BEFORE THE INDEPENDENT HEARING COMMISSIONER
GISBORNE DISTRICT COUNCIL
AT GISBORNE

UNDER	the Resource Management Act 1991 ("RMA")
AND IN THE MATTER OF	an objection under s357C RMA to a decision by Gisborne District Council (**GDC**) refusing a certificate of existing use under s139A RMA
AND IN THE MATTER OF	a resource consent application concerning a revetment wall at the toe of the cliff below 4-8 Tuahine Crescent, Wainui Beach
BY	**SIMON CAVE** **Applicant and Objector**

LEGAL SUBMISSIONS ON BEHALF OF GISBORNE DISTRICT COUNCIL AS DECISION MAKER (OBJECTION PROCEEDINGS) AND CONSENT AUTHORITY (RESOURCE CONSENT PROCEEDINGS)

Dated 14 OCTOBER 2022

CooneyLeesMorgan

ANZ Centre
Level 3, 247 Cameron Road
PO Box 143
TAURANGA 3140
Telephone: (07) 578 2099
Fax: (07) 578 1433
Lawyer Acting: MH HILL

MAY IT PLEASE THE COMMISSIONER:

INTRODUCTION

1. These matters relate to works proposed on private properties at 4-8 Tuahine Cresent, Wainui Beach. The Applicant (on behalf of the property owners) lodged the following applications:

    (a) A resource consent application dated April 2019 expressed as involving demolition of an existing seawall and construction of a new seawall at 6 and 8 Tuahine Crescent, and partial replacement of the seawall at 4 Tuahine Crescent, as well as access to the site (for construction vehicles) via Wainui Beach (**RC Application**); and

    (b) Subsequently, in May 2021, an application for a certificate of existing use under s139A(1) and s10 RMA to undertake the same works for which consent is sought under the RC Application.[1] In a decision dated 25 February 2022 Council declined to issue the existing use rights certificate. The Applicant objected to that decision under s357C RMA (**Objection**).

2. The works which are proposed to be undertaken by the Applicant either pursuant to the certificate of existing use (if the Objection is successful) or the RC Application (the **Proposal**) are identical and are summarised in Section 2 of the Reporting Officer's (Todd Whittaker) Section 42A Report.

3. Separate decisions are required by the Commissioner on the two matters, given the Commissioner's jurisdiction to hear and determine the matters arises under different provisions of the RMA. Different statutory considerations apply to each decision. Although the RC Application was publicly notified, members of the public do not have the right to submit or be heard on the Objection.

4. These submissions address each matter separately as follows:

    4.1 Part One relates to the Objection; and

[1] The design of the proposed works was subsequently amended to address end effects, and the Applicant now seeks to amend the resource consent application to reflect the updated design. The Commissioner will need to be satisfied that the proposed amendments do not increase the proposal's scale or intensity and do not substantially alter the character or effects. (*Darroch v Whangarei District Council* PT Whangarei A018/93, 1 March 1993 at 27).

4.2 Part Two relates to the RC Application.

5. The reporting planner has recommended granting the application, subject to conditions. Those conditions are now largely agreed between the parties, except in relation to the term of the consent. That matter is addressed in Part Two of these submissions.

PART ONE – OBJECTION

6. Despite having applied for resource consents, the Applicant continues to maintain its argument that the Proposal benefits from both existing use rights **and** is (in part) a permitted activity under the regional rules in the Tairawhiti Resource Management Plan (**TRMP**).

7. The Applicant's argument appears to be that:

7.1 Consent is not required under the rules which would otherwise trigger the need for District land use consents (DD1.6.1(32) and C9.1.6(12) TRMP), because the proposed works have existing use rights under s10 RMA;

7.2 Regional consents are not required because the activity is permitted by regional rules (C8.1.6(4) and 7.1.6(25)) applying to the management of natural hazards because the works constitute "*maintenance and minor upgrading"* of a legally established existing structure;

7.3 Therefore the statutory exclusion of existing use rights, where the relevant land is "controlled" for a regional council function (s10(4)), does not apply because regional consents are not required.

8. For the reasons expanded on below, Council's position is that:

8.1 Section 10 of the RMA (which the Applicant has applied for its existing use certificate under) only applies to activities controlled under the *district* plan provisions;

8.1 If consent is also required under the *regional* rules (as in this case), s10 RMA cannot apply to the activity as a whole, and accordingly the existing use rights certificate cannot be issued under s139A(1) which only relates to district rules - it is well established that that it is not permissible to fragment parts of a

particular activity and argue that parts of it have existing use rights and other parts do not.[2]

8.2 Section 20A RMA is the correct provision relating to existing use rights where regional rules are engaged. No application for a certificate of exiting use rights in relation to the relevant regional rules has been sought. Such an application would need to have been made under s139A**(2)** of the RMA relating to s20A of the Act (in this case the Application was only made under s139A**(1)**). Where regional rules requiring consent are engaged, consent must be applied for within 6 months of the rule becoming operative (or deemed operative) at which time any existing use rights expire;

8.3 Rules in a plan are to be interpreted on their face, having regard to the plain ordinary meaning. Intrinsic aids can be used where there is uncertainty around the meaning of the rule (not the case here). The Applicant's Proposal involves the removal and replacement of the existing structure and cannot logically fall within the plain, ordinary meaning of "*maintenance and minor upgrading*" in the TRMP. The works therefore require consent under regional rules C8.5.7(1), C8.5.7(3) and C8.5.7(4). This has been acknowledged by the Applicant through the RC Application[3];

8.4 Given regional rules requiring consent are engaged, s10 cannot apply to the activity as a whole and consent is required. This approach is supported by (but not dependent on) s10(4) of the RMA, which clarifies (for the avoidance of doubt) that existing use rights do not apply to land which is "controlled" for the purpose of a Regional Council function. In this case the TRMP seeks to control (i.e regulate though rules) the use of land within the coastal environment for the purpose of the management of natural hazards (a regional council function under s30(1)(c)(iv)). It follows that existing use rights are not available (or would be extinguished under s20A, following the application for resource consent);

8.5 There is a good policy reason why continuing existing use rights are not available where land is controlled for a regional council function, particularly the management of natural hazards. Regional Councils need to retain the ability to regulate land use for this critical function through plan rules. That is

[2] *Pukekohe Hiab Transport Ltd v Auckland Council* [2013] NZEnvC 96
[3] Section 8.1 – Consents required under the TRMP.

why the scheme of the Act only provides for "temporary" existing use rights where regional rules are engaged, requiring an application for consent within 6 months of the regional rule becoming operative (s20A);

8.6 The Applicant has in fact applied for consent. The proper approach is to enable a full assessment of the proposal through that application.

Relevant statutory provisions

9. The starting point for consideration of the existing use rights regime under the RMA is the statutory provisions. Relevantly, they provide:

9.1 No person may use[4] land in a manner that contravenes a *regional rule* unless the use is expressly authorised by a resource consent or is an activity allowed by s20A RMA (s9(2) RMA));

9.2 No person may use land in a manner that contravenes a *district rule* unless the use is expressly allowed by a resource consent or is allowed by s10 or s10A RMA (s9(3));

9.3 Section 9 does not apply to the use of the coastal marine area (**CMA**) (s9(6) RMA[5]).

10. The proposed structure has been designed to be located outside of the CMA and therefore s9 applies. However, the existing use application relies on s10 not s20A.

11. Section 10 is clear that it only relates to existing uses where land is being used in a manner which contravenes a rule in a *district plan* or *proposed district plan*. Section 20A is the relevant provision where regional rules are engaged.

12. This demarcation is reinforced by s10(4) RMA, which clarifies (in case there is any doubt):

> *For the avoidance of doubt, this section does not apply to any use of the land that is-*
>
> (a) ***Controlled under section 30(1)(c) (regional control of certain land uses)****; or*

[4] *"Use"* is defined in s2 RMA to include "*alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land."*
[5] The CMA is governed by s12 RMA.

(b) *Restricted under section 12 (coastal marine area); or*

(c) *Restricted under section 13 (certain river and lake bed controls).*

13. Section 30(1)(c) sets out the functions of a regional council in relation to the control of the "use of land" and includes soil conservation and the avoidance or mitigation of natural hazards.

14. The Applicant seeks to argue that "control" in this context only relates to control through a resource consent, but provides no authority for that proposition, relying instead on principles of statutory interpretation. The Interpretation Act 1999 referred to in the Applicant's submissions was repealed and replaced by the Legislation Act 2019.[6] However, the principles of statutory interpretation are the same and are simple - the meaning of legislation must be ascertained from its text and in light of its purpose and its context (s10 Legislation Act).

15. The text of ss9(2) and 9(3) of the RMA are clear. They create a separate regime for existing use rights for district as opposed to regional control of land uses. While district uses attract ongoing existing use rights, regional land uses do not. The separate regimes were recognised by the Environment Court in *McKinlay v Timaru District Council*[7] where the Court drew a distinction between ss10 and 20, which "... *provide for two parallel (but different) systems of existing use rights neither of which affect the other – the first deals with existing use rights under district plans, the second under regional plans."*

16. In that case the Regional Council had provisions in the Regional Policy Statement, but there was no regional plan or proposed regional coastal plan with rules that controlled the use of the property. Accordingly, the Court was prepared to hold that s10 existing use rights applied. However, it observed that: *"If, in the future, there is a regional plan with rules affecting the referrer's land then section 20 will apply and it would then be necessary to determine what existing use rights the referrers have, and how long they last for."*[8]

17. A regional council might seek to control the use of land in various ways, including through the use of permitted activity rules and performance standards, or through the requirement for a resource consent.

[6] The relevant sections came into force on 28 October 2021.
[7] (2001) 7 ELRNZ 121.
[8] Ibid at [13].

18. This is also supported by case law. The meaning of "control" in the context of the s30 regional council functions was considered by the High Court in *Attorney-General v The Trustees of Motiti Rohe Moana Trust.*[9] The High Court found that the ordinary meaning of control is to "regulate". Under the RMA, regulation occurs through rules in a plan. Rules have the force of a regulation under the Act.[10] Rules can be made for each of the classes of activities set out in s77A RMA, including permitted activities which can subject to activity performance standards. It follows that "control" for the purposes of s10(4) is not limited to control through the mechanism of a resource consent.

19. Council's Decision Report[11] on the Objection sets out the provisions in the TRMP which regulate (or control through regional rules) land use for the purposes of avoiding or mitigating natural hazards. Those provisions include a more generalised permitted activity Rule 8.1.6(4) and specific rules relating to Coastal Hazard Overlay CHZ1 (Extreme Risk Area), which provide for a number of discretionary activities. The subject site is situated within the CHZ1 overlay.

20. The cases advanced by counsel for the Applicant[12] refer only to contraventions of the district plan provisions but do not engage with, or even discuss, the relevance of regional plan provisions to s10. For the reasons explained above, the scheme of the Act is clear that where a regional council has elected to control the use of land for the avoidance or mitigation of natural hazards, whether through a consenting process and / or through permitted activity rules in a plan, ss9(2) and (3), and ss 10 (particularly s10(4)) and s20A, make it clear that the existing use rights regime under s10 (relating to matters regulated under a District Plan) cannot apply.

Engagement of regional rules in TRMP

21. Counsel are agreed that the starting point for interpretation of plan rules is the Court of Appeal decision in *Powell v Dunedin City Council.*[13] It is also agreed that the Court's decision in *Beach Road* provides authority for the need to consider the immediate context of the rule, including objectives, policies and other sections of the plan, *where any obscurity or ambiguity arises.*

[9] [2017] NZHC 1429
[10] Section 68 RMA.
[11] Decision Report at [16]-[19].
[12] *Ashburton Borough v Clifford* [1969] NZLR 927 and *Lendich Construction Limited v Waitakere City Council* A77/99.
[13] Applicant's opening submissions at [3.3]

22. However, there is no ambiguity in this case which would justify looking to external sources such as the evidence procured by the Applicant from the author of the relevant rules providing subjective commentary on the Council's "intention" in drafting the rules. The permitted *regional rule* now relied on by the Applicant (despite having applied for resource consent), Rule C8.1.6(4), is located within the general natural hazard rules which apply across all overlays in the plan. It provides for the following permitted activity:

> *"The maintenance and minor upgrading of legally established existing structures"*

23. The Applicant's submissions also helpfully set out the TRMP's definitions of "maintenance" and "minor upgrading".[14]

24. However, as identified in Council's Decision[15] on the Objection, section C8.5 of the TRMP provides further specific rules for coastal hazards, which apply to the subject site. This includes Rules C8.5.7(1), 8.5.7(3) and 8.5.7(4). Those rules provide (and require consent for) the "*alteration of works*" and also the "*removal of works*" designed to mitigate the effects of coastal hazards.

25. It is submitted that where any ambiguity arises about the extent of work enabled by the general "*minor upgrading*" permitted activity rule, consideration should be given to how the general permitted activity rule interacts with the more particular coastal hazard rules provided for in Section C8.5.

26. The Council's Decision provides an analysis of the works which are to be undertaken as part of the Proposal, compared to the structures that are currently in place. As identified in that Decision, the works encompasses removal of both existing rocks and railways irons, and the reconstruction of an entirely new section of wall.[16] It is submitted that the extent of the works to be undertaken go well beyond the Plan's definitions of "maintenance" and "minor upgrading", particularly when viewed alongside the activities which the TRMP requires consent for within the coastal hazard management section of the Plan (C8.5), ie the "removal", "replacement" and "alteration" of coastal protection works.

27. An activity cannot be both permitted and require consent. The interpretation which best gives effect to the sustainable management purpose of the Act and enables

[14] Applicant's opening submissions at 3.9.
[15] Council Decision at [18]
[16] Council Decision at [23]-[24].

Council to fulfil its function of managing natural hazards, and best fits with the plain wording of the rules, is one which requires consent for the removal and replacement of the existing structure (which is what is proposed to occur in fact), or at least acknowledges that it is being altered.

28. On the other hand, an interpretation which accepts that the existing structure is somehow being maintained (when it is being removed and replaced in fact), or upgraded in some "minor" way, would undermine the integrity of the Plan provisions.

29. Finally, it is noted that the Applicant seeks to rely on works undertaken in a different part of Wainui Beach (at Pare Street) to support its interpretation of the plan provisions. It is important that each decision is considered on its particular facts. The Commissioner will be aware that Council decisions do not create a legal precedent. In any event, the Pare Street situation can be readily distinguished. The structure at issue was a retaining wall (designed to retain the land behind it) rather than a coastal protection structure. Resource consent was also required to authorise the temporary retention of a rock revetment installed under the emergency powers provisions of the RMA. Relevant to the second part of these submissions, that consent was granted with a very limited term (of only 3 years) to enable Council to revisit the Wainui Beach Erosion Management Strategy (**WEBMS**) in the interim period.

Onus and standard of proof

30. The onus of establishing an existing use falls on the party asserting its existence,[17] in this case the Applicant. Similarly, the onus is on the Applicant to satisfy the Commissioner that the intensity and scale has not increased under the proposed works relative to the existing structure.[18] The standard is the balance of probabilities (more likely than not).[19]

31. It is Mr Whittaker's assessment that this burden has not been satisfied, particularly because the Applicant has not identified the date at which a relevant District Plan rule (which engages s10) became operative, and the Applicant's assessment of the scale and intensity of the activity has therefore not been made in relation to the date of the rule becoming operative.[20]

[17] *Waitakere Forestry Park Ltd v Waitakere City Council* A77/97 (Planning Tribunal).
[18] *Ibid.*
[19] *Holliday v Waimairi District Council* (1984) 10 NZTPA 281 (HC)
[20] Council Decision, section 4.3.

Conclusion on existing use

32. The Applicant's approach is contrary to integrated and sustainable management and good planning practice. Rather than simply pursuing the resource consent application, which would enable the works to be assessed comprehensively, the Applicant seeks to run a complex and convoluted argument relying on existing use rights and permitted activities on the one hand, whilst pursuing a resource consent application on the other.

33. The Applicant has not sought confirmation of existing use rights for the activities controlled under the Regional Plan under s20A of the Act. Even if the Objection is upheld, it will only affirm existing use rights for the district land use. The Applicant will then be faced with having to persuade the Council that the regional land use is permitted. The Council has already carefully considered this issue and, in a written decision dated 25 March 2022, declined to authorise a "deemed permitted activity" pursuant to s87BB of the RMA.

34. The Applicant has not applied for a certificate of compliance (COC) under s139 of the Act for the asserted permitted activity. It follows that, without a regional consent or a COC for the regional land use, the Council would be left with a compliance issue if the works proceeded without either the necessary consents or a COC (which operates as a deemed consent).

35. It follows that the sensible course is to pursue the consent application. The Council remains perplexed as to why the Applicant did not simplify matters (and reduce costs for the Applicant and ratepayers) by solely pursuing that application, particularly when the reporting officer has recommended approval and the planners are largely agreed on conditions.

PART TWO: RESOURCE CONSENT APPLICATION

36. The main outstanding issue is term.

37. Presumably the existing use approach was pursued in the hope of obtaining permission for the structure to remain indefinitely. For the reasons given by Mr Whittaker, such as approach is contrary to the NZCPS, the sustainable management purpose of the RMA, and Council's WBEMS, which will shortly be reviewed. While the Council's position is not reliant on the RMA reforms, it has also been clearly signalled by central government that the proposed new Climate Adaptation Act (**CAA**) is intended to assist in dealing with climate change, particularly "managed retreat" (the

strategic relocation of communities or assets prone to natural hazards such as coastal inundation).

38. The Reporting Officer considers that a term of 20 years is appropriate. The Applicant initially accepted that 20 years was appropriate, but has recently altered its position to seek a term of 50 years.

39. The Courts have previously held that the term of a consent should be governed by reference to the statutory purpose of the Act.[21] More specifically, it is clear that a shorter term may be appropriate for policy and adaptive management reasons – the ability to manage effects is not the sole determinant of term. For example, in a case relating to mangrove removal the Environment Court granted a shorter term consent on the basis that it would be poor resource management practice if a long-term consent had repercussions for the integrated management of the harbour in the future through an integrated management plan which was under development. A 12 year term was granted on the basis that a relevant planning instrument could become effective well before the expiration of the requested 20 year term, and that continuation of the removal of mangrove seedlings could hinder the effectiveness of such a plan.[22]

40. As noted above, the consents for Pare Street were limited to a three year term to enable Council to revisit the WBEMS in the interim. As explained in the s42A Report, the Council is currently undertaking a review of coastal hazard risk as a high priority for the district, including consideration of whether to initiate a dynamic adaptive planning programme for Wainui Beach. The WBEMS will be reviewed as part of this initiative, and is expected to reflect the NCZCPS discouragement of hard protection structures and encouragement of managed retreat, which is likely to be further reinforced under the signalled CAA. This can be considered relevant policy context under s104(1)(c) RMA, by giving whatever weight is considered appropriate. Ignoring it runs the risk of determining the application in a policy vacuum.

41. Despite the Applicant's position that a s128 review process might be sufficient to enable the cancellation of a consent if future policy no longer supports structures of this nature, cancellation of a consent following such a review is extremely rare and generally only appropriate to address effects not contemplated at the time of the application. Such a process is not considered appropriate here.

[21] *Bright Wood NZ Ltd v Southland Regional Council* C143/99
[22] *Royal Forest and Bird Protection Soc of NZ Inc v Waikato RC* [2007] NZRMA 439(EnvC)

42. In this case there is also a practical administrative reason for the 20 year term recommended by the reporting officer. This would align the term with the neighbouring seawall, and enable consideration of the ongoing suitability of these structures on a comprehensive basis.

Dated 14 October 2022

M H Hill
Counsel for Gisborne District Council