

BEFORE AN INDEPENDENT HEARINGS COMMISSIONER

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER a resource consent application and an objection to a decision of the Gisborne District Council by Simon Cave concerning a revetment wall at the toe of the cliff below 4, 6 and 8 Tuahine Crescent, Wainui Beach

**STATEMENT OF EVIDENCE OF DAVID LAURENCE MOUNTFORT
FOR SIMON CAVE**

PLANNING

Dated: 5 October 2022

1. INTRODUCTION

- 1.1** My full name is David Laurence Mountfort. I have 42 years' experience in the field of resource management and planning in New Zealand. I hold a Bachelor of Laws degree from Canterbury University and a Diploma of Town Planning from Auckland University. I am a full member of the New Zealand Planning Institute.
- 1.2** I am a planning consultant and the director of Mountfort Planning Ltd. I have been in this role since June 2009. I have also been a Hearings Commissioner since 2010 and this comprises the majority of my professional work. Previous to this I was employed as the Team Leader City Plan at the Christchurch City Council from 2002 -2009, as the District Planner at the Gisborne District Council from 1990 – 2002, as Assistant City Planner at the former Gisborne City Council from 1982 – 1990, and as a planner at the Ministry of Works and Development in Wellington from 1978-1982.
- 1.3** My planning experience includes extensive involvement in both preparation and processing of district and regional plans, and preparing, processing, assessing and reporting on resource consent applications. In this capacity I have been involved with both preparing applications on behalf of private clients and assessing and reporting on them to consent authorities. I have led teams at two Councils processing and reporting on resource consents and in more recent years acted as a reporting officer for several Councils in the Canterbury region. Although much of my local government career was as a manager, I always retained a hands-on role as lead planner in certain selected cases.
- 1.4** Of particular relevance to the current case, during the 1990s I was the lead author drafting the provisions relating to natural hazards in the Gisborne Regional Policy Statement, Regional Coastal Plan and District Plan, drafting the provisions, reporting on them to the Council and then through the hearings process. These documents are still in force, now forming part of the Tairāwhiti Resource Management Plan (the TRMP). At this time I commissioned coastal science investigations and reports from consultants leading into the development of the Regional Coastal Plan and the District Plan. The only exception to this is what is now described as Overlay 3, which was prepared by my colleague Trevor Freeman in the Council' Water and Soil Conservation Team. However I was closely involved with this to ensure its compatibility with the emerging District Plan. I discuss this further below.
- 1.5** As well during the 1990s I led the resource consents team processing and reporting on various resource consent applications for coastal protection works at Wainui Beach.
- 1.6** I left the Gisborne District Council in 2002 and have not been involved since, except for the preparation as a consultant of an introductory report on tsunami risk in the district.

Code of Conduct

1.7 I confirm that I have read the Code of Conduct for expert witnesses contained in the Environment Court of New Zealand Practice Note 2014 and that I have complied with it when preparing my evidence. Other than when I state that I am relying on the advice of another person, this evidence is entirely within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

2. Current Applications

2.1 With respect to the current applications I have been requested to comment on whether or not there was any intention, in the drafting of the planning documents, to exclude existing use rights for the purpose of section 10(4) of the Resource Management Act 1991. I note this subsection relates to regional planning documents and there is no corresponding clause relating to district plans in section 10 of the Act. The TRMP is a combined district and regional plan. Relevant to these applications, it contains both the Regional Coastal Plan, and Overlay 3 which deals with the Council's regional responsibilities for soil conservation under section 30 of the RMA.

3. Background matters

3.1 As I recall it, Overlay 3 had its origins in a notice made by the Council in about 1990 under section 34A of the then Water and Soil Conservation Act 1967, prior to the enactment of the Resource Management Act. This was prepared to implement the Council's responsibilities for soil conservation under the Water and Soil Conservation Act and in anticipation of the forthcoming RMA. On enactment of the RMA the s34A notice was deemed to be a Transitional Regional Plan. This notice was then adapted for the purpose of the RMA and included in what was called the District Plan, but which was actually a combined district and regional plan from its outset for this reason.

3.2 The 1990s was a particularly busy and dynamic period at the Gisborne District Council. This was a brand new Council, established in 1989, by the amalgamation of four territorial local authorities, the East Cape United Council, the East Cape Catchment Board, Gisborne Harbour Board and the pest destruction boards. The Council was charged with implementing a brand new Act significantly different from its predecessor Acts. As well all these organizations had to be combined, structures and systems established at every level and the staff bedded in.

3.3 There were a large number of significant environmental issues to be addressed as well as Wainui Beach. These included the need to establish working relationships with the iwi of the region, unsatisfactory solid waste management and landfill practices, a highly controversial sewage outfall into Poverty Bay just off Gisborne's main beach, severe soil

erosion in the hill country in much of the region, flood hazard issues from the rivers particularly within Gisborne City and on the Poverty Bay Flats and at Tolaga Bay, the ongoing effects of the Cyclone Bola event in 1987, the needs of the forestry industry with first generation forests commencing harvesting and timber processing becoming established, and a wide range of less pressing urban and rural planning issues.

- 3.4** The RMA required that a Regional Policy Statement be produced within two years and for a regional coastal plan to be prepared. Both were completely new and unfamiliar concepts. To add to the difficulties, in 1991 the Gisborne District Council was then the only unitary Council in New Zealand and there was no experience, caselaw or institutional knowledge to call on. The four existing district plans were carried over as transitional plans, but only the Cook County plan was operative with the other three at various stages of submission and appeal.
- 3.5** Turning to Wainui beach, this was a period of significant coastal erosion. Erosion at the beach has never been a gradual and consistent year on year process. Instead, periods of erosion have occurred, often years apart, followed by calmer interludes when the beach rebuilds itself. I understand that in the periods of erosion sand is stripped from the beach and transported a short distance off-shore to lie on the sea bed without being transported away to any extent. We were able to confirm this by bathymetric surveys conducted at the time. In the calmer interludes the sand is transported back by waves and the beach builds up again. However, this is not a steady state system. Several factors intervene to mean that over the long term the beach does not always return to its original location and profile. The first is of course sea level rise. The second is the fact that much of the beach is not underlaid by hard rock, but instead sits on softer materials more similar to estuarine floor materials than an exposed ocean coastline. When the sand is absent this material can be stripped away, so that when the sand returns it is laid down at a lower base level, and in some cases slightly inland of where it was formerly. The third factor is that due to a longer groyne at the mouth of the Hamanatua Stream further to the north, a sheltered area has been created to the south of this and a foredune has been steadily building there storing some of the sand permanently or at least in the long term. For the subject site, the result can be seen in the figures within Ms McPherson's evidence, where the cadastral boundaries have been overlaid over an aerial image and show the property boundaries and an esplanade reserve now out on the beach itself.
- 3.6** A similar cycle of erosion occurred in the 1970s, when the East Cape Catchment Board installed its groynes and gabion baskets and a number of private landowners including the Cave family constructed seawalls in front of their properties.
- 3.7** Since the 1990s I understand the beach stabilized again for quite a long time, but that erosion has been occurring again much more recently. I have been able to observe this on

my periodic visits to Gisborne over the years.

- 3.8** My purpose in recalling that history is to set the scene for how busy and demanding were the responsibilities we were charged with, and the need to make rapid progress on a number of very pressing issues, including Wainui Beach. While I am proud of everything we achieved at that time, this was a very steep learning curve, and I am sure many subtleties escaped us.

4. Existing Use Rights

- 4.1** One of those subtleties was section 10(4)(a) of the RMA with its cross-reference to section 30(1)(c). Under that, existing use rights do not apply to a use of land controlled by regional rules. This gives a regional council the ability to create rules that effectively negate existing use rights.

- 4.2** No such rule was created and therefore s10(1) applies and existing use rights apply.

- 4.3** I am aware that previously Mr Whitaker has stated that the existence of Rule C8.1.6(4) amounts to a control for the purposes of s10(4) and s30(1)(c)¹. I disagree with that. Rule C8.1.6.4 is a permitted activity for “*the maintenance and minor upgrading of all legally established existing structures*”. To me, this is not an indication that there was an intention to displace existing use rights by the adoption of a rule. To me a permitted activity, if fully complied with, is an absence of control. Any standards within a rule are initially a check list, and if complied with there is effectively no control.

- 4.4** An existing use right is a fundamental property right. I believe if there was an intention for a rule to limit such a right, then it should be explicitly stated, and supported through at least the policies and possibly the objectives of the plan, as well as discussed within the section 32 analysis including cost benefit analysis, none of which has occurred.

- 4.5** I note that a form of temporary existing use rights for activities otherwise controlled by regional rules was created by s20A of the RMA, under which the existing use rights would only continue until such time as a resource consent was applied for and determined. Section 20A was not enacted until 2002, outside the period in which the Council's plans were prepared and processed. Section 20A does not impose any mandatory duties on Councils to do anything at plan preparation stage. It is not triggered until someone wishes to continue with a use or activity that enjoys existing use rights in respect of relevant regional plan provisions.

- 4.6** Therefore, because s20A falls outside the period in which the plans were being prepared I do not consider it relevant to the issue of what was intended at that time.

¹ This is quoted in the Council's decision report on the EUR application, as set out in paragraph 6.2(f) of Ms McPherson's evidence

4.7 As a result I am able to confidently state that there was no intention on my part or any of the staff under my supervision or with whom I worked to exclude existing use rights at Wainui Beach for any uses or activities to which section 10(4) might apply.

4.8 I fully acknowledge that there could in theory be a difference between what we intended at the time and what we actually achieved. If the operative documents do in fact contain regional rules, overriding the existing use rights, despite our intentions at the time, then of course those rules would prevail. However I do not consider that to be the case. I have read and agree with the evidence of Georgina McPherson on that.

5. The resource consent application.

5.1 I have read Mr Todd Whittaker's report and addendum under s42A of the RMA on the resource consent applications. I broadly agree with his conclusions that the proposals are not contrary to the objectives and policies of the TRMP and that the adverse effects would be no more than minor. In fact, that conclusion is no more than an acknowledgement that the application passes the threshold test in s104D of the RMA. It must still be assessed on its merits. However Mr Whittaker does not go on to find any other reasons to decline the application, and I agree with that.

5.2 There is one matter in Mr Whittaker's reports which I do disagree about.

5.3 Several times he describes the application as being "in perpetuity", which he cannot accept.² He strongly recommends that the consent expire after 20 years and links this to the expiry of the consent for the protection works immediately to the south. He states that without a consent term the structure can remain "indefinitely".

5.4 However the application is not in perpetuity. The applicant has offered a review condition to deal with this situation, as described in the evidence of Ms McPherson. The review would take place in no later than 20 years, but could in fact take place sooner if erosion has proceeded to the extent that the seawall's effects have escalated.

5.5 I do not see any need to link this consent to the expiry of the consent to the south in this way. The works are not the same, the profile of the beach is different north and south of the groynes as can be seen on the aerials, and the groyne itself creates a discontinuity between the two sets of works. The rate of erosion could be different, as it appears that groynes can create sheltered areas immediately to their south.

5.6 In my opinion, the review condition offered would be a more flexible and adaptive approach than the fixed term Mr Whittaker prefers.

² See for example paragraphs 9-11 and 15 of the Addendum report