BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 125

IN THE MATTER of appeals pursuant to Clause 14 of First Schedule of the Resource Management Act 1991 (the Act) in relation to the Proposed Variation 1 (Coastal Policy) to the Proposed Bay of Plenty Regional Policy Statement and applications for strike-out

BETWEEN MOTITI ROHE MOANA TRUST
(ENV-2013-AKL-000069)

Appellant/Respondent to application for Strike-out

NGĀTI MĀKINO HERITAGE TRUST
(ENV-2013-AKL-000068)

Appellant/Respondent to application for Strike-out

MOTITI AVOCADOS LIMITED
(ENV-2013-AKL-000074)

Appellant/Applicant for Strike-Out

LOWNDES ASSOCIATES
(ENV-2013-AKL-000082)

Appellant/Applicant for Strike-Out

AND BAY OF PLENTY REGIONAL COUNCIL

Respondent/Applicant for Strike-Out

Hearing: At Tauranga on 26 & 27 May 2014

Court: Environment Judge J A Smith sitting alone pursuant to Section 279 of the Act

Participants: Mr M E Casey QC and Mr S J Ryan for Lowndes Associates **(Lowndes)**

Mr P H Cooney and Ms S E Wooler for the Bay of Plenty Regional Council (**the Regional Council**)
Mr N Swallow for Motiti Avocados Limited (**Motiti Avocados**) and also for parties who abide the decision of the Court: Port of Tauranga, Blakely Pacific Limited and Ors, Te Tumu Landowners Group and Ors
Mr J M Pou for Ngāti Mākino Heritage Trust (**Ngāti Mākino**)
Ms J Mason and Ms A E Shelton for Motiti Rohe Moana Trust (**Motiti Rohe**) and Mataatua District Maori Council (**Mataatua Maori Council**)
Mr J P Koning and Mr J N Gear for Te Runanga O Ngati Awa and Rangiwai Marae Committee – watching brief only

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DECISION OF THE ENVIRONMENT COURT ON APPLICATIONS TO STRIKE OUT

A. **The Draft Consent Memorandum produced by the parties and dated 16 December 2013 (the Draft Consent) is endorsed by the Court and changes indicated therein are to be made without further formality. The Court will issue an Order to this effect in due course. This resolves the appeal of Motiti Rohe in part as follows:**

i. **The Astrolabe Reef is classified as being of Outstanding Natural Character (ONC).**

ii. **Motiti Island's coastal edge and surrounds as shown on Map 21 of 35 of Appendix 1 to the Draft Consent is classified as being of High Natural Character (HNC).**

iii. **Attributes listed thereafter in Consent Memorandum are included in Appendix J.**

B. **With the exception of the following two points of relief sought, the appeal of Motiti Rohe is struck-out:**

i. **Islands, toka, reefs, substrate (and potentially water) surrounding Motiti, being those not already covered by the Astrolabe Reef or Motiti Island and surrounds notations (see map 21 of 35 attached hereto), be classified as ONC.**

ii. **Any Attributes to be listed in relation to the above in Appendix J are to be limited to those in Policy 13 of the New Zealand Coastal Policy Statement 2010 (NZCPS).**

C. **With the exception of item 5(f) of their appeal (being the classification of Okurei Reef as ONC) Ngāti Mākino's appeal is struck-out. Any changes to the attributes under Appendix J in relation to 5(f) are to be limited to those in Policy 13 of the NZCPS 2010. This partial strike out is granted on the basis that, with the exception of items 5(f), (g) and (h), the matters raised in the appeal were not the subject of submissions under the 1st schedule to the Act and that items 5(g) and (h) have been resolved by agreement.**

D. **For the sake of clarity, the Mataatua Maori Council's Section 274 Notice is limited to the remaining Ngāti Mākino and Motiti Rohe grounds of appeal.**

REASONS FOR DECISION

Introduction

[1] This hearing came about following the presentation of the Draft Consent signed by all parties except Motiti Rohe, Mataatua Maori Council and Ngāti Mākino and a series of applications for strike out. A judicial conference was held in February 2014 and a copy of the resulting minute is annexed hereto and marked **A**.

[2] Subsequently, the matter came to hearing on the basis of the Draft Consent and three applications for strike out filed by Lowndes, Motiti Avocados and the Regional Council.

[3] In respect of Lowndes and Motiti Avocados, the application was based on three grounds:

[a] That parties had reached agreement with the Council and were now attempting to resile from that agreement;

[b] Their appeals were not within the scope of their original submissions or of Variation 1; and

[c] It would otherwise be an abuse of process to allow the proceedings to continue.

[4] The Regional Council sought only that certain aspects of both appeals be struck-out as being beyond the scope of the original submissions of the parties. In the end it appeared that both Lowndes and Motiti Avocados recognised that certain aspects of the appeals of Motiti Rohe and Ngāti Mākino may still be extant. Given that each party supported the submissions of the other, the matter has become very confused as to the precise arguments relating to each of the applicants.

[5] No party addressed in any detail the Draft Consent presented to the Court for endorsement, which was the subject of the original directions. Nevertheless, it is clear that the Regional Council is still seeking to have that order endorsed by the Court on the basis

that the parties agreed to those orders, or alternatively that thay have not raised matters in their submissions or appeals that justify them participating in the decisions reached.

[6] Matters are also coloured by Miss Bennett for Ngāti Mākino and Mr Matehaere for Motiti Rohe taking some umbrage at the suggestion that they have changed their position and resiled from agreements made following mediation.

BACKGROUND

Variation 1 and the Rena

[7] It is important that this complex series of applications and considerations are considered in context. The Court has been dealing with the local plan for Motiti Island for approximately six years. It has been the subject of multiple hearings, and the final wording of the plan is still to be settled.

[8] Ngāti Mākino has been actively involved in other aspects of the Regional Policy Statement (**RPS**), including recent decisions of this Court relating to the role of Tangata Whenua in respect of natural waterways. It would be fair to say that they are pursuing an agenda to co-manage waterways, including the coast, and that their position has clarified in the last few years, particularly through the process of the last substantive hearing.[1]

[9] On 5 October 2011, prior to the notification of Variation 1 to the RPS, the MV Rena ran aground on the Astrolabe Reef. The Astrolabe Reef is 5 – 7 kms from Motiti Island and is contended to be part of the same rocky substrate. The grounding and subsequent clean up have galvanized many of the local people of the Bay of Plenty region, including iwi and hapu within the Bay and on Motiti Island in particular.

[10] Lowndes, acting in some form of agency for the ship's owners sought to delay the classification of the Astrolabe Reef pending the resolution of the issue surrounding the wreck of the Rena, which is still in situ. There have been indications on numerous occasions that an application for consent to allow the Rena wreckage to remain on the Astrolabe Reef. The last suggestion was that such an application would be filed by the end of May 2014. No such an application been filed as of the date of this decision.

[1] ***Ngati Makino Heritage Trust v Bay of Plenty Regional Council***, [2014] NZEnvC 25

[11] It would be fair to say that feelings amongst iwi and hapu are running high, and there is a real desire to ensure that any documents that might be relevant to a consideration of that future application properly reflect Maori concerns.

THE ISSUES

[12] While it is difficult in a practical sense to encapsulate the issues in a simple form, Ms Mason, for Motiti Rohe, suggested that there were issues of scope and of process. In terms of scope:

[a] Is the relief sought within the scope of Motiti Rohe's original submission on Variation 1?

[b] Is the relief sought in relation to the issue of natural character within the scope of Variation 1 and justiciable?

[c] Is the relief sought in relation to the implementation of NZCPS 2010 within the scope of Variation 1 and justiciable?

[13] In terms of process:

[a] Has there been a failure to respond to the direction made by the Court on 17 January 2014?

[b] Have the appellants resiled from the mediation agreement?

[c] Was Motiti Rohe's original submission on Variation 1 a valid submission?

[14] This statement of the issues assumes that the relief sought is clearly set out by Motiti Rohe. However, there is in fact a lack of clarity in the submission of both Motiti Rohe and Ngāti Mākino. The Court must first interpret the submissions to ascertain whether it complies with the relevant law relating to scope.

[15] There are also issues surrounding whether an agreement was reached between the parties, either in the document of 3 October which followed the mediation, by agreement orally; or by agreement before the Court on 17 February, as recorded in Document A.

[16] Faced with the essential disagreement by the parties on the exact issues, the Court is left with a very complex mix of facts, and the question of how to approach the various issues.

[17] In the end, I have concluded that I will adopt the following approach:

[a] What do the original submissions say;

[b] What issues are stated in the appeal documents;

[c] Was there any agreement, and if so, what has been agreed between the parties; and

[d] In respect to those matters that remain, what is the law as to scope, and how does it apply to the facts in this case.

Consultation

[18] Before I address these points I will first turn to the issues raised regarding consultation. Motiti Rohe suggested that the applications before this Court were invalid because there had been a failure to consult. This issue has been previously addressed in respect of Motiti Island in our earlier decision, and also in the decision relating to ***Tuhua***.[2] The local authority here advised Motiti Rohe and sought its views in respect of various plans it had in mind in December 2011. Some months later in April 2012 Motiti Rohe responded, and in May 2012 the Council and CEO indicated that there would be further engagement. Subsequently, Variation 1 was introduced on 31 May 2012.

[19] Variation 1 sought only to bring in some aspects of the NZCPS, particularly Policy 13 which had been finalised subsequent to the introduction of the proposed Regional Policy Statement. For the reasons given in the previous decision, I am satisfied that the consultation in this case was adequate and that it did not vitiate the process of the Plan.

[2] ***Trustees of Tuhua Trust Board v Minister for Local Government***, [2012] NZEnvC 202 at [37] – [42]; ***Hoete & Ors v Minister for Local Government***, [2012] NZEnvC 282 at [65] – [75]

What is required of a submission?

[20] The First Schedule to the Act sets out a procedure for notification and processing plan provisions. Clause 6(15) requires that submission must be in the prescribed form. This is because of the Council's subsequent obligation to summarise submissions and notify them by public notice.

[21] The schedule itself should be interpreted in a robust way, taking into account that the Council has to summarise the decision sought and third parties must understand that summary in order to cross-submit efficiently. While the Court in ***Hannah v Tasman District Council***[3] noted that there was some tolerance for imprecise expression, I nevertheless conclude that the document must identify the decision sought in regards to the Variation to the Regional Plan.

[22] There have been various formulations of this approach but the question I essentially put to the parties was *Is the particular matter of concern put in issue by Motiti Rohe or Ngāti Mākino submission?* In ***Campbell v Christchurch City Council***[4] the test were stated as, *Does the submission as a whole fairly and reasonably raise some relief expressly or by reasonable implication about an identified issue?*[5]

[23] In order to answer this I now examine each of the submissions in turn.

Motiti Rohe's Submission

[24] Variation 1 was intended to incorporate aspects of the NZCPS, most notably Policy 13, into the RPS. It was notified and the Council subsequently received a submission from Motiti Rohe on 2 July 2012, which was treated as being within time.

[25] That submission consisted of the earlier submission on the reviews of the Regional Policy Statement and Regional Coastal Environment Plan dated 2 April 2012 accompanies by a covering letter from Motiti Rohe indicating that they had had no opportunity to discuss the matter further since that original document was prepared. Annexed hereto and marked **B** is Motiti Rohe's submission and marked **C** is a copy of the covering letter.

[3] W058/2002
[4] [2002] NZRMA 332
[5] Ibid at [18]

[26] It is clear from the covering letter that Motiti Rohe's submission is intended to respond to Variation 1. However, the document itself was clearly prepared as a general commentary on all forms of plan, including territorial plans. The first page essentially establishes the credentials of Motiti Rohe and their interest in the provision of customary rights and interest for Motiti Tangata Whenua. It then raises concerns relating to the Rena and Astrolabe Reef, and concludes that the Regional Policy Statement Coastal Environment Plan should be robust and reflect international best practices. It further notes that there needs to be full and effective engagement with Tangata Whenua and claims that this has not occurred in the past and that the Regional Council must do more than have regard to or take into account the view of Tangata Whenua, it must provide for them. It goes on to discuss the lack of facilitated preparing a professional brief and the effect that this has had on their ability to make a more detailed submission.

[27] The submission then goes on to discuss *Over-riding Environmental Principles* and a series of *Issues*. Many of these reflect in a broad sense the type of issues discussed in the NZCPS and the proposed RPS as a whole. Motiti Rohe goes on to consider resource consents, which is an area clearly related to the application of plans, rather than the preparation of policy statements.

[28] The submission then goes on to address *Specific Matters relating to Motiti*. The first of which is that it sees the whole of Motiti Island, including the inland interior, toka and reefs as being within the coastal environment. Point 12 of *Specific Matters relating to Motiti* is provision for co-management of the Motiti Rohe. The balance of the submission then deals with features, landscapes and historic cultural heritage – matters dealt within the Proposed RPS but not in Variation 1. This submission clearly relates to a whole series of potential plans, with the Coastal Environment Plan seeming to be its primary target.

[29] Motiti Rohe clearly sought to have all of Motiti Island and its surrounding reefs and toka classified as ONC. Mr Casey QC for Lowndes conceded that this would include Astrolabe Reef and that Motiti Rohe's submission opposing the delay of it being classified in the RPS gave grounds to seek to maintain its Outstanding Natural Character.

[30] He also acknowledges that *Appendix J: Natural Character Attributes* (**Appendix J**) was connected to the Maps, and essentially listed the attributes that support the inclusions of areas within the map. I am not aware of any mapped areas that do not have supporting entries in Appendix J.

[31] Therefore, Motiti Island and its surrounding areas have relevant attributes included in Appendix J. A full reading of the submission also raises the question as to whether or not those lists of attributes referenced in the relief should include cultural characteristics. I am unable to find any link between the general commentary at the early part of the submission, arguably the use of the term *Natural Character* at item 2 of the *Specific Matters Relating to Motiti*. The cultural matters discussed at Item 6 for example, relate to Motiti Island itself, and not to natural character attributes.

[32] While Item 11 does seek that the plan *recognis[e] that the land above and below the water has cultural value to Motiti and the people who have ancestral relationship with these land and waters*, this relates to the protection of indigenous biological diversity of the land and waters rather than to its natural character attributes. It appears to me that the classification of the Astrolabe Reef, at least, as ONC would satisfy that concern.

[33] What is clear is that Astrolabe Reef being classified as ONC does not satisfy the submission at Item 2 that sought that the whole of Motiti Island and its surrounding island and rocks, toka and reefs be described as Outstanding Natural Character,

Motiti Rohe's Cross-Submission

[34] In its further submission to the Variation 1 appeal, Motiti Rohe made comment on a number of matters in the RPS and opposed the natural character changes sought by Motiti Avocados submitting that the *Intent and extent of NZCPS should be given full effect, especially Policies 2 & 17.* They also sought to *retain Motiti Rohemoana as outstanding natural character in RPS Coastal variation and protect from further subdivision use and development.* In respect of Lowndes, they opposed Method 53, stating that *Natural character or coastal environment needs to be identified, assessed and classified for protection and restoration.* They also oppose Appendices I and J while seeking to *Retain Motiti Island and other island and Astrolabe Reef within the Motiti Rohemoana as outstanding natural character.*

[35] It is important to recognise that a cross-submission cannot raise any new matters. It can simply support or oppose an issue raised by another party.[6] Given that both Lowndes and Motiti were seeking more liberal provisions, it is not possible for Motiti Rohe to seek

[6] Clause 8(2) of the First Schedule of the Act

an extension of ONC in their cross submissions. The cross-submissions do not extend matters beyond the original submissions made by Motiti Rohe.

[36] As already discussed, I do not think that anything is added to this argument by the cross-submissions. They could be summarised by saying Motiti Rohe would support the reinstatement of anything that Motiti Avocados or Lowndes sought to have deleted from the Plan.

[37] I have concluded that relevant submissions were made by Motiti Rohe in respect of the ONC classification of Motiti Island itself, and all areas surrounding it, including rock reefs, going as far as Astrolabe Reef. Although the attributes that Lowndes sought be deleted were taken out by the Council can be reinstated, there is no basis for an extended attribute list relating to cultural considerations. The submission does not identify the Appendix J additions sought.

[38] On this basis I have concluded that the only grounds supported by Motiti Rohe's submission are at 8(f): *retaining the designation of Motiti Island and the Motiti CMA as having outstanding natural character*. That clearly includes all islands, rocks, toka and reefs, including Otaiti (Astrolabe Reef).

Ngāti Mākino's Submission

[39] Ngāti Mākino's original submission is annexed hereto and marked **D**. It discusses particular aspects and matters with relative precision. For example, HNC on the *Natural Character Map* has been omitted in some places and Ngāti Mākino seeks that it be included.

[40] They seek changes to Policy CE2A at Page 7, including a new method for the identification of coastal areas unsuitable for development because of potential hazards. They also seek changed to Method 56 to avoid conflict between marine reserves and Maori customary fisheries. Issues regarding HNC areas on maps 23, 24 and 25 are also referred to in the submissions, with reference made to pages 47, 48 and 49. They seek *involving DOC and MINFISH in integrated coastal planning*. They also seek specific changes to Policy CE8B, CE8B and CE9B.

[41] In relation to Policy CE7B they seek specifically *ensuring subdivision, use and development is appropriate to the natural character of the coastal environment.* Clearly Ngāti Mākino seeks a number of changes to subdivision and other provisions.

[42] Most of the changes sought are relatively specific, relating to either a policy or method, or both. There is also a wider discussion of the planning maps at the commencement. It is important to note that this discussion is about specific maps and areas, namely within the rohe Waitahanui Ngāti Mākino and its coastal margins.

[43] The Ngāti Mākino notice of appeal notes at 5(a) that it covers matters *not explicitly raised in the original submission.* The reference to Otaiti (Astrolabe Reef) in the appeal bears no relationship to the original submission and is not included within the map areas identified. Furthermore, the discussion of *cultural considerations to the natural character evidence-based yardstick* at (d) related only to the relevant policies and methods, and it sought specific changes to the specific item wording rather than a plan-wide approach. 5(e), (f) and (g) were raised, and clearly needs to be the subject of on-going discussion.

[44] The full description of *Natural Character* as set out in the NZCPS is difficult to ascertain from the original submission, and does not fit easily within any of the categories. Classification as ONC or HNC is not a reference to the definition of natural character, given that it refers to specific pages and maps.

[45] I note that the detailed matters in the Schedule (i.e. Pages 6, 7, 9, 10, 19 and 56) do not appear to have been raised in the appeal.

[46] In respect of Ngāti Mākino, their submission did not relate to the Motiti Island area or to Astrolabe Reef, and thus they have no issues as to *ONC* or *HNC* as a result of their submissions. The purported extension into those areas on appeal is not permitted by Clause 6 of the First Schedule of the Act, particularly because of the need to notify third parties of the potential effect of the changes.

[47] In relation to the appeal of Ngāti Mākino, the matters in that appeal which were supported by submission are Items 5(e), (f) and (g). The others are not supported by a proper reading of the Notice of Submission.

On the Variation?

[48] Having reached the conclusion on what the submission and appeal documents raised validly under the Act, the issue as to whether or not these appeal subjects are on the Variation becomes moot. Quite clearly the Variation itself dealt with Policy 13. Given the constrained nature of the submissions, those clearly related to that topic.

[49] Nevertheless, I cannot leave this topic without making some commentary around Policy 13 and whether aspects of cultural relationship may not be included under that policy. The words *may include* make it clear that Policy 13(2) is not intended to constitute an exhaustive list and other matters not inconsistent with those listed might also be included. Support for that interpretation is found by reference to Policy 14 which speaks of *restoring cultural landscape features*. If they can be restored under Policy 14 it seems only logical that they can be protected under Policy 13.

[50] There is a connection between natural features, natural landscapes, and natural character. An Outstanding Natural Landscape can no doubt also have ONC. Dusky Sound is an example of this overlap. The degree to which a natural landscape is outstanding is often affected by the extent of its natural character. Nevertheless, each of these classifications addresses slightly different things. A natural landscape may still be outstanding even though it is modified, this may include cultural landscape features.

[51] In terms of aspects of a cultural relationship, Mr Paul's affidavit mentioned features such as currents, water temperature, bio-ecological aspects and relationship of various ecological elements of the water and sea which all make up the wholeness with which Maori perceive their environment. Natural features such as reefs may have a cultural dimension in that they have provided food or aided navigation. It does not appear to me that such relationships are necessarily irrelevant to natural character. The question for this Court is not whether or not such a matter might be argued, but whether it was raised in terms of the original submissions on this Variation.

[52] Similarly, it does not necessarily follow that Policy 13 should be amended in this way. I note that it is for each regional or local authority to interpret and implement these superior documents in light of their region, having regard to their overall obligation to give effect to the superior documents.

[53] Thus, Mr Cooney for the Regional Council conceded that they may very well face arguments at the Regional Coastal Policy Plan stage about the relationship of cultural aspects to Policy 13 and 14 of the NZCPS.

[54] Similarly, issues of co-management are clearly live matters at each stage, and I acknowledge that these matters are not lost simply because they were not included in the submissions. These are matters that can properly be taken into account and incorporated at the Regional Coastal Policy level. As noted by the Court in the previous decision[7] it is probably more appropriate that these type of recognitions and relationships are included at the Regional Plan level rather than the broader scope of the Policy Statement.

[55] It would be fair to say that the NZCPS as a whole contains a significant number of provisions relating to cultural matters, and that the additions by way of Variation 1 did not derogate from those provisions and may have in fact strengthened them.

The Consent Orders Sought

[56] Annexed hereto and marked **E** is the memorandum for consent orders and Draft Orders that deals with a number of issues.

[57] I accept that Ms Bennett for Ngāti Mākino was not present at the conclusion of the mediation negotiations in this matter, and that the document that she signed was not the final mediated agreement. I also accept Mr Matehaere's evidence that he signed the signature page disconnected from the mediation, and thus neither party signed the Mediation Agreement knowing its full content.

[58] Having said that, the Court went through each of the changes sought by the Draft Consent Order with each of the parties at the callover on 17 February 2014 and recorded that the parties accepted each of those changes. I am now told by Mr Pou that Ngāti Mākino does not accept all of those changes, and by Ms Mason for Motiti Rohe, that they accept none.

[59] However, I would briefly conclude that the parties had agreed, at least on 17 February 2014, to changes to the provisions included in the Draft Order

[7] [2014] NZEnvC 25

[60] I am therefore faced with a signed memorandum by the Regional Council, Western Bay of Plenty District Council, Federated Farmers of New Zealand, the Royal Forest and Bird Protection Society, NZ Transport Agency, Te Tumu Landowners Group & Ors, the Environmental Defence Society, Lowndes, Te Runanga O Ngati Awa, Tauranga City Council, Port of Tauranga, TKC Holdings & Ors, and Motiti Avocados. The only parties who have not signed this consent document are Motiti Rohe, Ngāti Mākino, and the Mataatua Maori Council.

[61] I now consider whether each of the matters agreed is within the scope of the original submissions or appeal of the parties, and therefore validly the subject of agreement by the parties.

The Changes Sought

[62] Policies 2.2.1, 2.2.2, 2.2.3 and 2.2.5 are not matters on which any of the three parties subject to today's proceedings directly submitted. I note that the changes are relatively benign, and if anything, are likely to be more acceptable to them than the original. Policy CE2B, which was the subject of the original submission but not appeal, notes that Policy 13 of the NZCPS 2010 will apply; recognising the blanket ranking of the open coast may require site specific assessment.

[63] Similarly, in Policy CE7B there has been a change to (d) from avoiding to examining the appropriateness of activities. This was part of the original submission of Ngāti Mākino but does not appear to have been in the notice of appeal. There is also a reference to Objective 6 and Policy 7 which properly balances the competing needs issues.

[64] Changes to Policy MN6B again do not appear to have been the subject of any direct submission by these parties on Method 49A. Even if Motiti Rohe's original submission is taken to refer in part to public access issues, these changes appear relatively unremarkable. Methods 49A and 53 do not appear to have been the subject of direct comment.

[65] Appendix J does not appear to have been the subject of direct comment by Ngāti Mākino or Motiti Rohe. Accordingly, the changes to it, although more comprehensive and probably closer to those appropriate for the areas in question, were not subject to their submission. It is correct that the Motiti Island margin has been noted as HNC, whereas the original submission for Motiti Rohe sought ONC for the whole island. Although this is not

the subject of any valid submission by Ngāti Mākino, it is a specific subject of submission by Motiti Rohe.

[66] As far as Astrolabe Reef is concerned, its inclusion as ONC satisfies the relief sought by Motiti Rohe. However, his does not resolve the issue about islands, toka, reef, or the substrate around Motiti, which apparently remains un-noted.

[67] Thus, of the matters within the appeal of Motiti Rohe's appeal there is an agreement on Astrolabe (at least to the 75m contour line), partial acknowledgment of Motiti itself as being of HNC, but no resolution for substrate, islands, reefs, etc.

[68] The only aspect of the order that is still disputed directly is that relating to the classification of Motiti Island's margins and immediately surrounding area as having HNC rather than ONC, with the interior of the island not being classified either way. To the extent that these issues go beyond the terms of the Draft Order, should they be struck out?

[69] As we understand it, the following aspects of Motiti Rohe's appeal still live:

[a] How much of Motiti Island should be included as *Outstanding* or *High* natural landscape;

[b] The status of all islands, reefs, toka and substrate between Motiti Island and Astrolabe;

[c] The status of Astrolabe Reef below 75m; and

[d] Whether the waters in this area to the 12 nautical mile limit have Outstanding Natural Character;

[70] The appeal does not raise the question of additional attributes, but simply the status in the areas covered. This would leave remaining for Ngāti Mākino issues as to the status of Okurei Reef and where Ngāti Mākino has not agreed with the assessment.

[71] I was advised at the hearing that the Te Tumu coastline issue has been resolved and we had previously been advised that the Waitahanui issue had also been resolved.

Application for Strike-Out

[72] If Lowndes was seeking to strike Ngāti Mākino out in respect of the Okurei Reef then this was not spelt out clearly in their application. Mr Cooney for the Regional Council acknowledged this aspect of the Ngāti Mākino appeal was still live. He acknowledged that there were appeals in respect of the Waitahanui River mouth and Te Tumu, but the parties agreed that those matters had subsequently been resolved. He notes that the Okurei matter is still not agreed.

[73] Mr Cooney accepts that the relief for retaining the ONC classification on Motiti Island is currently still live. I understood him to concede during discussions with the Court that this would include the outlying islands and waters, including the Astrolabe Reef. Given that the reef itself has now been described as ONC, I would accept that there is no useful point that could be served by including that within the appeal, except below the 75m contour.

[74] Nevertheless, the balance of Motiti Island, its surrounding toka, islands, reef and substrate, and even waters, are not currently subject to an ONC classification. Accordingly, it must be said that there are aspects of the appeals that appear to still be live, subject to the application to strike-out.

[75] I do not consider anyone raised any arguable case to strike Ngāti Mākino out on the Okurei ground of appeal. Accordingly, grounds 5(f) remains extant. I have already concluded that no other valid ground of appeal affects the proposed consent order.

[76] The argument in respect of the Motiti Rohe appeal appears to be an argument that Motiti Rohe has resiled from an agreement and that to allow them to continue with the points previously settled by agreement would amount to an abuse of process. The agreement asserted by Motiti Avocados relates to Motiti Island itself[8], an agreement that classifies only with the seaward edge of the island as being HNC rather than *ONC*.

[77] In short, if the strike-out application was successful on the basis of the agreement reached, it would not resolve the entire appeal for Motiti Rohe. Those parts of the appeal that apply to all offshore islands, reefs, toka and the like, possibly including the sea itself

[8] Pepper, Affidavit, Exhibit C

would remain to be resolved. Providing they weren't covered by the areas in Map 21 of 35 the question is whether it could strike out the Appeal relating to:

[a] Covering the whole of Motiti; and

[b] Its status as ONC rather than HNC.

[78] There was no direct evidence from Motiti Avocados regarding final agreement being reached. Mr Low indicated that there was progress on these issues during the day of Court assisted mediation, but seems to have acknowledged that the Council did not want to discuss any of the key issues raised by Motiti Rohe. In regards to the signed mediation agreement, Mr Matehaere tells me that he doesn't recall anyone telling him what the signatures were for. He does recall thinking that they were to sign the document as a record of the completion of the mediation. He then says:[9]

> The document which we were asked to sign was simply a list of parties, and was not attached to any of the documentation that allegedly now forms the Mediation Agreement.

[79] On 7 October 2013 Mr Low emailed Mr Sayers (a member of Motiti Rohe):[10]

> Just a reminder that you were to come back to us today re which of the matters are agreed.

[80] Mr Sayers wrote back saying that he had *only managed to speak with a couple of people* and in the circumstances feels that there is *insufficient engagement* and still seem to be *agreeing to disagree*.

[81] I am not satisfied on the evidence before the Court that there was an unequivocal agreement by Motiti Rohe to the classification of Motiti Island seaward edge as being of *High* Natural Character. More importantly, there is no evidence that Motiti Rohe abandoned claims over the balance of the island's Natural Character being *Outstanding* rather than *High*.

[82] The relationship between Motiti Island, Astrolabe Reef and all of the intervening islands, reefs and substrate (including potentially the water), was clearly a matter of

[9] Matehaere, Affidavit at [16]
[10] Matehaere, Affidavit, Exhibit A

importance to Motiti Rohe in filing their submission and appeal, and in the circumstances I am not satisfied that Motiti Rohe have unequivocally accepted that only the outer edges of Motiti should be *High* Natural Character, as set out in the draft consent order. In particular, they certainly have not abandoned their claim in respect of the balance of the island. The fact that they were to *come back* to advise what they agree on tends to indicate to me that document produced at mediation was not intended to be a final agreement.

The Concessions of 17 February

[83] The draft consent conditions were produced following the mediation and when all parties did not sign those orders a call over was directed. At that call over the Court went through each item of the draft consent conditions with the parties and recorded that there was no disagreement as to the actual changes sought. Importantly, this included the identification of Motiti Island Margin as *High* Natural Character.[11]

[84] Although not noted in the resulting minute, it was clear that both Ngāti Mākino and Motiti Rohe had other issues which they considered were not settled by the draft consent orders. Ngāti Mākino was of the view that they could still add attributes to Appendix J and agree Waitahanui, Te Tumu and Okurei.

[85] I have concluded that the latter course is open only in respect of Okurei.

[86] In relation to Motiti Rohe, I accept that the classification of the reef, toka, substrate and water around Motiti was not resolved. The contour beneath 75m on Astrolabe and also the classification of the whole of Motiti remained extant.

Disentitling Conduct

[87] The only agreement asserted was in respect of Motiti exterior edge being classified as *High* Natural Character.

[88] Motiti Avocados' application to strike-out is supported by what they consider disentitling conduct on the part of Motiti Rohe, being a failure to comply with directions on a repeated basis and seeking to resile from agreements reached before this Court. I should

[11] I have no note as to dissent. There may have been a desire to add further attributes to Column 4. However, there is no indication that the Rohe sought Outstanding Natural Character over the whole island.

point out that at the Court hearing, the Court recorded that the status of Motiti Island's surrounds as *High* was recorded and agreed, subject of course to an argument as to the status of outlying islands, reefs, toka and substrate. I have no precise regard that Motiti Rohe agreed to the edge of Motiti being of HNC.

[89] The Court's instruction to narrow and clarify issues within the scope of Motiti Rohe's submission was greeted by an affidavit from Mr Lawrence significantly expanding the range of outcomes sought. There has been a failure (as a matter fact) to provide the detail required by the Court at the required dates. The deadline of 17 February for additional attributes sought to be added to Appendix J was not complied with until the weekend prior to the commencement of the hearing, and even then the information provided was addressed by saying that:[12]

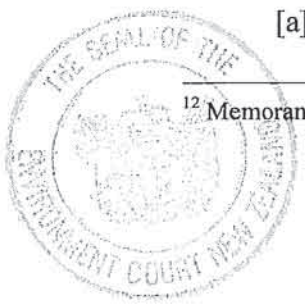
> ...the proposed wording in relation to including mataurangi Maori and the perceptual attributes of Appendix J needs to be developed in accordance with tikanga, which involves full consultation with tangata whenua and ahi kaa. Moreover it was always envisaged by the appellants that they would work with the BOP Regional Council and the spirit of partnership to jointly develop the appropriate criteria for Appendix J.

[90] Given my conclusion that that issue is not before the Court on the appeal, non-compliance with that direction has been of little moment. However, the particularisation of the appeal is a matter of somewhat more importance, and has definitely put other parties to extra cost. Motiti Avocados, in particular, is a major landowner on Motiti and has been involved in issues relating to the District Plan. The amended pleadings were filed within the extended time granted by the Court, and accordingly, no issue can be made as to the non-compliance with that requirement. Nevertheless, the list of issues provided in that by virtue of Mr Lawrence's affidavit is a significant increase in issues without particularisation of outcomes sought. In fact, the outline did not appear to relate to any particular part of the Plan, given that there were no references to pages, policies, methods or the like.

OVERALL CONCLUSION

[91] This is not a case where one particular action of Motiti Rohe could be said to have disentitled them. It is essentially a culmination of various matters, including:

[a] A poorly worded original submission;



[12] Memorandum of Counsel for Motiti Rohe, 23 May, paragraph [10]

[b] Expansive but indirect appeal; and

[c] Attendance at mediation, refusing to sign the subsequent draft consent order and then advice to the Court that they agreed with the matters contained within that draft, particularly *High* Natural Character of Motiti Island exterior only.

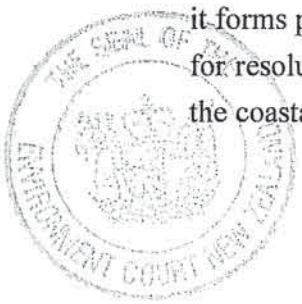
[92] I have concluded that Motiti Rohe agreed to the *Outstanding Natural Character* of Astrolabe to the 75m depth contour, and the *High Natural Character* of the exterior of Motiti Island. Motiti Rohe confirmed their position on the rest of the island, namely that it has *Outstanding* Natural Character. In reaching this conclusion I have regard to the fact that people attend mediations of this complexity and length at significant personal cost and inconvenience.

[93] In this case I am satisfied that on 25 February this year the parties agreed that those orders were appropriate, including Mr Sayers for Motiti Rohe. In those circumstances, whatever may have been the procedural defects during the mediation, the parties did substantively reach an agreement, at least by 17 February.

[94] In the end, I have concluded that I should strike-out the part of the Motiti Rohe appeal as it relates to Motiti Island itself and as to Astrolabe. In other words, the matters contained in the memorandum of parties in relation to the Astrolabe and in relation to Motiti Island itself become orders of the Court and items in the Plan.

[95] Therefore, what remains is the other islands, rocks, toka and reefs, substrate and potentially water, in the vicinity of Motiti and its status under the Plan. This may require some additions to Appendix J *Natural Character Attributes* in respect of those items, given that there are no attributes currently, but in the circumstances of this case I do not believe that the extension to cultural consideration is indicated in the submission and appeal documents. I would therefore expect it to follow the form of other Appendix J attributes, particularly those relating to Astrolabe and the like, based on Policy 13 of the NZCPS.

[96] For the sake of clarity, the status of the Astrolabe Reef below 75m is still at large, as it forms part of that substrate. I do not consider that the internal area of Motiti Island is still for resolution, as that matter has been addressed by the inclusion of Motiti as HNC around the coastal edges.



[97] As far as further attributes being added to Appendix J, I have concluded that this is not at large so far as the matters concluded are concerned.

[98] Accordingly, it is my intention to issue orders of the Court confirming the memorandum of parties on 16 December as to the orders to be made. This leaves outstanding in respect of the Ngāti Mākino appeal, the question of the Okurei area, and in respect of the Motiti Rohe appeal, the islands, toka, reef, substrate (including Astrolabe below 75m contour, and possibly water) not in the vicinity of Motiti Island (see Map 21 of 35).

ORDERS

[99] I therefore make the following orders:

[a] With the exception of Item 5(f) relating to the Okurei Reef, the appeal of Ngāti Mākino is struck-out. The issue remaining for parties is its inclusion, or otherwise, in the relevant planning maps. In the event that additional Attributes need to be included under Appendix J, these do not include cultural matters but those outlined in Policy 13 of the NZCPS; and

[b] With the exception of the following two points of relief sought, the appeal of Motiti Rohe is struck-out:

[i] Islands, toka, reefs, substrate (and potentially water) surrounding Motiti, being those not already covered by the Astrolabe Reef or Motiti Island and surrounds notations (see map 21 of 35 attached hereto), be classified as ONC.

[ii] Any Attributes to be listed in relation to the above in Appendix J are to be limited to those in Policy 13 of the New Zealand Coastal Policy Statement 2010 (NZCPS).

[100] The order issued by the Court will indicate the final disposition of all other appeals related to these issues as set out in the memorandum of counsel filed with the Court on 16 December.

COSTS

[101] Costs are reserved and any application is not encouraged.

[102] However, in the event that an application is to be made, it is to be filed within 20 working days; replies within 10 working days; final replies, if any, a further 5 working days.

DATED at AUCKLAND this 9th. day of June 2014

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND