Decision No. C 8 /2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 and section 121 of the Act

BETWEEN **LYTTELTON PORT COMPANY LIMITED**

(RMA 146/99)

Appellant

AND **THE CANTERBURY REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith
Mrs N J Johnson

HEARING at **CHRISTCHURCH** on 9- 13 and 16 days of October 2000

APPEARANCES

Mr S R Maling and Ms A C Dewar for the appellant
Ms M Perpick for the Canterbury Regional Council
Mr T Young for the Lyttelton Residents and Ratepayers Guild
Mr I Graham and Mr S Shrigley for the Inner Harbour Moorings Association
Mr Illingworth and Mr V McClimont for Lyttelton Harbour Residents Association Incorporated
Mr S Hemsley in person

DECISION

Introduction

[1] These appeals are from the decisions of an independent Commissioner for the Canterbury Regional Council **("The Regional Council")** relating to an area in the Port of Lyttelton known as the Inner Harbour Moorings area ("the **Moorings area").** The applicant, the Lyttelton Port Company Limited, ("the **Port Company"),** sought to:

(a) remove all of the existing piles in the Moorings area. This application was granted subject to conditions including condition 2 which is the subject of appeal. That reads:

> *2. No moorings which are occupied as at the date of this decision, shall be removed until application CRC 990039, and any appeals have been determined or withdrawn.*

(b) occupy the Moorings area to the exclusion of all other persons not expressly allowed to occupy the area. This application was declined by the Commissioner.

The application CRC 990039 is an application by Inner Harbour Moorings Association ("the **Moorings Association")** which has not yet been processed by the Regional Council, apparently at the request of the Moorings Association.

Background

[2] The Port of Lyttelton has been established for some 150 years and has been in continuous use for both recreational and commercial vessels during that time. Over that period it has undergone significant improvements by way of reclamations to provide flat land around the harbour areas together with breakwaters, jetties, wharves and other facilities to provide a well protected environment for shipping. This area is known as the **inner harbour** and shall be referred to as such throughout the

decision. In more recent years development has also occurred on the outside of the inner harbour (which shall be referred to as the **outer harbour)** to provide further extensive areas for containers and other cargo, together with coal. This area includes wharves, known as Cashin Quay, and is protected by a further breakwater protruding into the Lyttelton harbour. West of the inner harbour entrance is a large area of reclamation known as Naval Point Reclamation. There are jetties on the inner harbour side of this reclamation but not on the outer harbour side. Further to the west again is an area known as Magazine Bay which has a berthage area for small vessels. That area was originally protected by a floating tyre breakwater which was removed in more recent years.

[3] Recently there have been attempts to construct a larger marina at Magazine Bay ("the **Marina")** involving construction of floating jetties and floating breakwaters. This relied on floating concrete structures anchored by wires and substantial weights to the seabed. The High Court decision ***Canterbury Regional Council -v- Lyttelton Marina Ltd et al,*** and ***Lyttelton Marina Ltd and Magazine Bay Berth Holders Association Incorporated and Others***[1]**,** contains a detailed description relating to the marina and notes that construction began between 1981 and 1985.

[4] At the commencement of the hearing the Marina development was well underway with approximately 75% of the marina completed. On Thursday 12 October 2000 during the course of this hearing the area was hit by a particularly severe storm and the Marina was substantially destroyed, with significant loss of vessels moored at the jetties.

[5] When the hearing commenced there were no recreational vessels in the Moorings area by virtue of a decision by the Port Company to exclude all such vessels. There was one vessel which was anchored within the Moorings area, belonging to one of the submitters Mr V McClimont, and several vessels belonging

[1] [1999] NZRMA 330.

to the Port Company which were still moored to the piles. At the commencement of this hearing no piles had been removed but wire rope encircled most piles restricting vessels from entering the area.

[6] It is against a background of ongoing concern by recreational vessel owners as to the safety of the Marina and the exclusion of recreational vessels from the Moorings area that this appeal was heard.

The history of the appeal

[7] In 1998 the appellant sought consents to remove the piles from the Moorings area and to obtain occupation of this area to the exclusion of other parties. As already noted, the application for removal of the piles was granted subject to one condition preventing the removal of the piles until an application by the Moorings Association to occupy and place piles in the Moorings area had been finally disposed of. The Court is told that that application has still not been considered by The Regional Council at the request of the Moorings Association.

[8] The Port Company's application to occupy, which was declined by the Commissioner, has been the subject of further requests for information by some of the submitters. A copy of a confidential supplementary paper circulated to the Board of the Port Company in December 1998 was the subject of orders for confidentiality by the Court dated 30 June 2000.

[9] The matter had previously been listed for call but could not be reached as part of the list. At the commencement of this hearing all [submitter parties] made application for adjournment of the matter. After considering the various submissions of the parties the Court by oral decision declined the application for adjournment.

[10] As already noted, part-way through the hearing of this matter the Christchurch and Banks Peninsula areas were struck by a particularly severe southerly storm. With the consent of all parties the Court took the opportunity of viewing Magazine Bay and the Port during these extreme weather conditions. It was subsequently

conceded by the Port Company that there had been a failure of the Marina. A significant number of vessels were sunk or damaged with failure of the floating jetties in the Marina and the floating concrete breakwaters. In light of the concession by the Port Company it was unnecessary to recall any of the witnesses. Evidence given by a witness for the submitters, Mr McClimont, was not rebutted relating to the Marina. In light of the concession by counsel it is also unnecessary for the Court to consider in any detail, evidence produced by the Port Company supporting the ongoing safety or availability of the Marina for recreational vessels.

Issues on appeal

(a) Scope of conditions on pile removal

[11] Having regard to the significant developments at the Marina it is important that we focus on the issues before the Environment Court in this appeal. Consent has been granted for the removal of the Moorings area piles ("the **piles")** and the only issue relating to that consent before this Court on appeal is the condition limiting the timing of the removal until after the application by the Moorings Association has been determined or dealt with. In such circumstances the Court cannot impose a condition that would nullify the grant of consent and this point was conceded by all parties. It was also accepted by all parties that we have jurisdiction to consider as part of the conditions, limitation on the number of piles to be removed. That is, to the maximum number that were unoccupied at the time of the Commissioner's decision. The Court could also impose another form of limitation upon removal, either as to time or number of piles that might be removed.

[12] In deciding the appropriateness of the conditions it will be necessary to consider the status of the piles under the transitional provisions of the Resource Management Act 1991 **(the Act or RMA).**

(b) Occupation of the Moorings area

[13] The more substantial issue before the Court was the aspect of the appeal relating to the occupation of the Moorings area for the future. The Port Company

argued that because it owned the pile moorings what it sought was only an extension of its already existing rights of occupation. This requires some determination as to the extent of the occupation rights already enjoyed in the Moorings area and those enjoyed throughout the balance of the Port Company area. We are also required to examine in detail the concept of occupation as set out in section 12 of the RMA and its inter-relationship with other sections in the Act, particularly section 122(5). This involves:

(a) the issue of "exclusion" as this term is used in section 12;

(b) the question of whether occupation is reasonably necessary for another activity;

(c) consideration of the manoeuvring and mooring of commercial vessels and guaranteed access to the adjacent No. 7 wharf and nearby land as compared with other identified reasons for occupation including transactional costs, defending its position from alternative claims and economic efficiency;

(d) the scope of occupation as intended under section 12 in relation to areas of the coastal marine area that are on or over harbour bed vested in the Crown;

(e) the scope of potential development options in relation to a necessity for occupation at the present time.

[14] It is the Court's intention to deal with the pile issue first and consider issues relating to the exclusive occupation sought in the balance of the decision.

Removal of the piles

[15] The piles themselves have been in consistent use for a considerable period of time dating from around the 1920's. Prior to that time the area was used for either swing moorings or anchoring. The piles themselves devolved to the control of the Lyttelton Harbour Board and both the harbour bed in the Moorings area and the piles

themselves were owned by the Harbour Board at the time of the Local Government re-organisation in 1989. Although the Moorings area was originally transferred to the Banks Peninsula District Council, this was purchased by the Port Company for some $462,000 in 1995. In the meantime however, the harbour bed in the Moorings area was transferred to the Crown. Accordingly, to determine the scope of any consent that was transferred to the Port Company the Court must determine the consents that were in force at the time of transfer.

Deemed consent for the Moorings area

[16] Section 384 provides that any existing permissions are to become coastal permits. Section 384(1) provides relevantly:

> *(1) Every …*
>
> > *(b) Licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950, Order in Council made under section 175 of that Act, and every approval granted under section 178(1)(b) or (2) of that Act (or the corresponding provisions of any former enactment); and*
> >
> > *(c) …*
> >
> > *in respect of any area in the coastal marine area, being a permission, licence, permit, or authority in force immediately before the date of commencement of this Act, shall be deemed to be a coastal permit granted under this Act on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act) by the appropriate consent authority; and the provisions of this Act shall apply accordingly.*

The relevant date set out in section 384A(1) to determine the right to occupy the coastal marine area adjacent to a port is September 30, 1991. In respect of other

permissions not covered by section 384A these appear to become coastal permits on the date of commencement of the Act namely 1 October 1991 by virtue of section 384(1).

Section 425 of the Act also provides:

> *(3) Except as provided in section 384(1) -*
>
> *(a) Every licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950; and*
>
> *(b) Every Order in Council made under section 175 of that Act; and*
>
> *(c) Every approval granted under section 178(1)(b) or (2) of that Act-*
>
> *shall, notwithstanding the amendment of that Act by this Act, continue in force after the date of commencement of this Act on the same conditions and with the same effect as if that Act had not been so amended.*

Scope of deemed consent

[17] The Moorings area was not included in the occupation area under section 384A as the plan produced to the Court clearly shows.

[18] In respect of the Moorings area, the issue then arises as to whether or not the deemed resource consent in this case arises by virtue of the Harbours Act section 156 provision or section 178. In ***Canterbury Regional Council -v- Lyttelton Marina Ltd***[2] the Court concluded that the Marina was established under section 178. The Court drew a distinction between a licence or permit under section 156 which was subject, under section 158, to a 14 year time limit and one authorised under section 173 and requiring Ministerial approval under section 178(1)(b).

[2] [1999] NZRMA 330 at page 337.

[19] We can see no proper distinction between the Marina established by the Harbour Board and the piles except the date of establishment. We adopt the reasoning of the Court in ***Canterbury Regional Council v Lyttelton Marina Ltd*** and hold that the continuing existence of the piles was authorised pursuant to sections 173 and 178 of the Act. Section 178 of the Harbours Act 1950 as amended and inserted by section 41 of the 1977 Harbours Amendment Act reads:

> *178. RESTRICTION ON WORKS AFFECTING HARBOURS OR NAVIGATION UNDER STATUTORY POWERS -*
>
> *(1) Except where this Act or any other Act otherwise specially provides, the following provisions shall have effect with respect to harbour works, [pipelines, cables,] or any other structure of any kind undertaken or constructed by any Board or any local authority or other body or person (hereinafter called the constructing authority) on, in, over, through, or across tidal lands or a tidal water, [or the bed of the sea, or the bed or bottom of any harbour, navigable lake, or navigable river], by virtue of this or any other Act, namely:*
>
> *(a) ...*
>
> *[(b) If it appears to the Minister that the proposed work will not unduly interfere with or adversely affect the interest of the public (whether by being or tending to be to the injury of navigation or otherwise), he may approve the deposited plan, with or without such modification, addition, or condition as he may reasonably require, and subject or not to any restriction or condition necessary for the preservation of any public right:]*
>
> *(c) The work shall not be made, constructed, altered, or extended without the like approval but any such approval shall not confer on the constructing authority any right to construct, alter, or extend any work which independently thereof it would not have had:*

[(d) ...

(e) ...

...

[(2) The Minister of Conservation shall not give an approval under paragraph (b) of subsection (1) of this section except with the approval of the Minister of Transport; the Minister of Transport shall not give an approval under that paragraph or this subsection unless satisfied that the proposed work concerned will not unduly interfere with or restrict any public right of navigation; and the Minister of Conservation shall not give an approval under that paragraph unless satisfied that the work will not unduly interfere with or adversely affect the interest of the public].

Section 384(1)(b) of the (Resource Management) Act has already been quoted at para 16 of this decision.

Sub-section (2) of section 384 also states relevantly:

Notwithstanding section 12, a person who is the holder of -

(a) ...

(b) A licence, permit, or approval referred to in subsection 1(b); or

(c) ...

(d) ...

shall not thereby be authorised to carry out any activity referred to in section 12, except where that person also holds every other permission, licence, permit, or approval referred to in subsection (1)(a) or subsection (1)(b) that,

immediately before the date of commencement of this Act, he or she was legally required to hold in order to carry out the activity.

Subsection (3) reads:

Notwithstanding subsection (2), every coastal permit deemed to be granted by subsection (1) shall be deemed to include a condition enabling the holder of the permit, at any time until the proposed regional coastal plan is notified, to apply to the relevant regional council under section 127(1) to change the permit for the purpose of including, as conditions of that permit, matters that could have been included in a permission referred to in subsection (1)(a) or a licence, permit or approval referred to in subsection (1)(b) or a licence, permit, or authority referred to in subsection (1)(c), and of enabling the permit to authorise the activity.

[20] Applying the provisions of the statutes, the continued existence of the piles is permitted. Section 178(c) of the Harbours Act is incorporated as a condition of the deemed coastal permit by virtue of section 384(1) of the RMA which uses the words

…on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act)…

[21] The removal of the piles is not included within the powers under section 178(c) and accordingly by virtue of section 384(2) of the RMA the Port Company is obliged to have regard to the restrictions of section 12 of the RMA which states relevantly:

(1) No person may, in the coastal marine area, -

(a) …

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or

(c) - (f)…

> *unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.*

We conclude that maintenance is permitted in terms of the deemed resource consent and also the replacement of a broken or faulty pile as these are not precluded by the wording of section 12(1)(b) of the RMA. We find that the deemed resource consent under section 384 included the continued existence of the piles and the ability to maintain those piles.

[22] Section 178(2) of the Harbours Act is of some importance. Under that provision, approval is required by the Minister of Transport and the Minister of Conservation. The rights of public navigation and the interests of the public are required to be considered. The deemed resource consent must be deemed to be subject to these implied restrictions.

[23] In summary, section 178(c) of the Harbours Act would include conditions of the deemed consent allowing the existence and maintenance but not alteration or extension of the piles. The restriction imposed under section 12(1)(b) of the RMA would therefore be subject to the deemed consent to place, erect (and maintain) those piles. However, the deemed consent could not include rights to reconstruct, alter, extend, remove or demolish those piles as those rights are not provided for under section 178 of the Harbours Act.

Does the deemed resource consent include a right to occupy the area around the piles?

[24] A deemed consent for the use of the area around the piles for mooring can only exist if resource consent for the use of the piles for mooring a vessel is required. In ***Canterbury Regional Council-v- Lyttelton Marina Ltd***[3] the Court noted:

[3] [1999] NZRMA 330 at 349.

We think that the clear sense of section 384 is that a licence or permit granted under section 156 becomes a deemed coastal [sic] only if and to the extent that, a coastal permit is required in respect of the activities licensed or permitted.

And later, at page 350:

... The right which the berth holders have is to tie up to the marina and use its facilities. We do not see this as involving (or as ever having involved) any occupation of the "coastal space" which requires any separate permit or licence.

[25] In light of that decision we must conclude that although there is a deemed consent for the existence and maintenance of the piles by virtue of section 178 there is no corresponding deemed coastal permit in respect of the use of those piles. As a matter of contract the Port Company is able to licence the use of the piles as the piles are the property of the Port Company. But it has no right of occupation which exists outside that in terms of the RMA. In practical terms therefore the effect of the High Court decision ***Canterbury Regional Council v Lyttelton Marina Ltd*** on this case is that the deemed coastal permit relates only to the existence of the piles themselves and the use of those piles is a matter controlled by licence from the owner of the piles. This approach is consistent with that adopted by the Environment Court in the ***Auckland Regional Council***[4] declaration case where Judge Treadwell states at page 7 of that decision:

I am of the opinion that a permit authorising the jetty structure and without other express provisions only allows exclusive occupancy of the space occupied by the physical form of the structure and does not confer other rights concerning the air space above, over or below the structure or the area of water below the structure. Thus in the absence of prohibition by a permit consent condition members of the public whether on foot, swimming or diving may continue use [sic] the air space, the land and water unless prohibited by a condition in terms of section 122(5).

Decision A109/2000.

[26] Whether the occupation of the area around that pile is reasonably necessary for the use of the pile itself is a question that will be considered later in the context of this decision as it relates to occupation. We conclude that the deemed coastal permit relating to the piles cannot include wider powers of occupation than are necessary for the existence and maintenance of the piles.

The condition as to timing of pile removal

[27] On this analysis of the existing position we have reached the inescapable conclusion that it is not possible to impose conditions reserving rights of occupation until others have their application heard before the Court. The Commissioner having granted approval for the removal of the piles can not properly impose conditions restricting the timing of that.

[28] Because of our conclusion, that the permit does not give a power to reconstruct the piles, the deemed permit would be at an end when all piles were removed. It can not be assumed by the Court that having obtained consent for the removal of the piles the Port Company will necessarily exercise that consent or remove all the piles. Deemed consents would only continue for any piles not removed.

[29] Accordingly existing condition 2 of the consent should be deleted.

Deemed permit under section 384

[30] As already determined only the piles themselves have a resource consent to occupy the area (that is the seabed, the water column and the air space). Vessels in the area do not require resource consents to moor to the piles. Applying the ***Canterbury Regional Council*** decision vessels in the area do not require a resource

consent to moor to the piles. The ***Canterbury Regional Council*** decision related to a Marina where some vessels were berthed permanently.[5] Furthermore, in the ***Auckland Regional Council*** application for declaration the Environment Court considered the impact of section 122(5) (as it related to the occupancy of jetties). The Court considered that section 122(5) provides that no coastal permit shall be regarded as conferring occupancy to the exclusion of all or any class of persons unless the permit expressly provides otherwise[6].

[31] In our view section 122(5) is directly applicable in the current situation. There is no express restriction on the consent and the issue turns upon whether such a restriction is reasonably necessary to achieve the purpose of the coastal permit. The Port Company having applied to remove the piles is unable to argue that occupation of the area around them is reasonably necessary *"for the purposes of the coastal permit"*. Accordingly we conclude that the deemed coastal permit does not confer other rights in the circumstances where the piles are to be removed.

The Section 384A permit as a basis for exclusive occupation of Moorings area

[32] In our view the application for exclusive occupation is not an extension of existing rights but a new application. The essence of the Port Company's case here was that it sought occupation of the Moorings area on the same basis as it occupied the balance of the port area. Mr D G K Viles, the managing director of the Port Company, gave evidence on its behalf. He said at para 61 of his evidence:

> *This application to occupy under the same terms and conditions as the surrounding section 384(A) [sic] permit is to protect the commercial investment and all surrounding areas, and to exclude the very real possibility of conflicting rights being granted to some other parties whilst at the same time improving access to existing infrastructures such as the dry dock and No. 7 wharf*

5 There is a line of cases including ***Hauraki District Council v Moulton*** 2 NZED 375 where degree of annexation determined occupancy.

6 Decision A109/2000 Judge Treadwell.

[33] On this basis it seems fundamental to the position of the Port Company that the occupancy they hold under section 384A gives exclusive occupation of the area. In ***Ports of Auckland-v- Auckland Regional Council***[7] Judge Sheppard considered the background to section 384A and its application. He noted:

> *On the question whether the Ports Company's rights are to occupy space in the coastal marine area to the exclusion of others, both parties submitted that the Ports Company's rights to occupy are exclusive only to the extent required to enable Ports Company to manage and operate its port-related commercial undertaking. It seems to me that the true difference between them on this point is not the extent to which the Ports Company's rights of occupation are exclusive, but rather, which of them has the authority to decide whether occupation by another is compatible or not. I consider that that is an independent question, the answer to which does not assist to resolve the principal issue.*

And at page 15 the Court concluded:

> *... I do not need to attempt the questions about whether the Ports Company's rights in the areas defined by the coastal permit are exclusive, and if not, whether the Ports Company or the Regional Council has authority to permit occupation of parts of the defined areas by others.*

[34] Some guidance in respect of the extent of the rights under section 384A can be obtained from ***Port Otago Ltd -v- Hall***[8]**.** In the Court of Appeal decision Blanchard J noted:

> *It follows that we do not read section 384A as an indirect method of creating or preserving existing use rights for an extended period.*

The Court then noted:

7 Decision A23/95 at 11.
8 [1998] 2 NZLR 152 at 159 (CA).

The coastal permit does not authorise any activity or activities at all, other than to the extent that occupation is itself an activity. The permit, as the Full Court elsewhere accepts, is a permit for [Port Otago Ltd] to occupy the area specified in it. That right of occupation is conferred for the purpose of allowing the port company to manage and operate the port-related commercial undertaking it acquired under the Port Companies Act 1988, and it is limited to that purpose. The company does not have a right to occupy the area for any other purpose. But the port-related commercial undertaking is not authorised by the coastal permit as such; that undertaking is the purpose of the grant of the right of occupation and not itself part of the grant[9].

[35] We have concluded that the section 384A permit does not in itself give rights of exclusive occupation to the Port Company. Nor does it prevent any other application for occupation except to the extent that there is a conflict.

We are supported in that conclusion by reference to section 122(5). Section 122 on its face applies to all coastal permits including those under section 384A. Section 122(5) states relevantly:

(5) Except to the extent -

(a) That the coastal permit expressly provides otherwise; and

(b) That is reasonably necessary to achieve the purpose of the coastal permit, -

no coastal permit shall be regarded as-

(c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or

9 Ibid at 1 59.

(d) *Conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.*

[36] The requirements of section 122(5)(a) and (b) are cumulative. The section 384A coastal permit granted to the Port Company does not exclude any classes of persons. Section 384A(10) expressly recognises potential for competing claims for occupation. Although this clause appears to apply only to the transitional phase, it is consistent with section 122(5) and the potential limit to rights of occupation.

[37] In light of section 122(5) and quotations from the Court of Appeal decision in ***Port Otago Ltd -v- Hall*** it cannot be said that the occupation granted under section 384A to the Port Company is for all purposes and to the exclusion of all other persons. The occupation itself is limited to that required for the purpose associated with the operation and management of the port's undertaking. There is a lack of any express words limiting the persons who may enter into the area. We conclude that there is no general power to exclude classes of persons under the section 384A permit except for limited times and for limited reasons relating to the operational requirements of the port itself. The limits of those powers would of course vary within the port area and may very well be significantly greater on the jetties, wharves and piers than they might be in other portions of the harbour which are only required for navigational purposes from time to time. The Port Company itself did not propose that it restrict the right of persons to pass and re-pass through the areas of the port. We heard that vessels could stop for example to refuel at the fuelling jetty and anchor in certain areas temporarily.

[38] Accordingly we must conclude that the rights under s384A are not exclusive rights of occupation but give power to exclude identified classes of persons for limited periods and for reasons related to the operational requirements of the port.

The current status of the Moorings area

[39] We have concluded that neither the deemed coastal permit applying to the Moorings area, or the section 384A rights the Port Company have, give a right to

exclusive occupation for all purposes. Therefore, we must consider whether the use and occupation of those areas by the Port Company precludes competing applications for occupation within the area. This is one of the issues that the Court in ***Ports of Auckland***[10] determined it was not required to decide on that occasion. In this case, however, the Port Company's application for occupation seems to be predicated on an understanding that if it obtains an occupation consent this will preclude other parties from seeking occupation in the Moorings area. Mr Viles said in his evidence, paragraphs 94 and 95:

> *94. This application is to occupy the coastal marine area under the same terms and conditions as the surrounding 384A coastal permit. If the application is granted this will give us security of tenure for the current operations of the port and for the planning of the development of this part of the port whilst excluding conflicting rights being granted to another party.*
>
> *95. An occupation consent will also provide significant assurance that further more detailed investigation work for the necessary resource consents would not be wasted. Occupation would protect a strategic position for development when circumstances are right and avoid legal costs in defending that position.*

[40] Mr P T Donnelly, consultant economist to the applicant, went even further in para 12.4 of his evidence when he said:

> *I am convinced that s.7(b) and the enabling provisions of s.5(2) will be promoted by their exclusive occupation of the* [moorings] *area. My analysis leads me to the conclusion that occupation of the* [moorings] *area is necessary for the efficient operation to the port, and that granting consent will forthwith avoid unnecessary transaction and other opportunity costs being inflicted on society.*

[10] Decision A23/95 at 15.

[41] Notwithstanding this evidence counsel for the applicant accepted in closing that it was not possible to preclude further applications for occupation of the area. Section 122(5) specifically indicates that no coastal permit shall be regarded as conferring on the holder the same rights in relation to the use and occupation of the Moorings area against other persons as if they were a tenant or licensee of the land. It was not even contended that the current section 384A permit goes that far. It being conceded that the seabed in this area is vested in the Crown, it must be said that there is always potential for conflicting applications for occupation. This potential for competing applications is supported by reference to section 122(5) which requires any occupation to:

(a) expressly state the persons excluded; and

(b) be reasonably necessary.

[42] In respect of the current situation therefore, the Moorings area is subject to a deemed resource consent for the existence and maintenance of the piles. The limits of that occupation are subject to a reading of section 122(5)(a) and (b). We repeat the conjunctive word between the two provisions is *"and"*. This is a cumulative requirement that there not only be an express provision in the coastal permit but also that the provision is reasonably necessary to achieve the purpose of the coastal permit. This means that the current deemed coastal permit cannot exclude other persons from the area as there is no express provision within it.

The application for occupation

[43] Against the background of the status of the general port area and the Moorings area we must now consider the current application for occupation. The application must be considered under section 12 of the Act, particularly subsection (2) which states relevantly:

No person may, in relation to land of the Crown in the Coastal Marine area …

(a) Occupy any part of the coastal marine area; or

(b) ...

unless expressly allowed to do so by … a resource consent.

The word *"occupy"* takes its definition from section 12(4) and is defined as follows:

(a) 'Occupy' means the activity of occupying any part of the coastal marine area -

(i) Where that occupation is reasonably necessary for another activity; and

(ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and

(iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense; -

and 'occupation' has a corresponding meaning:

[44] By virtue of the definition of occupation the following elements can be derived from section 12(4)(a):

(1) That the occupation is reasonably necessary for another activity; and

(2) That it excludes all or any class of persons not expressly allowed to occupy that area; and

(3) It is for a period of time or in a way that would require a lease or licence to occupy unless there is a rule or resource consent.

These requirements are cumulative and are derived rather than direct. They comprise the definition of the activity for which resource consent is sought under section 12(2)(a).

The Proposed Regional Coastal Plan

[45] Under the Proposed Regional Coastal Environment Plan **(Proposed Coastal Plan)** this application is a non-complying activity. The Proposed Coastal Plan is currently at a somewhat complicated stage in its development. Although originally notified in 1994 changes known as Variations 1 to 9, have been introduced to Chapters 7 and 8. No hearings have been held in respect of the variations to date. In respect of the base plan itself, Council have considered and notified decisions on submissions. References have yet to be determined. The relevant variations are not yet as advanced as the proposed plan and therefore have not yet merged under Clause 16B to the First Schedule. Clause 16B however states relevantly:

> *From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.*

The meaning of these provisions is unclear but must involve a modification of any provisions in the proposed plan affected by the variation. In this case the variation does not change the status of the application as non-complying but other criteria of the proposed coastal plan which have been altered by the variation must be regarded with some circumspection.

[46] Mr A M Purves, consultant planner for the Port Company, gave evidence relating to the proposed coastal plan (with variations) including:

(a) That the port is recognised as having both regional and local strategic significance. It is noted as requiring relatively exclusive use of the coastal marine area at and adjacent to the port facilities and is in

accordance with policy 8.8(e) recognising that port infrastructure including hard standing areas, wharves, cranes, buildings and other structures may be further developed in response to commercial opportunities.

(b) Recognising that the port needs to have its own controls over access to the port operational area and that provision for public access to or use of such areas is not necessarily appropriate.

(c) Policy 8.5(a) also recognises the following:

(i) To give priority to maintaining safe anchorage of vessels; and

(ii) The need to avoid impeding navigational channels and access to wharves, slipways and jetties;

(iii) Avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available;

(iv) Having regard to existing commercial use of the area and any adverse effects on that activity.

The case for exclusive occupation

[47] We now consider the evidence given and submissions relating to the application. Evidence for the Port Company given by Mr Viles and Mr Donnelly made it clear that they primarily saw the advantage of obtaining occupation as excluding other parties from seeking to occupy the same area. However, both Mr Viles and Captain W T Oliver for the Port Company also made it clear that there were operational advantages in having exclusive occupation of the area. These turned largely upon the ability for greater manoeuvring, particularly with tugs and vessels off No. 7 wharf and into the dry dock area. Captain Oliver in particular made mention of several occasions when tugs had been compromised to some extent by the piles in the Moorings area, and particularly their fear of damaging or swamping moored vessels if mid or full thrust was used. Captain F R Keer-Keer for the

Regional Council on the other hand believed that the ports' pilots were well used to operating within confined spaces and that the manoeuvrability of vessels off both No. 7 wharf and the dry dock was not compromised by the existing piles. However, his view was that if the piles were removed then this would be more convenient for navigation.

[48] We conclude from the evidence that larger vessels would not be able to utilise the Moorings area in any event because of the water depth of 4-5 metres. Tugs are operable on the edges of the Moorings area but would be in marginal operating conditions once half-way into the Moorings area itself. The only immediate use of the Moorings area itself suggested by witnesses for the Port Company was transitory in the sense of potential utilisation by tugs manoeuvring vessels through the area.

[49] For the applicant the prospect of the Moorings Association obtaining occupation and constructing further moorings was of particular concern. They also cited difficulties with uncontrolled occupation of the area creating potential difficulties for operation of the access to No. 7 wharf and the dry dock.

[50] Counsel for the Regional Council quoted from the decision of ***Hauraki District Council v Moulton***[11] and the High Court decision in ***Canterbury Regional Council v Lyttelton Marina Ltd***[12] as authority for the proposition that people exercising their public right of navigation are not "occupying" the coastal marina area even when they leave a vessel in one place temporarily. The Regional Council position was that exclusive occupation would not prevent the navigational rights that seemed to be the concern of the Port Company.

[51] Evidence for the submitters related in part to the public amenity value of the area and that it constituted part of the coastal marine area. They pointed to the fact that it had traditionally been used by recreational vessels. They pointed to the lack of alternative places for the mooring of vessels in Lyttelton Harbour. They also pointed to the significant noise and impacts on the residential properties nearby of the use of the area for commercial vessels or land based activities. The submitters,

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[11] 2 NZED 375.
[12] [1999] NZRMA 330 Supra.

particularly Mr McClimont and Mr T Young, raised concerns relating to the installation by the Port Company of wiring between piles to prevent vessels entering the Moorings area. They pointed to this de facto attempt at exclusive occupation as providing a risk to vessels which had resulted in a hazard warning being issued by the Harbourmaster.

[52] The Port Company provided a significant amount of evidence about potential development of the area. All this potential development was at this stage speculative, including estimates of costs. There were no potential impact assessments. We have concluded that we can put little, if any, weight on potential uses of the area which do not constitute part of the application for occupation before this Court.

[53] Most, but not all, of the potential uses of the site would require resource consents. It was accepted by the applicant that the proposals were not sufficiently advanced to give the type of detail necessary to perform the scrutiny required in terms of the RMA. We do not believe we can put the potential developments any higher than that the Port Company believed there are uses to which the Moorings area could be put at some time in the future.

[54] From the time of the Commissioner's decision in early 1999 these proposals have not advanced. At the Court hearing no firm proposal or commitment was made by the Port Company as to any development in the Moorings area. One particular possible use, that of unloading and storing imported vehicles, appears to be a use that would not require significant modification in the area. It could be undertaken without utilising the Moorings area and may use No. 7 wharf for unloading and nearby open land areas for storage. Other uses, including potential construction of new breastwork for mooring commercial vessels and reclamation in the area would involve significant works by the Port Company at significant cost. Use by larger vessels in the area would require a significant increase in depth involving the removal of the underwater rock shelf in the Moorings area.

[55] At the time when some formal proposal is made in respect of the Moorings area, the evidence may then support the Port Company's contention that occupation

should be granted and the extent to which that should exclude any class or classes of person. At the present time however the proposals are **hypothetical possibilities**[13] and cannot provide a basis for assessment of effects or evidence to support the application.

In our view these hypothetical potential future uses of the site cannot form a basis for obtaining exclusive occupation at the current time.

Reasonably necessary

[56] The evidence for the applicant, in respect of whether or not the occupation of the area is reasonably necessary, related to:

(a) retaining options for future development;

(b) maintaining efficiency and avoidance of transactional costs in defending the occupation sought by other parties;

(c) operational use of the port particularly of No. 7 wharf and the dry dock.

[57] It was argued that as the ports' infrastructure is of strategic importance the occupation has a status as reasonably necessary. The Regional Council disagreed and submitted that there was no evidence before the Court that established that the occupation of the Moorings area (as opposed to the removal of the piles) was reasonably necessary for the operation of the port. The submitters' evidence, particularly that of Mr Young and Mr McClimont, made it clear that the area was not suitable for larger vessels. They also pointed to the risk to smaller vessels of not being able to have a portion of Lyttelton Harbour for safe mooring in serious storm events. Mr McClimont in particular pointed to the sinking of several vessels at the Marina on 12 and 13 October 2000. Some of these vessels were previously in the Moorings area until required to vacate by the Port Company.

Barrett v Wellington City Council [2000] NZRMA 481, 5 NZED 602(HC). In the context of baselines.

[58] All counsel adopted the definition as set out in ***Environment Defence Society Inc v Mangonui County Council***[14] where Cooke P said "necessary" is:

> *... a fairly strong word falling between expedient or desirable on the one hand and essential on the other.*

[59] The issue of difference between the parties appears to turn on whether matters such as efficiency and strategic importance equate to reasonably necessary. For The Regional Council and for the submitters it was said that questions of strategic importance or efficiency equate to something in the order of desirable or expedient.

[60] In our view there is no evidence before this Court that would establish that the occupation of the Moorings area is essential for the operation of the port. If the Port Company had finalised an option for development of the Moorings area and associated land, then there may be compelling evidence to support such a proposition. We are of the view that once the piles are removed any inconvenience with manoeuvring vessels from No. 7 wharf and the dry dock will be avoided, and therefore we are unable to see any real advantage to the Port Company in obtaining occupation of the Moorings area from an operational point of view. It may be **desirable** for the Port Company to have full control over this area. However, the general powers of the Harbourmaster to control navigation and mooring would be sufficient. Accordingly we cannot find that there is anything **necessary** about occupation of the area from an operational perspective. We see occupation as no more than desirable. Nor do we accept that such occupation is currently of strategic importance or that strategic importance equates to reasonably necessary.

[61] We must assess where this application fits between desirable and essential. We have concluded that the evidence before the Court falls short of establishing that the occupation of the area is reasonably necessary. We base that decision on the following factors:

(1) The port has operated for in excess of 100 years without significant conflict between the Moorings area and the balance of the port;

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14 [1989]3 NZLR 257 at 260.

(2) Although we accept that there have been changes in the size of vessels operating at the port, there is no immediate proposal before this Court for the use of the Moorings area for berthing ships;

(3) The Moorings area is still subject to navigation and use by other vessels, including recreational vessels and fishing vessels;

(4) There may be other areas of the port available for development or redevelopment.

Exclusion of parties under section 12

[62] In the alternative we consider that there is no basis for establishing the exclusion of any class or classes of persons under section 12. We consider that a resource consent for occupation must expressly state whether a class or classes of persons are to be excluded. Although it is unclear from the definition we are of the view that it must be established that it is reasonably necessary that parties be excluded from the coastal marine area. A reasoning for this view is based upon section 122(5) that provides that:

(a) the permit must expressly provide exclusion of persons from the area otherwise no exclusion occurs; and

(b) such exclusion must be reasonably necessary to achieve the purpose of the coastal permit; and

(c) the permit shall not be regarded as authority to occupy the coastal marine area which is land of the Crown as if the holder were a tenant or licensee unless the permit expressly says so and it is reasonably necessary.

Not only must any resource consent specifically state the class or classes of persons to be excluded, but it must be reasonably necessary for the purpose of the coastal permit. On those grounds we are unable to find any proper basis upon which persons could be excluded from the area.

[63] It was suggested that giving the Port Company occupation would avoid competing claims for occupation. This was close to a submission that the Court should be involved in allocating or licensing the resource. Any competing application for occupation would need to be considered on a case by case basis. We indicate that the clear direction of section 122(5) is to ensure that the coastal marine area vested in the Crown remains open to the widest range of persons possible.

Non-Complying Activity

[64] In addition to the other conclusions we have reached we also have concerns about the application meeting the tests under section 105(2A). We have insufficient evidence before us to form a view as to the extent of effects from the activity. Until there is a particular proposal before us we must assume that one of the major effects will be the lack of a harbour mooring for recreational vessels. In light of the loss of vessels at the Marina we cannot say that effect is minor.

[65] We also note the objectives and policies of the Proposed Coastal Plan, particularly 8.5(a)(i) and (iii) relating to priority for safe anchorage for vessels and avoiding displacing recreational use of an area. We are not convinced that exclusive occupation of the Moorings area (by itself) meets the objectives and policies of the plan. We acknowledge the many references to the port as regionally and strategically important. However, to date there is no proposal before us to demonstrate that the occupation of the Moorings area furthers those objectives. The application does not seek occupation for a port activity but rather for potential future use. Accordingly we conclude that the application as currently framed is contrary to the objectives and policies of the plan, particularly those cited above.

[66] On the evidence before us we have concluded the appellant has not satisfied the provisions of section 105(2A).

Conclusion

[67] For the reasons given we are of the view that no compelling reasons have been advanced by the Port Company to restrict the range of persons having access to

the Moorings area or that there is any particular use which the Port Company has for the area which would found the basis for such an application. The Port Company still holds a deemed resource consent for the existence and maintenance of the piles and it may wish to continue licensing those for mooring purposes.

[68] In the alternative there appears to be opportunities for all the parties to attempt to reach a consensus as to the most appropriate use for the Moorings area in the future. Having regard to the onus to establish any exclusive occupation as reasonably necessary, some element of public utility would seem to be contemplated in terms of the Statute. There is a potential adverse effect on the local community of excluding all recreational vessels from the harbour. There is merit in the various stakeholders including The Regional Council considering and developing a consultative/consensus approach to resolution of this matter. Alternatively The Regional Council may wish to consider promulgating particular rules for the Moorings area as is contemplated in the Act.

[69] For the reasons given we uphold the decision of the Commissioner for The Regional Council in declining the application for consent as it relates to the occupation of the Moorings area. The appeal on this aspect of the Commissioner's decision is disallowed.

[70] In respect of the application for the removal of the piles we confirm the decision of the Commissioner subject to the deletion of the existing condition 2.

[71] Costs are reserved. Any party wishing to seek costs must file applications within 15 working days (as defined in the Act). Any reply is to be filed 10 working days thereafter. Final reply (if any) to be filed 5 working days thereafter.

DATED at **CHRISTCHURCH** this 26th day of **January** 2001.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

J A Smith

Environment Judge