Proposed Marlborough Environment Plan (MEP)

Hearing Notes

11 December 2018

Block 11 – Topic 11

Allocation of Public Space - Coastal Occupancy Charges

Presentation from

Kenepuru and Central Sounds Residents' Association

Presentation to MEP Hearing Panel re Topic 11 – Coastal Occupancy Charges - 11 December 2018

Introduction

1. On behalf of the Kenepuru and Central Sounds Residents' Association (**KCSRA**). I would like to thank the hearing panel for the opportunity to talk to our various submissions and our subsequent further submission on the MEP as it concerns the above Topic.

2. My name is Andrew Caddie and I am the President of KCSRA. The Association was incorporated in 1991 and currently has 280 members (mainly household) who predominately reside full or part time in the Kenepuru Sound and Central Pelorus. Our objectives include among other things to coordinate dealings with central and local government. We are an active organisation dealing with a wide range of matters of concern and/or interest to members. For a fuller grasp of our activities go our website www.kcsra.org.nz.

3. In terms of my own professional background I hold two tertiary qualifications - a Bachelor of Forestry Science and a LLB, both from Canterbury University. I was a forester for a number of years with the then NZ Forest Service and also spent some time with a national forestry consultancy firm - PF Olsen Ltd. Following a period of OE I obtained my LLB and practiced law as a commercial solicitor for a number of years at various large National legal firms.

4. Suffice to say that insofar as our limited resources permit - and bear in mind we are a voluntary organisation with no staff - KCSRA has committed to engaging in the MEP process since it first began in 2014 with the release of various MDC discussion papers – in particular the paper entitled – "Proposed Frame work for Coastal Occupation Charges"

5. Realizing the importance of this topic to many members and the issues of fairness and equity it raised the then Committee prepared a reasonably brief but informative three page Discussion Note. We circulated this to our members seeking feedback. We also reviewed the supporting documentation - a 1999 paper from Boffa Miskel and a more recent paper prepared by Executive Fitness Ltd.

6. In due course we then prepared a nine-page submission and submitted the same to the Council in August of 2014. I have supplied a copy to the Panel of that detailed submission as evidence in terms of our process and development of the Association's views on this Topic. It also helps explain the reaction of the Association and other non business submitters when confronted in 2016 with how little impact we had made - other than to exercise officials minds as how to avoid confronting in the MEP the underlying concerns raised by such submitters.

7. In essence we submitted against the proposal insofar as it related to moorings, boast sheds and jetties. Like many residents we found the proposed charging regime whereby marine farmers paid a very low per hectare rate and moorings, jetties and boatsheds a very high square metre rate as inequitable. Other non business submitters approached the then proposed charging formula in other ways to the same effect eg - that marine farms occupied over 98% of the area relative to the total area under such consents.

8. If there was to be a COC for moorings, boat sheds and jetties then KCSRA submitted it be relatively nominal, say $30 per consent.

9. In 2016 we reviewed this aspect of the notified MEP. We were more than a little startled to see the sharp change of tact taken by the Council. Rather than specify a charging regime and the associated charges the Council was of the view it would essentially limit itself to creating the right to make and levy coastal occupation charges (section 64A of the RMA) in the MEP. The clearly burdensome (or just controversial?) detail of disclosing any charging formula and resultant set of charges would be tucked away in the Council Annual Plan process. Not confront today what can be put off for another year and another year etc.

10. Understandably we were not happy with this turn of events given our detailed application (and that of many other Sounds residents and community organization) to the 2014 process and submitted accordingly - albeit fairly briefly this time. See the KCSRA submission labeled "Miscellaneous Matters" and dated 23 August 2016 and in particular paragraphs 11 to 15 of that submission.

11. We also took the effort to review the Marine farmers Association submission on this topic and made a further submission in June of 2017.

12. The balance of this submission is structured into firstly a discussion around as to what the Council is required to consider when deciding to have a coastal occupation charging regime and determining the charging regime and if it is permitted to dodge the issues surrounding such charges by shifting the specifics to the Annual Plan process. Then, if time permits, some comments about the MFA views as to their apparent belief they are entitled to have a preferential voice as to how this charge and any other sums allocated by Council are to be spent on promoting the sustainable management of the Coastal Marine Area.

Determining Coastal Occupancy Charges' in the MEP

13. We note that the Association has not commissioned a legal opinion on the legality of what is now proposed in the MEP re Coastal Occupancy Charges (**COC).** So what follows is more of a plain English read and interpretation of the relevant legislation. As we see it Parliament has seen fit to place the process by which COC's may be imposed and the level of charges determined into section 64A of the RMA.

14. There is no COC charging regime currently in place in the Sounds[1]. Given the long history of public and private use and occupation of the CMA of the Sounds then a COC regime will of course affect a large number of people and entities that currently occupy parts of the common CMA for various activities and purposes. In this situation the RMA is quite directive as to one matter the likes of the MDC must consider when making the policy decision of deciding to charge or not.

15. Section 64A(1) requires the MDC to "*have regard to*" the extent **public benefits** from the coastal marine area are lost or gained due to the occupation. It then requires the MDC to have regard to the extent of the **private benefit** obtained from the occupation and to have regard to this exercise when deciding to apply the COC regime to persons occupying any part of the common marine and coastal area.

16. In passing we note the qualifying phrase "*to have regard to*". That is not we submit a mandatory requirement committing the Council to the outcome of any such exercise but

[1] We note Council has recently introduced an Annual Administrative fee of $40 for Coastal Permits /Consents – at least for community boat ramps.

rather something to bear in mind when making the policy decision to include a COC regime in the MEP.

17. If, as here, the policy decision is have a COC regime then the RMA requires a proposed regional plan to provide for a COC regime (S64A (4). In our view Policy 5.10.4 (with the suggested amendments of the section 42A reporter) goes some way to meeting that requirement with its talk of "*COC charges will be imposed on consent holders of coastal permits*". We will come back to the rest of the wording of this proposed policy later in our submission.

18. Having made the policy decision then section 64A(3) RMA requires certain matters to be specified in the MEP. We use the ordinary meaning of specify – to state something definitively and in this context to provide the details.

19. Section 64A(3)(1) requires the MEP to specify the circumstances when a COC will be imposed.

20. Arguably given the wording of S64A(3) which repeats again the need for MDC to have regard to the matters considered in S 64A(1) it could be argued that the MEP falls at the first hurdle – it does not specify any circumstances as required. However lets be charitable in the context of todays hearing and for todays discussion accept that here the balance of the wording of Policy 5.10.4. dealing with public /private/benefits etc is also a specified circumstance in terms of S64A(3)(a) albeit the only one proposed for the MEP.

21. We are surprised at this very narrow approach. Not the least that the earlier attempts through papers commissioned by MDC[2] to grapple with this assessment of public/private benefit loss gain generated **quite astounding and unfair outcomes**. Thus for example that there was a greater private benefit to a mooring consent holder as opposed to a commercial 24/7 profit driven marine farm operation.[3]

22. Further, we see nothing in section 64A(3)(a) or S64A generally that **prevents** the MDC from considering other "*circumstances*" when deciding to impose a COC. In the context of this charge and bearing in mind how any sums charged and collected are to be used we submit that one or more "circumstances" should be added to address the relative **effects of the occupying activity** on the sustainable management of the CMA.

23. As noted the Section 42A reporter appears to support or advocate for the view that the **only** circumstance permitted in this context is that of the public/private benefit/gain/loss exercise. At the most basic statutory interpretative level we note the word "circumstance" is used in the plural in Section 64A(3)(a). We submit there is **no restriction** to consider the effects of the activity in this context.

24. We submit that the Section 42A reporter is excessively focusing on a factor which MDC must have regard to when reaching the policy decision to include the right to charge rather than the process of - on whom will the charge be imposed and arriving at the level of the charge or the manner in which it will be determined.

25. In any event S64A(3)(c) requires the MEP to specify the level of charges to be paid or if this route has not been taken (as here) then specify the manner in which the charge will be

[2] Papers prepared by Boffa Miskell 1999 and Fitness Executive Limited 2014 on COC's.
[3] Table 3.3 " Coastal Occupancy Charges " prepared by Boffa Miskell November 1999.

determined – in this context its ordinary meaning is we submit to ascertain precisely. We submit that the MEP at Policy 5.10.**7 fails to do so**.

26. Policy 5.10.7 is by and large a list of desired outcomes rather than the specifics as to how the charges will be explicitly determined. eg that at the end of the process the level of charges will have been allocated fairly and equitably. That is a hoped for outcome and tells us nothing as to what the charges might be. We say Policy 5.10.7 misses the point and requirements of S64A. In passing we note the slightly strained use of the past tense both in the Policy and the section 42A report – as if the costing and allocation exercise has already been done?

Shift the detail of the COC to the Annual Plan

27. We also wish to briefly record our **higher-level concern** at the proposal by MDC to shift the specific determination of the COC regime to the Annual Plan. COC's are determined under the RMA. Annual plans under the Local Government Act[4].

28. As we see it MDC seems to be of the view that it has determined the COC regime and what happens in the Annual Plan process is merely administrative with the result already settled in the MEP process. Our submission is that the MDC has yet to met the requirements of the RMA. Accordingly it seems to us that the MDC faces the risk of a substantive legal challenge if it persists in wanting to shy away from properly determining the COC regime in the MEP as required by the RMA. This would be most unfortunate and a waste of ratepayer's money.

29. Further from a logistical perspective the Association is concerned at having to front up every year at the Annual plan process and argue the proposed determination of the COC regime. This in itself favors the well-resourced and connected aquaculture sector to easily manipulate this approach. In turn it creates the maximum amount of difficulty for effective participation and/or judicial review by individual permit holders of moorings etc. This is not an equitable outcome.

The Ratepayers share

30. As noted local authorities are required under the Local Government Act to prepare a cycle of annual budgetary and activity plans. Before we go on to consider the Councils proposal to shift the determination of the COC's to the Annual Plan process we wish to touch on a recommendation of the Section 42A reporter. In the narrative note to Policy 5.10.8 (dealing with how MDC proposes to spend COC collections) the S42A reporter has recommended some additional words. These are to make it clear that there is **no expectation** that COC's will be the **sole funding source** for undertaking the matters listed in Policy 5.10.8. **We submit in favor of that change.**

31. Our concern here was heightened by the suggestion that 25% of any such spending will be coming from general rates (community) and the balance from COC's. This figure was seemingly plucked out of the air with no narrative to support the same. None has been provided in the S 42A report (apart from noting our comment). We found this a massive and unnecessary diversion and said so (again) in our 2016 submission.

[4] Section 95 of the Local Government Act 2002

32. Upon reflection this figure seems to stem from the approach used by the Fitness Executives original 2013 paper to arrive at an apportionment by working backwards. This approach has been summarized and repeated in the new but undated supplementary paper now attached to the section 42A report.

33. In essence the approach seems to be to put up a "straw man budget" for this type of work programme and then see what might be an "acceptable" level of that budget to be allocated to Marine Farmers. Then work with square meter figures for mooring etc consent holders and per hectare figures for marine farms. A 10,000 times difference in the assessment approach.

34. We **reject this approach** for two reasons. Firstly the absence of clear words in the MEP that this approach by Council to defer the determination of COC's to the Annual Plan process is permitted by the RMA. Secondly it will result in a less than equitable outcome for mooring, boatshed and jetty consent holders.

KCSRA Approach to determine the level of COC

35. We submitted in 2014 and again in 2016 that a fair approach to determining the COC was on the basis that the marine farm industry is, by a country mile, the primary contributor to the undoubted need to put in place a far more detailed and ongoing set of long overdue environmental monitoring measures. Accordingly whatever level of charge MDC determines is appropriate to assist it in carrying out these matters then as we submitted in 2016 this should be allocated 70/30% between marine farms and the ratepayer.

36. On the assumption that this might be unacceptable to MDC (and the marine farmers) then an alternative approach[5], would be to use the same square area approach as proposed for marine farms to moorings etc. If this resulted in a very low charge for moorings etc., (as seems likely) then for administrative efficiency reasons a figure of $30 per consent for a mooring, boat shed or jetty consent would be the fall back. COC charges to be indexed to the Consumer Price index.

MFA Submissions

37. As noted we made further submissions on the MFA submission back in 2017. Accordingly we make one or two observations based on those further submissions.

38. The MFA suggests it supports a COC regime. That support is heavily conditional on, among other things, that in return they get security of tenure - their activity should be become a controlled activity[6] in the MEP. As a negotiating tactic this may be understandable but the Association fails to see why the ability of the public to test whether or not an existing activity in the common marine area is still an appropriate activity has, we submit, anything to do with a COC regime.

39. The MFA also advanced the view that if marine farmers are levied a COC charge (and decide to pay it) then it follows that they should have a direct say in the specifics of where the money is spent and when. Further if MDC decided to form a representative stakeholder group to consider such matters then their representation should reflect their relative

[5] KCSRA also suggested a levy per tonne. However it transpires that central government (MPI) does not as yet collect production figures for this industry and instead relies on industry estimates – see page 26 of the MPI publication Situation and Outlook for Primary Industries – December 2017.
[6] See MFA submitter point 426.38 and Stuff Media Article dated 30 June 2016.

contribution[7] ie if they pay the most then their representatives should have the majority decision-making power.

40. With all due respect to the MFA agreeing to make a financial contribution to the likes of the first NIWA coring study in the Kenepuru, this is a **totally different** situation. The MFA or its members are not been asked to be sponsors. We are contemplating a statutory based charge, not a sponsorship arrangement. We again submit against the MFA proposal and to the extent the S42A report recommended no change in the context of policy 5.10.8 **we support** the stance of the S42A reporter.

Conclusion

41. In the view of the Association the MDC has for too long been less than active in financially supporting independent marine monitoring activities - particularly those to better assess the adverse impacts of aquaculture activities on the marine environment. If more money is needed to discharge this role then COC charges targeted at those making the greatest contribution to the need to environmentally monitor are appropriate.

42. On this basis we record our members were overwhelmingly opposed to the introduction of such charges for moorings, boatsheds and jetties, and somewhat outraged by the then suggested COC approach that resulted in such consent holders making a far greater area based contribution than the profit driven commercial marine farming sector.

43. Nevertheless if the Panel is so minded to press ahead with a COC regime then we submit that a COC regime based on an equal cost per area approach is equitable. If this would result in administratively inefficient sums to collect from consent holders of moorings, jetties and boat sheds then the backstop of a flat $30 per consent would be appropriate.

44. The approach taken by the MDC in the MEP to defer the task of addressing the specifics of how the COC regime will determine the appropriate COC does not find favor with the Association. We believe this detail, should have been addressed in the notified MEP.

45. Part of the reason for the strong stance taken by affected members stemmed from past assurances from Council to members that there would be no such charges. We accept that to rely on such assurances and not carefully documenting the same may seem to stem from an out dated view of taking a person or organization on their word but it still, we submit, represents the values of many in the Sounds.

Andrew Caddie
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Kenepuru and Central Sounds Residents' Association

[7] See MFA submitter point 426.42.