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20 July 2021

Ref: 481858-117

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**ATTENTION: ANDREW CAMERON**

**EMAIL: a.cameron@cameronlaw.co.nz**

**SIMON CAVE - REVETMENT WALL AT 4, 6 AND 8 TUAHINE CRESCENT, WAINUI BEACH**

1. We are advising Gisborne District Council (**Council**) in relation to the above matter.

2. We understand your client Mr Cave has applied for a land use consent to construct a timber pile rip-rap hybrid sea wall to replace the existing degraded seawall at the above properties. The processing of that application, lodged with Council on 2 April 2019 (**Land Use Application**), is currently on hold at the applicant's request. The proposed works are described and assessed in the Land Use Application (**Works**) and we do not repeat them here.

3. On 11 May 2021, Mr Cave lodged an application for a certificate of existing use rights in relation to the Works pursuant to s139A(1) and s10(1) of the Resource Management Act 1991 (**RMA**) (**Existing Use Application**).[1]

4. We understand you have been in correspondence with Todd Whittaker, Council's consultant planner who was the reporting officer for the Land Use Application, and is processing the Existing Use Application. Mr Whittaker has indicated that Council's legal advice is that the Existing Use Application is not an available legal mechanism for the Works. We understand you have asked Council to consider the alternative of a deemed permitted activity.

5. While it is entirely a matter for your client as to which statutory process(es) it pursues in order to seek authorisation of the Works, this letter sets out our view of the legal position and reflects our advice to Council. We are sharing our opinion to assist you in advising your client as to the best course of action.

**Summary of our view**

6. In our view an existing use certificate is not available under s139A(1) of the RMA relating to the use of land allowed by s10 of the RMA. That is because the Works engage regional rules in the regional plan section of the Tairāwhiti Resource Management Plan (**TRMP**). It follows that s139A(2) and s20A are the applicable provisions, which require resource consent to be

[1] Although the Works are described differently in the two Applications, both appear to involve the removal and replacement of the existing structure and the visual simulation of what the proposed new structure will look like is identical in the two Applications.

applied for within 6 months after the date the relevant rule became operative. Whether or not the activity is within or without the CMA (or a combination) is not relevant to this issue.

7. The Works are not permitted under the TRMP, because they involve the removal and replacement of the existing structure and do not amount to "*maintenance and minor upgrading*" of a legally established existing structure. On that basis a deemed permitted activity is also not available.

**Explanation**

8. **Existing Use Certificate**

8.1 The Work engages rules in Part C of the TRMP, which are the region wide provisions. The Tairāwhiti Plan incorporates the Regional Policy Statement, Regional (including coastal) Plan and District Plan provisions. Part C are regional rules in a regional plan, not district rules in a district plan.

8.2 If the works are undertaken outside the CMA, the relevant regional rules are those referred to in the Land Use Application relating to works within the Coastal Hazard Overlay, specifically C8.5.7(1) requiring discretionary consent for the installation or alteration of works designed to mitigate the effects of coastal hazards, and Rule C8.5.7(4) requiring discretionary consent for removal of the existing seawall. Rule C8.5.7(3) is also engaged, requiring discretionary consent for altering the natural dune landform.

8.3 While consent may also be required under the District Plan (pursuant to Rule DD1.6.1(32) for activities not provided for in residential zones) it does not avoid the application of the regional rules. In relation to natural hazards, the TRMP makes it clear that "*The regional rules for each overlay apply in addition to the zone rules for the area.*" (Note to C8.1.6 – Regional Rules for Natural Hazards – General).

8.4 The Existing Use Application acknowledges the natural hazards overlays will apply to placement of rock at the upper extent of the seawall. The Land Use Application properly acknowledges the application of these regional rules. The Existing Use Application also appears to acknowledge this (in Appendix F) but seeks to argue that the permitted regional rule (C8.1.6(4)) is applicable. For the reasons below we do not agree.

8.5 As you will be aware, an existing use certificate under s139A of the RMA is available where a land use in a particular location was allowed by s10 of the RMA on the date on which the authority issues the certificate. Section 10(1) in turn provides that land may be used in a manner that contravenes a rule in a district plan or proposed district plan in certain circumstances.

8.6 Where regional rules are engaged, as in this case, the relevant provisions are ss139A(2) and 20A. Section 20A(2)(c) provides that if, as a result of a rule in a regional plan becoming operative, an activity requires a resource consent, the activity may continue after the rule becomes operative if, before the rule became operative, the person carrying on the activity has applied for a resource consent within 6 months after the date the rule became operative. We do not understand this to have occurred and therefore an existing use certificate is not available under s139A(2).

9. **"Deemed Permitted Activity"**

9.1 Section 87BB of the RMA gives Council a discretion to deem an activity to be a permitted activity if it would be a permitted activity under the TRMP expect for a

"*marginal or temporary non-compliance with requirements, conditions and permissions*" specified in the Plan.

9.2 In this case the Existing Use Application seeks to argue that permitted Rule C8.1.6(4) applies, notwithstanding that the Land Use Application for the same works acknowledges that the removal of the existing structure and replacement with a new structure would trigger the requirement for resource consents, as discussed above.

9.3 Notwithstanding the apparent inconsistency between the two Applications, we have considered the permitted Rule C8.1.6(4) and its interrelationship with Rules C8.5.7(4) and C8.5.7(1) requiring consent for the removal and installation or alteration of seawalls. An activity cannot be both permitted and require consent. Accordingly, Council must consider which rule(s) are more applicable to the proposed Works.

9.4 In this case the Works involve the removal of the existing structure (iron bar type rock revetment) and replacement with a new structure (timber and rock revetment backfill).[2] They would also exceed the capacity and dimensions of the original structure. Accordingly, in our view they fall outside the scope of the permitted activity, which relates to the maintenance and minor upgrading of legally established existing structures.[3] Rather, they amount to removal of a coastal hazard mitigation structure and installation of a replacement structure, which requires consent under the Plan.

9.5 On that basis it is not a question of marginal or temporary non-compliance with the requirements of the rule (such as a departure from a performance standard). Rather, the Works fall outside of the scope of the rule itself. On that basis a deemed permitted activity pursuant to s87BB is not an available legal mechanism.

**Conclusion**

10. Despite our view that neither an existing use certificate nor a deemed permitted activity are available statutory mechanisms to authorise the proposed Works, your client is not without a remedy. It is entitled to progress the Land Use Application. We understand the reporting officer recommended that the Land Use Application be granted subject to the term offered by the Applicant.

Yours sincerely

**MARY HILL**
**Partner**
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**Partner: MARY HILL**

[2] Landscape and Visual Comment by Rebecca Cray dated May 2021, included with the Existing Use Application.
[3] Quite aside from the question of whether the structure is legally established, which does not form the subject of this advice.

BROOKFIELDS
LAWYERS

NAVIGATING YOUR SUCCESS

30 November 2021

**EMAIL:** mhill@clmlaw.co.nz

Cooney Lees Morgan
Barristers and Solicitors
**TAURANGA**

**ATTENTION: Mary Hill**

**EXISTING USE RIGHTS APPLICATION – 4, 6, AND 8 TUAHINE CRESCENT, WAINUI BEACH**

## 1. Introduction

1.1. Thank you for your letter of 20 July.

1.2. We note you advise it was written to assist us to advise our client "as to the best course of action"[1] available to them. We have understood it is not intended to necessarily suggest the outcome of any formal decision still outstanding. We have proceeded to consider the relatively complex issues arising on this basis and in this open letter respond accordingly.

1.3. By way of general background, you note that our client's application for resource consent dated 2 April 2019 is currently on hold, at our client's request.

1.4. You have suggested that neither an existing use certificate is available under s 10 of the Resource Management Act 1991 (**RMA**) nor can the proposed activity be considered a deemed permitted activity under s 87BB of the RMA.

1.5. You state[2] that although the work is described differently in the two applications, both appear to involve the removal and replacement of the existing structure and do not amount to "*maintenance and minor upgrading*' of a legally established existing structure[3].

1.6. In your view the work constitutes 'removal and replacement' and triggers Rule 8.5.7(1) because the proposal is an 'alteration'[4] of works designed to mitigate the effects of coastal hazards.

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[1] last sentence of paragraph 5.
[2] see your footnote 1.
[3] see your para 7.
[4] alteration is not defined in the plan in relation to Part C8. The dictionary definition of 'alter' is to 'change' (Oxford English Dictionary-8th edition).



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1.7. You therefore conclude that an existing use certificate is not available because the work engages regional rules of the Tairawhiti Resource Management Plan (**TRMP**); specifically Rules 8.5.7(1) and also Rules 8.5.7(3) and 8.5.7(4).

1.8. Further, given your view of what the activity constitutes, you conclude it cannot satisfy the requirements of Rule 8.1.6(4)[5] nor can it be considered as a deemed permitted activity.

1.9. We disagree as a matter of fact and law and for the reasons stated in our clients' application for an existing use certificate (which we will not repeat here), the proposed work satisfies the requirements of s10(1)(a) of the RMA.

1.10. First, in our view, there are no rules in the TRMP which displace existing use rights in this context. The work constitutes the repair and maintenance of an existing use.

1.11. Secondly, the TRMP specifically provides for the maintenance and minor upgrading of legally established existing structures as a permitted activity.[6]

1.12. Thirdly, the work cannot be characterised as 'removal and replacement' as you suggest and on a proper interpretation of the plan provisions, it does not constitute a 'change'. The effects are the same or similar in character, scale and intensity and any non-compliance with requirements, conditions and permissions specified in the plan will be marginal and/or temporary[7].

1.13. Therefore, we remain of the view that our clients' application for an existing use certificate must be granted **or** approved as a deemed permitted activity **or** alternatively, the work should be allowed as a permitted activity.

1.14. In this letter we provide a more detailed analysis of the issues. Clearly, if the plan does not contain any regional rule which displaces our clients' existing use rights, the application must be granted. Therefore, a focus of the analysis which follows is the approach required to the interpretation of the relevant TRMP provisions.

1.15. Lastly, if Council were to wrongly (in our view) decline our clients' application, at the conclusion of this letter we address a suggested "way forward".

1.16. In summary, because the disagreement relates to the interpretation of plan provisions, in particular the relevance and application of Rule 8.5.7(1), in our view a joint declaration should be sought from the Environment Court. We are of the view this can be done 'on the papers'.

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[5] at para 8.3 of your letter, you note that consent may also be required under the land use provisions of TRMP pursuant to Rule DD1.6.1(32). This is a Unitary Plan. In our view this rule may be irrelevant given the provisions of C8 and, in particular, Rule 8.1.6(4) which establishes the permitted threshold for legally established existing structures.

[6] see Rule 8.1.6(4).

[7] noting the requirements of s87BB of the RMA.

## 2. Background

2.1. Our clients' application for a certificate of existing use rights includes a discussion of the site, environment and the use in issue[8], a general description of the proposed work, associated design detail and a construction management plan[9], and the history of the use demonstrating that it was both lawfully established and never discontinued.[10]

2.2. There is also a comprehensive assessment of effects demonstrating that the effects of the use are the same or similar in character, intensity and scale to those which existed before the plan provisions became operative (and, for that matter, prior to 20 November 1997).[11]

2.3. Importantly, the application includes the design of the existing work[12] and a comparison of the proposed work with that initial design detail.[13]

2.4. To summarise, the Wainui beach experiences episodic erosion events. The Cave family have owned their property at Wainui Beach since the late 1920s and Mr Simon Cave has been coming and going since the 1940s. In the 1960-1980s, extensive work was lawfully undertaken by the East Coast Catchment Board approved by the Soil Conservation and Rivers Control Council to construct this existing structure.

2.5. It has never been suggested and nor is there any evidence to support any suggestion this work was not lawfully established.[14]

2.6. Lastly by way of background, the effects of this existing work and the effects of the proposed work, are the same or similar in character, scale and intensity. While the proposed work will increase the height of the structure by up to 1m, that does not alter the overall effects assessment and nor does that preclude the granting of an existing use certificate.[15]

## 3. Planning Provisions

3.1. The rules directly in contention are set out in the introduction to this letter.

3.2. We have provided the analysis of the rules we consider relevant in appendix F of our client's application.

3.3. We note that neither the Regional Policy Statement nor the policy framework of the Regional Plan and Regional Coastal Plan contemplates the removal of coastal protection

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[8] s 3.
[9] s 4 and appendices B and D.
[10] s 7 and appendices G and H.
[11] noting Rule 8.1.6(4) and the definition of "minor upgrading" in E7 of the TRMP.
[12] see attachment D of appendix G.
[13] see section 4 of appendix B (Mr Morgan's Costal Environment Assessment).
[14] see para 9.4 of your letter of 20 July.
[15] see the decision of *Huljich v Mt Wellington Borough Council* (1981) 8NZTPA referred to in section 11.1.3 of the application.

work which is an existing use above the line of mean high-water springs. This work lies above that line, is on our clients' properties and is an existing use.

3.4. The policy framework and the relevant rules recognise that while there are difficulties and expenses in trying to control natural processes over time by physical works, there may be occasions when such works are appropriate.[16] However, in our view, the framework distinguishes between existing work (and its effects) and the installation of new work or the 'alteration' of existing work. This is reflected in the form and structure of the regional rules for natural hazards.

3.5. Rule 8.1.6(4) allows as a permitted activity the "*maintenance* and *minor upgrading* of legally established existing structures".

3.6. As defined in the plan[17], maintenance allows for the preservation of a structure to keep it in good repair and minor upgrading allows an expansion of the capacity of that existing structure where "*...the effects are the same or similar in character, scale and intensity as those that existed at 20 November 1997*" (as noted in para 2.2 above).

3.7. The evidence in support of our clients' application demonstrates the work proposed provides for repair to preserve the structure while expanding its capacity and ensuring its effects remain the same or similar to those established when that structure was initially designed and constructed. The work substantially predates the threshold for minor upgrading allowed as a permitted activity within the plan.

3.8. On the other hand, Rule 8.5.7(1) requires a discretionary activity consent for the "installation or *alteration* of works designed to mitigate the effects of coastal hazards".

3.9. Rule 8.5.7(1) contemplates a change of such works. The threshold for what constitutes an alteration or change, must be work that is not permitted under Rule 8.1.6(4). In other words, what constitutes an 'alteration' or change must be work that cannot satisfy the permitted activity threshold in Rule 8.5.7(1). Any other interpretation is inconsistent with a purposive approach to the interpretation of plans (see discussion in section 4 below) and places these two rules in irreconcilable conflict. Such an approach leads to absurdity and must be avoided.

3.10. We disagree with your suggestion that the proposed work constitutes removal and replacement. It constitutes maintenance to continue, keep up or preserve the structure. While elements of the existing structure are to be replaced (i.e., the existing railway irons with timber piles), this does not constitute removal of the 'works' per se. The application contemplates an outcome entirely to the contrary-that being, the retention/preservation of the works.

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[16] see for example B5.1.5 of the RPS.
[17] E7 of the TRMP defines maintain as '.....cause to continue, keep up ,preserve, or provide for the preservation of a building, machine, road etc in good repair'.

3.11. Further, for there to be any alteration of the 'works', there must be a change of effects. This is fundamental to the interpretation of planning instruments under the RMA generally. Importantly in this context, it ensures a consistency of approach to the interpretation of both rules by ensuring they appropriately address the effects of the activity and/or use on the environment.

3.12. The concept of 'maintenance' is discussed in *Falkner's* case.[18] The Court held as follows:-

> *"On maintenance, we were referred to an English case……in which the Master of the Rolls, Sir George Jessel, stated (at page 635) that:*
>
> *"…….you may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose".*
>
> and then:
>
> "*We accept the submission for the authorities that whether the current works are repair and maintenance is a question of fact and degree, which involves a comparison of the previous works with those the subject of the present recourse consent applications. We have described both earlier in this decision.*
>
> *We also accept that the works are to be considered from the point of view of their use, not their appearance, so we may accept restoration of efficacy in function and need not insist on exact repetition of form or material."*

3.13. This statement of the law is consistent with our interpretation of Rule 8.1.6(4) and in our view, Rule 8.1.6(4) encapsulates this approach. It focusses on the 'use' and the efficacy of the structure. Exact repetition of form or material is not required. What is required is a comparison of the 'before and after' effects of the structure to ensure a consistency of performance/effects.

3.14. Our clients' application applies this approach generally, satisfies the requirements of s10(1)(a) of the RMA and this test.

3.15. We note Rule C8.5.7(4) which requires discretionary activity consent for "removal of any works designed to mitigate the effects of coastal hazard". In your view this rule also applies. However, as discussed above, our clients' are not 'removing' the works, rather they are retaining/preserving the works. This rule is clearly intended to address permanent removal and the potential consequences such as 'end effects' or outflanking of adjoining structures. This rule has no application to this case.

3.16. Lastly, you suggest that Rule 8.5.7(3) requires discretionary activity consent for "any activity, including earthworks that alter natural dune landform". However, there are no dunes in this part of Wainui Beach and therefore, it is also irrelevant to this application.

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[18] Decision number A82/94, Environment Court, 13 October 1994 and attached to the application as appendix J. See page 17.

3.17. It is well recognised by the Courts that District Plans are not drafted with the skill of a Chancery draftsman.[19]

3.18. This said, as McCarthy J held in *Ashburton Borough v Clifford*[20], existing use rights are a basic property right.

3.19. In *Lendich Construction Limited v Waitakere City Council*[21], His Honour Judge Whiting held as follows:-

> *"In our view such a basic right should not be taken away except by clear unambiguous legislative enactment".*

3.20. To summarise. In our view there is no unambiguous regulation within the plan to remove/displace existing use rights available at Wainui Beach in relation to coastal protection work. Quite the reverse. Our clients' application clearly establishes that the proposed work otherwise satisfies the requirements of s10(1)(a) of the RMA.

## 4. Plan Interpretation

4.1. We have discussed the rules and the policy framework in the preceding section.

4.2. The interpretation of rules and plans has led to the adoption of the purposive approach by virtue of the Interpretation Act 1999.[22] One needs to look at the purpose of the Act, the context or scheme of the Act in which the provision appears and the actual text of the rules in the plan.

4.3. As noted, the plan as a whole adopts a precautionary approach towards any future installation or change to existing work, particularly if that work will create effects which are (to summarise) greater than those presently experienced.

4.4. While the District Plan itself is silent on the activity status of coastal protection work as a residential activity, the regional rules for natural hazards which apply to the district plan, allow such work as a permitted activity in the circumstances defined in Rule 8.1.6(4).

4.5. Therefore, in our view the policies and rules recognise the ongoing maintenance and repair of existing coastal protection work and its minor upgrading to be appropriate in the residential zone. The text of Rule 8.1.6(4) contemplates work of a nature and extent proposed by our client's application.

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[19] for example, see *Sandstad v Cheyne Developments* (1986) 11NZTPA (Court of Appeal).
[20] [1969] NZLR927.
[21] Decision number A77/99, Environment Court, 20 July 1999 at [32].
[22] see for example *Beach Road Preservation Society Inc v Whangarei District Council* CP27/00 (1 November 2000) Chambers J.

4.6. In our view, the text of the rules do not displace our clients' existing use rights and the exercise of those rights as they propose; rather, their proper interpretation supports the retention of their existing use rights.

4.7. If on examination of the plan with a purposive approach, it is still considered unclear whether it is intended that existing coastal protection work can continue, the High Court in *Nanden and Anor v Wellington City Council*[23] faced with competing potential interpretation of a plan said:-

> *"The fundamental issues of policy associated with which meaning should be adopted are as follows:-*
>
> 1. *It is desirable for an interpretation to be adopted which avoids absurdity or anomalous outcomes.*
> 2. *It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectation of property owners.*
> 3. *Practicality of administration by City Council Officers is also an important consideration."*

4.8. First, and as noted in para 3.9 above, the interpretative process must avoid the irreconcilable conflict of planning provisions.

4.9. Secondly, to avoid an anomalous and unlawful approach to the application of section 10 of the RMA, the starting point must be to establish whether an existing use is unambiguously displaced. The recent *Matata* case amply demonstrates how this must be done. This has not occurred here.

4.10. Thirdly, it would be an absurd and anomalous outcome if, on the one hand, a consent is required to demolish/remove works designed to mitigate the effects of coastal hazard (due no doubt to potentially significant adverse 'end effects'), but the ability to maintain an existing structure which avoids such effects is not permitted; assuming the overall effects of doing so remain the same or similar to that which existed before the plan provisions became operative.

4.11. Further, the approach must also be consistent with the expectations of property owners at Wainui Beach. Owners expect to have a full and complete understanding of what is intended by regulation to ensure consistency of approach and an ability to rely on existing works while the environmental effects of doing so remain the same or similar.

4.12. Lastly, it is impractical to administer any alternative framework. The ability of the community to continue to maintain and repair what is presently in situ avoids a practical and administrative nightmare.

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[23] [2000] NZRMA 562 at para [48].

4.13. The time and costs to a small council (and the community) of any alternative approach is prohibitive and unreasonable in the absence of a clear regulatory framework which complies with the requirements of s10 and properly applies the law concerning existing use rights. There is an additional risk (now evident) of ad hoc and inconsistent decision-making.

4.14. The principles of statutory interpretation clearly support our clients' application for an existing use certificate.

5. **Other Considerations**

5.1. First, you advise that in your view s87BB is also unavailable, assuming our existing use application were to fail.

5.2. You conclude that our clients' application requires a consent because it involves the removal of an existing structure and the installation of a new structure. For the reasons we have extensively discussed in section 3 above (eg 3.12-3.13), we disagree.

5.3. To determine the proposal is not 'maintenance' but (on your view) is to be considered an 'alteration', any non-compliance is marginal for the reasons discussed in Section 3 above (having regard to the requirements of the relevant rules in the plan). Further, your interpretation merely identifies a temporary non-compliance while a new structure, but with an equivalent purpose, is being built. The effects are clearly the same or similar.

5.4. Section 87BB is clearly intended to apply in circumstances such as this.

5.5. Secondly, we have noted at para 1.8 for the reasons summarised at footnote 5 (also summarised in para's 4.4 and 4.5 above), that the activity is permitted.

5.6. We have not sought to rely on this argument to date. However, in the event this matter proceeds to a declaration, the point will be pursued. In our view the evidence establishes that our clients' are entitled to a certificate of compliance based on the correct interpretation of Rule 8.1.6(4) and the fact that this provision provides for the proposed work to be a permitted activity under the district plan.

6. **Conclusion**

6.1 In our view, there are no rules in the plan which displace our clients' application for an existing use certificate. This remains our primary argument.

6.2 Should you disagree, the application should be granted as a deemed permitted activity for the reasons summarised in paras 5.1-5.4 above.

6.3 Alternatively, the application can be considered to be a permitted activity. This will be argued more fully if required.

6.4 Our differing views turn on the interpretation of plan provisions and the operation of s10. Accordingly, this matter is amenable to a declaration.

6.5 In the hope this can be avoided and a favourable decision to our clients' made, we have provided this detailed letter.

6.6 Should Council continue to disagree with this analysis, we have suggested we seek a joint declaration on the papers for a determination of the issues by the Environment Court. This will remove doubt and provide clear guidance regarding the way forward for all concerned. We anticipate this letter will be attached to any such application as our primary submissions.

6.7 We look forward to hearing from you within say 10 working days so the necessary application can be made, if required, without further delay. To assist this letter is also being copied to Todd Whittaker.

6.8 If you wish to discuss, we are only too happy to do so.

Yours faithfully
**BROOKFIELDS**

**Andrew Cameron**
Consultant

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22 December 2021

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**ATTENTION: ANDREW CAMERON**

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**SIMON CAVE - REVETMENT WALL AT 4, 6 AND 8 TUAHINE CRESCENT, WAINUI BEACH**

1. Thank you for your detailed letter dated 30 November 2021, which we have considered and taken instructions on.

2. Unfortunately your letter continues to overlook what we consider to be a number of fundamental issues with your client's application, which would preclude an existing use certificate being granted under s139A(1) and s10(1) of the RMA (being the provisions on which the application is based).

3. Those provisions relate to District Rules in a District Plan. The application, and your letter, overlook s20A(2) of the RMA. That section provides that, where an activity requires resource consent as a result of a rule in a regional plan becoming operative, the activity may continue after the rule becomes operative if it was lawfully established prior to that occurring, provided that *"the person carrying on the activity has applied for a resource consent from the appropriate consent authority within 6 months after the date the rule became operative and the application has not been decided or any appeals have not been determined."* Your client has acknowledged the regional rules are engaged and has properly applied for consent under those rules (that application remaining on hold at your client's request).

4. The law is clear that, even where an activity has existing use rights under s10, those rights will change if, in the future, there is a regional plan with rules affecting those rights.[1] Put another way, existing use rights are only temporary where regional rules come into play which affect those rights. The RMA requires resource consent to be applied for in relation to the activity within 6 months of the regional rule becoming operative, although the activity may continue in the interim.

5. The activity which is the subject your client's existing use application clearly engages regional rules in the Tairāwhiti Resource Management Plan (TRMP), as acknowledged by the resource consent application.

6. The policy intent behind this statutory approach is clear. Many regional rules are intended to address the potential for serious wider environmental effects which should reasonably

[1] *McKinlay v Timaru DC (2001)* 7 ELRNZ 116 (EnvC).

override personal property rights. In this case, the rules relate to natural hazards and it is clear they are intended to apply regardless of whether consent may also be required under the District Plan.[2] As you are presumably aware, the New Zealand Coastal Policy Statement discourages the use of hard structures, unless necessary to protect regionally significant infrastructure (not private land) and encourages managed retreat as a means of adapting to climate change and natural hazards over the coming 100 years. Allowing the replacement or alteration of a hard structure and affirming the rights of the new or altered structure to remain indefinitely (by upholding existing use rights) is not consistent with that approach. Rather, the plan envisages that structures may be consented if their effects can be assessed, mitigated, and monitored over time, including through the imposition of a term of consent

7. You will appreciate that an existing use certificate is treated as a resource consent authorising the activity in question. It may be relied on by third parties as evidence that resource consent is not required for the activity. In this case, resource consent is required for the activity under the TRMP.

8. It follows that in our view an existing use certificate cannot be granted under s139A(1) and s10(1). While an existing use certificate may have been available to your client under s139A(2) and s20A, that avenue requires resource consent to have been applied for with 6 months of the relevant regional rule(s) becoming operative.

**Conclusion**

9. We understand Council will issue its decision on the existing use application as a matter of priority in the new year (noting the RMA working day exclusion period applies from 20 December 2021 until 10 January 2022).

10. You have suggested seeking a "joint declaration" on the papers addressing the issues in dispute if Council declines to issue the existing use certificate applied for under s139A(1) and s10(1).

11. While we appreciate the constructive sentiment behind that suggestion, your client has an alternative remedy available to it (progressing its resource consent application), which Council considers is the appropriate course of action. On that basis, Council does not support a joint declaratory approach. While it will engage constructively in any proceedings filed by your client, it reserves the right to disclose this letter in relation to any issue as to costs should your client proceed with a declaration and be unsuccessful.

Yours sincerely

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[2] In relation to natural hazards, the TRMP makes it clear that "*The regional rules for each overlay apply in addition to the zone rules for the area.*" (Note to C8.1.6 – Regional Rules for Natural Hazards – General).