

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

IN THE MATTER of the Resource
Management Act 1991
(RMA)

AND

IN THE MATTER of direct referral of an
application under s87G of
the RMA for resource
consents for the necessary
infrastructure and related
activities associated with
holding the America's Cup
in Auckland

BETWEEN

**PANUKU
DEVELOPMENT
AUCKLAND**

(ENV-2018-AKL-000078)

Applicant

AND

AUCKLAND COUNCIL

Regulatory Authority

**MEMORANDUM OF COUNSEL FOR PANUKU DEVELOPMENT AUCKLAND IN
RESPONSE TO COURT'S MINUTE ON CONDITIONS**

Dated: 24 August 2018

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MAY IT PLEASE THE COURT

1. INTRODUCTION

- 1.1 This memorandum has been prepared in response to the Minute of the Environment Court regarding the structure and content of draft conditions of consent dated 20 August 2018 (the **Court's Minute**). The Court asked Panuku to lodge a revised set of consent conditions at the earliest opportunity this week.
- 1.2 Panuku is grateful for the Court's guidance as to the form and content of the applicant's proposed conditions of consent and has undertaken a further review and update of the conditions in light of the Court's Minute. Attached to this memorandum as Attachment A is a copy of the updated conditions of consent dated 24 August 2018 (**Applicant's Revised Conditions**).
- 1.3 Counsel address each of the matters raised in the Court's Minute below and how the conditions have been amended to address the helpful guidance provided. To further assist the Court and parties, comment boxes have been used throughout the Applicant's Revised Conditions to provide an explanation for amendments from the previous version of conditions (dated 7 August 2018 and attached to the evidence in chief of Mr Karl Cook and Vijay Lala).
- 1.4 As discussed further below, the rebuttal evidence on behalf of Panuku will provide further explanation in relation to the changes proposed, however counsel consider it useful to summarise these matters now to be reviewed alongside the Applicant's Revised Conditions. It may also be useful and appropriate to address certain matters in opening legal submissions at the commencement of the hearing on 10 September 2018.
- 1.5 Counsel note that in accordance with the Court's request for refinement of the conditions to be undertaken as collaboratively as possible, this draft memorandum and the draft conditions were circulated to parties (who have exchanged evidence, ASB, and mana whenua) this morning. The comments received have been reflected in the Applicant's Revised Conditions.

2. OVERALL MANAGEMENT OF THE ENTIRE OPERATION FROM COMMENCEMENT THROUGH TO DIS-ESTABLISHMENT

2.1 In response to the suggestions in paragraphs 4 to 6 of the Court's Minute, a new condition 3 has been inserted into the Applicant's Revised Conditions. The condition requires Panuku to appoint a suitably experienced person with appropriate seniority to take responsibility for implementing the consent conditions and manage the overall programme.

2.2 Further details regarding how this condition is intended to work will be explained in the rebuttal evidence on behalf of Panuku. In essence on any project like this, an applicant appoints a Project Manager or Programme Manager to undertake the tasks described by the Court and that will be occurring here. Panuku is happy to spell this out in a RMA condition if the Court would find that helpful.

3. TERMINOLOGY AND DIFFERENTIATION OF "EVENT" AND INDIVIDUAL EVENTS IN CONDITIONS

3.1 As the Court helpfully identified the earlier version of the proposed conditions was not consistent in the use of the terms Event and event. A number of amendments have been made throughout the Applicant's Revised Conditions in response to this matter.

3.2 "Event" remains defined as being the 6 month period in which the regattas will be held, and includes pack in and pack out. Throughout the conditions this defined term has been used when referring to this period. In other cases the wording has been amended to avoid the use of "event".

4. ADVICE NOTES WHICH SHOULD BE CONDITIONS

4.1 In response to paragraphs 8 and 9 of the Court's Minute, all advice notes have been reviewed and where they were directive and contained a requirement on the consent holder, these have been updated as part of the conditions.

4.2 To assist the Court and parties, comment boxes have been included in the Applicant's Revised Conditions alongside each of the remaining advice notes to provide an explanation as to why the advice note is considered necessary or appropriate.

5. THE INFRASTRUCTURE DEFINITION EXCLUDES SYNDICATE BASES

- 5.1** At paragraph 10 of the Court's Minute the Court has asked whether the infrastructure on the bases is covered by the consents. A similar matter was also raised in the evidence of Nicola Broadbent on behalf of the Council.
- 5.2** The definition of "Infrastructure" and its use in the conditions relating to management plans was intentional and given careful consideration by Mr Cook and Mr Lala in preparing the draft consent conditions. The intention was to require management plans only for those construction activities where the management of effects is necessarily and appropriately carried out via a plan, and to make it clear which elements of construction that approach is to apply to.
- 5.3** In general, management plans are considered necessary and appropriate for construction of Infrastructure, as defined in the 7 August 2018 version of the proposed conditions, because that work involves building wharves, piles, berths and earthworks being built over a wide area. Further, principally due to the potential for overlapping activities and cumulative effects, the Construction Traffic Management Plan (Conditions 103-105) applies to management of traffic for construction of Infrastructure and base buildings (with changes to Condition 103 made to make this more clear). Furthermore, as agreed with Viaduct Harbour Holdings, The Point Apartments and the Princes Wharf Group, a construction management plan is proposed for Base B on Hobson Wharf. That plan requires element of construction traffic, construction noise and vibration and construction lighting to be included.
- 5.4** However beyond the overall management of construction of Base B on Hobson Wharf and of construction traffic for Bases C-G on Wynyard Point, management plans are not considered necessary for the buildings on Bases C-G. This is because of the relatively small scale of the these buildings, their physical separation from sensitive receivers, and because those works will still be required to meet the construction noise and vibration standards in Conditions 109 and 109A and the lighting standards in the Auckland Unitary Plan.
- 5.5** Further amendments to the Applicant's Revised Conditions have been made to further clarify these matters and when management plans are required. The

rebuttal evidence on behalf of Panuku will cover these matters further as required in response to the Court's Minute and matters raised by Ms Broadbent.

6. CONDITIONS AND MANAGEMENT PLANS

6.1 At paragraphs 11 to 13 of the Court's Minute a number of comments have been provided in relation to the conditions requiring the preparation of management plans. Specifically the Court has indicated that two issues require attention:

(a) Some of the objectives would be better framed as conditions

(b) Mandatory requirements in the draft management plans should be in the conditions.

6.2 In relation to (b) above, Panuku has undertaken a full review of the current version of the draft construction management plans in response and identified a number of mandatory requirements in the management plans that are now included in the Applicant's Revised Conditions.

6.3 In relation to (a) above, and the example in Appendix A to the Court's Minute where the Court illustrated the nature of the redraft of the wording sought by the Court, a number of matters arise that counsel wish to highlight.

6.4 Firstly, as acknowledged in paragraph 3 of the Court's Minute, considerable time was spent during Court-assisted mediation with Commissioners Dunlop and Buchanan directing the parties to follow the format used in the conditions and this was agreed by all present. The parties then worked over the three days of mediation and in the subsequent caucusing to agree on the objectives and on the measures to give effect to those objectives, and these conditions are a large part of the settlements of various concerns that have been reached with submitters in this case.

6.5 Secondly, as was explained in the evidence in chief on behalf of Panuku, unlike a normal consent process where the management plans are prepared following the grant of consent, with the appointment of the Alliance and the timeframes for this project, the construction management plans have been drafted in parallel to the consenting process and these have been circulated to the parties (updated from feedback provided). While the significant benefit of this has been the ability

to provide parties with details of the proposed construction methodology, sequencing and matters of details often covered later in management plans, the corollary has been that the conditions have been drafted alongside the management plans and in some cases there may be minor inconsistencies that are still being addressed through the drafting of both in parallel.

- 6.6** As foreshadowed in the evidence in chief on behalf of Panuku (see paragraph 8.8 of the evidence of Mr Kurt Grant (EB Vol 1, E9, page 0326), the Community Liaison Group required to be established under condition 22 has already had its first two meetings (on 14 and 21 August 2018).
- 6.7** Thirdly, in addition to the time spent across three days of mediation, the focus of the full two days of expert planning caucusing was the conditions of consent, and revised versions of the consent conditions were circulated to all parties following the first day of planning conferencing on 27 July 2018, and a further updated version was attached to the joint planning statement dated 31 July 2018. The specific and formulaic approach to the conditions (referred to in the Court's Minute at paragraph 11) which was the focus of the mediation and expert conferencing was deliberately continued, so as to ensure it was consistent with the approach agreed with the parties as a mediation output and as the basis for settling concerns.
- 6.8** Counsel has reviewed the evidence filed on behalf of the Council and section 274 parties (received on 21 August 2018) and notes there is considerable support from the parties to the structure and format of the conditions generally, and in particular management plan conditions.
- 6.9** For example the evidence of David Ramsay on behalf of the Combined Owners and Residents of Apartments in Sheds 19, 20, 22, 23 and 24 Princes Wharf states (at paragraph 5.3):

The conditions use management plans to address many of the construction and operational effects that will arise from the consents. It has been important to the Group for those conditions to identify clearly the objectives of the management plans and the standards with which Panuku and its contractors will need to comply. Those objectives have become much clearer through the mediation process, which has also been assisted through the circulation of draft management plans. Our understanding is that the draft management plans are continuing to evolve and that a further iteration of them will be circulated with rebuttal evidence. It is important that the revised management plans continue to give effect

to the objectives and provide additional detail with respect to the methods to be adopted, both during construction and during the event.

- 6.10** Further to these comments counsel also notes that the draft construction management plans are intended to be referenced in the conditions as Appendix B and effectively those draft plans form part of the consent conditions.
- 6.11** In our submission the manner in which the management plan conditions have been drafted (following strong guidance from the Commissioners facilitating mediation and expert conferencing) provides a clear identification of the objectives of each plan at the start of the conditions relating to that plan. An unintended consequence of the re-framing suggested by the Court could be that the matters which are currently framed as objectives for management plans are not necessarily appropriate as requirements on the consent holder.
- 6.12** As an example, while it is appropriate to have an objective of the Construction Traffic Management Plan (condition 104(b)) to "ensure maintenance of access at all times for all modes of transport to / from properties in Wynyard Precinct and Viaduct Harbour Precinct and any on street loading zones in or adjacent to those Precincts" in our submission it is not appropriate, as a requirement on the consent holder, to state that "the consent holder shall "ensure maintenance of access at all times for all modes of transport to / from properties". While this is appropriate as an objective with a management plan to demonstrate how this will be achieved, framing this as a requirement on the consent holder is not appropriate as in reality it may not be possible to achieve this at all times.
- 6.13** In addition to the guidance from the Commissioners and parties, the planners also took guidance from the format of the conditions in the recent Kennedy Point Marina decision (*SKP Incorporated v Auckland Council* [2018] NZEnvC 081) when drafting the conditions. In our submission, the Applicant's Revised Conditions, having had the benefit of input from the Court's Commissioner and the parties, are a further improvement on the format of those conditions.
- 6.14** In light of these matters, Panuku has given careful consideration to the suggestions in the Court's Minute at paragraphs 11 and 12, and the example in Appendix A. To reframe the conditions relating to the 28 management plans required by the Applicant's Revised Conditions is a significant task and Panuku is concerned this would run contrary to the considerable work undertaken and costs incurred by parties in good faith during mediation and expert conferencing,

and is counter to the considerable support and agreement of parties to the draft conditions (reflected in parties' evidence). In many cases no evidence has been filed by some mediation participants, or much less evidence that originally foreshadowed has been filed. Given the number of management plan conditions and management plans, the cost of Panuku undertaking such a major revision and the cost of all the parties having to then review them, is significant and unreasonable and at a time when all parties are also stretched and fully engaged in preparing rebuttal (or in some case primary) evidence and negotiating and completing settlement of outstanding matters. As set out below in our submission the Applicant's Revised Conditions manage all effects of the proposal in the unique circumstances of this application.

6.15 With respect to the Court's suggestion, counsel are of the opinion that the way the management plan conditions are framed in the Applicant's Revised Conditions is a more appropriate structure that reflects the unique situation where parties are simultaneously able to review the conditions and draft management plans, and provide any comments in relation to either details of the draft plans, or the objectives of the plans in the conditions.

6.16 In light of these matters, Panuku considers that the Applicant's Revised Conditions, read alongside the draft management plans (any updated versions are to be provided in rebuttal evidence), provide a comprehensive suite of controls and appropriately avoid, remedy and mitigate any environmental effects of the application.

7. FURTHER CHANGES TO CONDITIONS

7.1 As has been foreshadowed in the evidence on behalf of a number of section 274 parties, Panuku has been continuing its discussions with these parties in earnest to try and resolve any outstanding issues between the parties. A number of amendments have been agreed to the conditions in response to matters raised by the following parties and to settle concerns, and these are now these are now incorporated into the Applicant's Revised Conditions:

- (a) Viaduct Harbour Holdings Limited
- (b) The Point Body Corporate
- (c) Princes Wharf Group
- (d) Sealink

(e) Sanford and AFPL

7.2 Comment boxes have been used in the Applicant's Revised Conditions to highlight where changes are proposed and agreed with these parties.

7.3 Counsel note that the evidence on behalf of Auckland Council has suggested further amendments to conditions. Following further discussions and meetings with the Council, a number of amendments have been made to the Applicant's Revised Conditions and there is full agreement between the Council and Panuku on the Applicant's Revised Conditions (noting there are still outstanding issues in relation to the Design Requirements document and discussions are continuing, and consequential changes may be required to the conditions as a result of those discussions). The comment boxes indicate the refinements made to settle all of the Council's remaining issues relating to the conditions.

DATED at Auckland this 24th day of August 2018



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