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Tasman Resource Management Plan

Plan Change 71:
Coastal Occupation Charges

Report prepared to fulfil the requirements of Section 42A of the Resource Management Act 1991

February 2021

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1.0 Introduction

1.1 Purpose of the Report

This staff report is prepared under Section 42A of the Resource Management Act 1991 (RMA) and discusses matters raised in submissions on Proposed Plan Change 71- Coastal Occupation Charges (Proposed Plan Change 71) and includes recommendations on those submission for the Hearing Panel.

Section 32AA of the RMA requires further evaluation by the Hearing Panel of any changes made to Proposed Plan Change 71 following consideration of the matters raised in the submissions. To the extent that changes are recommended in this report, further evaluation has been undertaken to support the Section 32AA requirement.

Under Clause 10 of the First Schedule of the RMA, Council is also required to give reasons for its decisions on Proposed Plan Change 71. This report is also written to assist the Hearing Panel with drafting reasons for the decision.

1.2 Scale & Significance

This report has been prepared with consideration of the scale and significance of the amendments requested in Proposed Plan Change 71.

The RMA enables regional councils to introduce a charging regime for the occupation of space within the coastal marine area. From the 1 October 2014 all regional councils are required to amend their regional coastal plans and either introduce a charging regime or to state in their plans that no charging regime will be imposed. Until this change is made, regional councils are prevented from undertaking further changes to their regional coastal plan. The sole purpose of Proposed Plan Change 71 is to fulfil the requirement to address coastal occupation charges in the regional coastal plan (Part 3 of the Tasman Regional Management Plan (TRMP)).

Plan Change 71 proposes the inclusion of text in the regional coastal plan which supports the principle of coastal occupation charges but defers the introduction of a charging regime *"at the present time"*. The scale and significance of Proposed Plan Change 71 is considered **minor**, with the proposed wording meeting the requirements of the RMA and in all practical sense making no change the default status quo in the TRMP. In keeping with the scale and significance of Plan Change 71, this Section 42A report has also been kept to a minimum.

1.3 Report Overview

The report addresses the following:

- **Part 1 – Introduction.** Introduces Proposed Plan Change 71 and provides background to the plan change and briefly covers the submissions made to it.
- **Part 2 – Discussion and Recommendations.** This section discusses and provides recommendations to the Hearings Panel regarding Proposed Plan Change 71 and the amendments sought through the submissions.

1.4 Background

Coastal occupation charges are a charge under the RMA that can be made against any person who occupies public space within the coastal marine area. Charges can apply to, but are not limited to, wharves, jetties, moorings, marinas, boat ramps, cables, pipes and marine farms; and those activities that are long-term occupations of the coastal marine area. Temporary and transient uses of the coastal marine area like fishing, swimming and anchoring vessels are not considered to be coastal occupations. The RMA requires Council to address coastal occupation charges in the regional coastal plan.

In 1991 when the RMA first gained ascent, it included provisions for “coastal rentals” which applied to most coastal structures. The coastal rentals were to be administered by regional councils and the revenue was to be passed on to central government. The amount to be paid was set by the Resource Management Transitional, Fees, Rents and Royalties) Regulations 1991. Regional councils, with the exception of Southland, refused to implement the coastal rentals and urged the Government to amend the legislation to allow the revenue collected from the coastal rentals to be retained by regional councils. In 1997, the RMA was amended and coastal rentals were replaced with coastal occupation charges. This change enabled councils to charge for coastal occupation, with the proviso that any charges collected had to be spent on the sustainable management of the coastal environment within the region. Further changes to the RMA in 2010 precluded coastal occupation charges being imposed on protected customary rights group or customary marine title group exercising a right under Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act 2011).

The principles underlying coastal occupation charging are that:

- public access to and within the coastal marine area is protected and private occupation of the coastal marine area is a privilege and not a right; and
- where private occupation has an adverse effect on public access to and use of the coastal marine area, then some form of compensation for the loss is appropriate.

Coastal occupations charges are a method by which the public can be ‘recompensed’ for the loss of the ability to use and access public space. There are clear analogies with land-based activities. For example, if somebody wished to use a local or national park for commercial purposes, e.g., coffee carts or concession stand, they would expect to pay for use of that space. The only difference with coastal occupation charges is that there are restrictions on what the money paid can be spent on.

1.5 Plan Change Request Process

Section 401A of the RMA (Transitional Coastal Occupation Charges) requires Council to include a statement or regime on coastal occupation charges in the TRMP. The inclusion of a statement or regime has to be undertaken at the same time as Proposed Plan Change 72 (Moorings and Coastal Structures) is notified. The purpose of Proposed Plan Change 71 is solely to meet the requirement of Section 401A of the RMA.

Before making a decision of whether or not to include a regime for coastal occupation charges, Council was required under Section 64A(1) of the RMA to have regard to both public benefits (lost and gained) and private benefits (gained) in determining whether or not to introduce a charging regime. After undertaking that assessment (see Section 2 of the Section 32A report) Council decided it was appropriate to charge for the private occupation of the coastal marine area where the private benefit outweighed the public net benefit.

However, following further evaluation of the options under Section 32 of the RMA (see Section 3 of the Section 32A report) Council determined that the risk of implementing a coastal occupation-charging regime, at that point in time, was too high due to lack of clarity in the legislation and a number of barriers to

implementation. Council decided that the most appropriate course of action was to introduce a statement into the TRMP supporting coastal occupation charges in principle, but not to introduce coastal occupation charges regime at that time, and to continue working towards developing a fair and equitable regime.

On the 27 February 2020 the Strategy and Policy Committee recommended that Proposed Plan Change 71 be notified.

The proposed wording is provided in Appendix 1 of this report.

On the 20 June 2020, Proposed Plan Change 71 was publicly notified with submissions closing on the 27 July 2020. Eleven submissions were received. A copy of the submissions can be found in Appendix 2.

The summary of decisions sought was publicly notified on the 7 November 2020 with the further submission period closing on the 23 November 2020. No further submissions were received.

Nine submissions supported Proposed Plan Change 71, one submission opposed Proposed Plan Change 71 and one submission requested changes to the text. Part 2 of this report discusses the submissions and includes recommendations regarding the decisions sought.

2.0 Evaluation of Submissions and Recommendations

2.1 Introduction

This section divides the issues raised in the submissions into separate topics and then discusses the matters raised in each topic and provides recommendations to the Hearing Panel. The first topic discusses the plan change as a whole and the second topic discusses the requested amendments to Proposed Plan Change 71.

2.2 Topic 1: Proposed Plan Change 71

This topic discusses and considers Proposed Plan Change 71 as a whole. The following submissions were received in support of the proposed plan change.

- Chris Rutledge (4168.1)
- Sanford Limited (4169.1)
- Torrent Bay Township Committee (2971.1)
- Marine Farming Association (4179.1)
- Thomas, Daryl (4170.1)
- Trevor Riley (2852.1)
- Nelson Pine Industries Limited (3495.1)
- Golden Bay & Tasman Bay Ring Road Farming Limited et al (4166.1 & 2)
- Golden Bay Marine Farmers Consortium Limited (327.1)

One submission was received which opposed the plan change in it's entirely and sought the deletion of the plan change (Michael Paul Mosley - 4167.1). Submission (4167.1) is summarised as follows:

> "It appears that Council has already decided to not charge, uncertain of the purpose of this consultation. Charging is a principle means of managing any limited resource, it is extraordinary that Council should decide not to use it. It appears that people holding mooring licences are being subsidised by the rest of the community of ratepayers. A mooring occupies approx. 1200 m^2. The submitter pays over $4000 p.a. for 809 m^2 section as a contribution for TDC functions. Why should a mooring not similarly pay a contribution? The consequence of not charging for moorings is already apparent at Trewavas St, there are several unused, derelict, unsightly boats moored there and there is no incentive for the owners to dispose of them properly when they are not charged for the privilege of mooring.
>
> The wording of para 3 is unacceptably vague. Given that the section itself recognizes the importance of a charging regime, I would expect that Council would commit itself to a time line for developing and introducing a charging regime."

Discussion

With the exception of one submission, all submissions either support or support in part Proposed Plan Change 71. Mr Mosley (4167.1) in his submissions requests the proposed plan change be deleted.

The main purpose of Proposed Plan Change 71 is to meet the requirements of Section 401A of the RMA which requires Council to either include a statement to the effect that charges will not be imposed (the option taken in this plan change), or impose a charging regime in the regional coastal plan. Under the First Schedule of the RMA Council can decide to withdraw or decline Proposed Plan Change 71 as requested by the submitter,

however, such a decision would not meet the requirements of Section 401A of the RMA or achieve the purpose of the plan change under section 32A of the RMA.

If Council decided to withdraw or decline Proposed Plan Change 71, the status of Proposed Plan Change 72 – Moorings and Coastal Structures could also be challenged, because notification of Proposed Plan Change 72 relies on Section 401A of the RMA being given effect to. If Council were to grant the relief sought by Mr Mosley (4167.1) then the decision would be contrary to the requirements of the RMA.

With regard to the reasons raised in Mr Mosely's submission, it is acknowledged that charging (and tendering) is a valid and common means of managing limited resources. That an ordinary person would be expected to use the smallest amount of space necessary for an activity, if to use more space would incur a higher financial cost. In reality that does not always happen and people occupy and pay for as much space as they can afford, often to the detriment of community members with the least capacity to pay. The RMA through specific objectives, policies and rules in the Tasman Resource Management Plan provides Council with additional and better tools in which to holistically manage limited resources. If access to resources was limited to those most capable of paying or for activities providing the highest return, then less than optimal outcomes may occur. For example, access to the moorings adjoining Abel Tasman National Park is currently restricted to landowners requiring access to their properties. Without this preferential allocation then landowners adjoining the park could easily lose the rights to use these essential moorings.

Mr Mosely makes a comparison between rates paid for land-based occupations and the decision to not charge for marine-based occupations. The essence of what is suggested is also accepted; however, current land-based rates are based on quantifiable and tangible services provided to property owners, e.g., the provision of water, stormwater, refuse disposal, roading, community services, etc. Public monies (rates) are expended on the sustainable management of the coast, e.g. navigation and safety, marine facilities and coastal monitoring. Regional councils have investigated whether or not coastal occupations could be charged rates as suggested by Mr Mosely; however, it proved difficult to identify what services coastal permit holders (occupation) received beyond the specific services recovered through the RMA administration and inspection fees. The regional councils did not pursue this option further.

Mr Mosley (4167.1) also raises concerns that Council had not committed to imposing coastal occupation charges. Marlborough District Council are currently in the process of introducing a coastal occupation charging regime. The proposed regime has now proceeded to the point that it may provide a path forward for Tasman and other regional councils. Central Government have also indicated that they may introduce a national charging regime, and the current government is also proposing to review legislation regarding the management of the coastal marine area. It is not possible or practicable to produce a timeline for the introduction of a coastal occupation charging regime; however, it is recommended that the inclusion of a charging regime should be reconsidered during the drafting of the Tasman Environment Plan.

It is recommended that the Hearing Panel accept in part the decision sought by the submitters supporting the plan change (subject to any modifications required under Topic 2 below) and decline the decision sought in submission (4167.1) by Mr Mosely for the reason that the request would not meet the requirements in Sections 64A, 401A or 32(1) of the RMA.

Recommendation

That Proposed Plan Change 71 be approved in part, subject to any modifications arising from Section 2.3 of this report.

2.3 Issue 2: Amendments sought to the text

This topic discusses and considers two requests (1050.1 &1050.2) for text amendments. The two requests arise from the submission by The Friends of Nelson Haven & Tasman Bay Inc.

The first request is summarised as follows:

> (1050.1) Amend the first paragraph as follows:
> "Under the Resource Management Act 1991 (Act) regional councils are able to charge for the occupation of the coastal marine area (CMA). Coastal occupation charges cannot be imposed unless the charge is provided for in the regional coastal plan and ensure that private occupation of this public land is recognised, with the loss of public benefit adequately accounted for. The funds raised by such charges can be used not only to mitigate, remedy or otherwise manage the actual or accumulative effects in the area but also in the wider environment (a public benefit). There is no inherent right to occupy public space in the CMA; however, coastal occupation charges must not be imposed on a protected customary rights group or customary marine title group exercising a right under Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011."
>
> **Reason:** Emphasis needs to be added to ensure that the "cost" of occupation of public space for private benefit is recognised. Southland Regional Council continues to charge coastal occupation charges; most other councils have failed to accept this cost to the public, but have bowed to commercial and private pressure.

The second request is summarised as follows

> (1050.2) Replace under the heading 'Coastal Occupation Charges' the words "common marine and coastal area" with "coastal marine area"
>
> **Reason:** Due to the uncertainties associated with the MACA Act where land title extend into the CMA, for future clarity it is best to ensure the Coastal Marine Area which is specified in the Resource Management Act and New Zealand Coastal Policy Statement is used. As coastal occupation charges must not be imposed on protected customary rights groups or customary marine title groups exercising a right under the MACA Act, the use of the phrase here is confusing.

Discussion

In the first request (1050.1) the submitter requests the first paragraph be amended as follows:

> "**Coastal Occupation Charges**
> ~~In accordance with section 64A of the Act, Council is required to consider whether or not a coastal occupation charging regime applying to persons who occupy any part of the common marine and coastal area should be included in the Regional Coastal Plan".~~ Under the Resource Management Act 1991 (Act) regional councils are able to charge for the occupation of the coastal marine area (CMA). Coastal occupation charges cannot be imposed unless the charge is provided for in the regional coastal plan and ensure that private occupation of this public land is recognised, with the loss of public benefit adequately accounted for. The funds raised by such charges can be used not only to mitigate, remedy or otherwise manage the actual or accumulative effects in the area but also in the wider environment (a public benefit). There is no inherent right to occupy public space in the CMA; however, coastal occupation charges must not be imposed on a protected customary rights group or customary marine title group exercising a right under Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011."

The wording proposed by the submitter adds further information regarding the form and nature of coastal occupation charges. The proposed wording does not change the effect of the plan change on any person or occupation, and whether or not the wording is included is largely a matter of drafting style. There is no recommendation to the hearing panel regarding this request.

In the second request (1050.2) the submitter has requested that the words "common marine and coastal area" should be replaced with "coastal marine area", as the proposed wording is considered confusing.

> "**Coastal Occupation Charges**
> In accordance with section 64A of the Act, Council is required to consider whether or not a coastal occupation charging regime applying to persons who occupy any part of the ~~common marine and coastal area~~ coastal marine area should be included in the Regional Coastal Plan…"

The RMA 1991 requires Council to prepare a regional coastal plan for the coastal marine area which includes the foreshore, seabed and coastal water and covers the area from the mean high water mark seaward to the outer limits of the territorial sea. Section 12 of the RMA sets out the restrictions on the use of coastal marine area and generally required uses (as listed) to be either provided for by a rule in the plan or through a resource consent.

At the time the RMA was enacted in 1991 the coastal marine area was considered to be in Crown ownership with Department of Conservation tasked with the management of the area on behalf of the Crown. Questions regarding ownership of the coast arose in the early 2000's and in 2004 the Foreshore and Seabed Act was passed which secured the ownership of the coast for the Crown. In 2011 the MACA Act 2011 came into effect and replaced the Foreshore and Seabed Act 2004. Under the MACA Act 2011 ownership of the coast passed into "no ownership", and the Act set out the roles, rights and obligations for the area the Act defined as the *marine and coastal area*. The MACA Act 2011 extinguished the majority of public ownership land titles e.g. former harbour board land consolidating them within the marine and coastal area. Property rights for freehold titles (and particular identified Crown lands) are however protected under the Act, and not subject to all of provisions. The area within the *marine and coastal area* which has no freehold titles et al, is defined in the Act as the "*common marine and coastal area" (see below)*. The *common marine and coastal area* in essence is the coastal marine area which is not privately owned.

> ***Section 9 of the*** *Marine and Coastal Area (Takutai Moana) Act 2011*
> ***"common marine and coastal area*** *means the marine and coastal area other than—*
> *(a) specified freehold land located in that area; and*
> *(b) any area that is owned by the Crown and has the status of any of the following kinds:*
> *(i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987:*
> *(ii) a national park within the meaning of section 2 of the National Parks Act 1980:*
> *(iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and"*

As part of the enactment of the MACA Act in 2011 a number of consequential amendments were made to the RMA 1991. Section 12(2)(a) of the RMA was amended and permission "*to occupy any part of the coastal marine area*" was changed to -permission to occupy any part of the "*common marine and coastal area*". Similar consequential changes were made to Section 64A, which requires Council to include a statement regarding a coastal occupation charging regime for persons occupying the "*common marine and coastal area" (see below)*.

> Section 12(2) of the RMA: "No person may, unless expressly allowed by …a rule in a regional coastal plan… or a resource consent,- (a) occupy any part of the common marine and coastal area; …"

> Section 64A(1) of the RMA: Imposition of coastal occupation charges requires the Council to consider "whether or not a coastal occupation charging regime applying to persons who occupy any part of the common and coastal area should be included".
>
> *Section 401B of the RMA -Obligation to pay coastal occupation charge deemed condition of consent "In every coastal permit that – (a) authorises the holder to occupy any part of the common marine and coastal area: and"*

The wording in MACA Act 2011 and the interplay with the RMA 1991 is complicated and takes some level of cognitive gymnastics to determine whether coastal occupation charges could be imposed on any particular coastal occupation. It would be less confusing if the wording was changed to refer to the simpler and more commonly used *coastal marine area*, as requested by the submitter. However, to change the wording from *common marine and coastal area* to *coastal marine area* would be technically incorrect under Section 64A of the RMA 1991.

The current wording in Proposed Plan Change 71 fulfils the requirement in Section 64A of the RMA to have a statement in the plan. The current wording has no tangible effect, other than as a matter of compliance with Section 64A. Changing the wording from *common marine and coastal area* to *coastal marine area* similarly would have no tangible effect. However, if alternative wording was adopted, then Council could potentially be challenged regarding whether or not the statement was correct. It is recommended that no change to the wording be made.

Recommendation

(1050.1) - No recommendation for the hearing panel.
(1050.2) - No change to the wording in the proposed plan change.

Appendix 1: Proposed Plan Change 71: Coastal Occupation Charges – Schedule of Amendments

Part III: Coastal Marine Area - Add a new section at the end of Part III Introduction as follows:

"**Coastal Occupation Charges**

In accordance with section 64A of the Act, Council is required to consider whether or not a coastal occupation charging regime applying to persons who occupy any part of the common marine and coastal area should be included in the Regional Coastal Plan.

Council agrees with the principle of coastal occupation charges and considers that an appropriate regime would assist in the sustainable management of the common marine and coastal area. However, given the legal and policy uncertainties around such a charging regime, Council has decided not to impose a charging regime at present.

Until such a time that a charging regime is included in the Plan, the Council will continue to cooperate with and support other regional authorities and central government agencies in the development of a legally defensible charging regime. Council will also continue to advocate the necessary changes to the legislation and policy at a national level."

Appendix 2: Copy of Submissions on Proposed Plan Change 71: Coastal Occupation Charges

Under separate cover