMA.
- 1.3 In brief, the Project will create a safe and integrated walking and cycling facility which will improve connectivity and community health and wellbeing, while at the same time providing improved resilience (through the proposed replacement seawalls and revetment structures) to commence the response to climate change and sea level rise effects along the Eastern Bays.
- 1.4 The Applicant has lodged resource consent applications with:
  - (a) Greater Wellington Regional Council ("**GWRC**") for various coastal permits relating to activities in the Coastal Marine Area ("**CMA**"), including among other things, reclamation, construction and removal of structures, discharges and deposition;<sup>5</sup> and
  - (b) Hutt City Council ("**HCC**")<sup>6</sup> for land use consents relating to the construction, alteration and diversion on Marine Drive, construction within the Significant Natural Resource site SNR 44 and earthworks within the Special Recreation and Passive Recreation zoning.
- 1.5 The Applicant's applications are described in more detail in the AEE, the s42A reports, the evidence of its planning witness, Caroline van Halderen<sup>7</sup> and in these submissions.

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<sup>4</sup> References to the PNRP in these submissions are to the Decisions Version notified on 31 July 2019, unless specified otherwise. Some PNRP provisions have been amended in "appeals versions" since the Decisions Version was notified, however none of those amended provisions are triggered by or relevant to the Project.

<sup>5</sup> For a full list of consents required under both the RCP and the PNRP refer to tables 8-4 and 8-5 of the Assessment of Effects on the Environment ("**AEE**").

<sup>6</sup> In its role as consenting authority.

<sup>7</sup> Evidence of Caroline van Halderen at paragraphs 51 – 57.

1.6 These submissions:

- (a) set out an overview of the Project, including the background and context to the applications and the Project's evolution;
- (b) identify the legal framework for the Panel's decision;
- (c) describe how that framework applies in this case, including with reference to:
  - (i) s104D and non-complying activity status;
  - (ii) the evidence before the Panel regarding the adverse environmental effects of the Project;
  - (iii) the relevant national and regional planning instruments;
  - (iv) the relevant objectives and policies from the RCP, LHDP and PNRP;
  - (v) s104 and the Project's positive effects;
  - (vi) other relevant matters;
  - (vii) sections 105 and 107 of the RMA;
  - (viii) the conditions proposed to attach to the resource consents and consent term; and
  - (ix) Part 2 of the RMA; and
- (d) identify the witnesses giving evidence for HCC.

## **2. PROJECT OVERVIEW**

### **Background**

2.1 The Applicant introduced the Project to the Eastern Bays community in November 2016,<sup>8</sup> however the concept of a shared path along Marine Drive has been a key priority for the community, which is made up of approximately 5,000 residents,<sup>9</sup> for a significantly longer period of time. A 2014 survey revealed the completion of the Shared Path to be one of the two most important issues facing the Eastbourne community (climate change being the other).<sup>10</sup>

<sup>8</sup> See Appendix I to the AEE at section 4.

<sup>9</sup> 180 of the 200 submissions received on the Project, were in support, including submissions from the Eastbourne Community Board (Virginia Horrocks and Belinda Moss), Lowry Bay Residents Association, Diane Cheyene (on behalf of Days Bay Residents Association), Alison Gandy (for Point Howard Association) and Petone Community Board. Four of the 15 submissions in opposition, and two of the five neutral submissions, were not Eastern Bays residents.

<sup>10</sup> The Eastbourne Community Survey 2014 asked residents to identify the most important issues they considered were facing their community. Completion of the Eastern Bays Shared Path was the most important issue (33% of respondents), followed by concern about climate change and extreme weather events (16% of respondents).

- 2.2 The Project was introduced as a key mechanism for providing a safe and integrated network for commuting and recreational purposes. The Project has featured in a number of HCC's broader strategies, including its Infrastructure Strategy 2018-2048<sup>11</sup> and 'Walk and Cycle the Hutt 2014 – 2019'. The Shared Path also forms an important part of the Great Harbour Way / Te Aranui o Pōneke – a walking and cycling route around Te Whanganui-a-Tara / Wellington Harbour, from Sinclair Head in the west to Fitzroy Bay in the east – that also links to the Remutaka Cycle Trail (one of the New Zealand Great Rides).<sup>12</sup>
- 2.3 During the Project's development phase the Applicant undertook a detailed alternatives assessment to consider other options; however due to the terrain, existing inland properties and driveway/road connections, an inland option was not recommended. Therefore, coastal options were considered. The recommended option (which became the Project) strikes a balance between providing a resilient structure to respond to climate change (a benefit that would not have been realised through an inland option), and providing for safe cycling and pedestrian usage, while minimising the amount of land to be reclaimed from the coast and the effects on the coastal environment.
- 2.4 The Project's benefits are numerous, and include cultural, economic, recreational, connectivity and health and safety benefits. Importantly, it will also provide much needed resilience to the Eastern Bays through improvements to existing seawalls and construction of new seawalls, which is of crucial importance in the context of the climate change crisis (predicted to result in a considerable rise in sea level). The Project's key benefits are discussed in more detail below.
- 2.5 Until recently the Project was to be predominantly funded by HCC, however in April 2020, the Government launched the Covid Response and Recovery Fund seeking infrastructure projects for potential investment to reduce the economic impact of the COVID-19 pandemic. On 5 August 2020 Julie Anne Genter (then Associate Minister for Transport) announced funding for the Project as part of the 'shovel ready' package.
- 2.6 The Project is forecast to cost approximately \$30 million, with the funding comprising:<sup>13</sup>
- (a) \$15 million from the Government, from the Covid-19 Response and Recovery Fund;

<sup>11</sup> HCC Infrastructure Strategy 2018-2048 at page 25.

<sup>12</sup> See Great Harbour Way/ Te Aranui o Pōneke "Background"

<<http://www.greatharbourway.org.nz/background/>>; Ngā Haerenga The New Zealand Cycle Trail "Remutaka Cycle Trail" (2020) <<https://nzcycletrail.com/find-your-ride/22-great-rides/remutaka-cycle-trail/>>.

<sup>13</sup> Paragraph 26 of Simon Cager's evidence and paragraphs 29 – 30 of Kara Puketapu-Dentice's evidence.

- (b) approximately \$7.5 million from Waka Kotahi NZ Transport Agency ("**Waka Kotahi**"); and
- (c) approximately \$7.5 million from HCC.

## Context

- 2.7 The Project's context, and the current physical state of the Eastern Bays and Marine Drive, are key to understanding the Project and its effects. In particular, the Project area<sup>14</sup> is a highly modified urban environment, with an existing seawall running along most of Marine Drive, and narrow existing road shoulders and footpaths that are underutilised for walking and cycling<sup>15</sup> (reflecting a significant lost opportunity for the Eastern Bays community).
- 2.8 The existing coastline along the Eastern Bays is a highly modified and actively managed shoreline, comprising rocky headlands and sand-and gravel-filled beaches; the construction of Marine Drive and other nearby features have modified the natural coastal processes of the area.<sup>16</sup>
- 2.9 Avifauna, including kororā / little penguins and variable oystercatchers are present in the Project area. Based on a dog survey undertaken in 2017, John Cockrem estimates the breeding population of kororā / little penguins in the Project Bird Area<sup>17</sup> to be approximately 25 pairs and the total kororā / little penguin population in the Project Bird Area to be approximately 60 to 70 penguins (as at October 2017).<sup>18</sup> A site visit undertaken by Dr Cockrem in November 2020 and reports from local residents and ornithologists indicates there is one variable oystercatcher breeding territory in the Project Bird Area.<sup>19</sup>
- 2.10 From a landscape and visual perspective, the natural character of the wider Eastern Bays landscape has been modified over time by road widening and retaining structures,<sup>20</sup> and the existing road edge in the Project area is 'makeshift', with ad hoc seawall construction creating 'untidy and abrupt juxtapositions'.<sup>21</sup>
- 2.11 Marine Drive provides the only road, infrastructure and utilities connection to the Eastern Bays community, accommodating the main Hutt Valley sewer line between the Seaview Wastewater treatment plant and the outfall

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<sup>14</sup> As set out at paragraph 6 of Jamie Povall's project design evidence, the Project area is the Eastern Bays from Point Howard to Sunshine Bay and including Windy Point.

<sup>15</sup> However, as discussed at paragraph 8 of Robert Greenaway's evidence, the 2014 survey showed that although 70% of the Eastern Bays adult population used the existing walkway and cycleway on the road shoulder along Marine Drive at least monthly, over half of survey respondents said the current state of the path setting deterred them from using it and described it as unsafe or very unsafe.

<sup>16</sup> Paragraph 26 of Michael Allis' evidence.

<sup>17</sup> Defined at paragraph 25 of Dr Cockrem's evidence as "*the length of coastline from Point Howard to the north end of Rona Bay beach along which the Shared Path will be constructed (not including Days Bay) extending 100 metres seaward from the base of current seawalls, rock walls and concrete edges of the road.*"

<sup>18</sup> Paragraph 29 of Dr Cockrem's evidence.

<sup>19</sup> Paragraphs 33 and 34 of Dr Cockrem's evidence.

<sup>20</sup> Paragraph 30 of Julia Williams' evidence.

<sup>21</sup> Paragraph 36 of Julia Williams' evidence.

at Bluff Point.<sup>22</sup> The Seaview plant and outfall services some 146,000 people. As Marine Drive predominantly runs between the houses and the coast it also provides coastal protection to those properties.

- 2.12 Marine Drive is vulnerable to wave overtopping and closure or reduced operation, requiring considerable ongoing maintenance requirements following storm events. The present ad hoc seawall does not provide effective storm mitigation, and around 33% of the seawall has been assessed as having less than 15-20 years remaining life, with over 20% of the length considered to be at risk of imminent failure (less than five years remaining life).<sup>23</sup>
- 2.13 As discussed in the evidence of Dr Allis,<sup>24</sup> sea level rise will increase the frequency of inundation and overtopping of the existing structures, with a 16cm rise in sea level predicted between 2030 to 2040. The effects of sea level rise are significantly compounded by climate change resulting in greatly increased storm events. Already some areas of Marine Drive are significantly affected during storm events; however, between 2030-2040 the present 1 in 100-year storm tide event is predicted to become a once per year storm tide event on average. Storm events increase tidal height as well as wave height, and the combined effects result in significantly greater overtopping, inundation and wave effects.
- 2.14 It is predicted<sup>25</sup> that without the Project (or comparable works) such storm tide events between 2030-2040 will considerably increase temporary closures of, and potentially result in the compromise of, even larger sections of Marine Drive; resulting in an increasingly marginal level of service into the future. That will in turn result in reduced access (including utility connections) to the Eastern Bays and potential severed infrastructure (the most significant being the main sewer pipe). The loss of these connections would put the health and safety and wellbeing of some 5,000 people at risk as well as creating potentially significant regional adverse effects (for example if treated wastewater needs to be discharged directly into Wellington Harbour).
- 2.15 While the Project itself will not provide full protection against such events it significantly increases the resilience and functionality compared to the existing seawalls and provides a design to be adapted in future. In doing so it buys time for long-term solutions to be considered and, if required, provides a foundation on which additional resilience measures can be constructed in the future.

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<sup>22</sup> Approximately 500m south-east of Pencarrow Head.

<sup>23</sup> See paragraph 15 of Mr Povall's transport and safety evidence.

<sup>24</sup> See paragraph 14 of Dr Allis' evidence.

<sup>25</sup> See paragraph 43 of Dr Allis' evidence.

## Engagement and consultation

2.16 Since the Project's conception, the Applicant has been committed to meaningful engagement and consultation with the Eastern Bays community, iwi mana whenua and other interested stakeholders. This has included:

- (a) workshops and site visits with stakeholders concerned with potential effects on kororā / little penguins, leading to the creation of the Little Penguin Interest Group;
- (b) meetings with key stakeholders including the Department of Conservation ("**DOC**"), GWRC, HCC, Waka Kotahi and CentrePort;
- (c) engagement with the relevant iwi authorities, in particular Te Rūnanga o Te Atiawa and Taranaki Whānui ki Te Ūpoko o Te Ika / Port Nicholson Block Settlement Trust ("**Taranaki Whānui**"); and with Te Rūnanga o Ngāti Toa Rangitira ("**Ngāti Toa**"), which has included:
  - (i) the commissioning of a Cultural Impact Report ("**CIR**") from Raukura Consultants, in consultation with Taranaki Whānui and Ngāti Toa (discussed in Morris Love's evidence);
  - (ii) providing a copy of the draft resource consent applications and AEE to Taranaki Whānui and Ngāti Toa prior to lodgement; and
  - (iii) continued engagement with Taranaki Whānui and Ngāti Toa, as discussed in the evidence of Mr Puketapu-Dentice and Mr Love;
- (d) close collaboration with members of the Eastbourne Community Board; and
- (e) consultation with other members of the community and private land owners.

2.17 The details of this engagement are explained in the evidence of Ms van Halderen, Mr Love, Mr Puketapu-Dentice and Simon Cager.

2.18 The engagement undertaken by the Applicant has led to important refinements to the Project's design, discussed in more detail below.

## Evolution of the Project

2.19 Resource consent applications for the Project were lodged with GWRC and HCC on 12 April 2019 and publicly notified by GWRC on 29 October 2019.

2.20 Since lodgement, the Applicant has continued to refine the key elements and design features of the Project in light of:

- (a) extensive engagement with the community, mana whenua and interested stakeholders (explained above);
- (b) the PNRP (Decisions Version), which was released publicly on 31 July 2019; and
- (c) a series of further information requests ("**FIRs**") from, and correspondence with, GWRC and HCC between May 2019 and November 2020.<sup>26</sup>

2.21 The submissions received have been overwhelmingly in support of the Project, reflecting both the community's longstanding desire to see the Shared Path constructed, and the fulsome engagement and feedback process that was undertaken. Of the 200 submissions lodged,<sup>27</sup> 180 were in support,<sup>28</sup> 5 were neutral, and 15 were in opposition.

2.22 A key submission in opposition received was from DOC, who expressed concerns that the Project did not adequately address potential effects on coastal vegetation, avifauna foraging habitat and kororā / little penguin habitat, and did not consider the Project to be consistent with the New Zealand Coastal Policy Statement 2010 ("**NZCPS**").

2.23 As the Panel is aware DOC has decided not to appear at the hearing (or present evidence). The Applicant has been in recent correspondence with DOC. DOC has informed the Applicant that:

*"Based on the technical expert advice received to date, it appears that the additional measures, changes to the application and proposed conditions of consent after filing its resource consent application, largely address actual and potential adverse effects on seagrass, foraging seabirds and Little Blue Penguins as identified in the original submission. The inclusion of the Department in the Little Blue Penguin Interest Group as part of the proposed conditions is also appreciated. The Director-General has therefore not provided evidence and has elected not to appear at the hearing on Tuesday."*

2.24 DOC has minor comments in relation to an older version of condition EM.5(b) relating to relocation of penguin nests. That condition was amended in the EIC of Ms van Halderen to reflect comments from Dr Cockrem). While the Applicant considers those changes address DOC's comment in the time available that has not been confirmed. Finally DOC has noted *"that Director-General is not withdrawing his submission. Whilst the Director-General has elected not to appear at the hearing,... he wishes to reserve his right to appeal if necessary."*

<sup>26</sup> Three FIR were received, dated 29 May 2019, 19 August 2019 and 10 September 2019. These FIRs, and the Applicant's responses, are publicly available at [Further Information | Greater Wellington Regional Council \(gw.govt.nz\)](https://www.gw.govt.nz/further-information/greater-wellington-regional-council/)

<sup>27</sup> The period for filing submissions closed on 27 November 2019.

<sup>28</sup> This includes one in conditional support.

2.25 Significant improvements to the Project are now proposed, ensuring that the Project's benefits are maximised, and any potential adverse effects are minimised (or in many cases avoided), to the greatest extent possible. The Project now includes:

- (a) comprehensive avifauna protection and habitat enhancement measures, including:
  - (ii) the preparation of a habitat enhancement plan ("**HEP**") and creation of four fenced protection areas for kororā / little penguins and shoreline foragers (including one specifically designed for variable oystercatchers);
  - (iii) \$15,000 towards public education in the Eastern Bays for oystercatchers;<sup>29</sup>
  - (iv) the provision of up to \$60,000 to be used for pest management in the protection areas and adjacent coastal environment;
  - (v) a commitment to initiating the required statutory processes to exclude dogs from sections of Rona Bay and Sorrento Bay abutting the Bishops Park and Sorrento Bay protection areas;
  - (vi) shoreline forager nesting surveys and a designated oystercatcher managed works zone in Sorrento Bay (where the one variable oystercatcher nest that has been identified is located);
  - (vii) the commissioning of a study of variable oystercatchers and their behaviour in the Project area, to be led by a suitably qualified ecologist;
  - (viii) the requirement for a Little Penguin Management Plan ("**LPMP**"), designed to ensure adverse effects on kororā / little penguins during construction are minimised;
  - (ix) six-monthly rubbish clean-ups along the Shared Path and its adjacent beaches;
  - (x) seawall and revetment habitat measures, including textured seawalls and purpose-made rock pool features to provide new habitat; and
  - (xi) education and signage along the Shared Path as to the ecological, especially avian, values of the coast and the need for their protection (including dogs on lead outside of any dog free areas);

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<sup>29</sup> This is an additional measure proposed by Dr Cockrem in his rebuttal evidence.

- (b) monitoring seagrass beds to ensure adverse effects resulting from Construction Works and/or beach nourishment are avoided;
- (c) ensuring effects on fish passage are avoided, including through pre- and post-construction monitoring;
- (d) beach nourishment and beach monitoring (which also provides replacement avian habitat);
- (e) a staged approach to landscape and urban design, including Bay Specific Urban Design Plans ("**BSUDPs**"), and a draft design protocol and certification process for the BSUDPs and the wider Landscape and Urban Design Plan ("**LUDP**"); and
- (f) the creation of a Mana Whenua Steering Group ("**MWSG**") to facilitate ongoing engagement with mana whenua throughout the life of the Project, provide an opportunity for mana whenua to provide kaitiaki inputs into the Project and ensure appropriate tikanga and kawa are applied.

2.26 As a result of these refinements, while the Project will inevitably change the current environment along Marine Drive, the Applicant's position, relying on expert technical evidence, is that it will:

- (a) have positive cultural effects;<sup>30</sup>
- (b) appropriately protect and avoid adverse effects on indigenous biodiversity, including intertidal and subtidal ecology,<sup>31</sup> seagrass,<sup>32</sup> fish passage,<sup>33</sup> penguins and shorebirds (including variable oystercatchers);<sup>34</sup>
- (c) not have more than minor landscape and amenity effects;<sup>35</sup>
- (d) not have more than minor effects on existing recreation (and in fact will have recreational and tourism benefits);<sup>36</sup>

<sup>30</sup> See paragraphs 19 – 22 of Mr Love's evidence.

<sup>31</sup> Paragraphs 20 and 24 of Ms McMurtrie's evidence explains that the effects or potential effects of the Project on benthic ecology will be less than minor, and the effects on benthic intertidal and subtidal ecology will be minor or less than minor.

<sup>32</sup> Paragraph 41 of Dr Matheson's evidence explains that the Project will avoid adverse effects on the existing seagrass beds in Lowry Bay.

<sup>33</sup> Paragraph 48 of Dr James' evidence explains that the Project will have negligible to less than minor effects on fish passage.

<sup>34</sup> Paragraph 59 of Dr Cockrem's evidence explains that the overall adverse effects of the Project on kororā / little penguins are likely to be less than minor. At paragraph 71 Dr Cockrem explains that the overall adverse effects of the Project on variable oystercatchers are likely to be less than minor. At paragraph 74 he explains that the overall adverse effects of the Project on other bird species are likely to be less than minor.

<sup>35</sup> Paragraph 25 of Ms Williams' evidence explains that the adverse landscape and visual effects of the Project will be no more than *Moderate - Low*, which is no more than minor.

<sup>36</sup> At paragraph 61 of Mr Greenaway's evidence he states that the Project's adverse effects on existing recreation will be no more than minor. Paragraphs 32 – 36 of his evidence set out the Project's recreation and tourism benefits.

- (e) not have more than minor effects on coastal processes;<sup>37</sup>
- (f) have economic,<sup>38</sup> health and safety<sup>39</sup> and connectivity<sup>40</sup> benefits; and
- (g) provide a base for the community to adapt to the effects of climate change.<sup>41</sup>

2.27 The Applicant understands GWRC's and HCC's positions now broadly align with the Applicant's position, subject to:

- (a) GWRC's concerns about residual adverse effects on oystercatchers after avoidance and mitigation measures;<sup>42</sup> and
- (b) some minor differences in preferred condition wording, including in relation to the Applicant's proposed staged approach to landscape and urban design planning.<sup>43</sup> This is discussed in the evidence of Ms van Halderen and Appendix A to her evidence.

2.28 On 8 December 2020 GWRC filed its Addendum Report, which concluded that potential effects on oystercatchers may be more than minor and that as a result, the Project may be contrary to the objectives and policies of the PNRP. However, it goes on to state that:

- (a) *"provided there is a satisfactory outcome with respect to the management of effects on oystercatchers the proposal would be generally consistent with the direction in the relevant statutory planning documents";*<sup>44</sup>
- (b) *"Although there are a number of adverse effects on the environment, provided effects on oystercatchers can be managed to an acceptable level, I consider that the benefits would outweigh the adverse effects and that the adverse effects could be avoided, remedied or mitigated to an acceptable level";*<sup>45</sup> and
- (c) Information provided regarding refinements to the Project on 18 November 2020 *"has not changed my view or the overall conclusions in my s42A report that the effects on oystercatchers may be more*

<sup>37</sup> This is explained at paragraphs 60 and 97 of Dr Allis' evidence. Further, paragraph 45 of Mr Reinen-Hamill's evidence explains that the Project's potential effects on the beaches and adjacent seabed areas are *low*.

<sup>38</sup> The Project's economic benefits are set out in Mr Copeland's evidence. See, for example, paragraphs 23, 26, 32 and 45 – 53.

<sup>39</sup> These benefits are set out in Mr Povall's transport and safety evidence. See, for example, paragraphs 19, 48 – 56.

<sup>40</sup> Connectivity benefits are set out in paragraphs 43 – 47 of Mr Povall's transport and safety evidence and paragraphs 34 – 36 of Mr Cager's evidence.

<sup>41</sup> See paragraphs 69 – 78 and 98 – 100 of Dr Allis' evidence.

<sup>42</sup> Section 12.1 (page 57) of GWRC's s42A report. See also paragraph 18 of GWRC's addendum to the s42A report dated 8 December 2020 ("**Addendum Report**") which states that the author's view and the overall conclusions from the s42A report remain unchanged.

<sup>43</sup> Paragraph 10 (page 57), HCC's s42A report.

<sup>44</sup> Paragraph 14, Addendum Report.

<sup>45</sup> Paragraph 15, Addendum Report.

*than minor and that subject to resolution of effects on oystercatchers it could be open to decision makers to grant the consent.*<sup>46</sup>

- 2.29 On 9 December GWRC provided an addendum report by Dr Uys providing reasons for the statements contained in the s42A Addendum Report.
- 2.30 As described above, the Applicant has worked hard to refine the Project in order to meet GWRC's concerns, in particular the concerns regarding oystercatchers. Setting aside all of the earlier work undertaken on the Project, since October 2020 the Applicant has:
- (a) attended and/or been represented by counsel and consultants at meetings with GWRC and HCC to discuss the councils' residual concerns with the Project;<sup>47</sup>
  - (b) provided a detailed response to the councils' concerns by way of Memorandum 6,<sup>48</sup> and via follow-up emails appended to GWRC's s42A report<sup>49</sup> and mentioned in the Addendum Report<sup>50</sup>;
  - (c) made considerable refinements and improvements, as outlined above, in the evidence-in-chief ("**EIC**") and rebuttal evidence of Dr Cockrem, and in the proposed conditions appended to Ms van Halderen's evidence as Appendix A, to minimise the potential effects of the Project on avifauna, and in particular on oystercatchers.
- 2.31 As a result of these efforts, Dr Cockrem's expert opinion is that the overall effects of the Project on kororā / little penguins, variable oystercatchers and other bird species are likely to be less than minor.
- 2.32 Subject to the reservations related to oystercatchers expressed in the s42A reports (and Addendum Report), GWRC is now satisfied that *"the majority of adverse effects can be mitigated to a level where they can be considered minor or less than minor"*<sup>51</sup> and HCC has concluded that *"adverse effects are appropriately avoided, remedied or mitigated"*.<sup>52</sup>

### **3. STATUTORY FRAMEWORK FOR THE PANEL'S DECISION**

#### **Section 104D**

- 3.1 Under the RCP, the bundled activity status for the Project in respect of the regional consents sought is discretionary. Under the LHDP, the bundled activity status for the district consents sought is discretionary. Under the

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<sup>46</sup> Paragraph 18, Addendum Report.

<sup>47</sup> On 15 October 2020 and 9 November 2020.

<sup>48</sup> Dated 22 October 2020.

<sup>49</sup> Appendix D.

<sup>50</sup> Paragraph 18 refers to an email sent to GWRC by Esther Bennett (counsel for the Applicant) on 18 November 2020.

<sup>51</sup> Section 12.16 (page 108), GWRC's s42A report.

<sup>52</sup> Paragraph 10 (page 57), HCC's s42A report.

PNRP, the bundled activity status for the regional consents sought is non-complying.

- 3.2 Section 104D requires that the Panel may grant resource consent applications for non-complying activities if either the adverse effects of the activity on the environment will be minor or the activity will not be contrary to the objectives and policies of the relevant plan or proposed plan. The Project has been developed to meet, and as discussed later does in fact meet, both of the section 104D(1) 'gateway tests'.<sup>53</sup>

### **Section 104**

- 3.3 Section 104(1) of the RMA provides that, when considering the applications for resource consent and any submissions, the Panel must, subject to Part 2 of the RMA, have regard to:

- (a) any actual and potential effects on the environment of allowing the activities;
- (b) any relevant regulations and provisions of statutory planning documents; and
- (c) any other matter the Panel considers relevant and reasonably necessary to determine the applications.

- 3.4 The "*environment*" against which the Project's effects must be assessed, as relevant to this case, is the physical environment that exists at present.<sup>54</sup>

### **Sections 104B and 108**

- 3.5 Section 104B of the RMA gives the Panel the discretion to grant or refuse resource consent applications for discretionary activities and, if the applications are granted, to impose conditions under section 108. As above, the bundled activity status for the Project under both the RCP and LHDP is discretionary, however under the PNRP it is non-complying.
- 3.6 Both the Project's effects and the planning framework are addressed below, as are recommended conditions of consent, as provided for under section 108.

### **Sections 105 and 107**

- 3.7 Sections 105 and 107 of the RMA relate specifically to the coastal permits sought by the Applicant from GWRC for discharges.<sup>55</sup>

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<sup>53</sup> Paragraphs 20, 62 and 181 of Ms van Halderen's evidence.

<sup>54</sup> The "*environment*" also embraces the future state of the environment as it might be modified by the exercise of permitted activities, and by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented; *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

<sup>55</sup> Refer to application number 8 in Table 8-4 of the AEE and application numbers 1-2 of Table 8-5 of the AEE.

3.8 In relation to the coastal permits for discharges sought, section 105 of the RMA requires the Panel to have regard to:

- (a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects;
- (b) the Applicant's reasons for the discharge; and
- (c) any possible alternative methods of discharge, including discharge into any other receiving environment.

3.9 Section 107 of the RMA restricts the grant of certain coastal permits that would contravene sections 15 or 15A of the RMA (which relate to the discharge of contaminants into the environment). Section 107 is triggered only where, after reasonable mixing, any of the effects in the receiving waters that are listed in section 107(1)(c) to (g) arise.

#### **4. HOW THE STATUTORY FRAMEWORK APPLIES TO THE PROJECT**

##### **Introduction**

4.1 We discuss below how the legal framework applies to the Project, in terms of:

- (a) the evidence before the Panel regarding the adverse environmental effects of the Project (limb 1 of the 'gateway' test under section 104D);
- (b) the objectives and policies of the RCP, LHDP and PNRP as they apply to the Project (limb 2 of the 'gateway' test under section 104D);
- (c) applying section 104 to the Project, including:
  - (i) the Project's positive effects;
  - (ii) the relevant national and regional policy and planning instruments; and
  - (iii) other relevant matters;
- (d) sections 105 and 107 of the RMA;
- (e) the conditions proposed to attach to the resource consents; and
- (f) Part 2 of the RMA.

4.2 As a non-complying activity<sup>56</sup> the starting point of an assessment of the Project against the legal framework is the section 104D 'gateway test'. In

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<sup>56</sup> Under the PNRP.

other words, in order for the Project to be granted consent the Panel must be satisfied either:

- (a) that the adverse effects of the Project are no more than minor; or
- (b) that the Project is not "*contrary to*" the objectives and policies of the relevant plans and proposed plans (in this case the RCP, LHDP and PNRP).

4.3 As above, the Project meets both of the section 104D(1) 'gateway tests'.

4.4 The Environment Court in *Monowai Properties Ltd v Rodney District Council* considered the meaning of "*contrary to*" in the context of section 104D. In its analysis, the Court likened the definition of "*contrary to*" to "*being repugnant to or opposed to*", *not simply that the proposal does not find support from them.*"<sup>57</sup>

4.5 In *Pencarrow Hills Ltd v Hastings District Council*, the Environment Court added that "*It does not mean that simply because a proposal may not find direct support in the objectives and policies it will be contrary to them. Further, the objectives and policies are to be viewed in an overall sort of way.*"<sup>58</sup>

4.6 There is a threshold that must be met for an activity or project to be considered "*contrary to*" a plan's objectives and policies. In order for this Hearing Panel to be satisfied that the Project is "*contrary to*" the objectives and policies of the RCP, LHDP or PNRP, it is not enough for there to merely be inconsistencies with the objectives and policies of those plans; the Project must be "*repugnant to*" them. The Project does not meet that threshold, as discussed below.

4.7 In addition, the assessment must be against an assessment of the plan as a whole. The Court of Appeal in *Davidson* also considered the section 104D 'gateway' test as it had been applied by the Environment Court<sup>59</sup>, noting "*On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although that was what it described as a "close-run judgment".*"<sup>60</sup>

4.8 Out of an abundance of caution, in coming to its position that the Project is not "*contrary to*" the objectives and policies of the relevant plans (limb 2 of the 'gateway' test), the Applicant has assessed the Project on the basis of each of the relevant plans "*as a whole*", as well as the particular relevant directive objectives and policies within those plans.

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<sup>57</sup> *Monowai Properties Ltd v Rodney District Council* EnvC Wellington A215/03, 12 December 2003 at [35].

<sup>58</sup> *Pencarrow Hills Ltd v Hastings District Council* EnvC Wellington W10/2005, 8 February 2005 at [31].

<sup>59</sup> *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

<sup>60</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [14], citing [2016] NZEnvC 81 at [249].

4.9 Because the Project triggers Policy 39A(a) of the PNRP, which requires avoidance of adverse effects on certain indigenous taxa, ecosystems, vegetation, habitats and areas, the Applicant has carefully designed and refined the Project so that it complies with that policy framework and, in particular, so that it avoids effects where that is required by the policies. This is discussed in more detail below.

#### **Section 104D - adverse effects on the environment (limb 1)**

4.10 The adverse effects of the Project identified by experts (and submitters), and the ways in which they have been minimised through design and/or mitigated to acceptable levels, are summarised below. The effects categories are broadly as follows:

- (a) Ecology effects, including on:
  - (i) avifauna;
  - (ii) intertidal and subtidal ecology;
  - (iii) seagrass;
  - (iv) fish passage; and
  - (v) vegetation and gravel beach ecology;
- (b) effects on natural character, landscape and visual values;
- (c) effects on amenity values and recreation;
- (d) effects on coastal processes;
- (e) water quality and the Waiwhetu aquifer; and
- (f) construction effects.

#### *Avifauna (excluding oystercatchers)*

4.11 Dr Cockrem has assessed the potential effects of the construction and operation of the Project on avifauna.

4.12 Dr Cockrem explains that the existing intertidal environment is highly modified.

4.13 Potential effects of the Project on kororā / little penguins within the Project Bird Area could include physical disturbance of roost or breeding sites, direct effects on adults, eggs or chicks and noise from construction activities. Long-term effects on kororā / little penguins include the loss of two breeding sites and possible long-term effects from the presence of people and potentially dogs on the Shared Path.

- 4.14 Shorebirds, including variable oystercatchers, could be affected by disturbance or displacement from feeding and roosting areas during the construction phase, and in the long-term could be affected by the presence of people and potentially dogs on the Shared Path.
- 4.15 Potential effects of construction and operation of the Project on kororā / little penguins will be avoided or minimised through:
- (a) the chosen design which will ensure that potential effects on kororā / little penguins are avoided and minimised including by:
    - (i) minimising further encroachment, including through the choice of seawalls;
    - (ii) limiting the ability for penguins to access to Marine Drive through bigger steps, setback and height of revetment;
    - (iii) the potential for rock rip rap design to include key holes for nests; and
    - (iv) maintaining existing conduits for penguin passage under Marine Drive;
  - (b) the construction footprint being minimised;
  - (c) the controls in place for construction works through the LPMP, including:
    - (i) two dog surveys prior to commencement of construction;
    - (ii) a protocol for managing construction effects on kororā / little penguins (including managing formerly occupied nest areas so not reoccupied);
    - (iii) a monitoring programme
    - (iv) staff and contractor training;
    - (v) signage; and
    - (vi) a feedback and refinement process;
  - (d) pest management (increased from \$40,000 to \$60,000 following discussions with GWRC and Dr Uys); and
  - (e) The protection areas at Whiorau Reserve, North Bishops Park and HW Shortt Park and requirement for their management (including pest management) and enhancement under the HEP.
- 4.16 Potential effects of construction and operation of the Project on shorebirds will be avoided or minimised through:

- (a) the chosen design minimising further encroachment, including through the choice of seawalls;
- (b) textures and created rockpool habitats being incorporated into the new seawalls and revetments, and existing rocky material being protected and replaced;
- (c) the construction footprint being minimised;
- (d) measures being put in place (including through the CEMP) to provide for staged construction and to carefully control sedimentation and the release of contaminants during construction;
- (e) requiring preconstruction shorebird nesting surveys and expert advice on construction controls for works within 100m when the nest contains eggs or chicks and a 'plan of works' for any such works;
- (f) pest management (increased from \$40,000 to \$60,000 following discussions with GWRC and Dr Uys);
- (g) signage along the Project area; and
- (h) the protection areas at Whiorau Reserve, North Bishops Park and HW Shortt Park and requirement for their management (including pest management) and enhancement under the HEP.

4.17 Additional provisions are proposed to avoid and minimise effects on oystercatchers as set out in the oystercatcher section below.

4.18 Dr Cockrem concludes in his EIC that with these measures in place, the effects of the project on kororā / little penguins,<sup>61</sup> and on shorebirds,<sup>62</sup> are likely to be less than minor.

4.19 For penguins Mr Watson, relying on Dr Uys, concludes that "*I am satisfied the effects on little penguins can be appropriately managed.*"<sup>63</sup>

4.20 For shorebirds Mr Watson, drawing on the review comments by Dr Uys that loss of habitat for shorebirds will be avoided and mitigated,<sup>64</sup> is in general agreement with Dr Cockrem. Mr Watson states "*Dr Uys is satisfied that the measures proposed by the applicant to mitigate effects on shoreline foragers such as shags and gulls can be considered acceptable.*"<sup>65</sup> He then concludes that the effects are likely to be less than minor.

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<sup>61</sup> At [59].

<sup>62</sup> At [74].

<sup>63</sup> GWRC s42A report, page 56.

<sup>64</sup> Memorandum 12 November at page 3

<sup>65</sup> GWRC s42A report at page 56.

## Oystercatchers

- 4.21 The critical adverse effect in issue, and unresolved between the two experts, relates to oystercatchers. Dr Cockrem's opinion is that given the context of the area, the effects of climate change and the proposed avoidance measures, the effects of the Project on oystercatchers are "*likely*" to be less than minor. Dr Uys' opinion (without reference to any source) is that the adverse effects of the Project "*may*" be more than minor.
- 4.22 A key driver for this dispute is whether oystercatchers are territorial. In his Memorandum dated 12 November, while Dr Uys accepted the Applicant's approach to avoiding effects for all other shorebirds he rejected it for oystercatchers on the basis they are territorial (so would not get the same benefits).
- 4.23 Dr Cockrem in his EIC:
- (a) explains that oystercatchers are territorial only during the breeding season;
  - (b) describes the background of oystercatchers in the area with one breeding pair and that the breeding population is based on Matiu/Somes, and Mākaro/Ward Islands with birds flying to the shore predominantly outside of the breeding season;
  - (c) details the potential effects of the Project on oystercatchers being loss of habitat, disturbance during construction and disturbance during operational use;
  - (d) proposes a study of habitat use and feeding behaviours of oystercatchers along the Shared Path before and after the Project;
  - (e) assesses the existing environment as "*a highly urbanised environment, with vehicles, and beach users (including with dogs) already in this area*"; and
  - (f) provides his opinion, with observations, that oystercatchers are territorial in the breeding season but not outside and can appear in flocks.
- 4.24 In relation to avoiding effects (over and above those relating to shorebirds above) on oystercatcher's Dr Cockrem recommended in his EIC (and the Applicant has accepted):
- (a) an additional protection area for oystercatchers at Sorrento Bay (focussed on a safe area to roost during storms); and

- (b) additional construction controls and limitations relating to both nesting and raising of chicks.

4.25 While Dr Cockrem considered these additional measures were sufficient he also recommended that dogs (which are required to be on lead within the Project area) be permanently excluded from a section of beach in front of the Bishops Park protection area and also in an area of Sorrento Bay (for oystercatchers). The Applicant has agreed to seek such changes to the dog control bylaws. Dr Cockrem also recommended a study as to behavioural changes which the Applicant has accepted. Both these matters are conditioned.

4.26 In his Addendum report of 9 December Dr Uys rejects the evidence and proposals of Dr Cockrem and maintains his position asserting that as oystercatchers are territorial birds the proposed measures are inappropriate and that Dr Cockrem has "*downplayed*" the effects of the loss of foreshore habitat on oystercatchers.

4.27 However, in his Addendum report Dr Uys clarifies his position agreeing with Dr Cockrem that oystercatchers are only territorial during the breeding season. That is an important change as it means that Dr Uys' rationale for differentiating oystercatchers to other shorebirds only applies during the breeding season.

4.28 In relation to the breeding Dr Uys retains his position that despite only the one territory based at Sorrento Bay the Project's loss of habitat to create territories is "*likely to affect the natural behaviour of the species.*" Dr Cockrem's EIC and rebuttal evidence (counsel will address this orally at the hearing) is that:

- (a) oystercatcher natural behaviour *may* be affected by the presence of people but that depends on what the people are doing (as Dr Cockrem explains if people are peaceful oystercatchers will continue with their natural behaviour in very close proximity); and
- (b) natural behaviour is already affected by the significant human modification to, and use of, the Project area and the behaviours those people display.

4.29 There is one oystercatcher breeding pair (and territory) in the Project area despite there being potential habitat for more (the area is 4.4km long). Dr Cockrem's opinion is that this is due to high levels of existing human interference. That is why the sole nest is on a rock slightly offshore so harder to access (but still vulnerable as shown by its recent abandonment due to a fisher using the rocks to fish).

- 4.30 Given the nest is not within the Project footprint, and there are no other nests in the Project area, Dr Cockrem's opinion is that this shoreline does not presently provide nesting opportunities for variable oystercatchers. But, as Dr Cockrem states in his EIC the new protection areas at Bishops Park and HW Shortt Park "*will provide breeding habitat and roosting areas for oystercatchers that will be safe from dogs and not subject to inundation by storms*".<sup>66</sup> Therefore, Dr Cockrem's opinion is that if oystercatchers decide to nest in the new protected areas the Project would benefit potential breeding of oystercatchers within the Project area by providing additional habitat that does not presently exist.
- 4.31 In relation to other matters raised by Dr Uys in his Addendum report Dr Cockrem:
- (a) records from his review of relevant literature that:
    - (i) population numbers recorded in the Wellington Region have been increasing since the 1970s, with the 2019 WMIL Report estimation of a breeding population of at least 728 variable oystercatchers (with an increasing trend of more than 10%);
    - (ii) variable oystercatchers are dispersed widely around the Wellington Region, with high local concentrations of oystercatchers on Mana, Matiu/Somes, and Mākaro/Ward Islands and these islands likely to be highly productive 'source populations' of variable oystercatchers; and
    - (iii) only a small part of the Project area (Eastbourne to the southern end of Day's Bay) has been included in Appendix Two of the Wildlife Management International 20 August 2019 report's list of coastal habitats of significance for indigenous birds (this report was commissioned by GWRC);
  - (b) provides a review of the effects of the Project using the EIANZ methodology (as used by Mr Overmars in his technical report) which concludes that the adverse effects of the Project on oystercatchers is "*low*", which is consistent with Dr Cockrem's EIC and his position that they are likely less than minor;
  - (c) recommends (despite the EIANZ criteria of low being categorised as not normally of concern) a number of avoidance and mitigation measures that the applicant has accepted;
  - (d) recognises the concerns of Dr Uys about the cumulative loss of shorebird habitat that has occurred around Te Whanganui-a-Tara /

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<sup>66</sup> Evidence of Dr Cockrem at paragraph 96.

Wellington Harbour but notes that in respect to oystercatchers the numbers counted around the Harbour coastline increased from 1975-77 to 1986-88 and that the numbers of oystercatchers counted in OSNZ surveys from Burdan's Gate to Days Bay and from Days Bay to Point Howard increased from surveys in the 1970s to surveys in the late 2000s. Therefore, notwithstanding the loss of shorebird habitat that has occurred over the years around the Harbour, the number of variable oystercatchers has been increasing for some time;

- (e) notes that flight initiation distances are not the same as the distances at which birds will continue with their natural behaviour in the presence of people. For example, birds may continue to feed in close proximity to people that are walking and not looking at the birds but if the people stop and look at the birds then the birds may move away;
- (f) considers that it is likely the proposed Sorrento Bay oystercatcher protection area will be of benefit to that breeding pair and their chicks; and
- (g) considers that the proposed study will provide information about oystercatchers that will contribute to the management of effects on birds in the Project area and may inform matters such as signage, other areas of potential dog exclusion and other potential opportunities that would assist oystercatchers (and other shorebirds) along the Eastern Bays.

4.32 Dr Cockrem also comments on the potential effects of climate change on oystercatchers in the Project area (relying on Dr Allis' EIC). The key issue will be a significant reduction in habitat as sea level rise. Further, the effect of storms on nesting birds will increase. These effects will place pressure on oystercatchers (and other shorebirds) within the Project area irrespective of the Project occurring. By providing protection areas higher up on beaches (and above storm tide effects) the Project provides protected habitat for oystercatchers to inhabit (and nest) that will not exist otherwise. This is an important benefit of the Project for oystercatchers.

4.33 Given the existing effects of human interference on oystercatchers in the project area Dr Cockrem recommends that the Applicant undertake a public education programme for oystercatchers to raise awareness and by doing so change behaviours.

4.34 The Applicant accepts that recommendation and will include a proposed condition that it spends up to \$15,000 on community education to increase the community's understanding of, and respect for, oystercatchers (and

coastal birds) in the Project area. Combined with the proposed signage this should provide a change in behaviours and greater respect being shown to all birds in the Project area.

- 4.35 Relying on Dr Cockrem's EIC and rebuttal evidence, and the matters listed above in relation to Dr Uys' opinions, the Applicant's position is that the evidence of Dr Cockrem should be favoured and, therefore, it is likely that the Project will have a less than minor effect on oystercatchers, and may have a positive effect.

#### *Intertidal and subtidal ecology*

- 4.36 Ms McMurtrie has assessed the potential effects of the construction and operation of the Project (as in, the replacement and creations of seawalls and revetment) on intertidal ecology, as well as the potential effects of the proposed beach nourishment on both intertidal and subtidal ecology.
- 4.37 Ms McMurtrie explains that the existing intertidal environment is highly modified, reflecting the fact that seawalls extend along 87% of the Project length. That will increase to 93% following construction of the Project.
- 4.38 Potential effects of construction and operation of the Project on intertidal ecology will be minimised through:
- (a) the chosen design minimising further encroachment, including through the choice of seawalls;<sup>67</sup>
  - (b) textures and created rockpool habitats being incorporated into the new seawalls and revetments, and existing rocky material being protected and replaced;
  - (c) the construction footprint being minimised; and
  - (d) measures being put in place (including through the CEMP) to provide for staged construction and to carefully control sedimentation and the release of contaminants during construction.
- 4.39 Ms McMurtrie's conclusion is that, with these measures in place, any effects to intertidal (benthic) ecology as a result of Project's construction will be 'less than minor'.<sup>68</sup> Ms McMurtrie highlights in particular that "*the inclusion of textures, depressions and rock pool habitats in the new seawalls reflects the global recognition of the ecological value of improving habitat complexity of manmade seawall structures.*"<sup>69</sup>
- 4.40 The proposed beach nourishment at Point Howard, Lowry Bay, and York Bay has the potential to have adverse effects on intertidal and subtidal

<sup>67</sup> Noting that design changes have been adopted to ensure no seawalls encroach into the subtidal zone.

<sup>68</sup> McMurtrie EIC at paragraph 20.

<sup>69</sup> McMurtrie EIC at paragraph 73.

ecology values in these areas over the short-term and medium-term. These potential effects have been carefully considered, and will be addressed through a range of measures that will be provided for in the Beach Nourishment Plan, including:

- (a) using materials similar to the existing beach sediment;
- (b) placing material in small volumes, during low tide and calm conditions, and away from emergent rocky areas at southern Lowry Bay;
- (c) protecting and replacing woody debris in the beach 'wrack line'; and
- (d) monitoring of the movement of beach nourishment materials, and an assessment of intertidal and subtidal beach fauna at least 12 months following completion of construction.

4.41 Ms McMurtrie concludes that with these measures in place, the effects of beach nourishment on the benthic intertidal and subtidal environment will be 'minor' or 'less than minor'.

4.42 The GWRC s42A report, drawing on the review comments by Dr Oliver, is in general agreement with Ms McMurtrie that the effects on intertidal and subtidal ecology will be appropriately managed to an acceptable level or will be no more than minor. To that end, the s42A report recommended a number of additional or amended conditions related to managing effects on those values. In response, a number of changes have been made in the conditions proposed by Ms Van Halderen. Ms McMurtrie and Ms Van Halderen respond in their evidence to the specific condition recommendations from the s42A report.

#### *Seagrass*

4.43 There are three areas of "At Risk-Declining" seagrass at Lowry Bay. Dr Matheson's evidence explains that a range of measures are proposed to avoid direct adverse effects on these areas of seagrass, particularly during construction and the proposed beach nourishment. In particular, the proposed conditions require the seagrass beds to be demarcated and avoided during construction, and for monitoring of the seagrass beds to be carried out before and after construction and beach nourishment (including as part of the Beach Nourishment Plan). Beach nourishment may ultimately prolong the existence of the seagrass beds in the face of sea level rise.

4.44 With these measures in place, Dr Matheson concludes that the Project will avoid adverse effects on seagrass. The s42A report concludes that effects

on seagrass "can be avoided or minimised such that adverse effects are likely to be less than minor".<sup>70</sup>

#### *Fish passage*

- 4.45 There are 14 piped stream outlets that will be intersected by the Project; 11 of the 14 will require small extensions. The proposed conditions require fish passage through these outlets to be maintained or improved, with a freshwater ecologist to be involved in the design of culvert extensions and alterations. The outlets will also be monitored for three years following the completion of construction, and any necessary remedial fish passage measures implemented by the applicant.
- 4.46 Beach nourishment has the potential to cause blockages of stream outlets. This potential effect will be addressed through the Beach Nourishment Plan, with initial placement of sediment to be at least 10m from outlets,<sup>71</sup> outlets to be monitored for a year following placement, and any blockages to be cleared.
- 4.47 Dr James' evidence is that, with these measures in place, the Project will have negligible to less than minor effects on fish passage.<sup>72</sup> The GWRC s42A report records agreement with Dr James' assessment; Dr James (and subsequently Ms Van Halderen) have adopted an amended form of the fish passage monitoring condition proposed by GWRC, as explained by Dr James in his evidence.

#### *Vegetation and gravel beach ecology*

- 4.48 Beyond the seagrass at Lowry Bay, threatened plant species are found within restoration and landscape planting areas along the Project alignment. The gravel beaches along the Project area where these plants are found are an endangered, naturally uncommon system, but of a moderate value given their small extent, modified condition, and recent significant losses to erosion.
- 4.49 To address effects on these plants, the vegetated parts of the gravel beach at Lowry Bay (and the one affected pingao plant) will be translocated to the beach nourishment area. Beach nourishment will sustain the gravel beach ecosystem at Point Howard, Lowry Bay and York Bay. Otherwise, potential effects on gravel beaches and plants will be managed through measures to be included in the CEMP and Beach Nourishment Plan.

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<sup>70</sup> At page 91.

<sup>71</sup> 10m has now been agreed as the appropriate distance by Dr James, Mr Reinen-Hamill and Ms Westlake for GWRC (refer to Dr James EIC at paragraph 59). This was incorrectly left at 20m in Ms van Halderen's EIC conditions version but will be changed to 10m.

<sup>72</sup> James EIC at paragraph 16.

- 4.50 The HCC s42A report concludes that, with conditions in place, the effects of the Project on vegetation and gravel beach ecosystems will be less than minor.<sup>73</sup>
- 4.51 The HCC s42A report, and a number of submissions, refer to the 'Atkinson Tree', a planted Pohutukawa Tree at York Bay beach. Mr Povall explains the detailed consideration given to the interaction between the Shared Path and the Atkinson Tree. Ultimately, the chosen design requires removal of the tree.<sup>74</sup> Replacement planting is proposed in the triangular piece of land behind the bus shelter in Taungata Road.

*Effects on natural character, landscape and visual values*

- 4.52 Ms Williams carried out a detailed assessment of the landscape, visual and natural character values associated with the Project area, and subsequently the effects of the Project on those values. Ms Williams categorised and evaluated the effects of the Project into biophysical effects, natural character effects, and effects on visual amenity effects.
- 4.53 Ms Williams considers that the Project is an appropriate development in this location in landscape, natural character and visual terms. Overall, Ms Williams considers that, provided the LUDP and BSUDPs are progressed and implemented as proposed the adverse landscape and visual effects of proposal will be no more than Moderate -Low, which is no more than minor in RMA terms.
- 4.54 The discussion of natural character, landscape and visual effects in the GWRC and HCC s42A reports focusses primarily on two matters:
- (a) the LUDP and BSUDP processes, and the effectiveness of those processes in terms of addressing the potential adverse effects of the Project (both reports); and
  - (b) the potential adverse effects of the safety barriers proposed for parts of the Shared Path.
- 4.55 The detailed design of the Project is intended to be finalised through the preparation of an overall LUDP, which will include a suite of BSUDPs. This process will involve input from a range of experts, consultation with the MWSG, HCC (Parks and Reserves), Residents' Associations and the Eastbourne Community Board, and certification by GWRC. Overall, these design plans will progress and finalise the Project design, in general accordance with the Design Features Report and other application documents.

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<sup>73</sup> At page 33.

<sup>74</sup> As Mr Povall explains, an arborist has investigated the Atkinson Tree and advised that the tree is in poor health and concluded that it was unlikely to survive relocation to another location.

4.56 The LUDP will respond in particular to the design principles set out in the Design Features Report and relevant industry standards. Ms Williams explains that:<sup>75</sup>

*"All design principles focus on 'good design' outcomes that will reduce adverse effects on natural character and visual amenity. For example, principles include: consistency in the location and design of elements and use of materials; maintaining a focus on the seashore and natural environment; avoidance of visual clutter; and a design that recognises the individual character of each bay."*

4.57 The BSUDPs provides for a specific design response to each bay within the Project area and will require the development of a design protocol (through consultation with the local community) for each bay. As Ms Williams explains:<sup>76</sup>

*"This means, for example, that the very urban Lowry Bay community may decide that seating opportunities, signage and storyboards are important, in contrast to the wilder, less modified Sunshine Bay where the community may focus more on naturalised planting areas and to Windy Point where specific beach access points, safety and shelter on the shared path is important."*

4.58 The Councils' appointed peer reviewer, Mr Head, is concerned that the LUDP and BSUDP process does not provide 'certainty' as to design outcomes. Mr Head, and subsequently the s42A reports, recommend condition amendments in respect of the process, and specific outcomes. Taking those amendments into account, the GWRC s42A report concludes that *"adverse effects on natural character are likely to be no more than minor"*, while the HCC s42A report concludes that *"any overall effects on biophysical effects are less than minor and effects on visual amenity might range from less than minor to minor but that is contingent on the LUDP and BSUDP process so a firm conclusion cannot be made."*

4.59 Ms Williams includes a detailed response to the condition amendments recommended in the s42A reports; some but not all of those amendments have been accepted in Ms Van Halderen's updated set of proposed conditions.

4.60 The proposed LUDP and BSUDP framework is a common, tested and appropriate way to provide for the final, detailed design to be developed in a manner to will address potential natural character, landscape and visual effects.

4.61 The provision of safety barriers along the Shared Path has been carefully considered, reflecting safety considerations but also the potential for adverse visual effects. Mr Povall explains that safety barriers are proposed along up to 800m of the Shared Path, in locations where the fall height

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<sup>75</sup> At paragraph 69.

<sup>76</sup> At paragraph 73.

between the path level and the adjacent beach or headland would be close to 1.0m vertical height or greater.

- 4.62 Ms Williams' view is that safety barriers will create only a small increase in adverse effects on natural character and visual amenity in those areas where they are located. Where railings are required, they will be integrated into the Shared Path layout through the more detailed design. Overall, adverse effects on natural character in bays where safety barriers will be installed will be Moderate - Low.
- 4.63 The Applicant does not rely directly on the 'permitted baseline' referred to in the HCC s42A report in respect of safety railings. That said, the fact that safety railings would be a permitted activity does reflect that they are generally considered appropriate features in a regionally significant transport corridor such as Marine Drive (and occur at many places along the coast in the Wellington region). When considered together with the detailed consideration given to the need for and location of safety barriers, and Ms Williams' assessment of their effects, the Applicant's position is that the provision of safety barriers as proposed is appropriate.

*Effects on existing recreation amenity and public access*

- 4.64 As discussed below, but not relevant to this section, the Project will bring significant benefits in the form of improved access to and along the coastal environment, and associated recreation benefits.
- 4.65 The potential effects of the Project on existing recreation activities and amenity, and access to this part of the coast, have been carefully considered and addressed. Mr Greenaway provides a summary of the potential effects of the Project on recreation activities by area. The primary potential effect is the loss of useable beach area, particularly at Point Howard Beach, Lowry Bay and York Bay. Beach nourishment at these locations is proposed to address this effect, to be managed via a Beach Nourishment Plan. Mr Reinen-Hamill describes the beach nourishment design and process in his evidence. The potential adverse effects of beach nourishment on other values are addressed elsewhere in these submissions.
- 4.66 The narrowed path width (to 2.5m) at Sorrento Bay, northern Lowry Bay, Mahina Bay and Sunshine Bay appropriately minimises beach loss at those locations. Mr Greenaway supports the approach to path width as appropriately balancing recreation considerations.
- 4.67 While some submitters are concerned about difficulties accessing the coast following construction of the Project, Mr Povall explains that access will in fact be improved (including through additional more formal access steps and ramps). The s42A reports note that boat ramps will be provided in an improved form in their existing locations, and that (subject to interruptions

during construction), effects on boating activities will be less than minor. The HCC s42A report adds that the loss of some informal carparking will be mitigated by 'formalising' existing carparking at Point Howard and Windy Point and is an acceptable consequence of the Project.<sup>77</sup>

- 4.68 There will be some temporary adverse effects on coastal recreation during construction, which will be managed via the CEMP. Mr Greenaway notes the end result, though, will be the provision of a significant community asset.<sup>78</sup>
- 4.69 Overall, Mr Greenaway concludes that the net benefits of the Project for recreation will be positive (see below) and substantial.<sup>79</sup> Both s42A reports conclude that, with the successful implementation on beach nourishment, effects on recreation amenity will be less than minor, and that access to the beaches and coastal marine area will be maintained.

#### *Effects on coastal processes*

- 4.70 Dr Allis considers in detail the effects of the Project on the existing environment, in terms of coastal processes. These effects are limited by the nature of the Project, which primarily amounts to modifications and improvements to existing seawall structures. Overall, Dr Allis' assessment is that the Project will have a no more than minor effect on coastal processes, provided that the detailed design process addresses potential effects in line with design plans and the proposed conditions.
- 4.71 The GWRC s42A report, relying on the advice of Dr Dawe, considers coastal effects processes in the following categories:
- (a) reclamation and encroachment into the CMA;
  - (b) fine sediment generation;
  - (c) hydrodynamic changes and sediment transport effects during construction;
  - (d) long-term hydrodynamic changes and sediment transport effects;
  - (e) effects on older and adjacent seawalls; and
  - (f) edge effects at seawall transitions and tie-ins.
- 4.72 Taking these categories in turn:
- (a) There will be a small encroachment into the Coastal Zone,<sup>80</sup> where the new structures extend beyond the existing structures. This encroachment amounts to 0.55ha, or 0.7% of the Eastern Bays

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<sup>77</sup> At page 26.

<sup>78</sup> Greenaway EIC at paragraph 40.

<sup>79</sup> Greenaway EIC at paragraph 39.

<sup>80</sup> Defined by Dr Allis as the crest of the existing seawall, out to 200m offshore.

Coastal Zone. This loss of area that will no longer be available for coastal processes to occur has been assessed by Dr Allis as having a negligible to no more than minor effect, relative to the Eastern Bays Coastal Zone. Taking into account the proposed beach nourishment, Dr Dawe agrees that effects will be no more than minor.<sup>81</sup>

- (b) Dr Allis' assessment is that the impact of fine sediment generation during construction on coastal processes will be limited due to the small lengths of the Project under construction at any one time, and most works being above high tide. Fine sediment generation will be within the range of natural Wellington Harbour turbidity levels. With the proposed conditions in place, Dr Dawe agrees that these effects will be no more than minor.
- (c) There will be some unavoidable localised hydrodynamics and sediment transport effects during construction, associated with the temporary structures needed to enable construction at all tides. These effects will be managed by limiting the areas that will be constructed at any one time; once the temporary structures are removed, conditions will promptly revert to their pre-construction state.
- (d) The seawalls and rocky revetments have the potential to alter hydrodynamic and sediment transport processes. Mr Povall and Dr Allis explain in their evidence the considerations that have informed the design of these structures, which will be a modernised and improved version of the existing structures. The proposed conditions provide for the final detailed design of the structures to be certified by GWRC, and for "as built plans" to be certified by a suitably qualified engineer. Dr Allis concludes that the hydrodynamic and sediment transport effects will be no more than minor. Dr Dawe agrees, with the GWRC s42A report highlighting the likely benefit of greater sediment retention at the beaches through the proposed curved seawalls.
- (e) The potential for the existing old seawalls to be adversely affected during the construction process (as in, existing seawalls being compromised during the process of sequentially constructing the new seawalls) will be managed by the proposed bay-by-bay staging, and by limiting the areas of seawall under construction at any one time.

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<sup>81</sup> At page 66.

Dr Dawe agrees that this proposed phasing will appropriately manage the potential effects on the existing seawalls during construction.<sup>82</sup>

- (f) Potential effects on coastal processes at transitions between seawall types, and tie-ins between seawalls and rocky headlands, will be addressed through appropriate 'tapering' at these transition points. Again, the proposed conditions provide for the final detailed design and "as built plans" to be certified. Dr Dawe and the GWRC s42A report express general comfort in respect of this issue, but propose additional conditions providing for the structures built to be maintained so that any CMA erosion, scour or instability attributable to the structures/works to be repaired by the consent holder; and that the structural integrity of the structures remain sound in the opinion of a Professional Chartered Engineer. Dr Allis' view is that those conditions are not necessary, noting HCC have a long history of active management of shoreline structures in the Eastern Bays, and pointing to the certification processes already proposed. Those proposed conditions have not been included in the version attached to Ms van Halderen's evidence.

#### *Water quality and the Waiwhetu aquifer*

- 4.73 The GWRC s42A report identifies potential (coastal) water quality effects arising during construction, associated with the release of cement-contaminated water, as well as disturbance and discharges causing increased suspended sediment and turbidity. Measures to address the risk of the release of cement-contaminated water, and more generally to manage disturbance and discharges during construction, are incorporated into the proposed construction methodology and conditions, and will be set out in the CEMP. The CEMP will be provided to GWRC and HCC for certification prior to construction commencing.
- 4.74 The GWRC s42A report expressed comfort with that overall approach and recommended additional conditions which have been included.<sup>83</sup> The report confirms that, subject to the effective implementation of the conditions, water quality effects will be acceptable.
- 4.75 The GWRC s42A report recommended that the CEMP be required to include a specific methodology for managing effects on the Waiwhetu aquifer where excavation or the seawall foundation would exceed 2.5m below ground level. That condition has been included in Ms van Halderen's

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<sup>82</sup> The GWRC s42A report proposed a condition requiring an outline construction programme to be provided as part of the CEMP; that condition has been included in Ms van Halderen's updated proposed conditions (condition GC.7(b)).

<sup>83</sup> Condition GC.7.

updated set of conditions.<sup>84</sup> With that condition in place, the GWRC s42A report concludes that potential effects on the aquifer will be appropriately managed.<sup>85</sup>

#### *Other Construction effects*

- 4.76 A number of the effects discussed above will arise during construction activities. In addition to those effects, the GWRC s42A report addresses construction-related effects that have the potential to impact residential and recreation amenity, covering noise and vibration and dust. Similarly, the HCC s42A report considers construction related effects 'above the seawall', including effects on users of Marine Drive, noise and vibration, dust, and temporary visual effects.
- 4.77 Both reports express comfort with the conditions framework proposed to address these potential effects, with the HCC s42A report noting in particular the CEMP and Traffic Management Plan.<sup>86</sup> Both reports recommended one change to the relevant conditions, so that the requirement for construction noise levels to comply with the relevant criteria from NZS6803:1999 is not subject to a "*as far as practicable*" proviso. In response, Ms van Halderen's updated conditions delete the "*as far as practicable*" proviso, and instead provide that where the relevant criteria cannot be met, a Noise Management Plan will be produced as part of the CEMP in respect of that exceedance.<sup>87</sup> This provides appropriate certainty that any exceedance of NZS6803: 1999 will be addressed.

#### *Overall assessment – adverse effects are no more than minor*

- 4.78 Overall, the adverse effects of the Project have been avoided or minimised to the level where, relying on the Applicant's evidence and the majority of the GWRC and HCC s42A reports, there are none that are more than minor. As set out above there is a dispute between the two avian experts as to the potential adverse effects on oystercatchers. The Applicant relies on the evidence of Dr Cockrem in relation to oystercatchers and his opinion that the adverse effects are less than minor.

#### **Section 104D - objectives and policies of RCP, PNRP and LHDP (limb 2)**

- 4.79 Although section 104D only requires that one of the two limbs of the 'gateway' test be met (and, as above, the Applicant's position is that any adverse effects of the Project on the environment are no more than minor), for completeness the Project has also been designed to ensure that it is not contrary to the relevant objectives and policies of the RCP, PNRP and LHDP, thus meeting both limbs of s104D.

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<sup>84</sup> Condition GC.7(m)(xi).

<sup>85</sup> At page 99.

<sup>86</sup> At page 29. The report refers to the peer review by Mr Wanty in respect of construction traffic in reaching that conclusion.

<sup>87</sup> Condition GC.8(h).

- 4.80 It is critical for the Panel to remember, as set out above, that when undertaking this assessment that the words "*contrary to*" provide a higher test of repugnancy, not mere inconsistency and also that the provisions of the plan as a whole should be assessed (reading in directive wording as appropriate).
- 4.81 Also, important scene setting is the question: what does the word "avoid" require? As set out in Memorandum 6 (and Ms van Halderen's evidence) (footnotes omitted):

8. As GWRC is aware, policies using the word "avoid", as is the case with Policy P39A(a) of the PNRP (Decisions Version) and Policy 11(a) of the NZCPS, have been the subject of considerable judicial scrutiny. The Supreme Court has observed, albeit in the context of Policies 13 and 15 of the NZCPS, that minor or transitory effects are acceptable within the context an avoidance policy:

"(...) It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."

9. We understand that this approach is broadly consistent with GWRC's position as expressed during the meeting on 22 January 2020 that consents can only be granted "if effects on threatened biodiversity are transitory or (less than) minor."

10. Further, the Environment Court in *Royal Forest and Bird Protection Society of New Zealand v Auckland Council* endorsed the approach of the Court of Appeal in *Man O' War*, as follows:

"The Court of Appeal also noted, with respect orthodoxically, that the requirement to "avoid" adverse effects is contextual, so that whether any new activity or development would amount to an adverse effect must be assessed in both in the factual and broader policy context."

11. The consideration of avoidance therefore also requires context-specific queries which relate to the particular species affected, use and vulnerability of habitat, inevitable effects on the species or habitat at issue (whether those are generated by natural or man-made causes, such as from sea-level rise or existing infrastructure), and enhancement resulting from development.

## *RCP*

- 4.82 Appendix S of the AEE provides a detailed assessment of the Project against the relevant provisions of the RCP.
- 4.83 Mr Watson's s42A report position is that the Project is consistent with some of the relevant provisions in the RCP.<sup>88</sup> However, he considers that due to possible effects on oystercatchers (relying on Dr Uys) the Project:

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<sup>88</sup> GWRC s42A report at pages 127–133 (section 13.3.2).

- (a) may be inconsistent with Objective 4.1.4 and Policy 4.2.10 due to a loss in foraging habitat and feeding resources for oystercatchers;<sup>89</sup>
- (b) is inconsistent with Objective 5.13 because of a loss of breeding and foraging habitat for 'At Risk' oystercatchers;<sup>90</sup> and
- (c) may be inconsistent with part of Policy 6.2.2.<sup>91</sup>

He also recommends that further information be provided by the Applicant on oystercatchers to determine the Project's consistency with Policies 5.2.1, 5.2.5 and 6.2.2.<sup>92</sup> (That information has been provided in Dr Cockrem's rebuttal evidence and is addressed above.)

4.84 The s42A Addendum Report refers to Objectives 4.1.2 and 5.1.3 and Policies 5.2.5 and 6.2.2 as being in issue.<sup>93</sup> Mr Watson maintains his position that the Project is not "*entirely*" consistent with the objectives and policies of the RCP solely<sup>94</sup> because potential effects on oystercatchers may be more than minor. It does not appear that Mr Watson recognised the importance of Dr Uys' change in position on territorial behaviours of oystercatchers (addressed above) in making this conclusion. However, oystercatchers remain the sole issue of material disagreement and are the focus of these submissions.

4.85 Mr Watson does not explain his justification for adding an additional test by including the word "*entirely*". But that is not the correct legal test (as set out above). That approach has affected Mr Watson's entire assessment of the RCP (and the NZCPS addressed below) and the Panel must carefully assess any conclusions reached as a result of taking such an approach.

4.86 The Applicant has provided evidence of Dr Cockrem that demonstrates that effects on oystercatchers can be avoided so they are no more than minor. That evidence is extensively addressed above and while relied on is not repeated here. More explanation on the provisions in the RCP identified in the s42A report and the s42A Addendum Report is provided below.

#### Objective 4.1.2

4.87 As set out in Appendix S of the AEE, the Applicant's position is that the Project is consistent with this objective. That position remains. It is unclear why Mr Watson considers the project to be "*inconsistent*"<sup>95</sup> with this objective as he provides no reasoning in his assessment.<sup>96</sup> The list of matters are each separated by the word "*or*". Therefore, only one of the

<sup>89</sup> GWRC s42A report at page 128.

<sup>90</sup> GWRC s42A report at page 131.

<sup>91</sup> GWRC s42A report at pages 131–132.

<sup>92</sup> GWRC s42A report at pages 131-132.

<sup>93</sup> At paragraph 12.

<sup>94</sup> GWRC s42A report at pages 151 and s42A addendum report at paragraph 12.

<sup>95</sup> GWRC s42A report at section 13.3.4.

<sup>96</sup> GWRC s42A report at pages 127-128.

matters needs to be achieved to be 'consistent' with the objective. Further, it appears that Mr Watson considers this to be an avoidance objective. It clearly is not. Irrespective, relying on Dr Cockrem's evidence addressed in detail above it is submitted that the Project is consistent with all the matters listed in this objective even adopting Mr Watson's (incorrect) approach.

#### Objective 4.1.4 and Policy 4.2.10

4.88 Mr Watson's concern with these provisions is that the Project's potential effects on oystercatchers may be more than minor and may not "safeguard" the life supporting capacity of breeding and foraging habitat for oystercatchers, potentially leading to an overall decline in oystercatcher numbers.<sup>97</sup> It is unclear where Mr Watson gets his reference to "safeguard" from as it is not in the objective (nor the policy). It is important when interpreting objectives and policies that the interpretation occurs with a careful consideration of the actual words used. The word used in the objective is "retain". It is submitted that is a softer wording than safeguard. Arguably too the focus of the objective and policy is on the resource rather than the species (as set out in the explanation to the policy). Policy 4.2.10 uses the word "protect" although Mr Watson does not appear to provide any assessment of the policy.

4.89 To be succinct the Applicant relies on Dr Cockrem's EIC and rebuttal evidence as summarised above. Dr Cockrem notes that there is one variable oystercatcher breeding territory in the Project area that could be affected by the Project.<sup>98</sup> However, he also states that:<sup>99</sup>

*"the outcome of each year of breeding attempts within this territory does not have a significant effect on the total population of oystercatchers that use the Eastbourne foreshore."*

4.90 Further, in his rebuttal evidence Dr Cockrem notes that presently successful breeding for that pair faces significant natural and human induced challenges (indeed this year the nest has been abandoned) by existing public use of the area. Despite this the population of oystercatchers is increasing.

4.91 The new oystercatcher protection area at Sorrento Bay will protect and retain a safe roosting location for the pair of oystercatchers in this breeding territory and for their chicks.<sup>100</sup> The other protection areas provide the opportunity for similar outcomes. Dr Cockrem's rebuttal evidence is that the ability of the area to retain oystercatchers will not be lost by the Project and overall the Project will provide a "Win/Win" outcome for all birds as sought by Mr Rumble in his submission. The Applicant's position is that for those reasons the Project is consistent with this objective and policy.

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<sup>97</sup> At page 128.

<sup>98</sup> Evidence of Dr Cockrem at paragraphs 11, 34, 85–86.

<sup>99</sup> Evidence of Dr Cockrem at paragraph 97.

<sup>100</sup> Evidence of Dr Cockrem at paragraphs 20, 70 and 97.

### Objective 5.1.3

- 4.92 At face value "*not allow*" is highly directive. But it relates to "*particularly high conservation values*". A list of matters to be included is provided. But when applying the objective, Policy 5.2.5 makes it clear that it is significant adverse effects that will not be allowed.
- 4.93 While the Project will include encroachment into breeding and foraging habitat of oystercatchers this encroachment has been significantly reduced. In her evidence Ms van Halderen refers to various measures taken to reduce the extent of encroachment onto the foreshore, and the establishment of the protection areas (including at Sorrento Bay specifically for oystercatchers).<sup>101</sup>
- 4.94 Dr Cockrem's position is that the actual loss of feeding opportunities for oystercatcher will be less than the estimated area because some of the mapped habitat is bare rock with no food for shorebirds.<sup>102</sup> Furthermore, the protection area will enable the oystercatchers to forage (roost and breed) throughout the year without the threat of dogs.<sup>103</sup> Relying on Dr Cockrem's EIC and rebuttal evidence (addressed above) the Applicant's position is that the Project will not have significant adverse effects on such areas and is consistent with the objective and policy.

### Policy 5.2.1

- 4.95 This policy recognises that reclamations create adverse effects and requires a balancing of effects both positive and negative. It appears that Mr Watson wants more information on the adverse effects (oystercatchers) but provides no assessment of the balance of adverse effects with the positive effects which the policy requires. While at face value this policy reflects an overall broad judgment approach (and adds nothing to it) the explanation to the policy is helpful. It reads:

It is assumed that all areas of foreshore and seabed in the coastal marine area are important, and therefore any loss of these areas will have adverse effects. By definition, reclamation and draining of foreshore or seabed will remove land from the coastal marine area, which is a finite resource, and Policy 5.2.1 seeks to ensure that the resulting adverse effects are recognised in decision making. The significance of the adverse effects will depend on the size of the reclamation and the nature of the site to be reclaimed.

- 4.96 The effects of the reclamation have clearly been recognised. The reference to all foreshore and seabed as being important, and the significance of the adverse effects depending on size of reclamation and the nature of the areas to be reclaimed, is also instructive. The reclamation areas for the Project have been reduced as far as practicable and the

<sup>101</sup> Evidence of Ms van Halderen at paragraphs 167–172.

<sup>102</sup> Evidence of Dr Cockrem at paragraphs 14, 44 and 79.

<sup>103</sup> Evidence of Dr Cockrem at paragraphs 65, 96 and 98.

nature of the site must be read in light of its context. That context is set out in the EIC and rebuttal evidence of Dr Cockrem. Relying on his evidence there is no significant adverse effect on oystercatchers. Then, applying the policy, the positive effects are significant. The 'balance' clearly lies on enabling the Project and the Project is consistent with the policy.

#### Policy 6.2.2

4.97 This policy seeks to not allow structures where there will be adverse effects (or significant adverse effects) on listed matters. Again, Mr Watson's concern is loss of foraging and feeding resources for oystercatchers will lead to a decline in breeding. Again, the Applicant relies on the EIC and rebuttal evidence of Dr Cockrem (as set out above and not repeated here for brevity).

#### Other relevant provisions of the RCP

4.98 The relevant provisions of the RCP are set out in detail in Appendix S to the AEE. There are important policies within the RPS that strongly support the Project including in relation to public access,<sup>104</sup> natural hazards,<sup>105</sup> cultural,<sup>106</sup> and structures.<sup>107</sup>

4.99 Mr Watson's position is that the Project is consistent with the relevant provisions in the RCP (including in relation to reclamation)<sup>108</sup> apart from potential effects on oystercatchers that may be more than minor. He therefore considers (applying his "*entirely*" consistent test<sup>109</sup>) that the Project is/may be inconsistent with those provisions addressed above.

4.100 The Applicant's position is that the Project (relying on the EIC and rebuttal evidence of Dr Cockrem and the evidence of Ms van Halderen) is consistent both with the individual provisions of the RCP and the RCP as a whole.

#### *PNRP*

4.101 The Project has been carefully designed and developed with expert assistance to ensure that adverse effects on indigenous biodiversity have been avoided, in line with Policies P39A(a), P40 and P41.

4.102 Mr Watson's position is that the Project is consistent with the relevant provisions in the PNRP,<sup>110</sup> except in relation to Policy P31,<sup>111</sup> and may be

<sup>104</sup> Objective 4.1.8 and policies 4.2.15, 4.2.16 and 4.2.20.

<sup>105</sup> Objective 4.1.11.

<sup>106</sup> Objectives 4.1.13 and 4.1.14.

<sup>107</sup> Objective 6.1.1 and Policy 6.2.1.

<sup>108</sup> GWRC s42A report at pages 127–133 (section 13.3.2).

<sup>109</sup> GWRC s42A report at page 151.

<sup>110</sup> GWRC s42A report at pages 133-142 (section 13.3.3).

<sup>111</sup> GWRC s42A report at pages 136-137. Referring to Policy P31(e).

contrary to Objective O35 and Policies P39A and P40, all solely due to effects on oystercatchers.<sup>112</sup>

4.103 Mr Watson's s42A Addendum Report maintains his position that the Project may be contrary to the objectives and policies of the PNRP requiring avoidance and protection of significant indigenous biodiversity values, because potential effects on oystercatchers may be more than minor. In particular, he refers to Objective O35 and Policies P31(e), P32, P39A, P40 and P41.<sup>113</sup>

4.104 In her evidence Ms van Halderen responds to Mr Watson's concerns around oystercatchers and Objective O35 and Policies P31, P39A and P40. Ms van Halderen's position is that the additional measures proposed by Dr Cockrem for oystercatchers make the Project consistent with the avoidance policies.<sup>114</sup> Dr Cockrem also concludes in his EIC and rebuttal evidence (addressed above) that the adverse effects of the Project on oystercatchers, when all of the measures proposed to avoid and minimise effects are taken into account, are likely to be less than minor.<sup>115</sup>

#### Policy P31(e)

4.105 Mr Watson's position is that the Project may be inconsistent with Policy P31(e) because Dr Uys is concerned that the Project cannot maintain foraging habitat for oystercatchers which may affect breeding success.<sup>116</sup>

4.106 Policy 31(e) reads:

... Critical habitat for indigenous aquatic species and indigenous birds

... (e) maintain or restore habitats that are important to the life cycle and survival of indigenous aquatic species and the habitats of indigenous birds in the coastal marine area, natural wetlands and the beds of lakes and rivers and their margins that are used for breeding, roosting, feeding, and migration, and

4.107 The Applicant relies on the EIC and rebuttal evidence of Dr Cockrem (addressed above and relied on but not repeated here) that that habitats important to oystercatchers will be maintained and restored in particular through the protection areas (and indeed the habitats will be enhanced in enabling oystercatchers to respond to the effects of climate change).

#### Policy P32

4.108 In his s42A Addendum Report<sup>117</sup> Mr Watson refers to this policy as an example of one which the Project "may" be contrary too (without providing any assessment – especially given the contrary position in his s42A report

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<sup>112</sup> GWRC s42A report at page 138.

<sup>113</sup> At paragraph 13.

<sup>114</sup> Evidence of Ms van Halderen at paragraphs 128–131, 178, and 242–243.

<sup>115</sup> Evidence of Dr Cockrem at paragraphs 96–98.

<sup>116</sup> At page 137.

<sup>117</sup> At footnote 4.

in which he says "*I consider the proposal is consistent with Policy 32*"<sup>118</sup>). The Applicant agrees with Mr Watson's position in his s42A report and considers that the Project is consistent with Policy 32.

Objective 35 and Policies P39A, 40 and 41

4.109 Objective 35 requires protection of ecosystems and habitats with significant indigenous biodiversity values are protected, and where appropriate restored to a healthy functioning state.

4.110 For the Project these policies need to be read as a package with:

- (a) Policy 39A providing direction as to how the indigenous biodiversity values of aquatic ecosystems, habitats and species within the CMA are to be protected (giving effect to Policy 11(a) of the NZCPS). Only Policy P39A(a) is relevant to the Project.<sup>119</sup> It requires the avoidance of adverse effects associated with use and development on a series of special and/or vulnerable ecosystems, habitats and species.
- (b) Policy P40 seeks to protect and restore ecosystems and habitats with significant indigenous biodiversity values, in this case Schedules F2c and F5.
- (c) Policy 41 sets out the mitigation hierarchy for effects relating to Policy 40, but for those ecosystems/habitats in Policy 40(b) to (d) which are identified and managed by Policy 39A(a) the only option is to avoid effects.

4.111 Again, as explained above, the only remaining matter of dispute relates to oystercatchers (Schedule F2c). In her evidence Ms van Halderen explains that the Project has been carefully designed so that it is consistent with Objective 35 among other objectives and policies.<sup>120</sup>

4.112 Avoidance has been focussed by reducing the extent of encroachment into the foreshore as set out in Ms van Halderen's evidence.<sup>121</sup> As noted in the evidence of Ms van Halderen, some of the Schedule F2c habitat includes existing seawalls and rock revetment.<sup>122</sup> This will be replaced by the Project but with a textured seawall that will provide improved habitat compared to the areas of already identified significant habitat. In addition to reducing encroachment into the Schedule F2c habitat, the Project will provide for the creation of new fenced (and pest managed, including outside such areas) protection areas for shoreline foragers (including oystercatchers) and the oystercatcher protection area. The total combined

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<sup>118</sup> Page 137.

<sup>119</sup> Policy P39A(b) relates to the ecosystem values of estuaries, which are not relevant to the Project.

<sup>120</sup> Evidence of Ms van Halderen at paragraphs 199 and 243.

<sup>121</sup> At paragraph 167.

<sup>122</sup> Evidence of Ms van Halderen at paragraph 177(a).

area of the four sites is 22,100m<sup>2</sup> (of which the majority relates to protected habitat for shorebirds as set out in Dr Cockrem's rebuttal evidence). Beach nourishment will provide appropriate foreshore areas for slightly longer before the "*insidious*"<sup>123</sup> effects of climate change strike in the next 10-20 years. Once climate change effects do strike the textured seawall and protection areas will provide additional habitat. Construction controls placed on works near nests (including the sole oystercatcher nesting area) and the amount of works that can occur at any one time assist in avoiding adverse effects of construction activities.

4.113 The Applicant relies on the EIC and rebuttal evidence of Dr Cockrem (addressed above and not repeated in detail here) and Ms van Halderen that the Project is consistent with these policies.

#### Plan as a whole

4.114 The relevant provisions of the PNRP (decision version) are set out in detail in Table 1 to memorandum 3 dated 19 August 2019. While appeal versions dated 8 October 2020 and 20 November 2020 are now relevant there have not been any material changes to the relevant provisions.

4.115 There are important policies within the RPS that strongly support the Project including in relation to cultural (including Māori relationships),<sup>124</sup> beneficial use and development (including regionally significant infrastructure),<sup>125</sup> recreation amenity and public space.<sup>126</sup>

4.116 Mr Watson's position is that the Project is consistent with the relevant provisions in the RCP (including in relation to reclamation)<sup>127</sup> apart from those addressed in detail above due to effects on oystercatchers.<sup>128</sup> Again, as addressed in detail above, relying on the EIC and rebuttal evidence of Dr Cockrem, Ms van Halderen and the Applicant take a different position.

4.117 Of relevance to the Panel, Policy P29 requires the Panel to have "*particular regard*" to the potential for climate change to, amongst other matters, threaten biodiversity or exacerbate natural hazards. Coastal erosion, storm surges, and sea level rise addressed in the evidence of Dr Allis and Mr Povall are considered by Mr Watson in his assessment of the Policy.<sup>129</sup> But neither the s42A report (nor its addendum report), nor the information and the Addendum report from Dr Uys, mention the potential for climate change to threaten biodiversity. As set out above this is a significant issue for the Eastern Bays and the Project.

<sup>123</sup> *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC) at [225].

<sup>124</sup> Objectives 1, 14 and 15 and Policies 1, 17 and 20.

<sup>125</sup> Objectives 9, 10 and 12 and Policies 9, 10 and 12.

<sup>126</sup> Objective 55 and Policy 133.

<sup>127</sup> GWRC s42A report at pages 133-142 (section 13.3.3).

<sup>128</sup> GWRC s42A report at pages 138 and 152.

<sup>129</sup> At pages 135-136.

4.118As Dr Cockrem has set out in his EIC and rebuttal evidence the protection areas will provide safe habitat as sea level rises, the textured seawalls may enable additional foraging habitat and the beach nourishment will provide additional habitat until it too is ultimately lost to sea level rise. The oystercatcher protection area is specifically designed to protect oystercatchers during storm events. The Applicant's position is that this is an important policy in relation to the Project – both in the reasons for it being advanced and in the measures for oystercatchers that it offers.

4.119The Applicant's position is that the Project (relying on the EIC and rebuttal evidence of Dr Cockrem and the evidence of Ms van Halderen) is consistent both with the individual provisions of the PNRP and the PNRP as a whole.

#### *LHDP*

4.120Ms van Halderen's position is that the Project is consistent with the relevant objectives and policies in the LHDP.<sup>130</sup> Mr Kellow's position is that the Project is consistent with the relevant provisions in the LHDP.<sup>131</sup> However, due to the lack of detail design he could not reach a firm conclusion on whether the project is contrary to Policy a) of Objective 7A 1.2.1.<sup>132</sup> The Applicant's position is that it is common practice not to have detailed design on specific matters and that the proposed LUDP and BSUDP, supported by the evidence of Ms Williams, provide sufficient certainty that the appearance of safety barriers will be appropriately managed to ensure that their adverse effects are no more than minor on the amenity values of adjoining residential areas.

4.121The Applicant's position is that the Project (relying on the EIC of Ms Williams and Ms van Halderen) is consistent both with the individual provisions of the LHDP and the LHDP as a whole.

#### **Conclusion on s104D**

4.122Overall, it is submitted that the Project achieves both limbs of the s104D gateway test (even if not reading the plan as a whole). The sole issue relates to oystercatchers and the Applicant relies on the evidence of Dr Cockrem.

#### **Section 104**

##### *Positive effects*

4.123Consideration of positive effects is part of the section 104 assessment via section 104(1)(ab), but it is also a central component of the RMA's sustainable management purpose, which requires resources to be

<sup>130</sup> Evidence of Ms van Halderen at paragraph 189.

<sup>131</sup> HCC s42A report at pages 46–53 (section 8.3).

<sup>132</sup> HCC s42A report at pages 48–49.

managed in a way that "*enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety*".<sup>133</sup>

4.124 In this case, there are myriad significant social, cultural, recreational, economic and health and safety benefits and the evidence demonstrates that the Project presents an important opportunity for the district and region.

4.125 In brief, the Project will:

- (a) improve safety for pedestrians and cyclists;
- (b) significant increase in the physical recreation uptake in the Eastern Bays community;
- (c) increase pedestrian and cyclist numbers in the Eastern Bays area, which in turn will:
  - (i) reduce reliance on private vehicles and vehicular emissions;
  - (ii) reduce congestion in the local road networks; and
  - (iii) improve physical wellbeing through increased exercise;
- (d) bring communities together by improving the connection to the water and the ability to 'promenade' along the water's edge and reducing social exclusion currently experienced by some Eastern Bays residents;
- (e) increase recreational opportunities within the Eastern Bays and wider by providing links to other district cycling or walking networks, and the wider transport network, for commuting and recreational purposes;
- (f) improve the resilience of Marine Drive, which is currently subject to erosion from the sea, and reduce the incidence of road closures during storm events;
- (g) respond to ongoing sea level rise as a result of climate change;
- (h) raise cultural and environmental awareness through the use of signage and storyboards; and
- (i) provide economic benefits to the district and region.

#### Resilience and coastal processes benefits

4.126 Marine Drive provides the only road, infrastructure and utilities connection to the Eastern Bays community. Both Marine Drive itself, and the main outfall sewer pipeline located in the road corridor of Marine Drive, are

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<sup>133</sup> RMA, section 5(2).

identified<sup>134</sup> as regionally significant infrastructure. Other key services located within the Marine Drive road corridor include telecommunications (which are also regionally significant infrastructure), gas, electricity and water, wastewater and stormwater infrastructure.<sup>135</sup> As Marine Drive predominantly runs between the houses and the coast it also provides coastal protection.

4.127 However, the current state of Marine Drive is not fit-for-purpose and does not respond adequately to storm tide events and wave overtopping hazards in the Eastern Bays, as discussed above and in the evidence of Dr Allis.

4.128 Through the Project's proposed seawall replacements, which will provide more effective deflection, dissipation and reflection of incident waves, the wave overtopping hazard is expected to reduce during minor to moderate storm events through the Eastern Bays in the Project area.<sup>136</sup> This increased coastal protection will "buy some time" for HCC and GWRC to consider longer-term measures for addressing sea-level rise and its impacts on Marine Drive.

4.129 Additional benefits identified by Dr Allis include:

- (a) through beach nourishment, there will be an additional erosion buffer for the Shared Path and Marine Drive, increased sediment volume and increased coarseness and longevity of sands;<sup>137</sup> and
- (b) the Project's design enables additional protection (for example, another layer of curved revetment) to be added on top of the Shared Path in the future, if that is considered appropriate.<sup>138</sup>

4.130 A flow-on benefit of the improved resilience is that with fewer incidents of wave overtopping and road closures along Marine Drive, there will also be fewer planned and unplanned maintenance costs to HCC as discussed in the evidence of Mr Cager.<sup>139</sup>

#### The erosion and design integrity of the seawalls, and the potential effects of climate change and natural hazards

4.131 Dr Allis also addresses the design integrity of the seawalls, and the potential of climate change and natural hazards (particularly flooding and wave overtopping).

4.132 The GWRC s42A report highlights the importance of appropriate seawall design to ensure the structural stability of the Project, especially in terms of avoiding erosion beneath the seawalls. The proposed design has been

<sup>134</sup> In the Regional Policy Statement for the Wellington Region and the PNRP.

<sup>135</sup> Evidence of Mr Povall (transport and safety) at paragraphs 26-27.

<sup>136</sup> Evidence of Dr Allis at paragraph 65.

<sup>137</sup> Evidence of Dr Allis at paragraph 63.

<sup>138</sup> Evidence of Dr Allis at paragraph 75.

<sup>139</sup> Evidence of Mr Cager at paragraph 31.

reviewed by Dr Dawe and Ms Westlake, while the processes that will be followed in finalising the detailed design of the Project (including certification processes) will ensure the seawalls are structurally robust. HCC's standard asset monitoring processes will then ensure any issues post-construction can be identified and addressed.

4.133 Marine Drive and the surrounding area is prone to flooding and road closures during periods of high water levels combined with waves and onshore winds. These issues will worsen in future; Dr Allis explains that:<sup>140</sup>

*"Ongoing climate change will unavoidably affect the existing environment primarily through rising sea levels. Rising sea levels will increase the frequency and severity of coastal hazards and road closures along Marine Drive, as well as reducing beach areas."*

4.134 The proposed new seawalls and revetment will reduce the overtopping hazard (and associated issues) during minor to moderate storm events, but there will be little change to the overtopping hazard during large storms at high tide. This is because the elevation of the seawalls will not be higher than the road surface. The benefit the Project provides will reduce over time as sea level rise continues; in that respect the Project "*buys some time*".<sup>141</sup>

4.135 However, as Dr Allis explains:<sup>142</sup>

*"The Shared Path has been designed to enable additional protection to be added onto the top of it in the future, if that is considered appropriate. It provides a platform for any further structural adaptation options (say, by adding another layer of the curved revetment) and it does not compromise other realistic future climate change adaptation options."*

4.136 The Project is an important first step in responding in an adaptive manner to the effects of climate change; in that respect there are trade-offs that will need to be considered in the future. The GWRC report concludes, based on the advice of Dr Dawe and Dr Westlake, that the Project design is: "*an appropriate balance between providing reasonable increased protection from the overtopping hazard now, while not precluding adaptation to sea level rise and the expected increase in severity and frequency of the overtopping hazard in future.*"

#### Effects on culture and heritage

4.137 The CIR prepared by Mr Love considers the potential effects of the Project on cultural values. In his evidence, Mr Love highlights that the Project will provide for cultural expression and realise cultural benefits, including to enhance the kaitiaki role of iwi mana whenua.

<sup>140</sup> Evidence of Dr Allis at paragraph 41.

<sup>141</sup> Dr Dawe agrees with this assessment. Dr Allis and Dr Dawe also agree that the proposed beach nourishment will provide some additional level of resilience against the overtopping hazard.

<sup>142</sup> Evidence of Dr Allis at paragraph 75.

4.138 Mr Love and Mr Puketapu-Dentice explain the intention for HCC mana whenua to be closely involved in the further development and implementation of the Project, through a partnership approach. This is reflected in the conditions, including those that set out that HCC will invite Taranaki Whānui and Ngāti Toa Rangatira representatives to establish a Mana Whenua Steering Group ("**MWSG**") to facilitate ongoing engagement, provide for kaitiaki inputs into the Project, and ensure tikanga and kawa are followed. Of particular note, the LUDP will be prepared in consultation with the MWSG, including to provide for cultural expression in landscape works and plantings.

4.139 The cultural benefits of the Project are identified in Mr Love's evidence and touched on above. These include:

- (a) the creation of opportunities for better interpreting Māori sites of significance along the Shared Path, both in terms of design and through interpretive panels (which will provide tangata whenua with the opportunity to share their cultural values with the wider community);
- (b) linkages with other regional projects (like the Te Ara Tupua – Ngā Ūranga ki Pito-One shared path);
- (c) increased partnership relationships between iwi and HCC;
- (d) increased cultural (and environmental) awareness through the use of signage and storyboards which the MWSG will be invited to advise on, providing tangata whenua with the opportunity to share their cultural values with the community; and
- (e) other elements of the Project that, through design and development, enhance iwi's kaitiaki role, and the protection of taonga and Māori sites of significance, including:<sup>143</sup>
  - (i) the establishment of the MWSG;
  - (ii) the development, through the MWSG, of protocols regarding accidental discovery, tikanga appropriate to the works or activities, and cultural monitoring;
  - (iii) opportunities for the MWSG to be involved with the development and implementation of the protection areas and other ecological management measures; and
  - (iv) the MWSG's active role in the LUDP process, including advising on providing for cultural expression in landscape works and

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<sup>143</sup> In conditions MW.1 – MW.3.

plantings, to ensure there is recognition of the Māori connection with the Project.

4.140 In addition, Mr Love welcomes the addition of the protection areas for the ecological and environmental benefits they will provide for kororā / little penguins and shoreline foragers, as well as the addition of the textured seawalls which will provide further ecological resilience to sea level rise and will offset encroachment in intertidal area.

4.141 The s42A reports conclude that the Project and proposed conditions are acceptable and appropriate in respect of cultural matters, and consistent with the relevant planning provisions in respect of cultural values and effects, as well as the Part 2 matters relating to cultural values. No submissions directly raise cultural matters.

4.142 The Project will not affect identified archaeological or heritage sites,<sup>144</sup> though the discovery of archaeological sites during construction is possible.<sup>145</sup> In that event, the conditions prescribe accidental discovery protocols (involving engagement with mana whenua); and any necessary application for an archaeological authority would be made under section 44 of the Heritage New Zealand Pouhere Taonga Act 2014.

#### Recreational benefits

4.143 As explained in the evidence of Mr Greenaway, the Eastern Bays currently are mostly of local recreation value, with the exceptions of Point Howard Beach and the Ferry Road headland.<sup>146</sup> Mr Greenaway estimates that the existing domestic and international tourism values of the study area are "*quite low*" beyond Days Bay considering the current condition of the road shoulder north of Days Bay.<sup>147</sup>

4.144 In contrast, Mr Greenaway details the many recreational benefits that the Project will bring to the area and the region, which includes a number of health and well-being benefits, as well as economic benefits, attributed to active recreation opportunities and physical activity.<sup>148</sup> In short, the Shared Path will lead to a significant increase in the physical recreation uptake in the Eastern Bays community, which will be particularly impactful given the current poor level of service in place for common forms of outdoor recreation such as walking, running and cycling. That significant increase will, in turn, have important flow-on physical and mental health benefits for the community.<sup>149</sup>

4.145 Increased tourism is another key category of benefit identified by Mr Greenaway. For example, the Shared Path will form part of the Remutaka

<sup>144</sup> In particular, the shared path will be 'narrowed' to avoid affecting the Skerrett Boat Shed in Days Bay.

<sup>145</sup> Heritage New Zealand Pouhere Taonga did not submit on the Project.

<sup>146</sup> Evidence of Mr Greenaway at paragraph 29.

<sup>147</sup> Evidence of Mr Greenaway at paragraph 31.

<sup>148</sup> Evidence of Mr Greenaway at paragraph 32.

<sup>149</sup> Evidence of Mr Greenaway at paragraph 33.

Cycle Trail, which has an established reputation and generates millions of dollars in domestic and international tourism revenue.<sup>150</sup> Mr Greenaway expects that the Project will lead to an enhanced reputation of the Remutaka Cycle Trail as it develops into a complete circuit, which will increase use of the Trail, and extend the time that visitors spend in the region.

4.146 Overall, Mr Greenaway considers the Project *"add to the smorgasbord of visitor experiences available in the Wellington region"* which will add diversity to visitor experiences and contribute to a more sustainable market.<sup>151</sup>

#### Economic benefits

4.147 Mr Copeland's evidence addresses the Project's economic benefits comprehensively. In brief, the Project will:

- (a) over the anticipated 3.5-year Project construction period, create an estimated 20 additional jobs, \$1.5 million per annum additional wages and salaries and \$8.6 million per annum additional expenditure with local businesses in the Hutt City (or, looking more broadly at the Wellington Region including Hutt City, an estimated 27 additional jobs, \$2 million per annum additional wages and salaries and \$15.2 million per annum additional expenditure with local businesses);
- (b) create savings in travel time costs and accident costs as a result of the safer and more efficient commuting options along the route and improved connectivity;
- (c) produce tourism economic benefits for Hutt City and the Wellington Region as additional tourists will be drawn to the area (and encouraged to extend their stay) and local tourists will be encouraged to remain within the region for recreational activities, thus increasing the Region's employment, incomes and expenditure; and
- (d) produce potential travel benefits for residents and foster a willingness to pay for improved access, even if it is not used. Residents benefit from feeling less isolated and from the knowledge that they have a broader range of recreational activities or commuting options available to them.

4.148 Mr Copeland considers the Project represents an efficient use of resources and provides for the economic well-being of local residents and businesses.

<sup>150</sup> Evidence of Mr Greenaway at paragraph 34. In 2015 the Remutaka Cycle Trail had an estimated \$3.3 million in generated domestic and international tourist revenue.

<sup>151</sup> Evidence of Mr Greenaway at paragraph 35.

Overall, he concludes that the Project will have significant overall net positive economic benefits for the Wellington Region and especially Hutt City.

#### Travel, health and safety benefits

- 4.149 As above, Marine Drive provides the only road access from Petone/Lower Hutt to the houses in the Eastern Bays, inhabited by approximately 5,000 people. Traffic volumes along Marine Drive range from between 6,000 to 8,000 vehicles per day.<sup>152</sup> Generally speaking, cyclists are not sufficiently accommodated on Marine Drive and are expected to use the very narrow road shoulder, or share the live traffic lane.<sup>153</sup> Pedestrian activity along Marine Drive is low, demonstrating a reluctance (which community feedback has confirmed) on the part of the potential pedestrians to walk along a road which lacks sufficient infrastructure to allow them do so safely.<sup>154</sup>
- 4.150 A key benefit of the Project, therefore, is that it will relocate pedestrians and cyclists from the live carriageway to an area – the Shared Path – where they feel much safer, reducing the risk of death and injury caused by motor vehicles colliding with other road users.<sup>155</sup> The public clearly shares this view, with 180 of the 200 submissions in support of the Project, and the vast majority of those in support citing safety as a factor.<sup>156</sup>
- 4.151 As Mr Povall explains,<sup>157</sup> and as set out in the *Transport Assessment*, future volumes of pedestrians and cyclists are conservatively<sup>158</sup> forecast to broadly double in numbers following the construction of the Shared Path, with existing numbers of 210 users a day<sup>159</sup> increasing to around 400 users a day.
- 4.152 Projected health benefits make up a significant amount (76%) of the quantifiable benefits of the Project and will stem from increased options for, and uptake in, functional active transport and physical recreation.<sup>160</sup> An associated benefit of increased numbers of cyclists and pedestrians will be a drop in the numbers of private vehicles (and vehicular emissions) used, as people will be encouraged to travel and commute via safe, active forms of transport, as opposed to driving. This will also benefit those people who continue to drive, as there will be less congestion on the road.<sup>161</sup>

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<sup>152</sup> Evidence of Mr Povall (traffic and safety) at paragraph 22.

<sup>153</sup> Evidence of Mr Povall (traffic and safety) at paragraph 28.

<sup>154</sup> Evidence of Mr Povall (traffic and safety) at paragraph 53.

<sup>155</sup> Evidence of Mr Povall (traffic and safety) at paragraph 54.

<sup>156</sup> Evidence of Mr Povall (traffic and safety) at paragraph 54.

<sup>157</sup> See paragraph 39 of his traffic and safety evidence.

<sup>158</sup> Evidence of Mr Povall (traffic and safety) at paragraph 42.

<sup>159</sup> 110 cyclists per day and 100 pedestrians per day.

<sup>160</sup> Evidence of Mr Povall (traffic and safety) at paragraphs 48 and 51.

<sup>161</sup> Evidence of Mr Puketapu-Dentice at paragraph 39.

## Social (connectivity) benefits

4.153 The Project will improve cyclist and pedestrian safety by providing a dedicated path, separated from vehicles, and lead to improved connectivity:<sup>162</sup>

- (a) between and within the Eastern Bays for recreation, access and commuting;
- (b) to Lower Hutt and beyond for work, education and recreation; and
- (c) to other regional cycle trails, such as the Remutaka Cycle Trail and the Great Harbour Way / Te Aranui o Pōneke.

4.154 The Project is also well-located to enable pedestrians and cyclists to access different modes of public/sustainable transport for part of their journey, should they so wish. For instance, people may cycle or walk along the Shared Path for the first leg of their commute, and then complete the second leg of their journey utilising the public transport services that are provided within Hutt City (extensive bus network and a well-established Rail network).<sup>163</sup>

4.155 The Shared Path will be well located to provide access to the Ferry terminal at Days Bay, for both commuter and leisure users.<sup>164</sup>

## **Section 104 – the relevant national and regional planning instruments**

### *Introduction*

4.156 Section 104(1)(b) requires the Panel to have regard to relevant provisions of planning instruments (as well as regulations).

4.157 In doing so, the Panel will bear in mind the analysis and guidance of the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* ("**Davidson**").<sup>165</sup> Essentially, the Panel must have regard to Part 2 where "*it is appropriate to do so*"<sup>166</sup> (that is the implication of the words "*subject to Part 2*" in section 104).<sup>167</sup> However where the relevant plan provisions have clearly given effect to Part 2, there may be no need to do so as it "*would not add anything to the evaluative exercise*".<sup>168</sup> Part 2 is explained in more detail below.

4.158 There is detailed evidence before the Panel from Ms van Halderen, Mr Watson and Mr Kellow,<sup>169</sup> on the relevant national, regional and district

<sup>162</sup> Evidence of Mr Cager at paragraph 34.

<sup>163</sup> Evidence of Mr Povall (traffic and safety) at paragraph 45.

<sup>164</sup> Evidence of Mr Povall (traffic and safety) at paragraph 46.

<sup>165</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

<sup>166</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [47] and [75].

<sup>167</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [66]–[76].

<sup>168</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [75].

Noting that "*absent such an assurance, or if in doubt, it will be appropriate and necessary to* [consider Part 2]".

<sup>169</sup> In their respective s42A reports for GRWC and HCC.

planning instruments relevant to this application, and a high level of consensus between them on what the relevant objectives and policies for the Panel to consider are.

4.159 The planners consider the following planning documents are relevant to the Project:

- (a) National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health ("**NESCS**");
- (b) New Zealand Coastal Policy Statement 2010 ("**NZCPS**");
- (c) Regional Policy Statement for the Wellington Region 2013 ("**RPS**");
- (d) RCP;
- (e) PNRP;
- (f) LHDP; and
- (g) National Policy Statement on Urban Development 2020 ("**NPSUD**").

4.160 The National Policy Statement for Freshwater Management 2020 ("**NPS-FM**") and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 ("**NES-FW**") recently came into force.<sup>170</sup> The NPS-FM and NES-FW were not discussed by any of the planners, however:

- (a) Dr Alexander James notes that the requirements in the NES-FW relating to culverts and fish passage do not apply to structures existing before 2 September 2020, including any later extensions to those structures.<sup>171</sup> As the Project only involves extensions to existing culverts, rather than the installation of new culverts, the NES-FW is not applicable;<sup>172</sup> and
- (b) the Project provides for fish passage through extensions to existing culverts.<sup>173</sup> Therefore fish passage, to such degree that it actually occurs, will be maintained in accordance with subpart 3.26(1) of the NPS-FM.<sup>174</sup>

<sup>170</sup> The NPS-FM was approved by the Governor-General under section 52(2) of the RMA on 3 August 2020 and came into force on 3 September 2020. The NES-FW also came into force on 3 September 2020.

<sup>171</sup> Evidence of Dr James at paragraph 52. See also regulation 60 of the NES-FW.

<sup>172</sup> Evidence of Dr James at paragraphs 13, 23 and 58.

<sup>173</sup> Evidence of Dr James at paragraphs 13, 15, 39–43. Condition EM.12 requires, among other things, that the Consent Holder ensures that fish passage is improved or maintained at the existing level.

<sup>174</sup> Subpart 3.26(1) of the NPS-FM requires every regional council to include the following fish passage objectives (or words to the same effect) in its regional plan: "*The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.*"

## NESCS

4.161 Mr Kellow, in the HCC s42A report, agrees with Applicant's assessment of the relevance of the NESCS.<sup>175</sup> In short, the Project will avoid potential effects from the disturbance or use of contaminated land through appropriate procedures as noted in the proposed conditions.<sup>176</sup>

## NZCPS

4.162 The relevant objectives and policies of the NZCPS are set out and assessed in Appendix S to the AEE, the GWRC and HCC s42A reports,<sup>177</sup> the evidence of Ms van Halderen and the s42A Addendum report.<sup>178</sup>

4.163 There is agreement between Mr Watson<sup>179</sup> and Ms van Halderen that the Project, through the approach applied, is consistent with Policy 10 in relation to reclamations.

4.164 Ms van Halderen's position is that the Project achieves, and is consistent with, the NZCPS provisions and avoids effects where required to do so by the directive policies.<sup>180</sup> Mr Kellow agrees that the Project is consistent with the relevant NZCPS objectives and policies and avoids adverse effects where required. However, he refers to and relies on Mr Watson's assessment for Objective 1 and Policy 11.<sup>181</sup>

4.165 Mr Watson considers that the Project is broadly consistent with the NZCPS.<sup>182</sup> However, he also notes concerns about inconsistencies with the NZCPS due to the potential effects on oystercatchers. Mr Watson's position is that the Project is inconsistent in part with Policy 6<sup>183</sup> and Objective 1,<sup>184</sup> and is potentially wholly inconsistent with Policy 11 due to adverse effects on oystercatchers being potentially more than minor.<sup>185</sup>

4.166 Relying on the EIC and rebuttal evidence of Dr Cockrem (addressed above) Ms van Halderen's position is that the additional measures proposed by Dr Cockrem make the Project consistent with the avoidance policies in the NZCPS.<sup>186</sup> Mr Cockrem concludes that the adverse effects of the Project on oystercatchers are likely to be less than minor.<sup>187</sup> The Applicant relies on their evidence that the Project is consistent with the NZCPS.

<sup>175</sup> HCC s42A report at page 36 (section 8.1).

<sup>176</sup> AEE at pages 96–97 (section 24.2); evidence of Ms van Halderen at paragraphs 76–77 and proposed conditions GC.6 and GC.7(m) in Appendix A to her evidence.

<sup>177</sup> GWRC s42A report at pages 109–122 (sections 13.1.1–13.1.2), HCC s42A report at pages 36–42 (section 8.1).

<sup>178</sup> Evidence of Ms van Halderen at paragraphs 78–142.

<sup>179</sup> GWRC s42A report at page 116.

<sup>180</sup> Evidence of Ms van Halderen at paragraph 139.

<sup>181</sup> HCC s42A report at pages 36–42 (section 8.1).

<sup>182</sup> GWRC s42A report at pages 109–122 (sections 13.1.1–13.1.2).

<sup>183</sup> GWRC s42A report at pages 114–115.

<sup>184</sup> GWRC s42A report at pages 109–110.

<sup>185</sup> GWRC s42A report at pages 117 and 122.

<sup>186</sup> Evidence of Ms van Halderen at paragraphs 128–131, 139(c), 178, 199 and 242–243.

<sup>187</sup> Evidence of Mr Cockrem at paragraphs 96–98.

4.167 Further, there are important policies within the NZCPS that strongly support the Project including in relation to cultural,<sup>188</sup> public access,<sup>189</sup> natural hazards,<sup>190</sup> and use and development.<sup>191</sup>

4.168 Mr Watson's position remains unchanged in his s42A Addendum Report, as discussed above in relation to the RCP. As for the RCP discussion Mr Watson also applies his "*entirely*"<sup>192</sup> consistent test to his assessment of the NZCPS which has no legal support or precedence and is contrary to standard assessments under s104 (or s104D).

#### *RPS*

4.169 The relevant provisions of the RPS are set out in detail in Appendix S to the AEE.

4.170 Mr Kellow's position is that the Project is not contrary to the relevant provisions in the RPS.<sup>193</sup>

4.171 Mr Watson's position is that the Project is consistent with most of the relevant provisions of the RPS (including in relation to reclamation and Policy 36),<sup>194</sup> except for Policies 35 and 37 against which the Project is inconsistent (in part) due to potential effects on oystercatchers.<sup>195</sup> Relying on the EIC and rebuttal evidence of Dr Cockrem (addressed above), the Applicant's position is that the Project is consistent with these policies.

4.172 Further, there are important policies within the RPS that strongly support the Project including in relation to public access,<sup>196</sup> regionally significant infrastructure,<sup>197</sup> natural hazards,<sup>198</sup> regional form design and function<sup>199</sup> and cultural.<sup>200</sup>

#### *RCP*

4.173 The relevant provisions of the RCP have been addressed in the sections above. The Applicant's position is that the Project is consistent with the objectives and policies of the RCP.

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<sup>188</sup> Objective 3 and Policy 2.

<sup>189</sup> Objective 4 and Policies 18 and 19.

<sup>190</sup> Objective 5 and Policies 24 to 27.

<sup>191</sup> Objective 6 and Policy 6.

<sup>192</sup> Section 42A Addendum report at [12].

<sup>193</sup> HCC s42A report at pages 42–46 (section 8.2). Mr Kellow notes at page 43 that Objectives 6 and 8 and the associated policies have been addressed by Mr Watson.

<sup>194</sup> GWRC s42A report at pages 123–127 (section 13.3.1).

<sup>195</sup> GWRC s42A report at pages 123–124 for Policy 35 because the effects on oystercatchers are potentially more than minor; and at pages 124–125 for Policy 37 because the Project is potentially unable to safeguard the life supporting capacity and breeding and foraging habitat for oystercatchers.

<sup>196</sup> Objective 8 and Policy 53.

<sup>197</sup> Objective 10.

<sup>198</sup> Objectives 19 and 21.

<sup>199</sup> Objective 22 and Policy 57.

<sup>200</sup> Objectives 23–28.

### *PNRP*

4.174 The relevant provisions of the PNRP have been addressed in the sections above. The Applicant's position is that the Project is consistent with the objectives and policies of the PNRP.

### *LHDP*

4.175 The LHDP has been addressed in the sections above. The Applicant's position is that the Project is consistent with the objectives and policies of the LHDP.

### *NPSUD*

4.176 Mr Kellow<sup>201</sup> and Mr Watson<sup>202</sup> found that the Project is consistent with Policy 1 of the NPSUD. The Applicant agrees.

### **Other relevant matters**

4.177 Other relevant matters for the Project, in terms of sections 104(1)(c), include the:

- (a) Government Policy Statement on Land Transport 2018 ("**GPS**");
- (b) 2017 edition of Coastal Hazards and Climate Change – A Guidance Manual for Local Government ("**2017 MfE guidance**");
- (c) Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA**");
- (d) Wellington Regional Land Transport Plan ("**RLTP**");
- (e) Regional Cycling Plan 2008 ("**Cycling Plan**");
- (f) Draft Hazard Management Strategy for the Wellington Regional 2016 ("**Draft Hazard Management Strategy**");
- (g) Eastern Bays Marine Drive Design Guide;
- (h) Walk and Cycle the Hutt 2014-2019;
- (i) Environmental Sustainability Strategy for the Hutt Valley 2015 – 2045 ("**ESS**"); and
- (j) Urban Growth Strategy ("**UGS**").

4.178 The AEE, Mr Watson and Mr Kellow assess other the matters that are potentially relevant to the Panel's decision<sup>203</sup>. In short, the other relevant matters support granting the necessary consents for the Project.

<sup>201</sup> HCC s42A report at page 42 (section 8.1).

<sup>202</sup> GWRC s42A report at page 122 (section 13.2).

<sup>203</sup> GWRC s42A report at pages 142–144 (section 14), HCC s42A report at pages 53–55.

4.179 Mr Watson's position is that the Project is consistent with the GPS,<sup>204</sup> achieves the outcomes of the RLTP,<sup>205</sup> has taken into account the 2017 MfE guidance,<sup>206</sup> has satisfied the notification requirements in MACA<sup>207</sup> and is in accordance with the framework and policy in the Draft Hazard Management Strategy.<sup>208</sup>

4.180 Mr Kellow generally agrees with the comments made in the AEE<sup>209</sup> in relation to the GPS, 2017 MfE guidance, RLTP, Cycling Plan and Draft Hazard Management Strategy,<sup>210</sup> that is that the Project is consistent with those documents. Further he considers that the Project achieves or is consistent with the Eastern Bays Marine Drive Design Guidelines, Walk and Cycle the Hutt 2014-2019 the ESS and the UGS.<sup>211</sup>

## Part 2

4.181 The Court of Appeal in *Davidson* determined that:

- (a) notwithstanding *King Salmon*, RMA decision-makers must have regard to Part 2 when making decisions on resource consents "when it is appropriate to do so";<sup>212</sup>
- (b) where the relevant plan provisions have clearly given effect to Part 2, there may be no need to refer back as it "would not add anything to the evaluative exercise".<sup>213</sup> It would be inconsistent with the scheme of the RMA to override those plan provisions through recourse to Part 2. In other words, "genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome";<sup>214</sup>
- (c) on the flip side it is appropriate to have regard to Part 2 if, having reviewed the objectives and policies of the plan as a whole:<sup>215</sup>
  - (i) (b) above is not the case (ie the plans have not provided a coherent set of policies that reflect clear environmental outcomes); or

<sup>204</sup> GWRC s42A report at pages 142–143 (section 14.1.1).

<sup>205</sup> GWRC s42A report at pages 143 (section 14.1.2).

<sup>206</sup> GWRC s42A report at pages 143 (section 14.1.3).

<sup>207</sup> GWRC s42A report at pages 143 (section 14.1.4).

<sup>208</sup> GWRC s42A report at pages 143 (section 14.1.5).

<sup>209</sup> See the AEE at pages 109-112.

<sup>210</sup> HCC s42A report at pages 53–54.

<sup>211</sup> HCC s42A report at pages 53–54 and the AEE at 113-114.

<sup>212</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [47] and [75].

<sup>213</sup> At [75]. Noting that "absent such an assurance, or if in doubt, it will be appropriate and necessary to [consider Part 2]".

<sup>214</sup> At [82].

<sup>215</sup> At [74]–[75].

- (ii) if the decision-maker considers that the plan has not been competently prepared (ie has not been prepared in a manner that appropriately reflects the provisions of Part 2).

4.182 The above position was succinctly summarised by the Environment Court in *Ohau Protection Society Inc v Waitaki District Council*:<sup>216</sup>

*"the obligation to refer to pt 2 remains unless the consent authority is assured that it would not add to its evaluative exercise under s104 RMA to do so."*

4.183 The AEE, GWRC and HCC s42A reports and Ms van Halderen's evidence contain Part 2 assessments. Again, apart from issues relating to oystercatchers, there is agreement among the planners<sup>217</sup> that the Project achieves the purpose of the Act and is consistent with the provisions of Part 2.

4.184 As the Panel must be "assured" that reference to Part 2 would not add value a brief summary of the Project against the relevant provisions of Part 2 is:

- (a) in relation to s6 of the RMA:
  - (i) the Project preserves the natural character of the coastal environment and protects it from inappropriate subdivision use and development as set out in the evidence of Ms Williams and Ms van Halderen (as to conditions);
  - (ii) the Project protects areas of significant indigenous vegetation and significant habitats of indigenous fauna as set out in the evidence of Dr Cockrem, Dr Matheson, Dr James, Ms McMurtrie and Ms van Halderen (as to conditions);
  - (iii) the Project will enhance public access to and along the CMA as set out in the evidence of Mr Greenaway, Mr Povall, Mr Cager and Ms van Halderen (as to conditions);
  - (iv) the Project will provide for and enhance the relationship of Māori and their culture and conditions with their ancestral lands, water, sites, waahi tapu and other taonga as set out in the evidence of Mr Love, Mr Puketapu-Dentice and Ms van Halderen (as to conditions); and
  - (v) the Project provides for the management of significant risks from natural hazards as set out in the evidence of Dr Allis, Mr Povall and Ms van Halderen (as to conditions);
- (b) in relation to s7 matters the Project has particular regard to:

<sup>216</sup> *Ohau Protection Society Inc v Waitaki District Council* [2018] NZEnvC 243 at [16].

<sup>217</sup> GWRC s42A report, section 16, HCC s42A report at section 9, and Ms van Halderen's evidence.

- (i) kaitiakitanga and the ethic of stewardship as set out in the evidence of Mr Love, Mr Puketapu-Dentice, Mr Cager, and Ms van Halderen (as to conditions);
  - (ii) the efficient use and development of natural resources, by being accommodated within an already highly modified environment, and of physical resources by protecting the existing regionally significant and lifeline utilise services to and along the Eastern Bays as explained in Mr Povall's evidence;
  - (iii) the maintenance and enhancement of amenity values along the Eastern Bays as explained in Ms Williams' evidence;
  - (iv) the intrinsic values of ecosystems (with the sole argument being oystercatchers) as explained in the evidence of Dr Cockrem, Dr Matheson, Dr James and Ms McMurtrie;
  - (v) the maintenance and enhancement of the quality of the environment (with the sole argument being oystercatchers) as explained in the evidence of Dr Cockrem, Dr Matheson, Dr James, Ms McMurtrie and Ms Williams;
  - (vi) the finite characteristics of natural resources (with the sole argument being oystercatchers), as explained in the evidence of Dr Cockrem, Dr Matheson, Dr James and Ms McMurtrie, and of physical resources as explained in the evidence of Mr Povall; and
  - (vii) the effects of climate change with protection from those effects being a key driver for the Project and its location along the coast as explained in the evidence of Mr Povall;
- (c) in relation to section 8 the Project has taken into account the principles of the Treaty by ensuring consultation has occurred and by it is aligning with iwi and their values and through the proposed conditions, especially in relation to the establishment of the MWSG, as set out in the evidence of Mr Love and Mr Puketapu-Dentice; and
- (d) in relation to section 5 the Project will promote the sustainable management of natural and physical resources. In relation to the s42A reports:

- (i) Mr Kellow states:<sup>218</sup>

I consider the proposal meets the purpose of the Act because the shared path will provide for the social, economic and cultural wellbeing of the local community and visitors by creating a widely supported, as evidenced through submissions, cycle and

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<sup>218</sup> HCC s42A report at section 9.

pedestrian path which will increase connectivity around the eastern bays, promote active transport and increase resilience while retaining access to the coastline. Adverse effects within Hutt City Council's jurisdiction are at worst minor (potentially on visual amenity of some individual dwellings and less than minor in all other respects.

(ii) **Mr Watson states:**<sup>219</sup>

Subject to the satisfactory outcome related to the management of effects on oystercatchers, my overall conclusion in respect of Part 2 matters is that the proposal could promote the sustainable management of natural and physical resources.

**4.185**The Applicant adopts the assessment of Ms van Halderen in her evidence<sup>220</sup> that:

I therefore consider that granting the consents for the Project will promote the purpose of the RMA as reflected through the relevant planning documents. The proposed conditions of consent, which have been significantly refined since the version attached to the AEE, will ensure the adverse effects have been appropriately managed and the significant positive effects of the Project can be realised.

**4.186**The Applicant adds that the Project manages the natural and physical resources of the Eastern Bays which enables its communities to provide for their social, economic and cultural wellbeing and health and safety while sustaining the potential of those resources for future generations, safeguarding the life supporting capacity and avoiding, remedying and mitigating adverse effects.

**Sections 105 and 107**

**4.187**The relevance of sections 105 and 107 to the Project (specifically, the applications for coastal permits for discharges) is explained earlier in these submissions. The AEE addresses these matters<sup>221</sup> and the Applicant agrees with Mr Watson<sup>222</sup> that the granting of the discharge consents is appropriate.

**Proposed conditions and consent term**

*Conditions*

**4.188**The conditions that are proposed to attach to the consents are explained in, and appended to, the evidence of Ms van Halderen. The conditions respond to issues raised during consultation, in submissions and further information requests and in the GWRC and HCC s42A reports, as well as effects assessed by experts. They have been drafted based on the

<sup>219</sup> GWRC s42A report at page 151.

<sup>220</sup> Evidence of Ms van Halderen at paragraph 33.

<sup>221</sup> At pages 118-119.

<sup>222</sup> GWRC s42A report at page 145.

planners' experience and input from other experts (reflecting their advice on best-practice avoidance, minimisation and mitigation measures).

4.189 The conditions provide a robust set of controls to ensure that the adverse effects of the Project on the environment will be avoided, or where avoidance is not possible, minimised or mitigated to acceptable levels such that adverse effects are no more than minor.

*Term*

4.190 The conditions provide frequent ongoing opportunities for HCC and GWRC to revisit matters if the Project were to give rise to any adverse effects that may arise as a result of the exercise of the consent that are appropriate to deal with at a later stage. The robustness of the conditions, and the powers of review, provide comfort to the Panel for the term sought by the Applicant, which is:<sup>223</sup>

- (a) 35 years for the coastal permits; and
- (b) unlimited duration for the land use consents and coastal permit for reclamation.

4.191 The 35-year term is necessary to reflect the significant regional and district importance of the consents into the future.

4.192 Mr Watson agrees with the above terms for the GWRC consents except for those related to construction works.<sup>224</sup> Those he considers should be 10 years to allow construction to be completed. But he also agrees that a 10-year lapse period is appropriate<sup>225</sup> (and the Applicant agrees). There is no point having the term the same as the lapse period – especially for a project likely to take 6 years to construct. The construction consents also need to be timed to ensure that any monitoring and reporting conditions still apply. It is submitted that 35 years for those consent is appropriate.

## **5. EVIDENCE TO BE PRESENTED**

5.1 The witnesses for HCC are as follows:

- (a) **Ihakara Puketapu-Dentice** – strategic overview and engagement;
- (b) **Simon Cager** – project overview and engagement;
- (c) **Dr Michael Allis** – coastal processes;
- (d) **Richard Reinen-Hamill** – beach nourishment;
- (e) **Shelley McMurtrie** – intertidal and subtidal ecology;

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<sup>223</sup> See evidence of Ms van Halderen at paragraph 53.

<sup>224</sup> GWRC s42A report at page 153.

<sup>225</sup> Ibid.

- (f) **Dr Fleur Matheson** – seagrass;
- (g) **Dr Alexander James** – fish passage;
- (h) **Dr John Cockrem** – avifauna;
- (i) **Robert Greenaway** – recreation and amenity values;
- (j) **Morris Love** – cultural effects and values;
- (k) **Julia Williams** – landscape and visual effects;
- (l) **Michael Copeland** – economics;
- (m) **Jamie Povall** – project design, and transport and safety; and
- (n) **Caroline van Halderen** – planning and engagement.

**DATED** this 14<sup>th</sup> day of December 2020

**David Allen / Esther Bennett**

**Counsel for the Applicant**