

*In the matter of:* An appeal under cl 14(1) of the First Schedule of the  
Resource Management Act 1991

*And:* **Viaduct Harbour Holdings Ltd**

*Appellant*

*And:* **Auckland Regional Council**

*Respondent*

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**Notice of appeal to Environment Court against decision  
on Auckland Regional Plan: Coastal – Proposed Plan  
Change 3 – Wynyard Quarter**

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*Dated:* 20 February 2009





Form 7

**NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST  
DECISION ON AUCKLAND REGIONAL PLAN: COASTAL –  
PROPOSED PLAN CHANGE 3 – WYNYARD QUARTER**

*Clause 14(1) of First Schedule, Resource Management Act 1991*

To: The Registrar

Environment Court

Auckland

**Part 1: THE DECISION APPEALED**

- 1 Viaduct Harbour Holdings Ltd (**VHHL**) appeal against a decision of Auckland Regional Council (**ARC**) on the following plan change:
  - 1.1 Auckland Regional Plan: Coastal – Proposed Plan Change 3 – Wynyard Quarter (**Plan Change 3**).
- 2 VHHL made a submission on the Plan Change 3.
- 3 VHHL received notice of the decision on 29 November 2008.
- 4 The decision was made by ARC on 4 November 2008.
- 5 The decision that VHHL is appealing is:
  - 5.1 The decision of ARC on Plan Change 3 in its entirety.

## **Part 2: REASONS FOR THE APPEAL**

6 The reasons for the appeal are as follows:

### ***Part 2.1: General matter – oppose whole plan change***

7 Oppose whole plan change.<sup>1</sup>

#### **Submission**

8 VHHL made submission 33/6 which opposes Plan Change 3 in its entirety and seeks that it be withdrawn.

#### **Decision**

9 The decision rejected the submission.

#### **Reasons for appeal**

10 VHHL has a unique track record of commitment to urban design, sustainable development, and public open space provision. The cluster of award winning and architecturally acclaimed buildings in the Viaduct Harbour Precinct and Wynyard Quarter are concrete examples of these achievements. In principle, VHHL supports:

10.1 The urban design framework for Wynyard Quarter, including the provision of public open space. But the Linear Park is now compromised as:

- (a) No provision is now made for the Linear Park in Quarter Area 5.
- (b) The proposed diagonal deviation of the Linear Park alignment sought by the requiring authority is not consistent with the fundamentally rectilinear grid of

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<sup>1</sup> Commissioners' Recommendations Report, section 5.2, pp 24-25.

the Central Area on which the Linear Park concept is based.

- (c) No provision has been made for a physical link to Victoria Park or the Central Area pedestrian network.

10.2 The proposed road upgrades to provide additional capacity (i.e. Beaumont Street, Westhaven Drive, and Halsey Street), subject to compensation being agreed on just terms. But the use of the proposed Te Wero Bridge should be restricted to pedestrians and cyclists only.

10.3 The maintenance and enhancement of a centre of excellence for marine related activities in Quarter Area 3 and along the Beaumont Street frontage (north of Gaunt Street).

10.4 The maintenance and enhancement of the fishing industry and fishing retail hub in Quarter Area 5.

10.5 The establishment of a Marine Events Centre in Quarter Area 7.

11 But VHHL **opposes** the Plan Change 3 because it:

11.1 Will not promote the sustainable management of natural and physical resources as required by s 5 of the *Resource Management Act 1991 (RMA)* as it:

- (a) Will not enable people and communities to provide for their economic, social and cultural well-being.
- (b) Will not maintain and enhance public access to and along the coastal marine area.
- (c) Will not protect historic heritage from inappropriate development.

- (d) Will not promote the efficient use and development of natural and physical resources.
- (e) Will not maintain and enhance amenity values.
- (f) Will not maintain and enhance the quality of the environment.
- (g) Will not have regard to the effects of climate change:
  - (i) For example, ARC has not had regard to relevant reports on the effects of climate change.
  - (ii) ARC has failed to carry out any risk analysis regarding the impact of the increased likelihood of more frequent and intense storm events on proposed coastal development (e.g. Quarter Areas 5 and 6, or the cumulative effect of the proposed development of these areas together with other proposals for development and reclamations along the Auckland waterfront).

11.2 Does not comply with the requirements of s 32 of the RMA. For example, the s 32 analysis carried out by ARC before notifying Plan Change 3 relied on background reports commissioned or received by Auckland City Council (**ACC**) but:

- (a) Ten out of 42 reports were not prepared or completed until after the resolution to notify Plan Change 3.
- (b) A copy of one report was not possessed by ACC.

(c) Four reports were prepared jointly by ACC and other interested parties but were not subject to independent peer review.

(d) Seven reports were prepared by land owners but were not subject to independent peer review.

No separate background research was commissioned or undertaken by ARC.

11.3 Does not comply with the requirements of Part 5 or Schedule 1 of the RMA.

11.4 Plan Change 3 will render land incapable of reasonable use contrary to s 85 of the RMA.

12 Plan Change 3 will not achieve integrated management of natural and physical resources as it was:<sup>2</sup>

12.1 Notified separately from Plan Change 4 and other related plan modifications pertaining to Wynyard Quarter, notified by ACC.

12.2 Heard separately from Plan Change 4 and other related plan modifications pertaining to Wynyard Quarter.

12.3 Heard by a different panel of Commissioners.

12.4 Not the subject of a joint decision regarding Plan Change 4 and other related plan modifications pertaining to Wynyard Quarter.

### **Relief sought**

13 VHHL seeks the following relief:

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<sup>2</sup> Further reasons for the appeal are given in Part 2.4 of this appeal.

13.1 That Plan Change 3 be withdrawn.

13.2 Without prejudice to or derogating from the general relief sought in paragraph 13.1 above, VHHL seeks in the alternative the relief specified in connection with the general and specific matters referred to in Parts 2.2 to 2.7 of this appeal below.

13.3 Such further, consequential, or alternative relief as may be required to give effect to this appeal or which may be appropriate in the circumstances of the case.

13.4 Costs.

***Part 2.2: General matter – Public law principles***

14 Public law principles.<sup>3</sup>

**Submission**

15 VHHL made submission 33/5 which opposes Plan Change 3 because it does not comply with relevant public law principles. For example, ARC has had regard to irrelevant considerations, and has a conflict of interest as freehold land owner via its wholly owned subsidiary entity Auckland Regional Holdings (**ARH**).

**Decision**

16 The decision rejected the submission. The Commissioners considered that:

... the plan change has been developed through a proper process in accordance with the requirements of the Resource

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<sup>3</sup> Commissioners' Recommendations Report, section 5.3, pp 26-27.

Management Act and also due process was observed throughout the hearing and deliberations.<sup>4</sup>

- 17 They also noted that ARC had appointed "three independent commissioners" to hear Plan Change 3.<sup>5</sup> But no reference was made to the fourth "elected" Commissioner or his role in the process.
- 18 At the Council hearing VHHL requested that copies of the *Framework Agreement* dated 29 June 2007 between ACC and ARH should be made publicly available pursuant to the Commissioners powers under s 4D of the *Commissions of Inquiry Act* 1908. VHHL submitted that release of the agreement was (*inter alia*) necessary in order to understand the evidence given by Kerry Stotter and other witnesses for ARH.<sup>6</sup>
- 19 The Commissioners declined to release copies of the agreement. The report records that a ruling was issued by the Commissioners,<sup>7</sup> but VHHL has not received a copy of the ruling.

#### **Reasons for the appeal**

- 20 VHHL opposes Plan Change 3 because it does not comply with relevant public law principles. For example:
  - 20.1 ARC had regard to irrelevant considerations before resolving to notify the Plan Change 3, namely, certain matters provided for by the *Framework Agreement* which do not relate to Plan Change 3.

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<sup>4</sup> Commissioners' Recommendations Report, p 26.

<sup>5</sup> Commissioners' Recommendations Report, p 26.

<sup>6</sup> The *Framework Agreement* is also relevant to the question of whether Auckland City Council (**ACC**) had regard to irrelevant considerations when resolving to notify other Proposed Plan Modifications pertaining to Wynyard Quarter, and whether the modifications comply with the requirements of s 32 of the RMA.

<sup>7</sup> Commissioners' Recommendations Report, p 27.

20.2 ARC has a conflict of interest as land owner via its subsidiary ARH and related companies, in that:

- (a) Development of land vested in ARH and its subsidiaries is contended (by ARC and ARH) to be dependent upon establishing the Te Wero link.
- (b) The design and/or construction process for the Te Wero link is to be project managed or directed by ARH and/or its subsidiaries.
- (c) ARC, ARH and its subsidiaries will benefit financially (approximately \$30 million per year)<sup>8</sup> from proposed development in Wynyard Quarter.

Giving rise to the appearance of bias, and breach of the rules of natural justice. For example:

- (d) Notwithstanding the apparent conflict of interest ARC appointed an "elected" Commissioner (Cr Mike Lee)<sup>9</sup> to be a member of the panel of Commissioners who heard submissions regarding Plan Change 3 and prepared a recommendations report dated 22 October 2008 that was adopted as the decision of ARC on 4 November 2008.
- (e) Cr Judith Bassett, Chair of ARH took part in the debate regarding the appointment of Cr Lee as a member of the panel of Commissioners, supported his appointment, and subsequently appeared as a witness for ARH at the Council hearing.

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<sup>8</sup> ARC Cr Joel Cayford, "Waterfront deserves waves of inspiration", *NZ Herald* Thursday 5 July 2007.

<sup>9</sup> The Commissioners' Recommendations and Report distinguishes between "independent" and "elected" commissioners.

- (f) Cr Lee chaired that part of the ARC meeting on 4 November 2008 that received the Commissioners' Recommendations Report and resolved to adopt the report as the decision of ARC.

- 21 The Commissioners undertook two site visits. First, on 23 July 2008 before the Council hearing started. Second, on 6 August 2008 during the hearing.<sup>10</sup> But they failed to advise submitters before the visits. As a result submitters were denied the opportunity to suggest that the Commissioners should visit any particular sites or places.
- 22 The report lists certain "background" documents considered by the Commissioners.<sup>11</sup> But does not provide a comprehensive list of all documents considered by the Commissioners. None of the documents formed part of the s 32 record compiled by ACC (and relied on by ARC) before notification. Submitters were not advised that the Commissioners would consider any of the documents, and copies of the documents were not made generally available to submitters (at any stage) so that they could comment on them in their submissions or evidence presented at the Council hearing, except for copies of three reports regarding the proposed Te Wero Bridge.<sup>12</sup>
- 23 The report contends that "extensive" consultation was undertaken by ARC regarding Plan Change 3.<sup>13</sup> ARC relies on non-statutory consultation undertaken in relation to the *Auckland Waterfront Vision 2040* (2005). But the report fails to record that VVHL did not participate in the "visioning" exercise

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<sup>10</sup> Commissioners' Recommendations Report, p 8.

<sup>11</sup> Commissioners' Recommendations Report, pp 10-11.

<sup>12</sup> Copies of three reports pertaining to the proposed Te Wero Bridge were released to VVHL by ARC pursuant to an official information request made under the *Local Government Official Information and Meetings Act 1987 (LGOIMA)*.

<sup>13</sup> Commissioners' Recommendations Report, pp 11-13.

because (it contended that) ARC had no jurisdiction to intervene in matters relating to the use, development, and protection of land governed by the Central Area Plan.<sup>14</sup>

- 24 Only limited stakeholder consultation was undertaken with VHHL regarding Plan Change 3 consisting of a one hour meeting before notification of Plan Change 3,<sup>15</sup> and a half-hour pre-hearing meeting after notification.<sup>16</sup>

- 25 The report records that:

At the forefront of the Commissioners' considerations is that, in general, the CMA is publicly owned open space. The Act recognises this through the different approaches it takes with respect to controls on land and uses of the CMA. Land use activities are permitted unless restricted by a rule/resource consent (section 9) while use and development activities in the CMA are all restricted unless allowed by a rule/resource consent (section 12).<sup>17</sup>

- 26 The Commissioners state that they were satisfied with the s 32 evaluation undertaken by ARC before Plan Change 3 was notified. The report also states that:

... the Commissioners have considered whether the proposed objectives are the most appropriate way to achieve the purpose of the Act and also the efficiency and effectiveness of the recommended policies, rules and other methods as the most appropriate for achieving the objectives when formulating the recommended amendments to the plan change ...<sup>18</sup>

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<sup>14</sup> VHHL *Memorandum of Understanding* (22 December 2004), cl 2.5, p 5. A copy of the MOU was tabled at the Council hearing as part of the Plans, Exhibits, & Figures attached to the Evidence of Peter Snelling.

<sup>15</sup> Meeting on 12 September 2006.

<sup>16</sup> Meeting on 13 March 2008.

<sup>17</sup> Commissioners' Recommendations Report, p 19.

<sup>18</sup> Commissioners' Recommendations Report, p 20.

- 27 In reaching these conclusions the Commissioners failed to have regard to the submissions and evidence presented at the Council hearing by VHHL which challenged the adequacy of the s 32 evaluation undertaken by ARC, and contended that the s 32 report was not "fit for purpose" and could not be relied on as providing adequate justification for Plan Change 3.
- 28 They also failed to acknowledge that regarding the Viaduct Harbour as "publicly owned open space" unlawfully derogates from the grant of occupation and management rights.<sup>19</sup>
- 29 No record of the Commissioners s 32 evaluation is provided in their report, and there is no record of any separate s 32 evaluation undertaken by ARC when deciding to adopt the Commissioners recommendations and report as the decision on submissions under cl 10 of Schedule 1 of the RMA.
- 30 As a result the decision (and notification of Plan Change 3) is a nullity and will be voidable following the making of a declaration by a court of competent jurisdiction.

#### **Relief sought**

- 31 VHHL seeks the following relief:
- 31.1 That Plan Change 3 be withdrawn.
- 31.2 Such further, consequential, or alternative relief as may be required to give effect to this appealor which may be appropriate in the circumstances of the case.

#### ***Part 2.3: Specific matter – berth access, water-space control, berthage, and navigation***

- 32 Berth access, water space control, berthage, and navigation.<sup>20</sup>

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<sup>19</sup> See Part 2.3 of this appeal below.

### **Submissions**

- 33 VHHL made submission 33/7 which seeks that Plan Change 3 be amended to include a specific rule in section 25.5, expressly providing for vehicular and pedestrian access to existing berths in the Eastern Viaduct and Te Wero Island for servicing vessels as a permitted activity.
- 34 VHHL made submission 33/15 which seeks such further, consequential, or alternative relief as may be required to give effect to the VHHL submission or which may be appropriate in the circumstances of the case.
- 35 VHHL made submission 33/16 which seeks such further, consequential, or alternative relief as may be required to avoid, remedy, or mitigate any actual or potential effect on the related environment including (but not limited to) waterspace and land controlled, managed, or owned by VHHL.

### **Decision**

- 36 The decision rejected the submissions.

### **Reasons for the appeal**

- 37 At the Council hearing VHHL accepted that the land areas in the Eastern Viaduct and Te Wero Island are outside the CMA. As a result a specific permitted activity rule providing for access to berths was not sought.
- 38 But the Commissioners failed to have regard to the adverse effect of buses using the proposed Te Wero Bridge on pedestrian access to and along the CMA. No consequential or alternative

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<sup>20</sup> Commissioners' Recommendations Report, section 6.4, pp 36-37.

relief was granted to avoid, remedy, or mitigate these adverse effects.

39 As a result the decision fails to recognise and provide for the maintenance and enhancement of public access to and along the CMA as required by s 6(d) of the RMA. The decision also fails to give effect to the *New Zealand Coastal Policy Statement 1994 (NZCPS)* and the Regional Policy Statement.

40 While the Commissioners noted the expert evidence presented at the Council hearing by John White, the Viaduct Harbour marina manager, they failed to have regard to:

40.1 The joint decision of ARC and ACC granting resource consents for the America's Cup Syndicate Village (November 1996) that provides the foundation for access to and along the CMA in the Viaduct Harbour.

40.2 The consent order issued by the Court on 10 February 1998 granting a coastal permit for occupation of the Viaduct Harbour for a period of 35 years to ACC, and setting out the terms on which the water-space is managed.<sup>21</sup>

40.3 The management deed (3 March 2003) pertaining to the Viaduct Harbour water-space granting VHHL and related companies the sole and exclusive right to manage the water-space.

41 As a result the decision derogates from the rights previously granted, is contrary to the legitimate expectation of the parties, and is *ultra vires* and outside the functions, powers, and duties of ARC under the RMA.

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<sup>21</sup> RMA 154/97.

### **Relief sought**

42 Without prejudice to or derogating from the general relief sought above in Parts 2.1 and 2.2 of this appeal VHHL seeks such further, consequential, or alternative relief as may be required to avoid, remedy, or mitigate any actual or potential effects on:

42.1 Control or management of water-space in the Viaduct Harbour and Westhaven Properties Marina (including but not limited to any effects on berthage rights or navigation).

42.2 The related environment (including but not limited to water-space or land controlled, managed, or owned by VHHL and related companies within the coastal marine area, Wynyard Quarter, or the Viaduct Harbour Precinct).

### ***Part 2.4: Specific matter – integration with Plan Change 4 notified by ACC***

43 Integration with Plan Change 4 notified by ACC.<sup>22</sup>

### **Submission**

44 VHHL made submission 33/14 which seeks such further, consequential, or alternative relief as may be required to ensure that Plan Change 3 is consistent with Plan Change 4 and other related proposed plan modifications pertaining to Wynyard Quarter notified by ACC on 8 July 2007 (as amended by submissions and further submissions made by VHHL).

### **Decision**

45 The decision accepted the submission in part and rejected the submission in part. But the decision does not specify which (if

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<sup>22</sup> Commissioners' Recommendations Report, section 7.1, pp39-40.

any) aspects of the relief sought by VHHL have been accepted. No reasons are given for rejecting the submission in part.

### **Reasons for the appeal**

46 The Commissioners noted that:

There is an obvious need for consistency between the the plan changes due to the inextricably linked nature of the land and wharves in the area.<sup>23</sup>

47 But notwithstanding the "inextricable" link between Plan Change 3 pertaining to Wynyard Quarter notified by ARC and Plan Change 4 notified by ACC, the local authorities have failed to ensure that integrated management of natural and physical resources will be achieved by holding a joint Council hearing. Instead, separate Council hearings were held before different panels of Commissioners.

48 While the Commissioners stated that "one Commissioner [Leigh McGregor] was appointed to each of the hearing panels considering the regional and district plan changes so a link was maintained between the two", the local authorities made no reference to this when resolving to appoint Commissioners. Additionally, no provision is made in the RMA for plan change hearings to be "linked" in this way.

49 In any event, the attempt to maintain a link between the two plan changes was a dismal failure. For example:

49.1 The different panels of Commissioners arrived at different, diametrically opposed, and inconsistent conclusions regarding the new Waitemata Harbour crossing:

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<sup>23</sup> Commissioners' Recommendations Report, p 39.

- (a) The Commissioners appointed by ARC to hear Plan Change 3 concluded in relation to the revised tunnel alignment sought by the New Zealand Transport Agency that:

It is not possible to undertake such amendments through the Plan Change 3 hearing process as they would be outside the scope of the plan change and the submissions on its proposed provisions.<sup>24</sup>

- (b) Whereas, the Commissioners appointed by ACC to hear Plan Change 4 and related plan modifications concluded that Plan Change 4 could be amended to show the revised tunnel alignment on Annexe 15.

49.2 The different panels of Commissioners arrived at different, diametrically opposed, and inconsistent conclusions regarding the proposed Marine Events Centre:

- (a) Plan Change 4 notified by ACC on 8 July 2007 provides for the establishment of the proposed Marine Events Centre in Quarter Area 7.
- (b) But notwithstanding this, Plan Change 3 also provides for the establishment of proposed Marine Events Centre on the Halsey Street extension wharf.
- (c) Only one of the proposed sites will be required for establishment of the Marine Events Centre.
- (d) But the different panels of Commissioners made no amendments to these provisions. As a result both sites remain zoned for establishment of the proposed Marine Events Centre.

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<sup>24</sup> Commissioners' Recommendations Report, p 46.

### **Relief sought**

50 Without prejudice to or derogating from the general relief sought above in Parts 2.1 and 2.2 of this appeal, VHHL seeks the following relief:

50.1 That Rule 25.5.29 providing for development of the Marine Events Centre on the Halsey Street extension wharf as a restricted discretionary activity be deleted, and that Policies 28.4.15 to 28.4.21 pertaining to the proposed Marine Events Centre deleted.

50.2 Such further, consequential, or alternative relief as may be required to give effect to the relief sought above or which may be appropriate in the circumstances of the case (including without limitation the deletion of any related provisions pertaining to the proposed Marine Events Centre).

### ***Part 2.6: Specific matter – Te Wero Bridge***

51 Te Wero Bridge and Policy 28.4.11.<sup>25</sup> Specific rule for Te Wero bridge.<sup>26</sup>

### **Submissions**

52 VHHL made submission 33/4 that opposed the Te Wero link because it will give rise to adverse environmental effects by virtue of the proposed bridge and reconnection of Jellicoe Street with the waterfront (east-west axis) along Quay Street which will be more than minor and cannot be satisfactorily avoided, remedied, or mitigated.

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<sup>25</sup> Commissioners' Recommendations Report, section 9.1, pp 53-60.

<sup>26</sup> Commissioners' Recommendations Report, section 9.5, pp 65-66.

- 53 VHHL made submission 33/9 which seeks that Policy 28.4.11 be deleted.
- 54 VHHL made submission 33/8 which seeks that Plan Change 3 be amended to include a specific rule in section 25.5 providing for establishment of the Te Wero link as a discretionary activity.
- 55 VHHL made submission 33/10 which seeks that the Plan Change 3 be amended to include specific standards, terms, and conditions in the new discretionary activity rule regarding the Te Wero link to guide ARC in the exercise of discretion when deciding the resource consent application for the bridge including (without limitation) the matters currently listed in Policy 28.4.11.

### **Decision**

- 56 The decision:
- 56.1 The decision accepted submission 33/4 in part (and rejected the submission in part) and amended the criteria in Policy 28.4.11 by:
- (a) Inserting 28.4.11(a)(iv) to ensure that vehicle traffic will not cause significant adverse effects on amenity values.
  - (b) Inserting 28.4.11(b)(iv) to provide for convenient and easily accessible shore to vessel communication systems regarding the regime for bridge opening/closing.
  - (c) Amending 28.4.11(f) to exclude private vehicles (including taxis and coaches) from using the bridge.
- 56.2 The decision accepted submission 33/8.
- 56.3 The decision rejected submissions 33/9 and 33/10.

## **Reasons for the appeal**

### *General reasons*

57 VVHL opposes Plan Change 3 because the Te Wero link will give rise to adverse effects on the environment which are more than minor and cannot be satisfactorily avoided, remedied, or mitigated. For example:

57.1 Navigation in Viaduct Harbour.

57.2 Continued viability of existing berths in the Eastern Viaduct and Te Wero Island, for example:

(a) Vessels berthed in the Eastern Viaduct and Te Wero Island will need vehicular access for servicing, provisioning, and owner/guest transfer.

(b) If adequate vehicular access is not provided to the berths in the Eastern Viaduct and Te Wero Island (or is impeded in any way) the existing berths will not be viable.

(c) Plan Change 3 will (if not amended) unlawfully derogate from access rights provided under the terms and conditions of the Ports of Auckland Access Agreement and the Auckland City Council Management Agreement.

57.3 Amenity values in the Viaduct Harbour Precinct (including, but not limited to, adverse environmental effects on air quality from the discharge of vehicle emissions).

57.4 Heritage values of the existing bascule bridge.

57.5 Quantitative and qualitative reduction of the Te Wero and Eastern Viaduct conservation covenant areas.

57.6 Public access by pedestrians along the Te Wero and Eastern Viaduct conservation covenant areas.

58 At the Council hearing VHHL presented expert evidence in support of its submissions from:

58.1 Kim Hardy: planning and resource management.

58.2 Dennis Scott: landscape.

58.3 Clinton Bird: urban design.

58.4 John White: marina manager.

58.5 Grant Smith: traffic and transportation.

59 The Commissioners failed to have regard to the expert evidence presented by VHHL.

*Te Wero Bridge and Policy 28.4.11*

60 The report states that Plan Change 3 "envisaged" that a link might be "restored" between Wynyard Quarter and Te Wero Island. But no provision is made for "resoration" of the link in the Viaduct Harbour Precinct provisions of the operative Central Area Plan. No changes were made to these provisions by Plan Change 4 and other related plan modifications notified by ACC.

61 No reference is made in the operative Central Area Plan to the possibility that the link "might" be restored. The Central Area Plan appeals were resolved by consent as recently as 2003 and 2005. Both ARC and ACC were parties to those appeals and

agreed to the terms for settlement as recorded in the memoranda and consent orders filed with the Court.<sup>27</sup>

- 62 Policy 28.4.11 is not consistent with the *Auckland Waterfront Vision 2040* (2005).
- 63 The Commissioners noted the concerns raised by submitters regarding use of the bridge by public transport but discussed this matter separately in section 9.2 of their report. Notwithstanding the concerns raised by VHHL regarding use of the bridge by buses, they failed to consider VHHL's submission in that section of the report.<sup>28</sup>
- 64 The Commissioners failed to have regard to alternative ways of establishing the link contrary to s 32(3) of the RMA, and failed to have regard to historic heritage contrary to s 66(2)(c)(iia) of the RMA.<sup>29</sup> Instead, they deferred to the resource consent process. The Commissioners would have been fully aware that "alternatives" are not normally considered when resource consent applications are decided.
- 65 The Commissioners concluded that "the concerns regarding potential effects of the bridge on vessel access to the Viaduct Harbour are valid" but they failed to recommend appropriate amendments to Plan Change 3 to ensure that any adverse effects of the bridge will be satisfactorily avoided, remedied, or mitigated.<sup>30</sup> As a result ARC has failed to carry out its functions under s 30(1)(d)(v) of the RMA.

*Specific rule for Te Wero Bridge*

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<sup>27</sup> RMA 898/00, 900/00, 902/00, and 903/00. Ports of Auckland Ltd the predecessor of ARH was also a party to the appeals and agreed to the terms for settlement.

<sup>28</sup> Commissioners Recommendations Report, p 55.

<sup>29</sup> Commissioners Recommendations Report, p 56.

<sup>30</sup> Commissioners Recommendations Report, pp 57-58.

66 VHHL seeks that a new discretionary activity rule be included in Plan Change 3 together with standards, terms, and conditions to guide ARC when exercising discretion when deciding resource consent applications for any proposed bridge.<sup>31</sup>

67 At the Council hearing relevant standards, terms, and conditions to guide discretion were set out in the expert evidence of Mr Bird.<sup>32</sup>

68 The Commissioners recommended that a new discretionary activity rule be included in Plan Change 3, but they declined to recommend the inclusion in the rule of any relevant standards, terms, and conditions to guide the exercise of discretion. The report states that:

The proposed new rule ... specifies the bridge as being from the Eastern Viaduct to Jellicoe Street to make it clear that it would apply to any new bridge that may be required, whether it is alongside the existing lifting bridge or between Te Wero Island and Jellicoe Street.<sup>33</sup>

69 The decision has no jurisdictional basis and is *ultra vires*. Plan Change 3 (as notified) does not provide for a (second) bridge alongside the existing bascule bridge. None of the submissions made regarding Plan Change 3 requested any amendment to provide for a second bridge in that location. The new rule provides for a bridge spanning the distance between the Eastern Viaduct and Jellicoe Street, but the Eastern Viaduct and Te Wero Island are not in the CMA. As a result the new rule purports to regulate development on land that is outside ARC's jurisdiction under the Regional Coastal Plan, and no regard has been had to the effects of providing a second bridge on historic heritage.

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<sup>31</sup> Commissioners Recommendations Report, p 65.

<sup>32</sup> Commissioners Recommendations Report, p 66.

<sup>33</sup> Commissioners Recommendations Report, p 65.

### **Relief sought**

70 VHHL seeks the following relief:

70.1 Without prejudice to or derogating from the general relief sought above in Parts 2.1 and 2.2 of this appeal VHHL seeks that:

- (a) A specific rule be included in section 25.5 of Chapter 25 providing for establishment of the Te Wero Bridge (linking Jellicoe Street with Te Wero Island) as a discretionary activity.
- (b) Policy 28.4.11 regarding the Te Wero link be deleted.
- (c) Specific standards, terms, and conditions be specified in the new discretionary activity rule regarding the Te Wero Bridge to guide the consent authority in the exercise of discretion when deciding resource consent applications (including without limitation, the matters currently listed in Policy 28.4.11), for example:

When considering a discretionary application for the construction of the Te Wero Bridge, the Council will give consideration to the following matters:

- (i) The extent to which the bridge is visually legible from vessels outside the Viaduct Harbour Precinct;
- (ii) The extent to which the opening and closing of the bridge does not adversely impact on the existing ease of marine vessel accessibility into the Viaduct Harbour Precinct;
- (iii) The extent to which the design and aesthetic appearance of the bridge is simple, elegant, and avoids visual clutter which would result from

- imitating marine vessel components such as masts and rigging;
- (iv) The extent to which the engineering of the opening and closing mechanism is expressed tectonically;
  - (v) The extent to which the design of the bridge is appropriate to Auckland's South Pacific setting;
  - (vi) The extent to which the bridge establishes a clear and complementary visual relationship with the existing heritage bascule lifting bridge;
  - (vii) The extent to which the bridge and its detailing are designed to accommodate the scale of pedestrian and the speed at which people typically walk;
  - (viii) The extent to which the bridge is able to be lifted and lowered without creating any adverse noise effects in its surroundings;
  - (ix) The extent to which the bridge is constructed out of high quality, low maintenance materials;
  - (x) The extent to which the bridge protects and enhances existing views from public places within the Viaduct Harbour Precinct out to the Waitemata Harbour.
  - (xi) The extent to which the landscape design and materials used for the Eastern Viaduct approaches to the Te Wero bridge:
    - (a) Give priority to the pedestrian,
    - (b) Are complementary to the heritage bascule lifting bridge, and
    - (c) Are consistent with and integrate with the existing promenade around the perimeter of the Viaduct Harbour Precinct.
- (d) That use of the proposed Te Wero Bridge be limited to pedestrians and cyclists only. And that any rule

providing for the bridge should expressly state that resource consent will be limited in this way by consent conditions.

- (e) Such further, consequential, or alternative relief as may be required to avoid, remedy, or mitigate any actual or potential effects on:
  - (i) Control or management of water-space in the Viaduct Harbour and Westhaven Properties Marina (including but not limited to any effects on berthage rights or navigation).
  - (ii) The related environment (including but not limited to water-space or land controlled, managed, or owned by VVHL within the coastal marine area, Wynyard Quarter, or the Viaduct Harbour Precinct).

70.2 Such further, consequential, or alternative relief as may be required to give effect to this appeal or which may be appropriate in the circumstances of the case.

### ***Part 2.7 Specific matter – Maximum heights***

- 71 Westhaven Viaduct Tenants & Ratepayers Assoc Inc (13/12) and the Marine Industry Association (45/7) made submissions regarding height limits. They sought that Rule 25.5.13(d) regarding maximum heights be amended by excluding vessel masts.<sup>34</sup>

### **Decision**

- 72 The Commissioners noted that normally vessels would not be defined as structures and would not therefore be subject to the

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<sup>34</sup> Commissioners' Recommendations Report, section 10.1, p 67.

rule. However, they noted that "a vessel being refitted on land could be in place for a sufficient time to be considered fixed to land". Similarly, museum exhibits placed on wharves would likely be considered structures.<sup>35</sup>

- 73 As a result the Commissioners recommended that Rule 25.5.13 (d) regarding maximum permitted height be amended to include reference to "masts". ARC adopted the Commissioners recommendations.<sup>36</sup>

### **Reasons for the appeal**

- 74 However, the amendment is not specific and goes beyond the relief sought in the submissions by referring to masts generally, rather than vessel masts in particular.

### **Relief sought**

- 75 Without prejudice to the general relief sought above in Parts 2.1 and 2.2 of this appeal VHHL seeks that Rule 25.5.13(d) (as amended by the decision) be amended to read in relevant part:

The maximum height of any permanent buildings permitted by Rule 25.5.7 or any temporary building or any structure shall be no greater than the heights indicated below (no account shall be taken of chimneys, aerials, lift towers, lighting poles, **vessel** masts, cranes, derricks, and cargo stacking and lifting devices):

- 76 Such further, consequential, or alternative relief as may be required to give effect to this appeal or which may be appropriate in the circumstances of the case.

### **Part 3: RELIEF SOUGHT**

- 77 VHHL seeks the following relief:

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<sup>35</sup> Commissioners' Recommendations Report, section 10.1, p 67.

<sup>36</sup> Commissioners' Recommendations Report, section 10.1, p 68

77.1 That Plan Change 3 be withdrawn.

77.2 In the alternative, and without prejudice to or derogating from the relief sought in paragraph 77.1 above VHHL seeks that the relief sought in connection with the general and specific matters set out above in Parts 2.1 to 2.7 of this appeal be granted.

77.3 Such further, consequential, or alternative relief as may be required to give effect to this appeal or which may be appropriate in the circumstances of the case.

77.4 Costs.

77.5 Directions for this appeal to be placed in the same track and case managed by the Court together with other proceedings that also pertain to Wynyard Quarter:

- (a) Objection under the *Public Works Act* 1981 regarding the taking of land at 99-177 Halsey Street, Auckland (ENV-2008-AKL-000184).
- (b) Appeal against decision of ACC concerning requirements for designations lodged by VHHL on 20 February 2009.
- (c) Appeal against decision of ACC regarding Plan Change 4 and related proposed plan modifications lodged by VHHL on 20 February 2009.

And that a common report date of 31 March 2009 be fixed by the Court regarding these proceedings.<sup>37</sup>

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<sup>37</sup> See the Court's directions of 20 January 2009 regarding objection ENV-2008-AKL-000184.

77.6 Directions for the proceedings referred to in paragraph 77.5 above to be heard together, either simultaneously or sequentially.

77.7 Directions for discovery and production of the *Framework Agreement*, and any related agreements.

**Part 4: DOCUMENTS ATTACHED**

78 VHHL **attaches** the following documents to this notice:


78.1 A copy of the submission made by VHHL.

78.2 A copy of the relevant decision.

78.3 Any other documents necessary for an adequate understanding of the appeal.

78.4 A list of names and addresses of persons to be served with a copy of this notice.

Signed on behalf of the appellant by:



**Trevor Daya-Winterbottom**

*Counsel for Viaduct Harbour Holdings Ltd*

20 February 2009

**Address for service of appellant:** PO Box 75-945 Manurewa  
Manukau 2243

**Telephone:** 0275 182 196

**Email:** [daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz)

**Contact person:** Trevor Daya-Winterbottom

## **Part 5: ADVICE TO RECIPIENTS OF COPY NOTICE OF APPEAL**

### **How to become a party to proceedings**

- 132 You may become a party to the appeal if you made a submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in Form 33) with the Environment Court within 30 working days after this notice was lodged with the Environment Court (i.e. 3 April 2009).
- 133 You may apply to the Environment Court under s 281 of the *Resource Management Act 1991* for waiver of the above timing requirements (see Form 38).

### **How to obtain copies of documents relating to the appeal**

- 134 The copy of the notice served on you does not attach a copy of the appellant's submission, or the decision. These documents may be obtained, on request, from the appellant.

### **Advice**

- 135 If you have any questions about this notice, contact the Environment Court Unit of the Department of Courts in Auckland.

