

ORIGINAL

Decision No. A 69 /2006

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

AND

IN THE MATTER of an appeal under section 358 of the Act

BETWEEN CURADOR TRUST

(ENV A 26/06)

Appellant

AND

NORTHLAND REGIONAL COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)  
Environment Commissioner C E Manning  
Environment Commissioner R M Dunlop

Hearing at Whangarei on 18 May 2006

Appearances

Mr R B Brabant for Curador Trust (**Curador**)

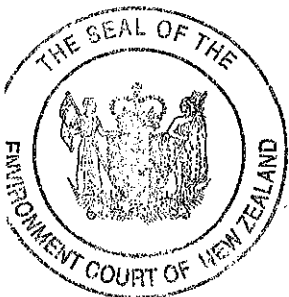
Mr R M Bell for the Northland Regional Council (**the Regional Council**)

### DECISION

#### *Introduction*

[1] This appeal relates only to the appropriate term for a coastal permit.

[2] Curador applied for and was granted a further coastal permit to use and occupy space in the Coastal Marine Area with a boat shed and associated piles. The boat shed has been in existence for over 40 years and was licensed by the Northland Regional Council harbour bylaws and before that under the previous licensing regime of the Northland Harbour Board.



[3] The first resource consent was granted for the subject boat shed (**Shed 15**) in 1997 for a period of some nine years until 31 March 2006. A further application was made and consent granted for the shed until 30 November 2014. Curador took an objection pursuant to section 357 of the Act and thereafter appealed to this Court. Curador seeks a term of 30 years from the date of grant, whereas the Regional Council has imposed a lesser period of some eight and a half years to 30 November 2014.

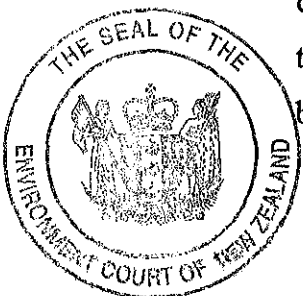
[4] The parties are agreed that on appeal this Court has before it the possibility of confirming either period or an expiry date between 2014 and 2036.

### *Background*

[5] This boat shed is one of a group at Kissing Point on the Hatea River, three kilometres downstream of the Whangarei Basin. Kissing Point appears to have been established within the tidal mangroves after the Second World War, around 1948. There appears to have been a combination of reclamation and construction of the boat sheds into the tidal waters of the Hatea River. Onerahi Road (also known as Riverside Drive), connecting Whangarei with Onerahi, has been constructed as a causeway through the tidal mangroves and may have been created around the same time as the first boat sheds. It provides access to Kissing Point with separation of some 40 metres from the boat sheds.

[6] Mr R H Ahlers, a witness who has lived in Whangarei since 1951, told us that the first boat sheds were constructed by Mr W McBreen of McBreen Jenkins Construction (a construction and earthmoving company), Mr Arthur Somner of Somners Waipu and Mr Les Waldron of Waldrons Quarries. He tells us other sheds followed later.

[7] Annexed hereto and marked "1" is a plan showing the boat sheds that have been constructed over this period in relation to Onerahi Road. The area between the road and the boat sheds has been reclaimed. Many of the sheds are connected and Curador owns both Shed 14 and Shed 15. The wall between Sheds 14 and 15 has been removed,



notwithstanding that there is a hip roof between the two. From the confusion between the owner and Mr Ahlers as to which shed was the subject of this application, we accept there is little to distinguish the two sheds. The group of sheds as a whole looks very similar from Onerahi Road.

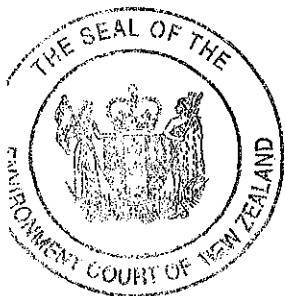
[8] That similarity has been emphasised in recent years with the formation of the Kissing Point Marine Association Incorporated, of which Mr Ahlers was the founding chairman. He confirmed to the Court in cross-examination that all shed owners were in the Kissing Point Marine Association (KPMA), and that they could only obtain power supplies if they were a member of the Association. He also accepted that there was an umbrella policy of insurance over the sheds, and that the Association billed individual members for power supplied to each shed and arranged the lease for the parking area in front of the boat sheds.

[9] More directly germane to the current case, the Association also made a group application for all owners of sheds, with the exception of Shed 15, for a consent for occupation of the Coastal Marine Area. This was granted in 1999 for a period of 15 years. This consent is due to expire on 30 November 2014.

[10] As we have already indicated, an application had been made in 1997 by the owner of Shed 15 for a resource consent in respect of that individual shed. Curador was not the owner of the boat shed at this stage and no explanation was given to us by any witness why a separate application was made in respect of this shed only. Resource consent was granted on 16 September 1997 to expire in March 2006. Accordingly, by the date the consent was granted for the balance of the boat sheds, the Regional Council was prepared to grant a consent for 15 years rather than the nine years granted in respect of Shed 15. The new consent for Shed 15 is aligned to expire in November 2014 along with the balance of the boat sheds.

*The current situation*

[11] Quite clearly the consent for Shed 15 was out of step with those for all the other boat sheds in the group. The Regional Council decision granting the Shed 15 consent to



expire on the same date as the other sheds has the primary purpose of bringing the shed into line with all others in the group.

[12] However, matters have not remained static since these consents were considered. The Regional Council has recently considered the grant of a consent for the Whangarei Cruising Club to establish facilities adjacent to the boat sheds. These facilities included club rooms which were granted a consent for some 35 years. Apparently the ancillary activities, including landing, walkway and pontoon structures, were at least recommended for a lesser period of 17 years because of their comparative lack of permanence.

[13] For the sake of completeness, we should add that the land adjoining all the boat sheds, which is effectively reclaimed land, has a lease arrangement which expires in 2017. It appears the Association and its members have a reasonable expectation that a further lease will be granted, although there is no formal right of renewal.

#### *The issues*

[14] Mr Brabant for the appellant points to the grant of the consent for the Whangarei Cruising Club rooms for 35 years and argues that there is no proper resource management reason why consent should not be granted for the term sought by Curador, namely 30 years. In particular, he points to the evidence confirming that:

- (a) the boat shed is in good order and repair;
- (b) there are no adverse effects on the environment from its use or operation;
- (c) there has been substantial expenditure on the shed, including sewage reticulation;
- (d) Shed 15 fulfils an important enabling function, in particular for Mr R Fisher's heritage vessel the *Akarana*;
- (e) there was a significant financial cost in acquiring Shed 15 by the new owner and the combined value of all 28 boat sheds is some \$1,700,000.

[15] Mr Bell's position for the Regional Council is that Shed 15 is indistinguishable in practical terms from the other boat sheds in the group. Accordingly, he says that the



consents should have a common expiry date so impacts and length of term can be a matter discussed in respect of all the sheds at the renewal time. He argues that this represents:

- (a) better integrated management of this Coastal Marine Area;
- (b) an ability to deal with potential cumulative effects as a group rather than one small part of the group of structures;
- (c) lower processing costs would be involved as only one application would be made by all the members through KPMA which has a history of acting collectively;
- (d) collective grouping of consents allows for more efficient work by the Regional Council having regard to the number of structures to be licensed and reviewed;
- (e) this course is consistent not only with the purpose of the Act but also the provisions of the relevant Regional Plans.

[16] His position could be summarised as stating that Shed 15 has no special features that differentiate it from its neighbours and accordingly, since it is out of step with the others, it should be brought into line with the other consents so all can be dealt with together.

### *The Regional Coastal Plan*

[17] This Plan became operative on 30 June 2004. Kissing Point is part of the Marine 4 (Controlled Moorings) Management Area. As well as the boat sheds, Kissing Point has the yacht club, boat ramp and around 100 pile moorings. Under the operative Plan, prior to the notification of the Plan Change we describe below, the boat sheds were controlled activities under rule 31.6.3(b).

[18] On 28 January 2005 the Regional Council notified a Plan Change which has the effect of changing the status of the boat sheds from a controlled activity to a discretionary activity by virtue of section 77C of the Act. We understand that notwithstanding Plan Change 1, there is intended to be no change to rule 33.6 which sets out the matters the Council is to have regard to in determining the duration of permits.



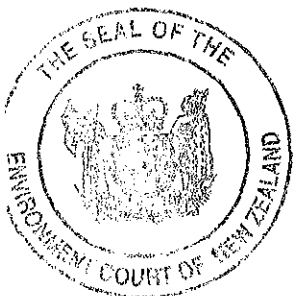
Accordingly, whether the application is controlled in terms of the Operative Plan or discretionary as proposed under Plan Change 1, it appears that the criteria to consider the term of consent remain unchanged. These are:

- (a) the sustainable nature of the resource affected by the proposed activity;
- (b) knowledge of the environmental effects associated with the activity;
- (c) the Northland Regional Council's regional monitoring strategy (when completed);
- (d) the period of the Operative Regional Coastal Plan and the extent of possible changes to it;
- (e) the anticipated life of any structure which is the subject of any application; and
- (f) the expiry date of other permits in the same coastal area where comprehensive reviews of all permits within that area are desirable.

[19] Mr A G Richards, the coastal consents team leader for the Regional Council, advises the Court that there are approximately 600 unauthorised coastal structures in Northland, many dating from before 1991. Because of the number of structures, Mr Richards told us the Council saw benefits in dealing with these structures in groups. He decided upon a schedule of expiry dates for structures based upon catchment locality. He considered this represented:

- (a) better integrated management of the Coastal Marine Area by providing for comprehensive and consistent review of structures within an area;
- (b) the opportunity to exercise good stewardship and consider environmental effects such as cumulative effects. He said that this opportunity would effectively be lost if each structure was considered in turn;
- (c) some levelling of the Regional Council's future workload to promote efficient work allocation and avoid, as far as is reasonably possible, unnecessary engagement or under-utilisation of Council staff.

[20] The original schedule was based upon a six year cycle but over ten years has passed and the schedule is due for review. It is on this basis that Mr Richards justifies the original grant in respect of Shed 15 to 2006 (being a period between six and ten



years). He accepts that when the other boat sheds were considered, 15 years was applied for and granted. He considered that this was close to a 12 year cycle (being a multiple on the six year period).

[21] He has prepared a list of boat sheds on the Hatea River, which is annexed hereto and marked "2", showing other boat sheds on the River, with expiry dates between 2007 and 2015. The other locations mentioned (Locations A, B and C) are between Kissing Point and the Town Basin.

### *The 35 year period*

[22] Mr Brabant seeks to rely upon the grant of consent for the cruising club of 35 years as demonstrating that there is no proper reason why a consent cannot be granted for 30 years for Shed 15. He points to the fact that the cruising club buildings are proximate to the boat sheds as demonstrating that the Regional Council has been inconsistent in applying this so-called policy. He emphasises that policy 6.4.4 of the Regional Plan describes the Marine 4 Management Area as:

*... a means of providing for the continuation of such activity where appropriate,  
... and of facilitating the management of any adverse environmental effects associated with them.*

[23] Where in a case such as this there are no adverse environmental effects, he emphasises that the continuation of the activity features prominently in the provisions of the Plan. This is reinforced by policy 17.4.1 (page 120), which provides for the continued lawful established use of the structures, and by the methods of implementation of 17.5.3, which allows for the inclusion of rules for specified existing authorised structures. Accordingly, in terms of the various criteria of section 33.6, he indicates that in terms of (a) and (b) the activity appears to be and has been sustainable, with no known effects. Considering criterion (e) he emphasises that the anticipated life of the structure is significantly greater than the period for which consent is granted and probably in excess of the maximum term which can be granted under the Act.



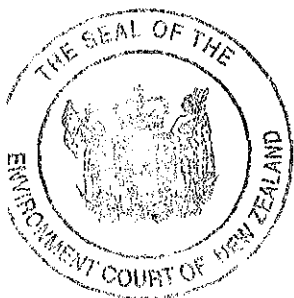
[24] In respect of the expiry of consents in 2014 for the other boat sheds, he says that this was a result of Mr Richards conditioning the applicant to apply for a lesser term than one which would otherwise be sustainable. He also points to the grant of consent for the Cruising Club. In light of the contradiction between the two, he would emphasise that the Court should be seeking to advance the purpose of the Act. In support of this argument he quotes paragraph [49] of the *R R and P K Johansen Brooke-Taylor v Marlborough District Council*<sup>1</sup> decision where the Court said:

*The Brooke-Taylor application seeks a 35 year term of consent so the council had the option to grant a shorter term if there was some resource management reason for doing so. But claim to ownership of the seabed is not about sustainable management of resources. And whereas the council's stance relates in part to efficient administrative process, the end result is that it has set up unnecessary [sic] road block in the path of appellants' sustainable use of resources. Further, there is no reference in the Sounds Plan that indicates a term of consent for a jetty or any other structure will be subject to a restricted term by reason of a policy or practice relating to any agreement with iwi.*

[25] We note that this decision was based upon a ground relating to restriction of consents that was not addressed in terms of the Plan. That is not the case here as the Plan specifically directs the Regional Council in consideration of term to common expiry dates with other relevant consents.

[26] Furthermore, there does not appear to be an assumption, at least within the Act, that a period of 35 years should be granted unless there is good reason to depart from that. Section 123(c) provides:

*The period for which any other coastal permit, or any ... is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116.*





[27] Accordingly, the Act is clear that the presumptive period is five years and the maximum period for which consent can be granted is 35 years. We are unable to see any basis upon which this creates an assumption that consent should be granted for 35 years unless there is good reason to depart from that. On a full reading of the *Brooke-Taylor* decision, we are not able to conclude that this was the conclusion of the Court.

### *The Newbury Tests*

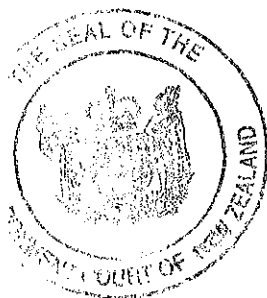
[28] Having concluded that the period granted by the Council was too short, the Court in *Brooke-Taylor* then went on to discuss an appropriate term, which in that case was determined to be 20 years. At paragraph [62] of that decision the Court considered the Newbury tests and stated:

*Newbury lay down the tests for validity of conditions in a resource consent with these three common law requirements –*

- [a] the condition must be for a resource management purpose and not for an ulterior one;*
- [b] the condition must fairly and reasonably relate to the activity authorised by the consent;*
- [c] the condition must not be so unreasonable that no reasonable consent authority could have imposed it.*

[29] It appears to us that the difficulty in applying this test in the current circumstances is that if the existing term condition in the consent is declared to be invalid, then the consent would be subject to a presumptive term of five years unless an alternative period was inserted. On its face it could not be said that a term of more than five years was not for resource management purposes, as the Act itself provides a presumptive period of five years.

[30] Clearly the period of grant is also specifically the subject of consideration in terms of the Act and also in terms of the Regional Plan. That being said, we agree with Mr Brabant that the term of consent must, in the circumstances of this case, be supported by one or more of the criteria set out in the Plan.



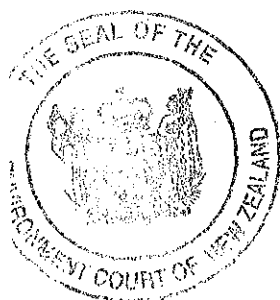
[31] Finally, for the same reasons we have just explained, we are unable to see that it could be said that a condition for the period of time now sought and for that previously granted by the Regional Council in the 1997 consent was so unreasonable that no reasonable consent authority could have imposed it.

*Criteria for length of term*

[32] We agree that both the life expectancy of the asset and the consents granted in the Kissing Point area are matters directly relevant to the determination of the period of consent, and this is specifically identified in 33.6(e) and (f) of the Plan. Furthermore, administrative efficiency is an element of sustainable management in terms of the Act, being managing the use of physical resources in a way and at a rate that recognises the various interests under the Act. In addition, we adopt the discussion of the Court in *PVL Proteins Limited and another v The Auckland Regional Council*<sup>2</sup> where the Court said at paragraphs [30] and [31]:

*Uncertainty for an application of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term. Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.*

*By comparison, expected future change in the vicinity has been regarded as indicating a shorter term. Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects compared with expenditure on repairs and maintenance or for profit). In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.*



<sup>2</sup> Decision A61/2001.

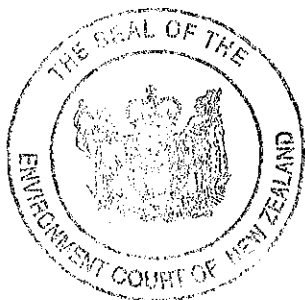
[33] We agree that the *PVL Proteins* decision recognised that activities with minor effects could generally be granted consent for a longer term. However, *PVL Proteins* must be seen in the context of the appeal to be determined. The appeal was in respect of resource consents to discharge contaminants to air from the operation of a slaughterhouse. Issues of commonality with identical consents were not raised in that case and are more relevant to this type of application within the Coastal Marine Area.

[34] We take into account that there is less scope in the context of this type of consent to consider monitoring or review of conditions because the output does not vary and the effects are minimal at least in terms of the evidence we have had to consider. Having noted that, we also note that the Court does routinely impose limited terms, including for consents such as air discharges. We particularly note that in the case of *PVL Proteins* the Court did not impose a term of 35 years but rather increased the term from ten years to 14 years.

#### *Consideration of term*

[35] Looking at the matter broadly in terms of the environment involved, the state of the Plan and the desirability of having common expiry dates, we would have concluded in the absence of the consents already granted for the other boat sheds that a term in the order of 15 to 20 years would have been appropriate. To that extent the 35 year term for the Cruising Club may be an exception. It may be that the Cruising Club consent was justified on the basis it provided access to the water to members of the public generally or to a section of the public (members and friends). Without more information on the Cruising Club consent, we cannot know the basis on which the Club was granted a 35 year term. It may be possible to justify the Cruising Club term on the basis that the particular benefits and effects are such that the extra term was justified in light of the cost of building a new physical resource.

[36] In respect of the existing boat sheds, they have already achieved significant benefit for their owners over the years. It cannot be that the mere existence of a physical resource within the CMA justifies perpetual grants of consent. If that is the principle Mr Brabant wishes to establish, it is not one we can support. If this were the



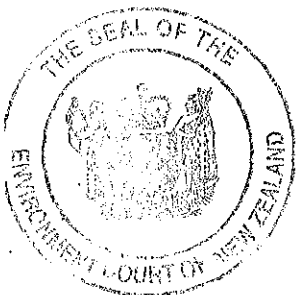
case, consent holders could merely upgrade their asset prior to renewal and thus be assured that a resource consent would be granted. We do not think any such expectation is implied, either in terms of the Act or the Regional Plan.

[37] As has been clear with a number of physical resources in the CMA, community values, and in consequence the extent to which structures are acceptable do change over time. There can be no assurance that the Plan will remain unchanged into the future. In particular, we conclude that the Regional Council, utilising a planned programme of review of grouped consents, has an appropriate mechanism to achieve sustainable management and good stewardship in terms of the Act.

[38] We have concluded that there is no proper basis upon which Shed 15 can be distinguished from the other boat sheds in the group. In particular, Shed 15 would require structural alteration to stand independently of Shed 14. That being the case, there is no basis upon which there should be a distinction between any of the boat sheds in the group. In reaching that conclusion we have particular regard to the commonality of action and resources of the KPMA discussed earlier in this decision.

[39] We conclude it would be more efficient for all the boat sheds to be dealt with in a common consent, both in terms of the cost for the applicants (one application) and also in terms of the Regional Council reporting and consideration of the issues. We see no proper basis upon which Shed 15 was ever separated from the other sheds and it should be rejoined with a common expiry date as soon as possible. To extend the expiry date of Shed 15 would merely lead to a repetition of the same argument at the time the balance of the boat sheds were due for renewal in 2014. If we granted consent for Shed 15 for between 15 and 20 years it would expire between 2021 and 2026. A new consent for the other sheds would be considered in 2014. The Council would be faced with further complaints about the short period of time for the consent if they were only granted to 2021-2026.

[40] Although we recognise that Shed 15 has been put to extra cost in applying separately for consent in 2006, we consider the impacts of that are minor compared with the perpetuation of the staggered timing of consents.



[41] We have regard to the term of grant for some eight years. We still consider that it is, in the circumstances, a reasonable period. It also enables all the boat sheds to be considered for consent at the same time in November 2014. This is also consistent with the predominance of other consents within the Hatea River area as shown in Annexure "2" and distinguishable from the grant of consent for the cruising club.

***Result***

[42] Accordingly, we confirm the decision of the Regional Council.

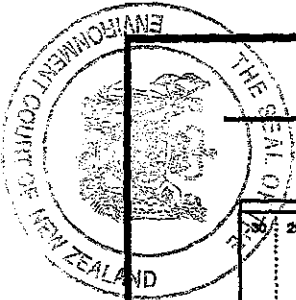
[43] Although an application for costs is not encouraged, if any application is to be made, it is to be filed within 15 working days, reply within ten working days and a final reply five working days thereafter.

**DATED** at CHRISTCHURCH this 31<sup>ST</sup> day of May 2006

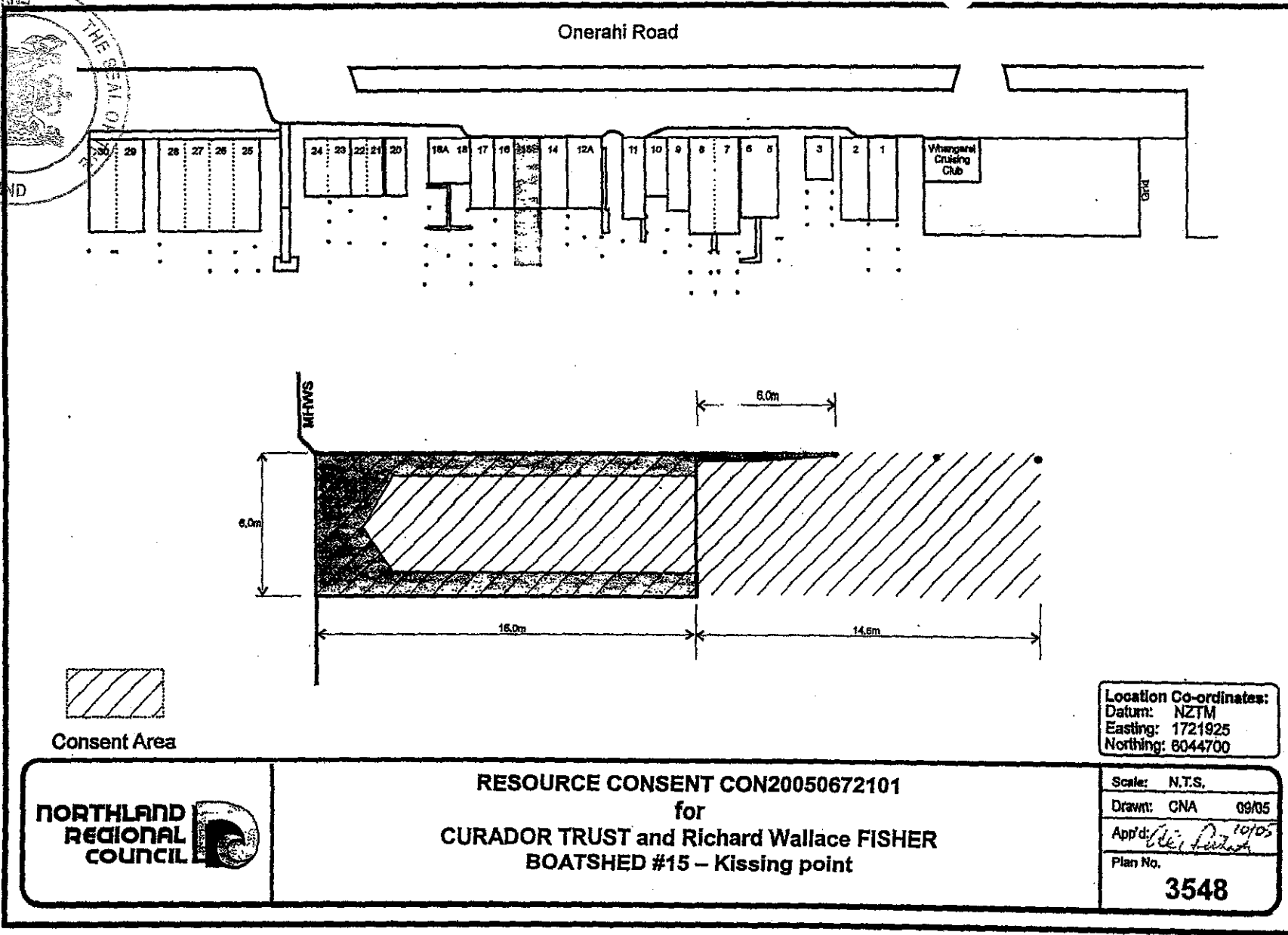
  
J A Smith  
Environment Judge



Issued<sup>3</sup>: - 1 JUN 2006



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Consent Area

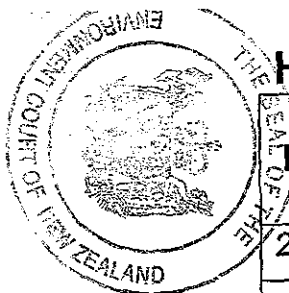
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 Easting: 1721925  
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**RESOURCE CONSENT CON20050672101**  
 for  
**CURADOR TRUST and Richard Wallace FISHER**  
**BOATSHED #15 – Kissing point**

Scale: N.T.S.  
 Drawn: CNA 09/05  
 App'd: *Richard Fisher* 10/05  
 Plan No.  
**3548**

ANNEXURE 1



## HATEA RIVER BOATSHEDS

Consent Reference	Type of structure	Expiry date	Duration (years)	Location*	Comment
20050615801	Boatshed	31/03/2015	9		Approximately 250 meters upstream of Location A
20050614801	Boatshed	31/01/2015	10	A	One of group of 9 boatsheds at location
19990614801	Boatshed	31/01/2015	16	A	One of group of 9 boatsheds at location
20050615401	Boatshed	31/01/2015	10	A	One of group of 9 boatsheds at location
20000615701	Boatshed	30/11/2015	15	A	One of group of 9 boatsheds at location
20020963701	Boatshed	30/04/2007	5	B	Pohe Island – due for redevelopment by Whangarei District Council
20020616901	Boatshed	30/04/2007	5	B	Pohe Island – due for redevelopment by Whangarei District Council
20020616101	Boatshed	30/04/2007	5	B	Pohe Island – due for redevelopment by Whangarei District Council
20020614601	Boatshed	30/04/2007	5	B	Pohe Island – due for redevelopment by Whangarei District Council
20020616401	Boatshed	30/11/2014	12	C	One of 3 boatsheds at location. Expiry date coincides with group of Kissing Point boatsheds.

\* refer attached plan for location.