BEFORE AN INDEPENDENT HEARINGS COMMISSIONER

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF 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

---

OUTLINE OF LEGAL SUBMISSIONS FOR SIMON CAVE
DATED THE 5th DAY OF OCTOBER 2022

BROOKFIELDS
LAWYERS
Andrew Cameron
Telephone No. 021 658 877
P O Box 1192
WELLINGTON 6142

MAY IT PLEASE THE COMMISSIONER:

1.0 Introduction

1.1 These submissions are being filed well in advance of the hearing to provide a basis for an understanding of the primary issues between the applicant and Council in particular.

1.2 While the background and history of this matter is relatively complex, it is respectfully submitted there are just three primary issues the subject of material disagreement.

1.3 They are as follows:-

(a) whether the existing work is a use of land that is *controlled*?

(b) is the proposed activity a permitted activity having regard to the wording of rule 8.1.6(4) of the Tairawhiti Resource Management Plan ("**TRMP**")?

(c) assuming a resource consent is required (which is not conceded by the applicant), what term should be applied to that consent?

1.4 These issues are thoroughly discussed from a planning perspective in the s 42A report prepared by Todd Whittaker and the planning evidence of Georgina McPherson for the applicant. These submissions provide the legal context relevant to the planning analysis-it does not repeat it.

1.5 With the exception of the issue of term, issues (a) and (b) have been the subject of detailed discussion in my letter of 30 November 2021. These submissions will not repeat the contents of that letter which continues to be relied upon for the purposes of argument framed by two letters from Counsel for the Gisborne DC ("**GDC**"). These letters have been filed with the evidence in accordance with the Directions[1].

1.6 It is also recorded that in section 11 of the existing use rights application, the fundamental legal principles relevant to the consideration of existing use rights applications generally and this proposal specifically, are set out. Again, for the purposes of these submissions, those principles are not repeated but

[1] These letters are the communications I consider central to the communications of direct relevance and otherwise referred to in paragraph 4 of the applicants notice of objection dated 6 May 2022.

continue to be relied upon for the purposes of argument; although it is understood they are not directly disputed.

1.7 While a little unusual, to ensure there is an efficient process to facilitate the determination of all issues, Counsel have agreed that the existing use rights and resource consent issues can be heard and determined by the same Commissioner at the same time[2]. However, it is acknowledged and agreed that the applicant is not impliedly accepting that any existing use right could be extinguished by any resource consent that is issued. That will be a matter for the applicant to determine at the conclusion of the process and having regard to the outcome of this process.

1.8 Therefore, the parties seek a decision on both issues at the same time but without prejudice to the applicant's ongoing reliance on any existing use rights which may be determined to apply, as the applicant sees fit.

1.9 Lastly, and by introduction, these submissions do not repeat the details of the proposal, the legislative background, the relevant planning framework and the basis on which the resource consent should be generally considered under s104, should a consent be required. This is all comprehensively addressed in both the s 42A report and the evidence of Georgina McPherson and neither appear to materially disagree with the other concerning these matters generally[3].

1.10 However, to be clear, the planning analysis advanced by Ms McPherson on these points is relied upon for any further legal analysis regarding these points that may be required at the hearing.

1.11 These submissions focus on the three primary issues in contention and how relevant legal principles should be applied in these circumstances, having regard to all of the evidence.

[2] The evidence for the applicant has been completed and we have a final section 42A report. Having also drafted these submissions, it is apparent that the issues arising in connection with both applications are interlinked to the extent they should be heard within the same process, but be the subject of separate decisions. I am filing a further memorandum seeking further directions concerning the conduct of the hearing process so this point can be further considered.

[3] I do note that issues relevant to the permitted baseline and what constitutes the existing environment for consenting purposes should be clearly traversed but these concepts flow from a determination of the three primary issues and the applicant will simply rely on the standard principles in relation to both concepts in support of the resource consent application in the usual way.

1.12 It is anticipated this will provide a clear pathway for the determination of both the objection and resource consent applications.

2.0 Control

2.1 As a matter of law, the Interpretation Act 1999 applies to the interpretation of the RMA, just as it does any other statute. This requires a consideration of the:

(a) text of the relevant section;

(b) purpose of the section or subsection and the purpose of the Act as a whole; and

(c) indications set out in s 5(2) and (3) Interpretation Act 1999, including importantly the scheme of the Act.[4]

2.2 In this case any ambiguity in the meaning of the word "control" in the text of s 10(4) can be cleared up having regard to the use of that word within its relevant context. That context, for the purpose of existing use rights, is clearly framed by the provisions of s 20A of the Act. That section provides that, if as a result of a regional plan rule becoming operative an activity requires a *resource consent*, the activity requires an application within the prescribed period set out in s 20A(c).

2.3 It is clear, that in the absence of a regional plan provision requiring a resource consent, existing lawful activities can continue. Therefore, in the absence of the requirement to obtain a resource consent, an existing use cannot be said to be controlled for the purpose of s 10(4).

2.4 It is respectfully submitted that in the interpretation of s 10(4), the use of the words "resource consent" in s 20A(2) are determinative of this issue[5].

2.5 This conclusion is supported by the evidence of David Mountfort who drafted the relevant plan provisions.

[4] See for example *Coalition of Residents Associations Inc v Wellington City Council* (EnvC W056/01).
[5] It is further submitted that this interpretation is consistent with the decision of the Court of Appeal in *Ashburton Borough v Clifford* [1969] NZLR 927 *and Lendich Construction Limited v Waitakere CC* A77/99, Environment Court, 20 July 1999 for the reasons discussed n paragraphs 3.18-3.20 of my letter of 30 November 2021.

2.6 He advises that no consideration was given to extinguishing the existing use rights at the time the plan was drafted. He notes that, in the course of the process (and as would be required), there was no s 32 analysis or compliance with Schedule 1 of the Act to assess such an outcome. Further, he appreciates that to extinguish existing use rights, explicit provision should be made within a plan and contemplated by the process, if that is intended[6]. Again, no such provision has been made in the planning framework to this effect.

2.7 Therefore, the context relevant to the preparation of the plan and the statutory obligations required of Council if it had intended to extinguish existing use rights, provides further material context in support of the applicant's conclusion.

2.8 Having regard to our interpretation of r 8.1.6.4 of the TRMP, the applicant submits that a resource consent is not required to undertake the work proposed and there is no control to negate the existing use rights otherwise established.

2.9 Therefore, how does one approach the interpretation of this rule?

3.0 Rule 8.1.6(4)

3.1 The approach to the interpretation of this rule has been carefully considered in the evidence of Georgina McPherson. That analysis is not repeated in these submissions.

3.2 In my letter of 30 November there is discussion of the relevant legal principles concerning the interpretation of rules in plans. I now provide a further more detailed overview of those principles.

3.3 It is respectfully submitted that the starting point is the decision of the Court of Appeal in *Powell v Dunedin City Council*[7].

[6] For the reasons noted in footnote 5.
[7] [2005] NZRMA [174] at 29 to 37.

3.4 In that case, the Court of Appeal upheld the reasoning of Chambers J in the *Beach Road Preservation Society Inc v Whangarei District Council*[8] case and held as follows at paragraph 35 of its decision:

> "While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*,[9] regard must be had to the immediate context (which in this case will include the methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of a particular rule would not, in our view, be consistent with the judgment of this Court in *Rattray* or with the requirements of the Interpretation Act".

3.5 The Court of Appeal upheld the decision in *Powell* in *Official Bay Heritage Protection Society Inc v Auckland City Council*[10]*.*

3.6 As discussed in my letter of 30 November, the principles established in *Nanden v Wellington City Council* [11] provides further guidance in circumstances where a purposive approach is required. The *Nanden* principles were taken as a starting point to the interpretation of a district plan rule in the Queenstown Lakes District Plan by Heath J in the case of *Mount Field Limited v Queenstown Lakes District Council* [12] where held at paragraphs 36 and 37:-

> "[36] My starting point is William Young J's judgment in *Nanden v Wellington City Council*. His Honour discussed the approach to interpretation of a district plan, saying:
>
> [48] 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.

[8] [2001] NZRMA [176].
[9] *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA).
[10] [2008] NZRMA 245.
[11] [2000] NZRMA 562.
[12] High Court, Invercargill, CIV-2007-425-0700.

(2) It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectations of property owners.

(3) Practicality of administration by City Council officers is also an important consideration. In particular, it is unlikely that the City Council would deliberately adopt a rule which meant that the lawfulness or otherwise proposed houses or renovations could only be assessed after lengthy historical research had been carried out.

[37] In *Brownlee v Christchurch City Council*, Judge Jackson (at [25]-[36]) considered, in more detail, the criteria for interpretation. In summarising his approach, Judge Jackson said:

[25] In my opinion the relevant factors to consider in interpretation of a plan prepared under [the Act] include:

(1) the text of the relevant provision in the plan;

(2) the purpose of the provision;

(3) the context and scheme of the plan;

(4) the history of the plan;

(5) the purpose and scheme of the [Act] being the statute under which the plan is prepared and under which it operates;

(6) any other permissible guides to meaning including the common law principles or presumptions of statutory interpretation)."

3.7 Having regard to these various principles and the application of those principles, it is submitted as follows.

3.8 The rule provides for the maintenance and minor upgrading of a legally established existing structure.

3.9 The terms "*maintain*" and "*minor upgrading*" are defined as follows:-

> "Maintain:- shall mean course to continue, keep up, preserve, or provide for the preservation of a building, machine, road etc in good repair."
>
> "Minor upgrading:- means to expand the capacity of an existing structure, where the effects that result from the process are the same or similar in character, scale and intensity as those that existed at 20 November 1997 or prior to the commencement of the minor upgrading for activities established after 20 November 1997".

3.10 Clearly, the proposed work is "*maintenance*". The definition of "*maintain*" in the TRMP is, in my submission, consistent with the approach taken to that concept in *Falkner's* case and as discussed at paragraph 3.12 of my letter of 30 November 2021.

3.11 Central to this discussion is whether or not what is proposed constitutes "minor upgrading". Mr Whittaker has concluded that the work represents an alteration of the existing structure.

3.12 However, the definition of "*minor upgrading*" permits the expansion of the capacity of an existing structure where the effects that result from the process are the same or similar. His focus is on the words "existing structure" rather than the work that is proposed and the effects that follow from the *process* of that work (which must be the same or similar in character, scale, and intensity) for activities established before 20 November 1997. Rather, the rule and definitions must be read in context having regard to all of the words in both definitions noting that the definition of *minor upgrading* is in relation to *activities* and a *process* of work concerning structures already existing at 20 November.

3.13 It is submitted that a process of maintenance (preservation) to an existing structure may be substantial/comprehensive. However, provided there is no alteration to its purpose and the effects remain the same or similar, it does not constitute an alteration for the purpose of these definitions.

3.14 This argument is generally summarised in my letter of 30 November 2021.

3.15 However, to further assist, the problem inherent in the approach being taken by Mr Whittaker is illustrated by the evidence of Mr Muir concerning the work that was urgently required at a property in Pare Street in 2020. As a consequence of the seemingly same interpretation being applied to these definitions, an impossible situation arose which led to the potentially absurd

or anomalous outcome of a consent being required when the maintenance work was urgent; the property itself was put at risk and the outcome could well been anomalous (the destruction of the dwelling).

3.16 In my submission the interpretation of the provisions was inconsistent with the expectations of property owners when maintenance work is urgently required to repair an existing structure. The practicality of administration in such circumstances was extremely difficult, if not nigh on impossible for all concerned.

3.17 In the end, the problem in that case was resolved by a seemingly pragmatic decision to determine that the work could proceed as a "deemed permitted activity".

3.18 However, in my submission, if the rule had been properly interpreted from the outset, the work could have proceeded as a permitted activity (the effects of the proposed work were the same or similar) without issue and/or was clearly permitted as an existing use.

3.19 I further submit that this is consistent with the purpose of the provision and the overall context and scheme of the plan.

3.20 To summarise, this plan has set out to ensure further coastal protection work within the coastal marine area is constrained/controlled. It also seeks to constrain/control the installation and alteration of existing structures above the line of mean high water springs to ensure that any increased adverse effects within the coastal environment can be appropriately managed.

3.21 However, the plan also requires a consent to be obtained before any work can be "removed". This is clearly because the removal of any existing protection work creates the risk of end effects to adjoining owners with all of the consequences (in the context of sustainable management) which flow from that.

3.22 This plan has not set out to control the maintenance of existing work established prior to 20 November 1997. It also allows minor upgrading of those existing coastal protection structures above the line of mean high water springs provided the effects are the same or similar. The literal if not abstract interpretation of the words 'existing structure' creates an ambiguity where

none is intended and offends the rules of plan interpretation for all the reasons discussed above.

3.23 The applicant's approach to the interpretation of this rule is consistent with the history of the plan (as discussed by Mr Mountfort), the overall framework of the plan provisions[13] and is not inconsistent with the provisions of the New Zealand Coastal Policy Statement 2010.

3.24 The NZCPS does not go so far as to require the removal of existing structures- other than in extreme circumstances. The position is clearly different for all new structures or the alteration of existing structures where the effects of any alteration are not the same or similar to the existing situation. The wider policy framework within the NZCPS certainly discourages hard protection in such circumstances, but implicitly acknowledges that a balance needs to be maintained to ensure existing protection is not constrained for no good resource management purpose[14].

3.25 The concept of managed retreat is not a philosophy-it must be grounded in the 'evidence' and applied in accordance with the relevant science and expert assessment. In my submission, 'triggers' should be established within the planning framework to ensure clarity of application when such circumstances arise and in particular in relation to existing protection work (such as this) and where the 'effects' remain the same or similar to what has been occurring over time[15].

3.26 Should the Council wish to impose a different outcome for existing development to that contemplated by the plan when drafted, a first schedule process is required.

3.27 This would be onerous. However, to endeavour to impose restrictions of the kind contemplated by this process on a consent-by-consent basis when that was not contemplated at the time the plan was drafted, is unfair and

[13] I have noted the discussion by the planners of the objectives and policies of the TRMP and adopt the approach outlined by Ms McPherson in her evidence concerning these provisions as relevant.
[14] Significantly, the planning framework is consistent with the decision of the Environment Court in *Falkners* case and in my submission, reflects an approach directly contemplated by the declarations made and the analysis of issues by the Court in that decision.
[15] The need for caution is also very important in circumstances/a coastal environment susceptible to 'episodic' events. At Wainui beach, this is very much the position. After an 'episode' the beach will recover for extended periods. This must be fully understood and recognised in the context of any assessment of sustainable management where there is an existing built environment.

unreasonable as a matter of law. It would also create an "exception" of application to only the Cave family at this time (to the best of my knowledge).

3.28 Any such change should be considered and implemented, if required, in accordance with a thorough planning process in relation to the Wainui beach environment as a whole. The inconsistency of approach between work 'permitted' at Pare St and the Cave family situation underscores the importance of this point.

3.29 Therefore, it is submitted that the proposed work is a permitted activity when this rule is properly considered in accordance with established principles applicable to the interpretation of plan provisions and having regard to the evidence and overall planning framework.

4.0 Duration of Consent

4.1 Assuming a consent is required as a matter of law, Mr Whittaker considers a term of 20 years to be appropriate.

4.2 Ms McPherson disagrees. In her opinion a term of 50 years is appropriate having regard to the comprehensive evidence available and in particular noting the evidence of both coastal experts, Sam Morgan (for the Applicant) and Dr De Lange (for the Council).

4.3 The work proposed is subject to a land use consent (assuming a consent to be required). Therefore, consent can be granted on an indeterminate basis. Mr Whittaker does not consider this to be appropriate and is particularly concerned to ensure that any consent should not prevent the implementation of any adaptive strategies/policy which might formally be required to address coastal issues at Wainui Beach in the future.

4.4 First, and as already noted, it is observed that this is the first occasion to the best of my knowledge that a term is being contemplated in respect of the public work undertaken at Wainui Beach. I have also submitted that issues of sustainable management concerning the future of coastal protection structures at Wainui Beach should be clearly dealt with within the planning framework, rather than on a consent-by-consent basis. The existing planning framework does not contemplate such an approach and will plainly create the ongoing risk of ad hoc outcomes contrary to the expectations of land owners and the community as a whole.

4.5 Current modelling by two well recognised experts, does not suggest that a term of less than 50 years is necessary in this case, to facilitate sustainable management. Ironically, if the Applicant's wish to remove the work, they would also require a resource consent which in my submission would likely be declined because of the adverse effects on public access and neighbours to the north.

4.6 However, the position being assumed by the applicant in this case is not intended to convey that a future adaptive response as a consequence of climate change and sea level rise can necessarily be excluded with absolute certainty at this time over a term of consent of 50 years.

4.7 As a matter of general law, the duration of a consent should be determined primarily by sound resource management practice and the Act's sustainable management purpose.[16]

4.8 Cleary, security of term is consistent with sustainable management. Applications of this kind are time consuming, expensive and stressful for those directly involved.

4.9 However, it is also acknowledged that Mr Whittaker's concern regarding the possibility of future adaptive management cannot be ignored in the context of this dynamic environment and having regard to the potential future complexities of climate change and sea level rise. While these issues have been modelled and carefully considered by both Mr Morgan and Dr De Lange, the applicant accepts that if a consent is required[17], an adaptive regime may assist.

4.10 It is generally submitted that the power to review conditions under ss 128 - 132 of the Act is at the heart of an adaptive management regime[18] and in circumstances where a decision-maker might have been materially influenced by recommendations of witnesses which subsequently contain a material inaccuracy and there are consequential significant adverse effects

[16] For example *Royal Forest and Bird Protection Society of New Zealand Inc v Waikato Regional Council* [2007] NZRMA 439 and *Brooke-Taylor v Marlborough District Council* EnvC W067/04.
[17] If it is an existing use, an analogous outcome can be achieved through the provisions of s31, 10(4) and 20A(2) (when read together). An 'existing use' does not create an indeterminate outcome if the planning framework is formally changed.
[18] See *Golden Bay Marine Farmers v Tasman District Council* EnvC W019/03.

on the environment, it is open to a future decision-maker to cancel that consent.[19]

4.11 It is therefore generally submitted, that in the absence of a clear evidential basis to limit the term of a land use consent, the consent should remain indeterminate. In this case however, the applicant concedes that a term of more than 50 years due to "modelling constraints"[20] should not be advanced. However, in advancing a term of 50 years, the applicant also accepts that in this environment, and in the unlikely event that a further adaptive response is required, a review condition to the effect drafted in Ms McPherson's evidence is considered desirable on a precautionary basis.

4.12 There are three further points as a matter of law on this issue.

4.13 First, a decision-maker cannot have regard to any possible future legislation or potential/anticipated changes to the planning framework. The decisions must be based on the law as it presently stands.

4.14 Secondly, it is unfair and unreasonable to limit the term of a consent for one party due to speculation about what might occur when another consent expires in 20 years' time. That issue should be properly addressed in the manner suggested by Ms McPherson and reflected in the review condition drafted.

4.15 There is no evidence available to assume that if the work to the south of the Cave property were to be discontinued, the Cave's work cannot continue to be sustainably managed.

4.16 Further, by endeavouring to manage this environment on a consent-by-consent basis and impliedly suggesting this may create a degree of administrative convenience/efficiency, is unhelpful.

4.17 With the greatest of respect, if there is to be administrative efficiency, then the planning framework as a whole needs to be revisited if the Council thinks that is truly necessary and is in the interests of sustainable management at Wainui Beach (as the evidence of Mr Muir so plainly demonstrates).

[19] *Director General of Conservation v Marlborough District Council* EnvC C113/04 (the Hector's Dolphin case).
[20] See the evidence of Mr Morgan.

4.18 It is well appreciated that to undertake such an exercise would be a considerable administrative undertaking and may well be assisted (although I hesitate to speculate) by future legislative intervention. However, that is for another day.

4.19 Thirdly, and having regard to this point, at paragraph 14.7 of her evidence, Ms McPherson discusses the weight that can be given to the Wainui Beach Erosion Management Strategy as an 'other matter' under s104(1)(c).

4.20 It is submitted that her analysis of the relevance of that Strategy is correct for the reasons discussed by her. These reasons are consistent with and apply the reasoning of the Environment Court in *Auckland CC V Auckland RC*[21]and which I respectfully adopt. This reasoning also applies to any other Strategy that may be under consideration.

4.21 Therefore, it is submitted that a term of consent of 50 years, with the review conditions suggested in the draft conditions attached to the evidence of Ms McPherson, should be consented (if such a consent is required).

5.0 Conclusion

5.1 The evidence establishes that the Cave family is entitled to an existing use certificate for the work proposed.

5.1 The evidence and general argument demonstrates that rule 8.1.6.2 is not a control for the purposes of s 10(4) of the RMA, and the work proposed constitutes maintenance and a minor upgrade and is therefore a permitted activity.

5.2 Should these arguments be rejected and a consent is required, a term of consent of 50 years as a land use consent reflects sustainable management on the evidence assuming that review conditions are included as a condition of consent to enable adaptive responses to changing circumstances in the unlikely event such a response is required given the outcomes anticipated by both coastal experts.

[21] ENC Auckland A054/2004,22 April 2004 [31]-[34].

5.3 It is stressed, that the evidence of the expert witnesses on this point suggests that the modelling undertaken by Mr Morgan, if anything, is conservative and therefore this approach is also conservative and is consistent with the principles of sustainable management in these circumstances.

_____
AFD Cameron
Counsel for the Applicant

5 October 2022